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Re: MacArthur Station – Modified 2016 Project Addendum (PUD 06058-R01)

Dear Chairman Nagraj and Honorable Members of the Oakland Planning Commission:

I am writing on behalf of the Coalition for Appropriate Development and its members who include residents of the Temescal, Mosswood, Longfellow, Santa Fe, and Golden Gate neighborhoods (the “Coalition”) to urge the Planning Commission to reject the MacArthur Station – Modified 2016 Project (“Project”) and the CEQA Addendum prepared for it. The Project is a dramatic departure from the project as it was originally approved in 2008. Prior to 2008, members of the Coalition participated vigorously in the planning and EIR process for the existing approved project. Although the members remained concerned about the scope of the project, they felt the final version was a reasonable compromise. Now, the developer, Boston Properties, is requesting major revisions to the Planned Unit Development (“PUD”) permit adopted in 2008 that would increase the height of the residential building on Parcel B from up to 80 to 260 feet, increase the number of residential units from 150 to 402, and increase the commercial square footage from 5,500 to 10,000 square feet. The Coalition objects to these

proposed revisions as being inappropriate for the neighborhood, and in violation of the General Plan and zoning laws. In addition, because the Project will have significant environmental impacts that have not been analyzed or mitigated, a new Supplemental Environmental Impact Report (“SEIR”) is required under CEQA if the Project is not rejected outright.

The use of an addendum for such a significant change renders meaningless the previous robust public process. The City’s use of an addendum to the 2008 EIR is not authorized by CEQA and does not properly address the environmental impacts of the proposed Project, underestimating the severity of the Project impacts on the environment, and fails to recognize the drastic change from the Project originally approved in 2008. The Project would allow for the residential building planned for Parcel B to be more than three times the height originally agreed to in 2008, and 170 feet taller than the maximum allowed in the S-15 zone. The proposed tower is completely out of scale with the mixed-use residential neighborhood, casting shadows, blocking views, creating wind tunnels, and initiating a transformation of a neighborhood into an imposing downtown area. The Coalition urges the Planning Commission to reject the new Project and the Addendum prepared for it in order to protect the neighborhood’s character, and to comply with the City’s land use laws and the California Environmental Quality Act (“CEQA”).

Under CEQA, the City has a duty to prepare an SEIR to analyze the new and significant impacts arising from the changes proposed by the new Project, as well as to analyze changed environmental circumstances within the City that may significantly increase the Project’s impacts, and to adopt all feasible mitigation measures to mitigate these impacts. PRC § 21166; 14 CCR §§ 15162, 15164(a). As detailed below, at a minimum, an SEIR is required to analyze and mitigate a number of new, significant impacts that have not been previously analyzed.

First, The Coalition has prepared these comments with the assistance of expert ecologist Dr. Shawn Smallwood, who has spent nearly two decades researching animal density and distribution, interactions between wildlife and human infrastructure and activities, and conservation of rare and endangered species, among other things. Dr. Smallwood’s comments and curriculum vitae are attached hereto as Exhibit A, and are incorporated herein by reference in their entirety. According to Dr. Smallwood, the environmental impact of the Project’s proposed 25-story tower on birds could be substantial, resulting in fatalities to many species of migratory birds, as well as special status species. This potentially significant impact must be reviewed in a supplemental EIR. An Addendum cannot be used to address a previously ignored significant potentially impact. Nor does the Addendum evaluate or mitigate these potentially significant impacts.

In addition, the Addendum itself admits that the Project will create a significant wind hazard, and it is inconsistent with a number of General Plan policies and zoning laws. Each of these constitute new and significant impacts that have not previously been analyzed under CEQA. As a result, an addendum is inappropriate, and an SEIR is required.

Rather than comply with CEQA by preparing an SEIR, the City hides behind a long list of CEQA exemptions to avoid conducting a full environmental review of the Project. Yet none

of these exemptions preclude the City from its obligation to fully analyze and mitigate the Project's impacts on birds, its wind impacts, and its inconsistencies with land use policies.

As just mentioned, an Addendum is inappropriate under PRC § 21166 and 14 CCR 15162 because the Project major revisions to the 2008 EIR are required to analyze and mitigate these new significant impacts. In addition to this justification for failing to prepare an SEIR, the City also relies on the Community Plan Exemption found in PRC § 21083.3. Addendum, p. 17. This reliance is misplaced because the Community Plan Exemption does not exempt analysis of impacts that are "peculiar to" the parcel or project if those impacts were not addressed as significant impacts in the previous EIR. 14 CCR § 15183. Here, the Project will have significant biological, wind, and land use impacts that are peculiar to the Project and have not been previously analyzed in any of the EIRs mentioned in the Addendum. Accordingly, this exemption does not relieve the City of its obligation to prepare an SEIR.

The City next relies on the Qualified Infill Exemption under PRC § 21094.5 that allows streamlining for certain qualified infill projects. Addendum, p. 18. Under the Infill Exemption, no additional environmental review is required if the infill project would not cause any new or more significant impacts, or if uniformly applicable development policies or standards would substantially mitigate those effects. This exemption is equally inapplicable because the Project will cause new environmental impacts that will not be mitigated by uniformly applicable development policies. None of Oakland's Uniformly Applied Development Standards include mitigations for bird collision fatalities, wind hazards, or land use policy inconsistencies. *See* Addendum, Attachment A.

In determining whether additional environmental review is required when a previous Program EIR has been approved, the analysis is the same as the analysis for determining whether an Addendum is appropriate. In both instances, additional environmental review is required if any of the conditions in 14 CCR § 15162 are met. Here, additional environmental review is required, and an Addendum is inappropriate, because the Project will have significant impacts that have not been analyzed in any of the previous CEQA documents.

Finally, the City avoids addressing aesthetic and parking impacts under Pub. Res. Code § 21099(d), which states that "Aesthetic and parking impacts of a residential, mixed-use residential, or employment center project on an infill site located within a transit priority area shall not be considered significant impacts on the environment." Nothing in PRC § 21099(d) alters CEQA's requirement that the biological, wind, and land use impacts discussed below be fully evaluated in an SEIR. Moreover, while the City may choose not to evaluate aesthetics under CEQA, it is still required to analyze aesthetics to the extent they are relevant to determining the Project's consistency with the City's land use laws.

