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Via E-mail
April 28, 2022

Travis Martin
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**Re: Comment on the Initial Study/ Mitigated Negative Declaration for the
Amazing 34 Distribution Center Project**

Dear Mr. Martin:

I am writing on behalf of **Supporters Alliance For Environmental Responsibility ("SAFER")** regarding the Initial Study and Mitigated Negative Declaration ("IS/MND") prepared for the Amazing 34 Distribution Center Project, including all actions related or referring to the proposed demolition of two onsite warehouse distribution buildings, and construction of a single new distribution warehouse totaling approximately 89,475 square feet located at 791 South Waterman Avenue in the City of San Bernardino ("Project").

After reviewing the IS/MND, we conclude the IS/MND fails as an informational document, and that there is a fair argument that the Project may have adverse environmental impacts. Therefore, we request that the City of San Bernardino ("City") prepare an environmental impact report ("EIR") for the Project pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, et seq.

This comment has been prepared with the assistance of expert consulting firm RK Engineering and expert wildlife biologist Shawn Smallwood, Ph.D. RK Engineering's and Dr. Smallwood's comments and curriculum vitae are attached as Exhibit B and C hereto and are incorporated herein by reference in their entirety.

I. PROJECT DESCRIPTION

The proposed Project is described as involving the demolition of two warehouses which it states are currently on the Project site in order to construct a single new distribution warehouse. The site is 3.84 acres and will consist of a 77,562 square foot (sf) warehouse, 7,353 sf of warehouse mezzanine, and 4,560 sf of wholesale and office space. There are single-family homes directly east and north of the Project site. The

project will require a zoning amendment from Office Industrial Park to Industrial Light. The MND states that construction is estimated to begin on July 15, 2022 and end on September 1, 2023.

II. LEGAL STANDARD

As the Supreme Court held, “If no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.” *Communities for a Better Environment v. South Coast Air Quality Management Dist. (ConocoPhillips)* (2010) 48 Cal. 4th 310, 319-320, citing, *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d at pp. 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal. App. 3d 491, 504–505. “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

The EIR is the very heart of CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903, 927. The EIR is an “environmental ‘alarm bell’ whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return.” *Bakersfield Citizens*, 124 Cal.App.4th at 1220. The EIR also functions as a “document of accountability,” intended to “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.” *Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392. The EIR process “protects not only the environment but also informed self-government.” *Pocket Protectors*, 124 Cal.App.4th 927.

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” Pub. Res. Code § 21080(d) (emphasis added); see also *Pocket Protectors*, 124 Cal.App.4th at 927. In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (CEQA Guidelines § 15371), only if there is not even a “fair argument” that the project will have a significant environmental effect. Pub. Res. Code §§ 21100, 21064. Since “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process,” by allowing the agency “to dispense with the duty [to prepare an EIR],” negative declarations are allowed only in cases where “the proposed project will not affect the environment at all.” *Citizens of Lake Murray v. San Diego*, 129 Cal.App.3d 436, 440 (1989). CEQA contains a “**preference for resolving doubts in favor of environmental review.**” *Pocket Protectors*, 124 Cal.App.4th at 927 (emphasis in original).

III. DISCUSSION

A. The City Has Allowed Project Development Prior to the Certification of the Final MND, Thereby Undermining the Fundamental Purpose of CEQA – To Require Consideration of Environmental Factors Prior to Project Implementation.

The MND states that “[t]he Project involves the demolition of existing warehouse building [sic] to make way for a single new distribution warehouse . . .” MND, p. 11. Additionally, the MND section on Existing Conditions states that “[t]he Project site is currently developed with 2 warehouse distribution buildings to be demolished.” MND, p. 9. However, a search of the Project site on Google Maps demonstrates that the site had in fact been cleared of the two buildings as of at least August 2021. See Screenshots of property, Exhibit A. Additionally, expert wildlife biologist Shawn Smallwood, Ph.D., conducted a site review of the Project site on April 25, 2022 and found that “where buildings once stood, only vacant pads remained” on site. Smallwood Report, Exhibit C, p. 1; Photo 1, p.2 (showing a view of the project site upon which there are currently no buildings). The MND’s description of the Project as involving demolition of warehouses onsite, and its description of existing conditions as including two warehouses onsite is therefore false and misleading.

