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August 19, 2020

By E-Mail and U.S. Mail

Planning Commission
City of Hayward
c/o Sara Buizer, Planning Manager
777 B. Street
Hayward, CA 94541
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Re: Appeal of Mission Village Mixed Use Development Entitlement Extension

Dear Members of the Planning Commission:

I am writing on behalf of Valley Oak Partners, LLC to urge you to deny the appeal submitted by Rosemarie Aguilar and Glenn Kirby and Confirm/Approve the March 9, 2020 Planning Commission staff decision to grant a two year extension of entitlements for Vesting Tentative Tract Map ("VTTM") No. 8304 and Site Plan Review ("SPR") application No. 201504677 for the Mission Village Mixed Use Development (the "Project"), proposed for the corner of Mission Boulevard and Industrial Parkway.

I. Background

The Project is a 72 townhome development with 8,000 square feet of stand-alone retail on a 5.880 acre site. The Project would also create open space, including a zen garden and a children's play area. The Project would redevelop the Project site, including the Holiday Bowl building, which was destroyed by a fire on July 18, 2020. The Project was initially approved by the City Planning Commission in January 2017, after substantial work with both the City and the community to develop a project that would fulfil the needs of the surrounding neighborhood and the City of Hayward. The City prepared an Initial Study and Mitigated Negative Declaration ("MND") for the Project under the California Environmental Quality Act ("CEQA"), which analyzed the environmental impacts of full buildout of the Project, and adopted a Mitigation Monitoring and Reporting Program.

Following a protracted three-year remediation process with the Regional Water Quality Control Board to address contaminants on the Project site from a former drycleaner, Valley Oak Partners applied for an extension of the VTTM and SPR in July 2019. The City Planning Director approved the extension on March 9, 2020 and the extension became final and effective on March 24, 2020. Two local citizens, Rosemarie Aguilar and Glenn Kirby filed an appeal of the extension ("Aguilar appeal") on March 23, 2020. On June 25, 2020, the day the appeal was

to be heard by the City of Hayward Planning Commission, the Laborers' International Union of North America ("LIUNA") filed a letter on the extension of the VTTM and SPR.

II. The LIUNA Letter Was Not a Properly Filed Appeal

As an initial matter, the Hayward Municipal Code requires that any appeal of a Planning Director determination must be filed prior to the effective date of the decision being appealed. Hayward Municipal Code § 10-1.2845. The effective date of the extension of the SPR and VTTM was March 24, 2020. For this reason the LIUNA comment letter, which was filed with the City on June 25, 2020, was not timely filed as an appeal of the extension of the Project's entitlements under the Hayward Municipal Code and thus LIUNA is not an appellant in this action. The notice for the extension of entitlements clearly states that "[w]ritten appeals, along with the appropriate fee, must be received no later than 5:00 p.m. Monday, March 23, 2020…" Because the public had notice of this date and the Hayward Municipal Code only allows for an appeal of a Planning Director determination before the action becomes final, LIUNA has not properly appealed the Planning Director's action.

In contrast, the Aguilar appeal was filed within the timeframe for an appeal under the Hayward Municipal Code and thus we address its allegations below.

III. The Aguilar Appeal Does Not Have Merit

The Aguilar appeal claims that when the Project was first approved there was no housing crisis, but that now there is and thus the City should recommend that the property be designed for a higher density development. The Aguilar appeal states that the City should:

- Require a design for high density housing (25-35 dwelling units per acre ("DU/acre")) as allowed in the zoning;
- Set aside a required percentage of units for low and middle income applicants;
- Require that within 60 days of the approval of the new development, demolition of all vacant buildings shall begin and the site shall be returned to a pre-development condition.

First, the housing crisis in California has been ongoing since the 1970s, though it has significantly worsened in the recent decades. It is clear however that California had a housing problem in 2017 and that the Aguilar appeal raises no new issues that were not known to the City at the time it approved the Project in 2017. In addition, the Project complies with the Hayward 2040 General Plan, the land uses and densities in the Sustainable Mixed Use General Plan Land use designation, and the S-T4 Urban General Zone development standards. It should be noted as well that the Project's compliance with these standards was achieved with no requested variances from any development standards.