The use of an addendum to gloss over the dramatic changes to the neighborhood landscape, potentially drastic impacts on birds, and inconsistencies with adopted land use policies is unacceptable and contrary to the fundamental purposes of CEQA. In order to give the Project's environmental impacts the consideration which they are due under CEQA, the City

must prepare an SEIR.

Separate from CEQA, approval of the Project would constitute an abuse of discretion by the City because the conditions found in the Planning Code for approving a modification of the Planned Unit Development permit cannot be met here. The location, design, and size of the Project are visually obtrusive, the Project does not harmonize with the surrounding area, and the changes are unnecessary to achieve additional density. These features disqualify the Project from receiving a revised PUD permit. Oakland Planning Code § 17.140.080.

The Coalition requests that the Planning Commission decline to approve the Project and its related EIR Addendum, and instead remand the Project to Staff to prepare and circulate a legally adequate SEIR to address the issues raised in these and other comments and to require implementation of all feasible mitigations and alternatives required by law.

PROJECT BACKGROUND

The MacArthur Station Project Planned Unit Development (“PUD”), an Environmental Impact Report for the MacArthur Station Project, and other related entitlements (collectively, the “Original Project”) were approved by the City in July 2008. The Original Project authorized the development of an 8.2 acre site with up to 675 residential units, 49,000 square feet of commercial space, and 5,000 square feet of community space, a parking structure for BART patrons, and various infrastructure improvements.

Starting in the 1980’s, neighborhood residents, including members of the Coalition, worked with various developers to inform proposals for MacArthur Transit Village. Prior to the adoption of the Original Project in 2008, neighborhood residents spent countless hours over more than four years participating in meetings, workshops, and negotiations to reach a plan that they, the developer of the Original Project (MacArthur Transit Community Partners, aka Bridge Development Partners and McGrath Properties), and the City thought was a net gain for the neighborhood. The neighbors worked with the developer and the City in good faith to come up with a plan that would meet the needs of the City and the developer, while maintaining the integrity and feeling of the neighborhood. The Original Project is that compromise. On the basis of that compromise, the developer received more than \$17 million from the Redevelopment Agency. The tower proposal amounts to a bait and switch tactic that threatens to toss the previous public process out of the window, and puts into question the developer’s claim to any of the Redevelopment funds.

In complete disregard for that good-faith work put in by the community, the City and developer now seek major revisions to the Original Project. The Project currently before the Planning Commission centers on Parcel B of the Original Project. The Project would dramatically increase the height of the Parcel B residential building from an up to 80-foot, six story building to a 260-foot, 25-story high-rise. As the Staff Report admits, neither the S-15 zoning regulations nor the PUD allow for a building height of 260 feet. The Project also allows

an increase in the number of dwelling units on Parcel B from 150 to 402, an increase of 252 dwelling units. The Original Project included a 50-unit residential building on Parcel C-2 that would not be built as part of the new Project, so the total increase in dwelling units would be 200. These are significant changes that will result in significant environmental impacts that must be fully analyzed and mitigated.

The 2008 EIR mentions a “tower alternative,” but the EIR itself admits that it does not include a full CEQA analysis of that alternative. The 2008 EIR states, “the analysis of potential impacts associated with the planning alternatives does not satisfy the CEQA requirements as these alternatives are not designed to lessen project impacts identified in Chapter IV. The planning alternatives may result in similar or more severe environmental impacts.” Having already told the neighbors not to take that concept too seriously, the City cannot now claim that it fully reviewed its impacts or solicited adequate public comments on that concept in the prior EIR. Therefore, an SEIR is necessary to analyze and mitigate the Project’s significant environmental impacts.

LEGAL STANDARDS

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”) (except in certain limited circumstances). *See, e.g.*, Pub. Res. Code [“PRC”] § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. “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.

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. [“CCR”] § 15002(a)(1). “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA requires public agencies to avoid or reduce environmental damage when feasible by requiring “environmentally superior” alternatives and all feasible mitigation measures. 14 CCR § 15002(a)(2) and (3); *See also, Berkeley Jets, supra*, 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley, supra*, 52 Cal.3d at 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” 14 CCR

§15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial deference.’” *Berkeley Jets, supra*, 91 Cal.App.4th at 1355, quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409, fn. 12. As the court stated in *Berkeley Jets*, 91 Cal.App.4th at 1355:

A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722]; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.)

An addendum to a previously certified EIR was intended to be used “as a way of making minor corrections in EIRs and negative declarations without recirculating the EIR or negative declaration.” 14 CCR § 15164(a), Discussion. After an EIR has been certified, an agency may only prepare an addendum to a previously certified EIR when changes or additions to the EIR are necessary, but where none of the conditions triggering preparation of subsequent EIR have occurred. 14 CCR § 15164(a). By contrast a subsequent or supplemental EIR is required to be prepared – and an addendum is inadequate – in any of the following instances: (a) substantial changes are proposed in the project which will require major revisions of the environmental impact report; (b) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; (c) new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. PRC § 21166; 14 CCR §§ 15162; 15164(a).

DISCUSSION

I. THE CITY MUST PREPARE AN SEIR BECAUSE THE NEW PROJECT PROPOSES SUBSTANTIAL CHANGES THAT WILL REQUIRE MAJOR REVISIONS TO THE EIR.

If an agency proposes changes to a previously approved project, the agency must prepare a supplemental EIR if the changes are “[s]ubstantial” and “will require major revisions of the previous EIR or negative declaration due to the involvement of new significant effects or a substantial increase in the severity of previously identified significant effects.” 14 CCR § 15162;

Friends of College of San Mateo Gardens v. San Mateo County Community College Dist. (2016) 1 Cal.5th 937, 949. “The purpose behind the requirement of a subsequent or supplemental EIR or negative declaration is to explore environmental impacts not considered in the original environmental document.” *Id.*, quoting *Save Our Neighborhood*, 140 Cal.App.4th at 1296.

