



Item 5.3 Public Comment Provided by
Michael R. Lozeau, Lozeau Drury, LLP

T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 150
Oakland, CA 94612

www.lozeaudrury.com
brian@lozeaudrury.com

BY E-MAIL

October 6, 2023

Lathrop City Council
Sonny Dhaliwal, Mayor
Paul Akinjo, Vice Mayor
Minnie Diallo, Councilmember
Diane Lazard, Councilmember
Jennifer Torres-O'Callaghan, Councilmember
390 Towne Centre Drive
Lathrop, California
website_cco@ci.lathrop.ca.us

Teresa Vargas, MMC
City Clerk
390 Towne Centre Drive
Lathrop, CA 95330
website_cco@ci.lathrop.ca.us

**Re: Comment on Ashley Furniture Project (CUP-23-08; SPR 23-09)
City Council Agenda Item No. 5.3**

Dear Mayor Dhaliwal, Vice Mayor Akinjo, and Honorable Councilmembers:

I am writing on behalf of Laborers' International Union of North America, Local Union No. 73 ("LIUNA") regarding the Ashley Furniture Project ("Project") proposed to be located at the northwest corner of Dos Reis Rd and Manthey Road. The Planning Commission voted to recommend that the City Council find that the project is exempt from the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines section 15183 (14 CCR § 15183) and Public Resources Code ("PRC") section 21083.3. However, after reviewing the Environmental Checklist prepared for the Project and the 2022 General Plan Update EIR that the Project relies upon, we conclude that the Project does not meet the requirements for an exemption under CEQA Guideline § 15183 and PRC § 21083.3. As such, LIUNA respectfully requests that the City Council refrain from approving the Project until the Project undergoes environmental review under CEQA.

PROJECT DESCRIPTION AND BACKGROUND

The Project proposes to construct and operate a 1,486,607 square foot industrial building including a mix of retail, office/call center, and warehouse and distribution uses. About 110,000 square feet would be dedicated to retail use, 24,000 square feet to office and call-center uses, and 1,352,347 square feet to warehouse and distribution center uses.

The Project proposes to construct approximately 2,046 parking spaces throughout the development site, with 942 spaces for passenger vehicles and 1,104 spaces for truck trailer

parking. The Project expects to generate 2,798 daily passenger vehicle trips, including 203 a.m. peak hour trips (124 inbound, 79 outbound) and 255 p.m. peak hour trips (110 inbound, 145 outbound) for passenger vehicles. Another 680 daily truck trips also are expected, including 95 a.m. peak hour trips and 45 p.m. peak hour trips.

The Project site is located within the Central Lathrop Specific Plan (“CLSP”) Phase 2 area, which was approved by the City in 2004. In 2022, the City certified an environmental impact report (“EIR”) for the City’s 2022 General Plan Update (“2022 GP EIR”), which changed the land use designations in the CLSP Phase 2 area from Residential/Commercial to Limited Industrial. An Environmental Checklist was prepared for the Project to evaluate consistency with the 2022 GP EIR.

On September 13, 2023, the Planning Commission voted to recommend that the City Council approve the Project conditional use permit (CUP-23-08) and site plan review (SPR-23-09) and find that the Project is exempt from further environmental review under Public Resources Code section 21083.3 and CEQA Guidelines section 15183 because the Project would not result in any impacts beyond those addressed in the 2022 GP EIR. Prior to the Planning Commission meeting, LIUNA submitted a written comment attached hereto as **Exhibit C** and incorporated by reference.

LEGAL STANDARD

To achieve its objectives of environmental protection, CEQA has a three-tiered structure. (*Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1185-86 (*Hollywoodland*) [citing 14 CCR § 15002(k)].). First, if a project falls into an exempt category, or it can be seen with certainty that the activity in question will not have a significant effect on the environment, no further agency evaluation is required. (*Id.* at 1185.) Second, if there is a possibility the project will have a significant effect on the environment, the agency must perform an initial threshold study and may issue a negative declaration if the study indicates no significant impacts. (*Id.* at 1185-86; see also 14 CCR §§ 15063(b)(2), 15070.) Finally, if the project will have a significant effect on the environment, an environmental impact report (“EIR”) is required. (*Hollywoodland*, *supra*, 161 Cal.App.4th at 1186.)