The Project site is zoned for 17-35 DU/acre and the Project proposed 18 DU/acre. This is within the density allowed for the Project site. In addition, while the Aguilar appeal argues for more dense residential development and less commercial development, the project is the result of extensive collaboration and feedback with the local neighborhood and citizens of Hayward. The

current project design, including density, reflects this feedback. Local support of the Project design continues to this day, as evidenced by the numerous letters in support of denying the appeal. Thus, it is clear that the Project was significantly vetted to respect the desires of all, residents, the City, Planning Staff, and the Planning Commission.

The Hayward Municipal Code requires any project with more than 50 units to comply with the City's Affordable Housing Ordinance, which allows the developer to either incorporate the required number of affordable units (7.5% of total units) within the development, pay an in-lieu fee, or some combination of both units and fees. The Project complies with the Hayward Municipal Code affordable housing ordinance and has chosen to pay the in-lieu fee in satisfaction of this requirement. The developer has relied on this option as it has compromised with various constituents on the design features of the project and expended considerable monies on the environmental cleanup of the site. Payment of the fee is part of the Conditions of Approval for the Project.

Finally, it appears that the Aguilar appellants are eager to see redevelopment of this site and the fastest way for that to occur is to approve the extension of the Project entitlements and allow the developer to proceed with the Project. Rescinding the extension or "recommend this property be put out to bid", as suggested by the Aguilar appellants, would require the Project to go back to square one and would set up a new, likely multi-year process of planning and entitlement before any activity on the Project site would occur.

For these reasons, the Planning Commission should reject the Aguilar appeal and Confirm/Approve the Planning Staff extension of the Project's entitlements.

IV. The LIUNA Comments Do Not Prove Subsequent CEQA Review is Required

As explained above, the LIUNA comments were not timely presented to the City under Hayward Municipal Code § 10-1.2845 and thus LIUNA has not perfected its appeal and the City may not consider their arguments in this appeal. However, for clarity and informational purposes, we respond here to LIUNA's claims that further CEQA review of the Project is necessary.

Once CEQA review is completed for a project and an EIR or negative declaration is adopted by the lead agency, further environmental review is governed by Public Resources Code ("PRC") § 21166 and CEQA Guidelines ("Guidelines")[1] § 15162. After initial CEQA review, "section 21166 prohibits agencies from requiring a subsequent or supplemental [review] unless substantial changes are proposed in the project or in circumstances which will require major revisions . . ., or unless certain new information becomes available." *Id.* Although section 21166 speaks only in terms of the EIR, the CEQA Guidelines apply section 21166 to project changes following an agency's adoption of a negative declaration or MND. Guidelines § 15162(b); *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1477-81. Therefore in order for the City to be required to conduct subsequent CEQA review of the Project, LIUNA must demonstrate one or more of the following:

[1] All references to the CEQA Guidelines are to Title 14 of the California Code of Regulations.

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

The trigger for subsequent environmental review is whether (a) substantial changes in the project, (b) substantial changes in the circumstances under which the project is undertaken, or (c) new information of substantial importance which was not known and could not have been known at the time of the prior EIR, would lead to the identification of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.

Contrary to LIUNA's claims that the "fair argument standard" for when CEQA review is required applies here, the standard for whether further environmental review is required when an EIR or MND has already been adopted is more deferential than the standard for whether initial CEQA review is required. In *Friends of the College of San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937, 951-53, the Supreme Court held that an agency's decision to proceed under CEQA's subsequent review provisions is subject to substantial evidence review, reasoning that the previous environmental review retains relevance and warrants increased deference to the agency's determination. The test for subsequent review is not the "fair argument standard", but is "markedly different, however, if a project is evaluated

after an initial environmental review has occurred." *Moss v. County of Humboldt* (2008) 162 Cal. App. 4th 1041, 1049.