CEQA is first and foremost designed to require governmental decisionmakers to consider the environmental impacts of their actions *before* proceeding with a proposed project. The City violated this most fundamental requirement of CEQA by allowing developers to commence demolition of buildings for the proposed project before the mitigated negative declaration was certified, and before the document had been circulated for public consideration and comment. In so doing, the City has undermined the basic goals of CEQA.

CEQA states that the lead agency must consider public comment on the negative declaration “prior to carrying out or approving a project for which a negative declaration has been adopted.” CEQA § 21091(e). Requiring early consideration of environmental impacts allows the decisionmaker to require more environmentally beneficial project alternatives or mitigation measures at a point when true flexibility remains. CEQA requires environmental factors to be considered at the “earliest possible stage . . . before [the project] gains irreversible momentum,” (*Bozung v. Local Agency Formation Comm.*, (1975) 13 Cal.3d 263, 277), “at a point in the planning process ‘where genuine flexibility remains.’” *Sundstrom v. Mendocino County*, (1988) 202 Cal.App.3d 296, 307.

The City violated this basic tenet of CEQA law by allowing site demolition to commence prior to the circulation of the MND. In so doing, the City effectively deprived the public of its right to “have an appropriate voice in the formulation of any decision [affecting the environment].” *Environmental Planning v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354.

B. The MND Fails to Provide an Accurate Project Description.

An accurate and stable project description is a bedrock requirement of CEQA, as demonstrated by the Court in the case of *County of Inyo v. City of Los Angeles*:

Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the “no project” alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.

(1977) 71 Cal.App.3d 185 at 192-93. The ability of informed citizens to participate in environmental review is a key component of CEQA. *Washoe, supra*, 17 Cal.App.5th at 285 [“Informed public participation is essential to environmental review under CEQA.”]; *Inyo, supra*, 71 Cal.App.3d at 192 [“The EIR process facilitates CEQA’s policy of supplying citizen input.”]. Through the EIR process, CEQA “provide[s] public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment.” *Washoe, supra*, 17 Cal.App.5th at 286 [quoting Pub. Res. Code § 21061].

As discussed above, the MND describes the Project as including demolition of two buildings onsite, but those buildings have already been demolished. The Project’s description therefore fails to meet CEQA standards. The City must prepare a revised MND, or an EIR which includes an accurate project description.

C. The MND Incorrectly Reports the Project’s Baseline Environmental Conditions, Therefore its Analysis of Impacts is Inadequate.

Before analyzing a project’s impacts, an EIR must first identify and describe “the physical environmental conditions in the vicinity of the project as they exist at the time the notice of preparation is published.” 14 CCR § 15125(a). This information is critical to the EIR’s impact analysis because it serves as the baseline against which a project’s predicted effects can be described and quantified. 14 CCR § 15125(a); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447 (*Smart Rail*). A description of important environmental resources that will be adversely affected by the project is critical to a legally adequate discussion of the environmental setting, and emphasis is to be placed on rare or unique environmental resources when describing the environmental setting. 14 CCR § 15125(c); *San Joaquin Raptor/Wildlife Rescue Ctr. v County of Stanislaus* (1994) 27 Cal.App.4th 713, 722-30 [description of the environmental setting deficient because it did not disclose the specific location and extent of riparian habitat adjacent to the property, inadequately investigated the possibility of wetlands on the site, understated the significance of the project’s location adjacent to a river, and failed to discuss a nearby wildlife preserve].)