Here, the Planning Commission recommended that the City Council find the Project exempt from CEQA under CEQA Guidelines section 15183 (“Section 15183”), which, for projects “which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified,” does not require additional environmental review for such projects “except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site.” (14 CCR § 15183(a).)

The purpose of Section 15183 is to streamline CEQA review and relieves the City of the obligation to prepare an EIR if a qualifying project’s impacts “[are] not peculiar to the parcel or

to the project, [have] been addressed as a significant effect in the prior EIR, or can be substantially mitigated by the imposition of uniformly applied development policies or standards.” (14 CCR § 15183 (c).) Section 15183 further explains,

An effect of a project on the environment shall not be considered peculiar to the project or the parcel for the purposes of this section if uniformly applied development policies or standards have been previously adopted by the city or county with a finding that the development policies or standards will substantially mitigate that environmental effect when applied to future projects, unless substantial new information shows that the policies or standards will not substantially mitigate the environmental effect.

(14 CCR § 15183(f).) A city’s decision to utilize Section 15183 is governed by the substantial evidence standard of review. (*Lucas v. City of Pomona* (2023) 92 Cal.App.5th 508, 538.)

DISCUSSION

I. The Project Is Not Exempt from CEQA Under Section 15183 Due to Unmitigated, Project-Specific Impacts to Biological Resources.

LIUNA retained wildlife biology expert Dr. Shawn Smallwood, Ph.D., who conducted a site visit and reviewed the Project’s documentation, including the Environmental Checklist and the Biological Resources Analysis Report prepared by Olberding Environmental, Inc. dated May 2021 (“Biological Report”). Dr. Smallwood found the Project would result in significant, unmitigated impacts to multiple special-status species of wildlife. Dr. Smallwood’s comment and CV are attached as **Exhibit A**.

A. The Project’s Biological Report underestimates the diversity of species using the Project site.

Dr. Smallwood conducted a site visit to the Project site for approximately 2.5 hours on September 21, 2023. (Ex. A, p. 1.) During those visits, Dr. Smallwood “detected 35 species of vertebrate wildlife, including 10 special-status species,” including Swainson’s hawk, which is listed as a threatened species in California, and loggerhead shrike, a California Species of Special Concern priority level 2. (*Id.* at pp. 3-4.) Dr. Smallwood estimates that with additional surveys, a total of 178 species would be detected at the Project site, of which 51 would be special-status species. (*Id.*, p. 9.) Based on his site visit and projections, Dr. Smallwood concluded that “[m]ore surveys are needed” and “the species richness at the site relative to its level of disturbance is peculiar to the site.” (*Id.*, p. 10.)

B. The Project’s Biological Report fails to accurately characterize the existing environmental setting.

Dr. Smallwood found that the Project’s Biological Report failed “to accurately

characterize the existing environmental setting, including the biological species that use the site, their relative abundances, how they use the site, key ecological relationships, and known and ongoing threats to those species with special status.” (Ex. A, p. 10.) He explains that an accurate characterization of the environmental setting typically relies on two factors: (1) field surveys and (2) reviews of literature and databases. (*Id.*) For this Project, “these needed steps were grossly inadequate.” (*Id.*)

First, the Biological Report’s field survey lacked critical information, including the time of day of the survey or the duration of the survey, and did not meet the minimum standards for surveys of plants (Ex. A, p. 11.) Further, the Biological Report’s survey only detected 6 species of vertebrate wildlife at the Project site, which is that number that Dr. Smallwood detected in his first *two minutes* on the Project site on September 21, 2023. (*Id.*) The survey also only detected 3 special-status species, whereas Dr. Smallwood detected 10. (*Id.*) Additionally, the Biological Report’s survey made no mention of the great horned owl pellets, kangaroo rat and Botta’s pocket gopher burrow systems, or birds smaller than a white-tailed kite as were observed by Dr. Smallwood. (*Id.*) The Biological Report had no surveys for bats or several special-status species known to occur in the area, including burrowing owl and Swainson’s hawk. (*Id.*)