Here, the Project constitutes a major departure from the Original Project, and the changes will result in significant new environmental impacts that were not covered in the 2008 EIR or and other CEQA document. Despite the need for major revisions to the 2008 EIR as a result of the major modifications now proposed, the City failed to prepare an SEIR, and instead prepared an Addendum. The use of an addendum to gloss over the dramatic changes to the neighborhood landscape, potentially significant impacts on birds, the creation of hazardous winds, and inconsistencies with adopted land use policies is inconsistent with CEQA. In order to give the Project’s environmental impacts the consideration which they are due under CEQA, the City must conduct an SEIR.

A. An SEIR is Required Because the Project’s Impacts on Birds were not Considered in the 2008 EIR.

The new 25-story tower may have significant impacts on birds that must be properly analyzed and mitigated in an SEIR. According to expert wildlife biologist Dr. Shawn Smallwood:

[T]he proposed project will add a level of impact that is entirely missing from the CEQA review. *Constructing a building to 260 feet above ground* will not only take aerial habitat from birds, but it will also interfere with the movement of birds in the region and it *will result in large numbers of annual window collision fatalities*.

Smallwood Comment, p. 4.

“Highrise buildings intercept many nocturnal migrants as well as birds flying in daylight.” Smallwood Comment, p. 4. As Dr. Smallwood explains:

The proposed project would impose a 260-foot tall high-rise in the aerial habitat of many birds. Birds migrating through Oakland at night, in route to or from the Altamont Pass, down the coast, or in the Diablo Range, would encounter this high-rise. Many of these nocturnal migrants would be attracted to light emissions from the building or would encounter the building by chance, and many of these birds would perish due to collision with this building. Other birds would encounter the high-rise during daylight hours and would be deceived by the transparency or reflected images in the glass of windows. Many of these birds would perish.

Smallwood Comment, pp. 4-5.

The Project’s potential impact on birds is not negligible. Dr. Smallwood’s comments cite to dozens of studies to support his conclusion that the Project “will result in many collision fatalities of birds.” Smallwood Comment, p. 4. “The numbers of collision fatalities could be very large, and **some of the collision victims would be members of special status species that are rare or declining, and some could be special status species.**” Smallwood Comment, p. 9 (emph. added). Specifically, some of the special-status species that may be affected by the Project include the Sharp-shinned hawk, Cooper’s hawk, western burrowing owl, Olive-sided flycatcher, Least Bell’s vireo, yellow warbler, and Lawrence’s goldfinch. *Id.* In addition to these special status species, there are dozens of other bird species that may be impacted that are protected under the International Migratory Bird Treaty Act. *Id.*

Despite these potential significant impacts on biological resources, this impact has not been analyzed or mitigated in the 2008 EIR, the Addendum, or any other CEQA document relevant to the Project. The entire analysis of biological impacts in the Addendum is:

As noted in the 2008 Project EIR, the project site is located within a developed area, the majority of which is covered with impervious surfaces. Wildlife and botanical resources present within the project site are adapted to disturbed, urban conditions and would not be adversely affected by implementation of the proposed project.

Addendum, p. 92. An analysis of the Project’s impacts on birds is also absent from the 2008 EIR, and each of the other CEQA documents mentioned in the Addendum.

Moreover, since the 2008 EIR was adopted nine years ago, the City, in cooperation with the Golden Gate Audubon Society, adopted a set of Bird Safety Building Measures to its building permit requirements in 2013. Despite adoption of these standards, the Addendum makes no mention of them, and does not require compliance with them. The Bird Safety Measures would be directly applicable to the Project because they apply to all construction projects that 1) include glass as part of the building’s exterior, and 2) includes substantial vegetation or a green roof or green wall.¹ City of Oakland, Bird Safety Measures (2013).

The Bird Collision Reduction Measures include numerous mitigation measures, many of which are also recommended by Dr. Smallwood. *Id.*; Smallwood Comment, pp. 7-8. Some examples of these mitigation measures includes the creation of a bird collision reduction plan,

¹ According to the Addendum, the “25th story would include an approximately 4,500-square-foot common open space landscaped terrace. A portion of the building located on the southern part of Parcel B would be stepped down to approximately 14 stores tall. The roof area of this portion would include an approximately 11,000-square-foot common landscaped terrace. The southwestern and northwestern corners of the Parcel B building portion of the structure would be stepped down to approximately 11 stories and would include a rooftop terrace. A significant portion of the eastern side of the structure would be stepped down to five stories and would also include an approximately 8,500-square-foot common rooftop terrace.” Addendum, p. 33.

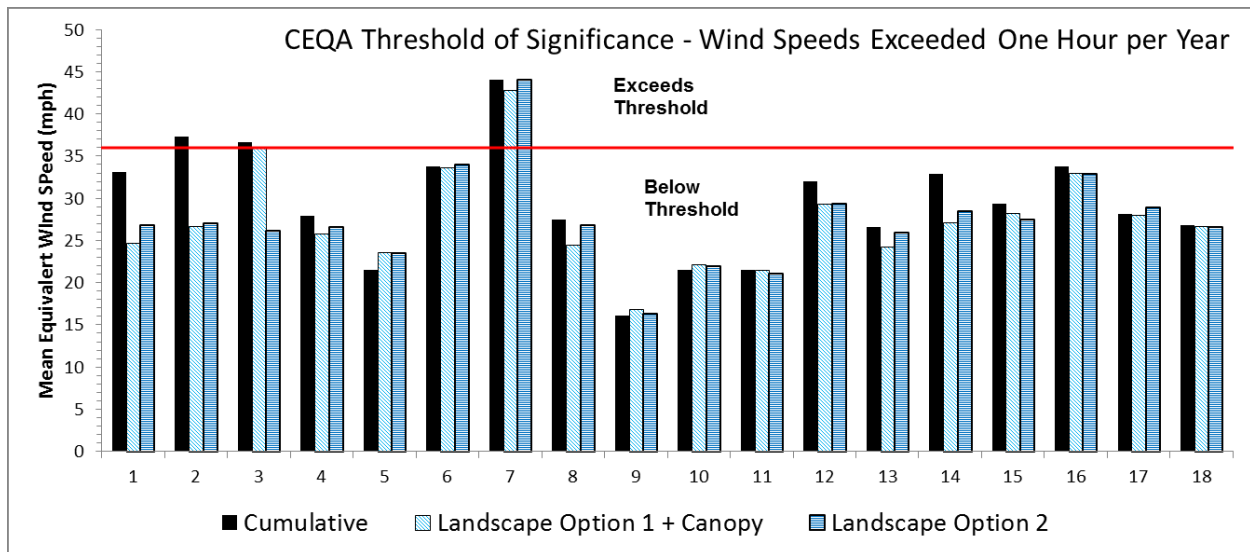
application of bird-friendly glazing treatments, and reducing light pollution during bird migration season.