Courts have repeatedly held that where an EIR contains an “inadequate description of the environmental setting for the project, a proper analysis of project impacts [i]s impossible.” *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1122 [invalidating EIR with only passing references to surrounding viticulture]; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 873-75. “[T]he impacts of the project must be measured against the ‘real conditions on the ground,’” and not against hypothetical permitted levels. *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124-125. As the court has explained, using such a skewed baseline “mislead(s) the public” and “draws a red herring across the path of public input.” *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 656; *Woodward Park Homeowners v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-711.

Here, the City has analyzed almost all environmental impacts in the MND assuming that there are two warehouses currently onsite which will be demolished as part of the Project. All of the sections which rely on this improper baseline are therefore inadequate, and the City must prepare a revised MND or an EIR which accurately assesses the Project’s impacts.

D. The Project Will Have Significant Adverse Energy Impacts That the IS/MND Fails to Adequately Analyze and Mitigate.

RK Engineering Group (RK) conducted a peer review of the MND from an energy impact standpoint and provided comments. RK Engineering’s comment letter and CV are attached as Exhibit B and summarized below.

1. The MND Fails to Adequately Discuss Renewable Energy Sources.

RK Engineering found that the MND did not discuss whether renewable energy sources could be incorporated into the project. Ex. B, p. 2. In failing to do so, the MND failed to adequately evaluate energy impacts, and a potentially significant impact may therefore occur. *Id.* In support of its conclusions, RK points to a recent California court case, *League to Save Lake Tahoe Mountain Area Preservation Foundation, et al. v. County of Placer, et al.* (2022) 75 Cal. App. 5th 63 (*League to Save Lake Tahoe*), in which the court ruled that an EIR should “address the project’s potential to increase its use of renewable energy sources.” *Id.* at 1. RK states that this ruling is consistent with CEQA Guidelines on energy, which state that “the means of achieving energy conservation includes decreasing the reliance on fossil fuels, such as coal, natural gas and oil, and increasing reliance on renewable energy sources.” *Id.* at 2. In failing to discuss renewable energy, the MND has failed to adequately analyze energy impacts, and the City should prepare an EIR which does so.

2. The MND Fails to Consider and Implement all Feasible Mitigation Measures.

RK recommends a number of mitigation measures which could be implemented for the Project to ensure that it would not result in the wasteful, inefficient, or unnecessary consumption of energy. Ex. B, p. 2. RK's recommendations stem from the California Attorney General's Bureau of Environmental Justice's letter on Warehouse Projects, which provides recommendations on best practices and mitigation for reduction of energy consumption. *Id.*; see also, State of California, Department of Justice, *Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act*, <https://oag.ca.gov/system/files/media/warehouse-best-practices.pdf>. RK concludes that "[b]y not incorporating all feasible mitigation measures, the project has the potential to result in wasteful, inefficient or unnecessary consumption of energy." *Id.* at 5. An EIR should be prepared for the Project which adequately assesses the Project's energy impacts and potential mitigation measures.

E. The Project Will Have Significant Adverse Biological Impacts That the IS/MND Fails to Adequately Analyze and Mitigate.

Shawn Smallwood, Ph.D. reviewed the IS/MND's analysis of the Project's biological impacts, in addition to conducting a site visit of the Project site. Dr. Smallwood's comment letter and CV are attached as Exhibit C and his comments are briefly summarized here.

1. The IS/MND is inadequate in its characterization of the existing environmental setting as it relates to wildlife.

Dr. Smallwood's analysis of the Project's impacts is supported by a site visit that he conducted on April 25, 2022. Ex. C, p. 1. Dr. Smallwood reconnoitered the area for 1 hour and 50 minutes at 6:14 am, and for another hour starting at 10:18 am, both times with the use of binoculars. *Id.* During that visit, he observed the presence of 22 species of vertebrate wildlife at and near the Project site, two of which are special-status species. *Id.*, see Ex. B, Table 1, p. 3. Dr. Smallwood found that the site "composed an island of open space that would attract any wildlife in search of breeding opportunities, forage, or stop-over opportunities during long-distance travel." *Id.* at 2.