Thus, LIUNA must demonstrate much more than a mere fair argument that the Project may have potential impacts on the environment in order to prove that further CEQA review is necessary. Instead, the question turns on whether there is "substantial evidence" that one of the above triggers will be met. LIUNA must show that there is not substantial evidence to support the City's determination that the previously approved MND retains informational value for analyzing the Project and they have not carried that burden here.

1. LIUNA Has Not and Cannot Allege Any Change in the Project.

The Project has not changed in any significant way since the 2017 approval and thus there is no change to the environmental effects of the Project. In the absence of any project changes, no further environmental review can be required.

2. LIUNA Has Not and Cannot Allege Any "Substantial" Changes in the Project's Circumstances That Will Require Major Revisions.

The circumstances under which the project is undertaken have not significantly changed and LIUNA makes no argument that they have. The MND was approved only three years ago and there have been no significant changes in the vicinity of the Project that would require "major revisions" to the MND.

3. LIUNA Has Not and Cannot Offer Any New Information of "Substantial Importance" That Demonstrates a New or Worsened Significant Impact that Cannot Be Mitigated.

In order to trigger additional review, an appellant needs to demonstrate not only that there is new information which could not have been known at the time of the approval, but that this new information would lead to a new or worsened significant impact that cannot be mitigated. LIUNA's allegedly new evidence of formaldehyde does not meet this standard.

a. The Emission of Indoor Formaldehyde Is Not New Information.

First, as explained by LIUNA in their letter, formaldehyde emissions and their potential impacts on air quality were known in 2017. LIUNA claims that a 2019 study shows that even using products that meet CARB's standards would not eliminate potential formaldehyde impacts, but that study is not new information about the potential for formaldehyde risks. This potential was known at the time of the MND. The only thing that has changed is the study (Chan, W. et al. "Ventilation and Indoor Air Quality in new California Homes with Gas Appliances and Mechanical Ventilation", May 22, 2019, Lawrence Berkeley National Lab) which LIUNA overstates and which has questionable application to the Project.

LIUNA claims that the 2019 study shows that, even with houses built with CARB-compliant materials, formaldehyde off-gasing may create impacts to sensitive receptors. The 2019 study reviewed 70 homes built between 2011 and 2017. While the CARB composite wood standards were adopted in 2007 and the phase 2 standards went into effect in July 2012, under

the regulation retailers could legally sell Phase 1 compliant products from their existing inventory through December 31, 2013. *See* ARB Composite Wood Products FAQ, p. 2 https://www.arb.ca.gov/toxics/compwood/consumer_faq.pdf ("Retailers (such as big box stores, small retailers) are allowed to sell Phase 1 compliant products until December 31, 2013"). Thus, it was not until January 2014 that all wood composite products in the marketplace were compliant with CARB's standards. Therefore, at least some, if not many, of the homes in the study (built between 2011 and 2017) had products that were not in compliance with the now required phase 2 CARB standards. This fact would affect the calculations of health risk that Mr. Offerman relies on to allege that the Project will have significant health impacts.

Second, the 2019 study required participants to keep their windows closed for the duration of the study and rely on mechanical ventilation, creating an a-typical situation. In reality, many participants related that they generally keep their windows open for hours at a time during spring, summer, and fall and prior research showed that self-reported window usage was below actual usage. Chan et al. at 40 ("[i]n summer, fall, and spring, approximately half of the homes (47% on average) reported substantial window use (>2 hours per day on average); but during winter more than half (57%) reported not opening their windows at all. For context, it is important to note the finding of Offermann (2009) that actual window use exceeded seasonal projected use in the sample of homes for which both types of data were available"). This use of ventilation would greatly reduce formaldehyde concentrations in indoor air and thus the studies do not accurately capture real-world behavior. In addition, the studies on indoor formaldehyde assume a continuous 24-hour exposure and 100% absorption by the respiratory system, further unrealistic assumption unsupported by substantial evidence. For these reasons, the Project can be distinguished from the homes studied in the 2019 study.