Second, the Biological Report’s review of available wildlife databases was inadequate. (Ex. A, pp. 12-13.) The Biological Report relied solely on the California Natural Diversity Data Base (“CNDDDB”) to determine which species have potential to occur in the project area. The Biological Report did not consult other known databases, such as iNaturalist or eBird. When searching CNDDDB, the Biological Report only searched for species with documented occurrences within the nearest CNDDDB quadrangles, which “screens out many special-status species from further consideration in the characterization of the wildlife community as part of the baseline environmental setting.” (*Id.*, p. 12.) Furthermore, “CNDDDB is not designed to support absence determinations or to screen out species from characterization of a site’s wildlife community.” (*Id.*) Based on available databases and site visits, Dr. Smallwood estimates that “107 special-status species of wildlife are known to occur near enough to the site to warrant analysis of occurrence potential.” (*Id.*, p. 20.)

Third, the Biological Report improperly assumed that the Project site’s lack of *nesting habitat* means that development of the Project would not cause impacts to wildlife species. However, as Dr. Smallwood explains,

[T]here is no sound scientific distinction between nesting habitat and some other characterization of habitat. For any given species, the environment of a site is either habitat or it is not, as habitat is defined as that part of the environment that is used by a species. . . . Certain portions of a species’ habitat may provide nesting opportunities, but all parts of its habitat are critical to the nesting success of members of the species. If an animal cannot find sufficient forage and cover during non-nesting season or at portions of its habitat where it does not normally nest, then it might not survive to reproduce or its nesting attempt might not succeed. [The Biological Report] asserts a false distinction of the value of a site based on whether

the species nests on-site.

(Ex. A, p. 19.) By limiting habitat to only nesting habitat, the Biological Report underestimates the value of the Project site and the impacts to species that may occur. For example, the Biological Report claimed that loggerhead shrike have a low likelihood of occurrence on the Project site due to lack of trees and shrubs needed for nesting. However, Dr. Smallwood observed a loggerhead shrike foraging on the Project site during his site visit. This is just one example of how the Biological Report misjudged the occurrence likelihood of the many special-status species discussed in the Biological Report as well as the potential wildlife impacts peculiar to this specific site.

C. The Biological Report failed to adequately analyze and mitigate the Project's biological impacts due to habitat loss, wildlife movement, and vehicle collisions.

Dr. Smallwood found that the Biological Report and Environmental Checklist failed to address numerous potentially significant impacts that the Project may have on biological resources, including habitat loss, wildlife movement, collision mortality due to Project-generated traffic, and cumulative impacts. (Ex. A, pp. 18-25.)

1. Habitat Loss and Fragmentation

Dr. Smallwood warns that “[t]he project would destroy 89.92 acres of habitat to every species of wildlife that makes use of the project site.” (Ex. A, p. 20.) Dr. Smallwood predicts that development of the Project would result in the loss of 191 bird nest sites and a lost breeding capacity of 630 birds per year. (*Id.*, pp. 20-21.) Dr. Smallwood concludes that this impact is significant. (*Id.*)

2. Wildlife Movement

The Biological Report provided a “flawed and misleading” analysis of the Project’s impact on wildlife movement. (Ex. A, p. 21.) According to the Environmental Checklist, the Biological Report “included a CNDDB record search that did not reveal any documented wildlife corridors or wildlife nursery sites on or adjacent to warehouse site.” However, as Dr. Smallwood explains, “CNDDB is not where an analyst would find information relevant to whether a site is important to wildlife movement. . . . In effect, there is no analysis of whether the project would interfere with wildlife movement.” (*Id.*)

The Environmental Checklist also claims that the Project’s impacts on wildlife movement were adequately addressed in the 2022 GP EIR. However, the 2022 GP EIR only focused on the San Joaquin River as a wildlife corridor. As such, “[t]he General Plan EIR implies the premise that interference with wildlife movement in the region can result only from a project’s disruption of the function of a wildlife movement corridor.” (Ex. A, p. 21.) This is not the proper standard under CEQA. Rather, CEQA requires an analysis of impacts to wildlife movement “regardless of

whether the movement is channeled by a corridor. A site such as the project site is critically important for wildlife movement because it composes an increasingly diminishing area of open space within a growing expanse of anthropogenic uses, forcing more species of volant wildlife to use the site for stopover and staging during migration, dispersal, and home range patrol.” (*Id.*) By ignoring this standard, the Biological Report has failed to adequately and mitigate the Project’s impacts on wildlife movement disruptions that are unique to the Project site.