This impact is substantial, and requires a major revision to the 2008 EIR because the Project’s potentially significant impact on birds has not been fully analyzed and mitigated. In failing to analyze the Project’s impacts on birds, the City has violated CEQA. An SEIR must be prepared to analyze the impacts of the Project on birds and mitigate any significant impacts to the extent feasible

B. An SEIR is Required Because the Project will Create Significant New Wind Impacts.

In addition to impacts on biological resources, the Project will also have significant wind impacts that must be fully analyzed and mitigated in an SEIR. According to the City’s thresholds of significance, a project has a significant impact if it “[c]reates winds that exceed 36 mph for more than one hour during daylight hours during the year.” Addendum, p. 39; Addendum Appendix H, p. 3. The guidance goes on to say that a wind analysis only needs to be conducted if the project’s height is greater than 100 feet, and if it is either located next to a substantial body or water, or if it is located downtown. *Id.*

The Addendum includes a wind analysis, which concludes that the Project will result in a significant hazardous wind impact. Addendum Analysis, Appendix H, pp. 28-30.



Source: Addendum Appendix H, Figure 6. Configuration C (Cumulative-plus-Proposed).

The Project will have a significant wind impact because at three different locations, the Project creates hazardous winds that exceed 36 mph for more than one hour during daylight hours during the year. Addendum, p. 73. According to the Addendum, mitigation measures can

reduce wind speeds at two of the three hazardous locations, to reduce the impact to a less-than-significant level. At the third location, Point 7, however, the Addendum says the impact cannot be mitigated.

The Addendum tries to minimize this impact by stating that the impacted location, Point 7 of the wind analysis, “is located in the loading access way at the south end of the site, a location where few if any pedestrians are expected to travel and where similar wind reduction measures would be difficult to implement due to the limited size of the area and the necessity for vehicular access at this location.” Addendum, p. 73. Looking at the location of Point 7 (see Addendum Appendix H, p. 22) in relation to BART and the existing parking garage, it is easy to see how this location will be used frequently. Point 7 is located between the BART parking garage and the proposed tower. Addendum Appendix H, p. 22. The primary access location for the existing BART parking lot is located directly south of Point 7 on Walter Miles Way. The Project includes construction of a new sidewalk along the east side of Walter Miles Way. When constructed, the easiest route for pedestrians walking from the BART garage to the BART station would be to walk north on the new sidewalk on the east side of Walter Miles Way, and therefore walk right past Point 7, which the Wind Analysis labels as “not suitable for pedestrians.” Addendum Appendix H, p. 9.

In addition to an analysis of the Project’s compliance with CEQA, the Wind Analysis also conducted a “wind comfort analysis” which looks to the commonly-used Lawson criterion and is one of the most widely accepted sets of criteria for assessing usability at locations with respect to the wind environment. Addendum Appendix H, p. 1. The Wind Analysis determined that a number of locations on the north side of the proposed tower (Points 2, 3, and 14-17) are rated “Business Walking,” which indicate that they will sometimes be perceived as windy, and may not be comfortable for seated or standing pedestrians. Addendum Appendix H, p. 9. Point 7, which is located on the southwest corner of the proposed tower, is rated “Uncomfortable” and as a result will sometimes be perceived as a windy location that is not suitable for pedestrians. Addendum Appendix H, p. 9. As discussed below, this is inconsistent with the requirement that transit oriented developments be pedestrian friendly. Oakland General Plan Policy T2.2.

The Addendum improperly dismisses this significant impact on the grounds that the City was not required to conduct the analysis for the Project since it is not located next to a body of water or in downtown. Based on this criteria, the City did not conduct a wind analysis for the Original Project or for the Tower Alternative in 2008. 2008 EIR, p. 444. The 2008 EIR briefly states that implementation of the tower alternative could “minimally increase shade and shadow and wind impacts over those anticipated for the proposed project,” but provides no data or analysis to demonstrate whether the impact would be significant.

Here, in contrast, the City did conduct a wind analysis, and the result cannot be ignored. The Project will have a significant impact. As a result, the Addendum’s conclusion that the Project will not result in a new significant impact related to wind (Addendum, p. 74), is not supported by substantial evidence. An SEIR is needed to fully analyze and mitigate the wind impacts to the extent feasible because the Project creates a significant new wind impact that was

not covered by the 2008 EIR.

C. An SEIR is Required Because the Project's Violates Oakland's Land Use Policies

In addition to determining compliance with CEQA, the Planning Commission is also tasked with determining whether the Project complies with Oakland's General Plan and zoning laws. While inconsistencies with land use laws is in and of itself an abuse of discretion, it also constitutes a significant impact under CEQA that requires a full analysis and mitigation under CEQA. CEQA requires the lead agency to analyze the impacts of a project in reference to relevant planning documents, including the General Plan, specific plan, or zoning ordinance. CEQA Guidelines, App. G. A determination that a project is consistent with a general plan is subject to an abuse of discretion standard of review, and should be overturned if findings are not supported by substantial evidence. *Families Unafraid to Uphold Rural El Dorado* ("FUTURE") *v. Board of Supervisors of El Dorado County* (1998) 62 Cal.App.4th 1334; *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 357. The Project's inconsistency with relevant land use laws constitutes a significant impact under CEQA that must be analyzed and mitigated in an SEIR. The City abused its discretion by concluding that the Project does not conflict with relevant land use policies.

As an initial matter, the Project conflicts with the City's zoning laws. The Project site is zoned "S-15 Transit Oriented Development," which includes a commercial corridor height limit of 90 feet. Addendum, p. 61. As the City admits in the Staff Report, "it would be significantly taller than what is allowed in the underlying zoning district and the existing low-rise character of the surrounding neighborhood." Staff Report, p. 29.