Every CEQA document must start from a "baseline" assumption. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *Communities for a Better Env't. v. So. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321. Dr. Smallwood found that the IS/MND was incomplete and inaccurate in its characterization of environmental setting due to an inadequate biological survey and a review of literature and databases that was too cursory. Ex. C, p. 8-21. The biological survey for the IS/MND was prepared by Gonzales Environmental Consulting in June 2021 (GEC Report). The GEC Report only detected a fraction of the species identified by Dr. Smallwood, despite having surveyed the area for a longer

period of time and having had direct access to the site. Ex. C, p. 8. Notably, Dr. Smallwood pointed out that the GEC Report did not record having seen signs of pocket gophers, which Dr. Smallwood observed were numerous, including ones that were spilling onto the sidewalk. *Id.*, see also, Photo 11, p. 10. Dr. Smallwood concluded that his findings demonstrate that there is a fair argument that an EIR should be prepared to accurately characterize the environmental baseline and properly assess impacts to wildlife. *Id.* at 8.

Dr. Smallwood also identified flaws in the IS/MND's review of databases. Ex. C, p. 15. The GEC Report only reviewed the California Natural Diversity Data Base ("CNDDDB") and inappropriately used it to screen out special-status species from further consideration. *Id.* at 15-16. Dr. Smallwood looked at additional databases that are useful to determine presence and likelihood of presence, such as eBird and iNaturalist. *Id.* Based on that review, he identified 99 special-status species that could potentially occur on-site, as compared to the GEC Report's 41. *Id.*; see also Table 2, p. 17-20. Ultimately, Dr. Smallwood found that "[t]he site provides one of the few remaining opportunities in the region for wildlife to find breeding substrate and opportunities to forage and stop-over during travel." *Id.* at 21.

A skewed baseline such as the one used by the City here ultimately "mislead(s) the public" by engendering inaccurate analyses of environmental impacts, mitigation measures and cumulative impacts for biological resources. See *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th 645, 656; *Woodward Park Homeowners*, 150 Cal.App.4th 683, 708-711. This inaccurate baseline and the species identified by Dr. Smallwood warrants discussion and analysis in an EIR to ensure species are accurately detected and that any impacts are mitigated to a less than significant level.

2. The IS/MND fails to analyze the Project's impact on lost breeding capacity.

Dr. Smallwood found that the Project would contribute to a decline in birds in North America, a trend that has been happening over the last approximately 50 years largely due to habitat loss and fragmentation and would be further exacerbated by this project. Ex. C, p. 21. Based on studies on the subject, Dr. Smallwood estimates that the presence of the Project on the site could lead to as many as 66 bird nests lost annually. *Id.* He further found that the reproductive capacity of the site would be lost, as the Project would prevent 191 fledglings per year, which would in turn contribute to the lost capacity of 217 birds per year. *Id.* at 22.

Because this impact was not addressed in the IS/MND and Dr. Smallwood has presented substantial evidence of a fair argument that habitat loss will impact species, the City must prepare an EIR to analyze the impact.

3. The IS/MND fails to analyze the project's impact to wildlife movement.

Dr. Smallwood found that the IS/MND falsely claimed to have performed analyses to determine whether the Project would adversely impact wildlife movement. Ex. C, p. 22. Despite the MND's claims, it "identifie[d] no seasonal foraging grounds, nor does it provide any foundation for analysis of genetic exchange among populations. And in fact, no level of demographic organization is characterized for any species of wildlife in the area, nor is there any description of how and to where wildlife move, disperse, or migrate in the area." *Id.*

Based on his assessment of the site, Dr. Smallwood determined that due to the multiple species of wildlife residing onsite, the majority of which are breeding, there would be offspring needing to disperse from the site, as well as other species which would need to come to the site to breed and persist. *Id.* He concluded that "[a]s one of the last remaining patches of open space in the region, it is likely very important to wildlife movement," and an EIR should be prepared to properly analyze this impact. *Id.*

4. The IS/MND fails to analyze the project's impacts on wildlife from additional traffic generated by the Project.

According to the IS/MND, the Project will generate 913,213 annual Vehicle Miles Traveled ("VMT"). Ex. C. p. 24. Yet the IS/MND provides no analysis of the impacts on wildlife that will be caused by the traffic on the roadways servicing the Project.