3. Vehicle Collisions

The Biological Report and 2022 GP EIR failed to analyze wildlife mortality and injuries caused by Project-generated traffic. (Ex. A, pp. 22-24.) Dr. Smallwood estimates that the Project would result in 6,151 vertebrate deaths annually due to collisions with Project-generated traffic. (*Id.*, pp. 24.) Especially due to the special-status species likely to occur at or near the Project, these collisions represent a significant impact to wildlife that has not been addressed, discussed, or mitigated by the Environmental Checklist or 2022 GP EIR. But for the Project, these additional wildlife collisions would not occur.

4. Cumulative Impacts

The Environmental Checklist concludes that cumulative impacts to biological resources were addressed in the 2022 GP EIR, which relies on the San Joaquin Multi-Species Habitat Conservation Plan (“SJMSCP”) to prevent significant cumulative impacts. However, as discussed in greater detail below, the SJMSCP has failed at conserving wildlife species and cannot be relied upon to conclude that cumulative impacts will be less than significant. (Ex. A, pp. 24-25.)

D. The Project cannot rely on the SJMSCP to mitigate the Project’s impacts to biological resources.

To mitigate the project’s impacts to biological resources, the Environmental Checklist requires compliance with the SJMSCP, as required by the 2020 General Plan. (Env’t. Checklist, p. 55.) However, as Dr. Smallwood explains, the SJMSCP cannot be relied upon to mitigate the Project’s impacts “[d]ue to grossly deficient implementation and due to poor performance of the SJMSCP.” (Ex. A, p. 25.) Dr. Smallwood identified several shortcomings of the SJMSCP, as discussed below.

First, the majority of special-status species likely to occur at the Project site are not covered by the SJMSCP. (Ex. A, p. 26.) As a result, “the SJMSCP insufficiently covers special-status species that would be adversely affected by the project.” (*Id.*) The reason that so many species are not covered by the SJMSCP is that more and more species have been designated as “special-status” since adoption of the SJMSCP. The SJMSCP does not provide any protection for those species.

Second, the SJMSCP requires protocol-level detection surveys. (Ex. A, p. 26.) Yet, no

such surveys have been conducted on the Project site. (*Id.*) Detection surveys must be conducted, especially for burrowing owl and Swainson's hawk, to properly comply with the SJMSCP.

Third, Dr. Smallwood conducted an in-depth review of the SJMSCP and found that, to date, the SJMSCP has utterly failed at conserving special status-species. (Ex. A, pp. 26-33.)¹ To conduct his analysis, Dr. Smallwood reviewed the SJMSCP's Annual Reports published since 2008. As an initial matter, he found that the Annual Reports had flaws with study design, deficient implementation, and poor reporting, including inconsistent naming of preserve areas, a failure to conduct any trend analysis, and a failure to report survey methods including time, duration, or standards. (*Id.*, pp. 27-28.) Dr. Smallwood's review of the Annual Reports revealed several unsettling trends demonstrating the SJMSCP's failure to conserve species, including a decline in Swainson's hawk detections (*id.*, p. 29), a decline in detections of species covered by the SJMSCP (*id.*, p. 30), a decline in detections of all species (*id.*), a decline in the productivity of Swainson's hawk (*id.*, p. 32), and a decline in the number of acres surveyed (*id.*, p. 33). Based on this analysis, Dr. Smallwood concludes that "[t]he SJMSCP has failed in its implementation, and it has proven ineffective at conserving its covered species; it should not be used to mitigate impacts to wildlife that occur on the project site. (*Id.*)

Although Section 15183 exempts project from further CEQA review where project-specific impacts can be mitigated by uniformly applied development policies or standards (such as the SJMSCP), the exemption does not apply if "new information shows that the policies or standards will not substantially mitigate the environmental effect." (14 CCR § 15183(f).) Here, Dr. Smallwood's analysis of the SJHSCP's Annual Records presents new information showing that the SJMSCP has failed to substantially mitigate impacts to wildlife and, therefore, cannot substantially mitigate the Project's impacts. As a result, the City's reliance on Section 15183 is misplaced.