Moreover, the Project is inconsistent with a number of provisions from the General Plan. For example, General Plan Policy N1.8, "Making Compatible Development," states:

The height and bulk of commercial development in the "Neighborhood Mixed Use Center" and "Community Commercial" areas should be compatible with that which is allowed for residential development.

Similarly, Policy N8.2, "Making Compatible Interfaces Between Densities," states:

The height of development in urban residential and other higher density residential areas should step down as it nears lower density residential areas to minimize conflicts at the interface between the different types of development.

Policy T2.2, "Guiding Transit Oriented Development," states:

Transit-oriented developments should be **pedestrian oriented**, encourage night and day time use, provide the neighborhood with needed goods and services, contain a mix of land uses, **and be designed to be compatible with the character of surrounding**

neighborhoods.

Oakland General Plan (emph. added).

These General Plan policies are not met here. The General Plan designates the Project site as Neighborhood Mixed Use, and therefore the height of the Project should be compatible with what is allowed for residential development. A 25-story, 260-foot high-rise is inconsistent with the low-rise residential neighborhoods surrounding the Project site. Further, the Project cannot be said to adequately step down as it nears a lower density area since single-story houses are located across the street from the 25-foot tower. Moreover, as discussed above, the Project will create significant winds that conflict with a pedestrian oriented project. The City must comply with its own land use policies and retain the character of the residential neighborhoods surrounding the Project site.

II. THE CITY MISLED THE PUBLIC BY EXPRESSLY DISAVOWING THE TOWER ALTERNATIVE IN 2008.

It is profoundly unfair to allow the Project to move forward in its proposed form when the public was previously told that the “tower alternative” was not viable. The Original Project was not born overnight. It came about through years of discussion and compromises between the community, the City and the developers, with the Original Project representing the ultimate agreement that was reached.

In 2008, when the EIR for the Original Project was released and contained a “tower alternative,” members of the public were understandably upset. Rather than the agreed upon maximum height of 80 feet, the tower alternative in the EIR included a 23-story residential tower that would reach up to 240 feet. Members of the public were persuaded not to panic, however, because the 2008 EIR expressly stated that tower alternative was not being analyzed as an alternative under CEQA because “the analysis of potential impacts associated with the planning alternatives does not satisfy the CEQA requirements...” 2008 EIR, p. 483. Beyond the text of the EIR itself, community members were repeatedly assured by the City that the tower alternative was not viable. At meetings with City officials, for example, members of the Coalition were told that the tower alternative had been studied and completely rejected. Similarly, in response to a comment on the 2008 EIR, the City stated: “[t]he tower development initially proposed by the developer was determined to be infeasible for a number of reasons, not just as a result of the community opposition.” 2008 EIR Response to Comments, p. 94.

After previously telling the public that they did not need to worry about the tower alternative, the City is now presenting it as the only alternative. The City misled the public by expressly disavowing the tower alternative in 2008, only to now bring it back without a full environmental review and layering in claims of various exemption sot CEQA. The consequence of the City’s previous rejection of the tower alternative in 2008 was that members of the public were dissuaded from fully commenting on the environmental consequence of the alternative. Members of the community were made to believe that a 6-story residential building was all that

was being proposed for Parcel B. As a result, in the 2008 EIR, comments on the tower alternative were almost non-existent because the EIR said the alternative was not being considered.

The City's bait-and-switch is manipulative of the CEQA process, and undermines the ability of the public to comment on the Project. The City should prepare and circulate it for public review and comment a draft SEIR that analyzes and mitigates the Project's significant environmental impacts.

III. THE REQUIREMENTS FOR A PLANNED UNIT DEVELOPMENT PERMIT REVISION CAN NOT BE MET.

Approval of the Project requires an amendment to the existing Planned Unit Development permit. The Planning Code requires that modifications to a PUD be processed in the same way a new PUD permit would be processed. Accordingly, a PUD may be granted only if the following criteria are met (Oakland Planning Code § 17.140.080):

A. That the location, design, size, and uses are consistent with the Oakland General Plan and with any other applicable plan, development control map, design guidelines, or ordinance adopted by the City Council or Planning Commission;

As discussed above, the Project is inconsistent with numerous provisions of the General Plan and the S-15 zoning ordinance. As a result, this criteria cannot be met.

B. That the location, design, and size are such that the development can be well integrated with its surroundings, and, in the case of a departure in character from surrounding uses, that the location and design will adequately reduce the impact of the development;

There is no way for the Project to be well integrated with its surroundings because of its massive scale, dwarfing all other buildings in the surrounding areas. The predominant character of the Temescal, Mosswood, and Longfellow neighborhoods will be forever changed by the presence of a high-rise building among otherwise low-rise, family-oriented, residential neighborhoods. As a result, this criteria cannot be met.

C. That the location, design, size, and uses are such that traffic generated by the development can be accommodated safely and without congestion on major streets and will avoid traversing other local streets;

There is no evidence that the traffic generated by the Project can be accommodated safely, and without congestion on major streets. Instead, the 2008 EIR and the Addendum conclude that the Project will have a significant impact on traffic. Moreover, since the 2008 EIR was prepared, traffic has only gotten worse. The 2008 EIR does not take into account the 40th Street/MacArthur BART Bicycle Access Project and the Telegraph Avenue Complete Streets

Implementation Plan, which together is removing a driving lane in each direction on both Telegraph Avenue and MacArthur Boulevard, and added bikeways to driving lanes on 40th street. As a result, this criteria cannot be met.

D. That the location, design, size, and uses will result in an attractive, healthful, efficient, and stable environment for living, shopping, or working, the beneficial effects of which environment could not otherwise be achieved under the zoning regulations;

The same number of housing units could be built at the Project site without a 260-foot tower. The Original Project contained two shorter residential buildings rather than one to achieve additional density at the Project site. The same benefits, and more, would be achieved under the zoning regulations and the Original Project. As a result, this criteria cannot be met.

E. That the development will be well integrated into its setting, will not require excessive earth moving or destroy desirable natural features, will not be visually obtrusive and will harmonize with surrounding areas and facilities, will not substantially harm major views for surrounding residents, and will provide sufficient buffering in the form of spatial separation, vegetation, topographic features, or other devices.