Finally, Mr. Offermann's claim that the Project would result in significant impacts is based on pure speculation and assumption, regarding Project construction and materials, regarding health risk modeling of formaldehyde, regarding how much ventilation there will be in Project homes, and regarding application of a significance threshold that is not formaldehyde specific. CEQA does not require speculation. CEQA Guidelines § 15145; *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376 (where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences). The 2019 study relied on by the commenter simply does not conclude that formaldehyde constitutes a significant impact.

Nor does anything in the LIUNA letter trigger further analysis under the California Supreme Court's decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369 ("*CBIA*"). In that case, the Supreme Court held that "when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users." *Id.* at 377 (emphasis added). As the formaldehyde emissions at issue do not "already exist", nothing in CBIA suggests that this impact must be considered under CEQA. In CBIA the court firmly declined to expand CEQA, and held that the CEQA Guidelines at issue "are valid to the extent they call for evaluating a project's potentially significant *exacerbating* effects on existing environmental hazards—effects that arise because the project brings "development and people into the area affected." *Id.* at 388 (emphasis in original). Thus, CBIA was about analyzing the

potential impacts from existing environmental conditions, such as emissions from nearby roadways, flood zone location, or earthquake hazards, that could be exacerbated by a project and thus cause impacts on a project's residents or other residents. There is no "area affected" by indoor air quality issues from the Project at this time because the Project does not exist.

Like LIUNA, the appellants in *Concerned Dublin Citizens v. City of Dublin* argued that evolving regulations necessitated supplementation. *Concerned Dublin Citizens*, 214 Cal. App. 4th at 1318. In that case, the petitioner argued that the city was required to supplement prior CEQA review due to new information regarding the effects of greenhouse gas emissions ("GHGs"). The court disagreed finding that, even though the prior EIR in question failed to analyze emission impacts at all, the impacts were known at the time the EIR was prepared and the evolving standards did not constitute new information. *Id.* at 1319. In this proceeding, LIUNA has not illustrated how the formaldehyde study constitutes new information about potential health risks or even health risks from formaldehyde specifically. As LIUNA admits, the effects of indoor formaldehyde emissions were known in 2017. None of the assumption on which the City relied on in the MND have changed. The City cannot be compelled to supplement its environmental analysis because LIUNA has offered a study which in fact shows nothing has changed.

b. LIUNA Has Not Demonstrated a New or Worsened Significant Impact.

LIUNA and Mr. Offermann argue that new information shows that CARB's regulation of formaldehyde in composite wood products has not reduced indoor formaldehyde emissions below the Bay Area Air Quality Management District's ("BAAQMD") CEQA threshold. Essentially, LIUNA and Mr. Offermann are arguing that nothing has changed from 2017. If emissions have not changed, then there can be no new or worsened significant impact from what was analyzed in 2017.

The MND completed for the Project in 2017 addressed potentially significant impacts to sensitive receptors from air pollutants and required Mitigation Measure AIR-2, which requires central heating and ventilation systems that meet an efficiency standard of MERV 13 and must include installation of a high efficiency filter and/or carbon filter. Mission Village Initial Study/Mitigation Negative Declaration, p. 19. Thus, the potential impact on sensitive receptors of air pollution was already assessed in the MND and as explained above, the 2019 study does not support the conclusion that indoor air emissions of formaldehyde are now somehow a new or worse significant impact than in 2017.

c. LIUNA Has Not Identified Any New or Previously Infeasible Mitigation that the Applicant Has Declined to Adopt.

LIUNA has not identified any new mitigation measures or mitigation measures previously found infeasible that would reduce an effect, that the Applicant has declined to adopt.

For these reasons, we urge the City to deny the Aguilar appeal of the Planning Commission staff extension of the VTTM and SPR for the Mission Village Mixed Use Development.

Sincerely,

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