E. The additional mitigation measures required for the Project's impacts to biological resources are inadequate and render the Project ineligible for an exemption under Section 15183.

In addition to compliance with the SJMSCP, the Project is required to adopt the mitigation recommendations identified in the Biological Report, which include preconstruction surveys for reptiles, birds, and burrowing owls. (Env't'l Checklist, pp. 52-54.) The need for these additional mitigation measures is proof in and of itself that the Project will result in Project-specific impacts that have not been adequately addressed or mitigated by the 2022 GP EIR. Section 15183 exempts projects with project-specific impacts only where those impacts "can be substantially mitigated by the imposition of uniformly applied development policies or standards." (14 CCR § 15183(c).) The preconstruction surveys required for this Project are *not* uniformly applied policies or standards. Rather, they are specific mitigation measures taken from

¹ The data utilized in Dr. Smallwood's evaluation of the SJMSCP is available at: <https://www.dropbox.com/scl/fo/mzkfrnz0utg7gd6oldk4b/h?rlkey=zklf5bmetrp0g95u9mi7kxtc3&dl=0>

the Biological Report specifically designed to mitigate *this* Project's peculiar impacts to wildlife that are not addressed in the 2022 GP EIR. As a result, the Project does not qualify for an exemption under Section 15183 and further CEQA analysis is required for the Project.

Moreover, as Dr. Smallwood explains, pre-construction surveys are inadequate to mitigate the Project's impacts. (Ex. A, pp. 33-35.) Rather, protocol-level detection surveys are necessary because detection surveys have a much greater probability of detection than pre-construction-surveys. (*Id.*, p. 33.) Dr. Smallwood explains that "[b]irds are highly skilled at hiding their nests" and "[l]oggerhead shrikes and burrowing owls, as examples, make efforts to fool human observers into thinking the birds' nests are located where they are not." (*Id.* p. 34.) As a result, "[l]ocating nest sites of these species and most others requires multiple surveys over long time periods . . . This is why the breeding-season survey protocols require multiple surveys spaced through much of the breeding season." (*Id.*) Furthermore, even with pre-construction surveys, impacts to wildlife would not be reduced to less-than-significant levels because such surveys do nothing to mitigate the additional impacts identified by Dr. Smallwood, including breeding capacity and habitat fragmentation. (*Id.*) Therefore, the Project will result in Project-specific impacts to biological resources that remain significant and unmitigated.

II. The Analysis of the Project's Impacts to Human Health from Emissions of Toxic Air Contaminants Is Inadequate.

For warehouses and distribution centers within 1,000 feet of planned residential uses or other sensitive receptors, the 2022 General Plan requires "requires the preparation of a Health Risk Assessment ("HRA") that meets the standards established by the Office of Environmental Health Hazard Assessment ("OEHHA"), and the San Joaquin Valley Air Pollution Control District ("SJVAPCD"). (2022 GP, p. 3.3-31 [LU-5c].) The General Plan prohibits approval of such a project "until it can be demonstrated that the project would not result in an exceedance of the established thresholds of significance for public health risks at nearby sensitive receptors." (*Id.*)

Here, there are numerous sensitive receptors within 1,000 feet of the Project, including clusters of residences 320 feet, 400 feet, and 940 feet away and a single residence 820 feet away (Env't Checklist, p. 43.) According to the Environmental Checklist, an HRA was conducted and found that the Project's increased cancer risk from emissions of diesel particulate matter ("DPM") would not exceed SJVAPCD's significance threshold of 20 in one million. (*Id.*, pp. 44-45.) LIUNA retained air quality experts Matt Hagemann, P.G., C.Hg., and Paul E. Rosenfeld, Ph.D., of the Soil/Water/Air Protection Enterprise ("SWAPE") to review the HRA. SWAPE found that HRA did not comply with the standards established by OEHHA and, as a result, the Project's impacts had not been adequately evaluated. SWAPE's comment and CVs are attached as **Exhibit B**.