The Project is the definition of “visually obtrusive” and will in no way harmonize with the surrounding neighborhoods. Rather than harmonize with the surrounding areas, the Project overwhelms the family-friendly, livable, neighborhood that currently exists. As a result, this criteria cannot be met.

In addition to these criteria, the criteria for a PUD “bonus” cannot be met. The massive scale of the Project is possible only based on a provision of the Planning Code that allows for certain “bonuses” for Planned Unit Developments in an S-15 zone. The bonus relied on by the City is found in Planning Code § 17.142.100(G), which allows the City to waive height requirements for PUDs, but only “for the purpose of promoting an integrated site plan.” 17.142.100(G). As with the PUD criteria just discussed, the height bonus cannot be justified. The Project proposes a 25-story tower in a village development of 5 and 6 story, which the village itself surrounded by 1 to 3 story buildings and houses in the surrounding neighborhoods. A waiver of height restrictions to allow a 25-story building next to 5 and 6 story buildings does not promote an integrated site plan.


Since these criteria for a new PUD cannot be met, and neither can the provisions for a height bonus, it would be an abuse of discretion for the City to approve a modification to the PUD.

CONCLUSION

The Coalition urges the Planning Commission to reject the Project, and direct staff to fully analyze and mitigate the Project's environmental impacts through an SEIR. Unless an SEIR is prepared to address these deficiencies, the public and decision makers will be deprived of an opportunity for full input and informed decision making, and the Project's impacts will go unmitigated. An EIR Addendum is wholly inadequate and must be replaced with an SEIR. Alternatively, the Planning Commission should reject the Project because it is inconsistent with the City's land use policies, and the criteria for a revised PUD cannot be met.

For the foregoing reasons, the City may not approve the Project as currently proposed. The Coalition urges the Planning Commission to decline to approve the proposed modifications and require the staff to go back and perform legally adequate environmental review for the Project, and properly mitigate its significant impacts. Thank you for your attention to these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'R. Davis', is written above a horizontal line.

Rebecca L. Davis
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Appropriate Development

EXHIBIT A

Shawn Smallwood, Ph.D.
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Davis, CA 95616

Catherine Payne
Bureau of Planning
250 Frank H. Ogawa Plaza, Suite 2114
Oakland, CA 94612

23 January 2017

RE: MacArthur Transit Village Project Modified 2016 CEQA Analysis

Dear Mrs. Payne,

I write to comment on the Modified 2016 CEQA Analysis prepared for the MacArthur Transit Village Project (Urban Planning Partners, Inc.), which I understand is to include a 260-foot tall building, 19 stories taller than the original project.

My qualifications for preparing expert comments are the following. I earned a Ph.D. degree in Ecology from the University of California at Davis in 1990, where I subsequently worked for four years as a post-graduate researcher in the Department of Agronomy and Range Sciences. My research has been on animal density and distribution, habitat selection, habitat restoration, interactions between wildlife and human infrastructure and activities, conservation of rare and endangered species, and on the ecology of invading species. I have authored numerous papers on special-status species issues, including "Using the best scientific data for endangered species conservation," published in *Environmental Management* (Smallwood et al. 1999), and "Suggested standards for science applied to conservation issues" published in the *Transactions of the Western Section of The Wildlife Society* (Smallwood et al. 2001). I served as Chair of the Conservation Affairs Committee for The Wildlife Society – Western Section. I am a member of The Wildlife Society and the Raptor Research Foundation, and I've been a part-time lecturer at California State University, Sacramento. I was also Associate Editor of wildlife biology's premier scientific journal, *The Journal of Wildlife Management*, as well as of *Biological Conservation*, and I was on the Editorial Board of *Environmental Management*.

I have performed wildlife surveys in California for thirty-two years. Over these years, I studied the impacts of human activities and human infrastructure on wildlife, including on golden eagle, Swainson's hawk, burrowing owl, mountain lion, San Joaquin kangaroo rat, and other species. I have performed wildlife surveys at many proposed project sites. I have also performed hundreds of hours of diurnal and nocturnal flight behavior surveys of birds and bats. I also collaborate with colleagues worldwide on the underlying science and policy issues related to anthropogenic impacts on wildlife.

My CV is attached.

BIOLOGICAL IMPACTS ASSESSMENT

The project analysis as it relates to potential impacts on biological resources was brief. According to Urban Planning Partners (2016:92), “*As noted in the 2008 Project EIR, the project site is located within a developed area, the majority of which is covered with impervious surfaces. Wildlife and botanical resources present within the project site are adapted to disturbed, urban conditions and would not be adversely affected by implementation of the proposed project.*” This statement composes the entirety of the analysis. The premise is that because the site is already urbanized and because the wildlife species that occur there are adapted to urban conditions, the revised project poses no potential adverse impacts to wildlife.

I cannot agree with this analysis. Its premise is flawed. Applying the same logic to the Altamont Pass Wind Resource Area (APWRA), one might conclude that raptors occurring in the APWRA would not be adversely affected by any changes to the APWRA because raptors are already adapted to being struck and killed by wind turbines in the APWRA. This conclusion would be erroneous. Or, applying this logic to a road widening project, one might conclude that wildlife already adapted to being struck and killed by autos and trucks will therefore experience no adverse impacts from widening the road. This conclusion would also be erroneous. These conclusions are of course ridiculous because the wildlife that are characterized as “adapted” are in truth experiencing injury and death at the existing project.

The existing developed area is causing significant numbers of injuries and deaths of birds every year. For example, if there are homes or commercial buildings with windows, then there are ongoing impacts to birds. Window collisions are often characterized as either the second or third largest source or anthropogenic-caused bird mortality. The numbers behind these characterizations are often attributed to Klem’s (1990) and Dunn’s (1993) estimates of about 100 million to 1 billion bird fatalities in the USA, or more recently Loss et al.’s (2014) estimate of 365-988 million bird fatalities in the USA or Calvert et al.’s (2013) and Machtans et al.’s (2013) estimates of 22.4 million and 25 million bird fatalities in Canada, respectively. However, these estimates and their interpretation warrant examination because they were based on opportunistic sampling, volunteer study participation, and fatality monitoring by more inexperienced than experienced searchers.