Vehicle collisions with special-status species is not a minor issue, but rather results in the death of millions of species each year. Dr. Smallwood explains:

In Canada, 3,562 birds were estimated killed per 100 km of road per year (Bishop and Brogan 2013), and the US estimate of avian mortality on roads is 2,200 to 8,405 deaths per 100 km per year, or 89 million to 340 million total per year (Loss et al. 2014). Local impacts can be more intense than nationally. The nearest study of traffic-caused wildlife mortality was performed along a 2.5 mile stretch of Vasco Road in Contra Costa County, California. Fatality searches in this study found 1,275 carcasses of 49 species of mammals, birds, amphibians, and reptiles over 15 months of searches (Mendelsohn et al. 2009). This fatality number needs to be adjusted for the proportion of fatalities that were not found due to scavenger removal and searcher error.

Ex. C, p. 22, 24.

Using the IS/MND's estimates of VMT as a basis, Dr. Smallwood was able to predict the impacts to wildlife that could be caused by the project. *Id.* at 24. Using the data from the Mendelsohn et al. (2009) study, Dr. Smallwood calculates that operation of the Project over 50 years would cause an accumulated 10,000 wildlife fatalities. *Id.* He therefore states that "the project-generated traffic would cause substantial, significant impacts to wildlife." *Id.* at 25. An EIR should be prepared which includes an analysis and mitigation of the result increased traffic from the Project will have on wildlife.

5. The IS/MND fails to adequately address the cumulative impacts of the Project on wildlife.

The GEC Report prepared for the MND provided a discussion of cumulative impacts which Dr. Smallwood determined was inapplicable to the Project. Ex. C, p. 25. Specifically, the GEC Report stated that some habitats would only be temporarily disturbed, and that some surviving species would return to the disturbed site following construction activity. *Id.* However, Dr. Smallwood states that “none of the soils and vegetation on the site would remain, because the site would be covered by impervious surfaces” and therefore “[w]ildlife would be unable to return to the site.” *Id.* The GEC Report also concludes that the site features disturbed habitat, thereby limiting its value to native plant and animal species. *Id.* Dr. Smallwood notes that “[w]ildlife communities worldwide have been disturbed by human activities, so the mere fact that the site has been disturbed cannot preclude use of the site by wildlife.” *Id.* Further, Dr. Smallwood’s observations demonstrate that species do in fact use the site. *Id.* An EIR should be prepared to adequately analyze potential cumulative impacts to wildlife caused by the Project.

As for the proposed mitigation measures, Dr. Smallwood states that while preconstruction surveys should be conducted for birds and burrowing owls, they represent only a “last-minute, one-time salvage and rescue operation[] targeting readily detectable nests or individuals before they are crushed under heavy construction machinery.” *Id.* These surveys would therefore fail to detect most species. *Id.* at 25-26. As for the mitigation measures MM BIO-3 to BIO-5, Dr. Smallwood agrees that these are best practices, but that they would “do little to nothing to mitigate impacts to wildlife.” *Id.* at 26. Dr. Smallwood recommends several measures, including detection surveys and compensatory mitigation, which he states should be considered in an EIR for the Project. *Id.* at 27.

6. CONCLUSION

In light of the above comments, the City must prepare an EIR for the Project and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Amalia Bowley Fuentes', with a stylized, cursive script.

Amalia Bowley Fuentes

LOZEAU DRURY LLP