First, SWAPE notes that the Checklist failed to provide the exposure assumptions for the HRA, such as the age sensitivity factors ("ASF") or fraction of time at home ("FAH") values, and, as a result, the HRA may underestimate the Project's increased cancer risk. (Ex. B, p. 2.)

Additionally, the Checklist failed to provide the dose and risk equation used to calculate the Project's cancer risks. (*Id.*) Without providing this equation, there is no way to verify that the HRA utilized the proper equation recommended by OEHHA. (*Id.*)

Second, even though the 2022 General Plan requires that the HRA meet the standards established by OEHHA, the HRA prepared for the Project failed to do so because it only analyzed the Project's *operational* cancer risks but completely ignored the Project's *construction-related* cancer risks. According to OEHHA, the cancer risk of all short-term projects lasting at least 2 months should be assessed and projects lasting more than 6 months should be evaluated for the duration of the project. (Ex. B, p. 3.) Because construction of the Project will surely last at least 2 months (and may exceed six months), the HRA should have included construction-related emissions in addition to operational emissions. The HRA further conflicts with OEHHA guidance by failing to evaluate the lifetime cancer risk to nearby receptors as a result of Project construction and operation *combined*. (*Id.*)

Due to these shortcomings, the HRA does not comply with OEHHA standards as required by the 2022 General Plan and underestimates the Project's cancer risks. As a result, the City lacks substantial evidence to conclude that the Project will not result in specific health impacts. Furthermore, the City lacks substantial evidence to conclude that the Project's impacts were addressed in the 2022 GP EIR since the 2022 General Plan required compliance with OEHHA standards, which the Project's HRA did not do. The HRA must be updated prior to any approval of the Project.

III. The Analysis of the Project's Energy Impacts Is Inadequate.

The 2022 GP EIR's discussion of the General Plan's energy impacts boils down to stating that by complying with California's Building Energy Efficiency Standards ("CalGreen"), promoting the use of renewable energy sources and encouraging public transportation and bicycle use, and the fact that PG&E will generally make progress on adding new renewable energy sources to its portfolio, projects within the planning area will not have energy impacts. (2022 GP EIR, pp. 3.7-41 to 3.7-42.) The Environmental Checklist focuses on the Ashley Furniture Project's compliance with CalGreen and PG&E's long-term efforts. (Env't Checklist, p. 66.) None of these considerations address the energy effects that are peculiar to a 1.4 million square feet furniture distribution and retail center.

The standard under CEQA is whether the Project would result in wasteful, inefficient, or unnecessary consumption of energy resources. Failing to undertake "an investigation into renewable energy options that might be available or appropriate for a project" violates CEQA. (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 213.) Energy conservation under CEQA is defined as the "wise and efficient use of energy." (CEQA Guidelines, app. F, § I.) The "wise and efficient use of energy" is achieved by "(1) decreasing overall per capita energy consumption, (2) decreasing reliance on fossil fuels such as coal, natural gas and oil, and (3) increasing reliance on renewable energy resources." (*Id.*)

Noting compliance with the California Building Energy Efficiency Standards (Cal.Code Regs., tit. 24, part 6 (Title 24)) does not constitute an adequate analysis of energy impacts. (*Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 264-65.) Similarly, the court in *City of Woodland* held unlawful an energy analysis that relied on compliance with Title 24, that failed to assess transportation energy impacts, and that failed to address renewable energy impacts. (*California Clean Energy Committee v. City of Woodland*, 225 Cal.App.4th 173, 209-13.) As such, the General Plan EIR's reliance on Title 24 compliance does not address the proposed furniture warehouse Project's energy impacts. The energy effects of the Project are, by definition, peculiar to the Project. Given the vast expanse of roofing provided by the proposed Project, any evaluation of its energy impacts cannot ignore the obvious feasibility of an array of solar panels on the roof or covering the extensive parking proposed at the site. Energy efficiency, in the context of the Proposed project and site would require the consideration and implementation of sufficient solar panels to meet all of the Project's direct electricity demand, as well as solar power that would offset the considerable GHG and other air pollution emissions that will result from the thousands of trucks and cars driving to and from the Project every day once it's operational.