Klem’s (1990) estimate was based on speculation that 1 to 10 birds are killed per building per year, and this speculated range was extended to the number of buildings estimated by the US Census Bureau in 1986. Klem’s speculation was supported by fatality monitoring at only two houses, one in Illinois and the other in New York. Also, the basis of his fatality rate extension has changed greatly since 1986. Whereas his estimate served the need to alert the public of the possible magnitude of the bird-window collision issue, it was highly uncertain at the time and undoubtedly outdated more than three decades hence. Indeed, by 2010 Klem (2010) characterized the upper end of his estimated range – 1 billion bird fatalities – as conservative. Furthermore, the

estimate lumped species together as if all birds are the same and the loss of all birds to windows has the same level of impact.

Homes with birdfeeders are associated with higher rates of window collisions than are homes without birdfeeders (Kummer and Bayne 2015, Kummer et al. 2016a), so the developed area might pose even greater hazard to birds if it includes numerous birdfeeders. Another factor potentially biasing national or North American estimates low was revealed by Bracey et al.'s (2016) finding that trained fatality searchers found 2.6× the number of fatalities found by homeowners on the days when both trained searchers and homeowners searched around homes. The difference in carcass detection was 30.4-fold when involving carcasses volitionally placed by Bracey et al. (2016) in blind detection trials. This much larger difference in trial carcass detection rates likely resulted because their placements did not include the sounds that typically alert homeowners to actual window collisions, but this explanation also raises the question of how often homeowner participants with such studies miss detecting window-caused fatalities because they did not hear the collisions.

By the time Loss et al. (2014) performed their effort to estimate annual USA bird-window fatalities, many more fatality monitoring studies had been reported or were underway. Loss et al. (2014) were able to incorporate many more fatality rates based on scientific monitoring, and they were more careful about which fatality rates to include. However, they included estimates based on fatality monitoring by homeowners, which in one study were found to detect only 38% of the available window fatalities (Bracey et al. 2016). Loss et al. (2014) excluded all fatality records lacking a dead bird in hand, such as injured birds or feather or blood spots on windows. Loss et al.'s (2014) fatality metric was the number of fatalities per building (where in this context a building can include a house, low-rise, or high-rise structure), but they assumed that this metric was based on window collisions. Because most of the bird-window collision studies were limited to migration seasons, Loss et al. (2014) developed an admittedly assumption-laden correction factor for making annual estimates. Also, only 2 of the studies included adjustments for carcass persistence and searcher detection error, and it was unclear how and to what degree fatality rates were adjusted for these factors. Although Loss et al. (2014) attempted to account for some biases as well as for large sources of uncertainty mostly resulting from an opportunistic rather than systematic sampling data source, their estimated annual fatality rate across the USA was highly uncertain and vulnerable to multiple biases, most of which would have resulted in fatality estimates biased low.

In my review of bird-window collision monitoring, I found that the search radius around homes and buildings was very narrow, usually 2 meters. Based on my experience with bird collisions in other contexts, I would expect that a large portion of bird-window collision victims would end up farther than 2 m from the windows, especially when the windows are higher up on tall buildings. In my experience, searcher detection rates tend to be low for small birds deposited on ground with vegetation cover or woodchips or other types of organic matter. Also, vertebrate scavengers entrain on anthropogenic sources of mortality and quickly remove many of the carcasses, thereby preventing the fatality searcher from detecting these fatalities. Adjusting fatality rates

for these factors – search radius bias, searcher detection error, and carcass persistence rates – would greatly increase nationwide estimates of bird-window collision fatalities.

The existing conditions – the developed area – is undoubtedly killing many birds each year. Not only are windows killing many birds, but so too are house cats, feral cats, electrocution distribution lines, electric power poles, and autos. This said, the proposed project will add a level of impact that is entirely missing from the CEQA review. Constructing a building to 260 feet above ground will not only take aerial habitat from birds, but it will also interfere with the movement of birds in the region and it will result in large numbers of annual window collision fatalities.

High-rise buildings intercept many nocturnal migrants as well as birds flying in daylight. Johnson and Hudson (1976) found 266 bird fatalities of 41 species within 73 months of monitoring of a four-story glass walkway at Washington State University (no adjustments attempted). Somerlot (2003) found 21 bird fatalities among 13 buildings on a university campus within only 61 days. Monitoring twice per week, Hager et al. (2008) found 215 bird fatalities of 48 species, or 55 birds/building/year, and at another site they found 142 bird fatalities of 37 species for 24 birds/building/year. Gelb and Delacretaz (2009) recorded 5,400 bird fatalities under buildings in New York City, based on a decade of monitoring only during migration periods, and some of the high-rises were associated with hundreds of fatalities each. Klem et al. (2009) monitored 73 building facades in New York City during 114 days of two migratory periods, tallying 549 collision victims, nearly 5 birds per day. Borden et al. (2010) surveyed a 1.8 km route 3 times per week during 12-month period and found 271 bird fatalities of 50 species. Parkins et al. (2015) found 35 bird fatalities of 16 species within only 45 days of monitoring under 4 building facades. From 24 days of survey over 48 day span, Porter and Huang (2015) found 47 fatalities under 8 buildings on a university campus. Sabo et al. (2016) found 27 bird fatalities 61 days of searches under 31 windows. In San Francisco, Kahle et al. (2016) found 355 collision victims within 1,762 days under a 5-story building. Ocampo-Peñuela et al. (2016) searched the perimeters of 6 buildings on a university campus, finding 86 fatalities after 63 days of surveys. One of these buildings produced 61 of the 86 fatalities, and another building with collision-deterrent glass caused only 2 of the fatalities. There is ample evidence available to support my prediction that the proposed 260-foot tall building will result in many collision fatalities of birds.

COLLISION FACTORS

Below is a list of collision factors I found in the scientific literature. Following this list are specific notes and findings taken from the literature and my own experience.