The Environmental Checklist contains no discussion of the project's cost effectiveness in terms of energy requirements. There is no discussion of energy consuming equipment and processes that will be used during the construction or operation of the project. The project's energy use efficiencies by amount and fuel type for each stage of the project including construction and operation were not identified. The effect of the project on peak and base period demands for electricity has not been addressed. As such, the Environmental Checklist's conclusions are unsupported by the necessary discussions of the Project's energy impacts under CEQA and the City lacks substantial evidence to exempt the Project under Section 15183.

IV. The City Must Prepare a Statement of Overriding Considerations.

The 2022 General Plan Update concluded that several of the impacts identified as a result of the General Plan Update project were significant and unavoidable. These impacts included agricultural resources, air quality, greenhouse gas, and traffic noise impacts. In the Environmental Checklist prepared for the Project, the City acknowledges these significant and unavoidable impacts, but states that:

Impacts from buildout of the General Plan including cumulative impacts associated with development and buildout of the CLSP Phase 2 plan area and the warehouse Project site, as proposed, were fully addressed in the General Plan EIR (State Clearinghouse No. 2021100139), and implementation of the proposed project would not result in any new or altered impacts beyond those addressed in the General Plan EIR.

(Env't Checklist, p. 13.) Similar statements are repeated for each of the specific unavoidable significant impacts. This conclusion does not, however, address all of the City's obligations to grapple with acknowledged significant and unavoidable cumulative

impacts.

In the case of *Communities for a Better Environment v. Cal. Resources Agency*, the court of appeal held that, although tiering may allow a later project to rely on the environmental analysis contained in a prior program-level EIR, that procedure does not relieve the agency of acknowledging the significant and unavoidable impacts and reconsidering its statement of overriding considerations. As the Court explained:

The section appears to allow an agency, in approving a later project that has significant unavoidable impacts, to forego making a statement of overriding considerations *specifically tied to that project*. This is contrary to CEQA law. CEQA section 21094, subdivision (d) requires agencies that approve a later project to comply with CEQA section 21081. Under CEQA section 21081, an agency approving a project with significant environmental effects must find that each effect will be mitigated or avoided, or “that *specific* overriding economic, legal, social, technological, or other benefits of *the project* outweigh the ... effect[]” The requirement of a statement of overriding considerations is central to CEQA’s role as a public accountability statute; it requires public officials, in approving environmentally detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to substantial evidence in support. Under Guidelines section 15152(f)(3)(C), however, an agency apparently could adopt one statement of overriding considerations for a prior, more general EIR, and then avoid future political accountability by approving later, more specific projects with significant unavoidable impacts pursuant to the prior EIR and statement of overriding considerations. Even though a prior EIR’s *analysis* of environmental effects may be subject to being incorporated in a later EIR for a later, more specific project, the responsible public officials must still go on the record and explain specifically why they are approving the later project despite *its* significant unavoidable impacts.

(*Communities for a Better Env’t v. California Res. Agency* (2002) 103 Cal.App.4th 98, 124-25.).

The same reasoning applies to the implementation of Section 15183. The Project, based on its reliance on the 2022 GP EIR, will have cumulative impacts on agricultural resources, air quality, greenhouse gas emissions, and traffic noise. Although sections 21083 and 15183 provide for streamlining of the environmental review of a subsequent project, neither section relieves the City from its obligation to make a statement of overriding considerations for the Project. (PRC § 21081.) Thus, the City must prepare a statement of overriding considerations—supported by substantial evidence and evaluating whether any additional feasible mitigation measures applicable to this specific project—prior to approval of the Project.

CONCLUSION

In light of the above the Project does not qualify for an exemption from CEQA under

LIUNA Comment re: Ashley Furniture Project
City Council Agenda Item 5.3 (October 9, 2023)
October 6, 2023
Page 12 of 12

Section 15183 and, the City must prepare an EIR or, if appropriate, a mitigated negative declaration for the Project prior to approval.

Sincerely,

A handwritten signature in blue ink that reads "Brian B. Flynn". The signature is written in a cursive, flowing style.

Brian B. Flynn
LOZEAU DRURY LLP