- (1) Inherent hazard of a structure in the airspace used for nocturnal migration or other flights
- (2) Window transparency, falsely revealing passage through structure or to indoor plants
- (3) Window reflectance, falsely depicting vegetation, competitors, or open airspace
- (4) Black hole or passage effect

- (5) Window or façade extent, or proportion of façade consisting of window or other reflective surface
- (6) Size of window
- (7) Type of glass
- (8) Lighting, which is correlated with window extent and building operations
- (9) Height of structure (collision mechanisms shift with height above ground)
- (10) Orientation of façade with respect to winds and solar exposure
- (11) Structural layout causing confusion and entrapment
- (12) Context in terms of urban-rural gradient, or surrounding extent of impervious surface vs vegetation
- (13) Height, structure, and extent of vegetation grown near home or building
- (14) Presence of birdfeeders or other attractants
- (15) Relative abundance
- (16) Season of the year
- (17) Ecology, demography and behavior
- (18) Predatory attacks or cues provoking fear of attack
- (19) Aggressive social interactions

(1) Inherent hazard of structure in airspace.—Not all of a structure’s collision risk can be attributed to windows. Overing (1938) reported 576 birds collided with the Washington Monument in 90 minutes on one night, 12 September 1937. The average annual fatality count had been 328 birds from 1932 through 1936. Gelb and Delacretaz (2009) and Klem et al. (2009) also reported finding collision victims at buildings lacking windows, although many fewer than they found at buildings fitted with windows.

(2) Window transparency.—Widely believed as one of the two principal factors contributing to avian collisions with buildings is the transparency of glass used in windows on the buildings (Klem 1989). Gelb and Delacretaz (2009) felt that many of the collisions they detected occurred where transparent windows revealed interior vegetation.

(3) Window reflectance.—Widely believed as one of the two principal factors contributing to avian collisions with buildings is the reflectance of glass used in windows on the buildings (Klem 1989). Reflectance can deceptively depict open airspace, vegetation as habitat destination, or competitive rivals as self-images (Klem 1989). Gelb and Delacretaz (2009) felt that many of the collisions they detected occurred toward the lower parts of buildings where large glass exteriors reflected outdoor vegetation. Klem et al. (2009) and Borden et al. (2010) also found that reflected outdoor vegetation associated positively with collisions.

(4) Black hole or passage effect.—Although this factor was not often mentioned in the bird-window collision literature, it was suggested in Sheppard and Phillips (2015). The black hole or passage effect is the deceptive appearance of a cavity or darkened ledge that certain species of bird typically approach with speed when seeking roosting sites. The deception is achieved when shadows from awnings or the interior light conditions give the appearance of cavities or protected ledges. This factor appears potentially to be

nuanced variations on transparency or reflectance or possibly an interaction effect of both of these factors.

(5) Window or façade extent.—Klem et al. (2009), Borden et al. (2010), Hager et al. (2013), and Ocampo-Peñuela et al. (2016) reported increased collision fatalities at buildings with larger reflective facades or higher proportions of facades composed of windows. However, Porter and Huang (2015) found a negative relationship between fatalities found and proportion of façade that was glazed.

(6) Size of window.—According to Kahle et al. (2016), collision rates were higher on large-pane windows compared to small-pane windows.

(7) Type of glass.—Klem et al. (2009) found that collision fatalities associated with the type of glass used on buildings. Otherwise, little attention has been directed towards the types of glass in buildings.

(8) Lighting.—Parkins et al. (2015) found that light emission from buildings correlated positively with percent glass on the façade, suggesting that lighting is linked to the extent of windows. Zink and Eckles (2010) reported fatality reductions, including an 80% reduction at a Chicago high-rise, upon the initiation of the Lights-out Program. However, Zink and Eckles (2010) provided no information on their search effort, such as the number of searches or search interval or search area around each building.

(9) Height of structure.—I found little if any hypothesis-testing related to high-rise buildings, including whether another suite of factors might relate to collision victims of high-rises. Are migrants more commonly the victims of high-rises? I would expect that some of the factors noted in other contexts will not be important with the upper portions of high-rises, such as birds attacking reflected self-images, or the extent of vegetation cover nearby, or the presence or absence of birdfeeders nearby.

(10) Orientation of façade.—Some studies tested façade orientation, but not convincingly. Confounding factors such as the extent and types of windows would require large sample sizes of collision victims to parse out the variation so that some portion of it could be attributed to orientation of façade.

(11) Structural layout.—Bird-safe building guidelines have illustrated examples of structural layouts associated with high rates of bird-window collisions, but little attention has been towards hazardous structural layouts in the scientific literature. An exception was Johnson and Hudson (1976), who found high collision rates at 3 stories of glassed-in walkways atop an open breezeway, located on a break in slope with trees on one side and open sky on the other, Washington State University.

(12) Context in urban-rural gradient.—Numbers of fatalities found in monitoring have associated negatively with increasing developed area surrounding the building (Hager et al. 2013), and positively with more rural settings (Kummer et al. 2016a). However, these relationships might not hold when it comes to high-rises.

(13) Height, structure and extent of vegetation near building.—Correlations have sometimes been found between collision rates and the presence or extent of vegetation near windows (Hager et al. 2008, Borden et al. 2010, Kummer et al. 2016a, Ocampo-Peñuela et al. 2016). However, Porter and Huang (2015) found a negative relationship between fatalities found and vegetation cover near the building.

(14) Presence of birdfeeders.—Dunn (1993) reported a weak correlation ($r = 0.13$, $P < 0.001$) between number of birds killed by home windows and the number of birds counted at feeders. However, Kummer and Bayne (2015) found that experimental installment of birdfeeders at homes increased bird collisions with windows 1.84-fold.

(15) Relative abundance.—Collision rates have often been assumed to increase with local density or relative abundance (Klem 1989), and positive correlations have been measured (Dunn 1993, Hager et al. 2008). However, Hager and Craig (2014) found a negative correlation between fatality rates and relative abundance near buildings.

(16) Season of the year.—Borden et al. (2010) found 90% of collision fatalities during spring and fall migration periods. The significance of this finding is magnified by 7-day carcass persistence rates of 0.45 and 0.35 in spring and fall, rates which were considerably lower than during winter and summer (Hager et al. 2012). In other words, the concentration of fatalities during migration seasons would increase after applying seasonally-explicit adjustments for carcass persistence.

(17) Ecology, demography and behavior.—Klem (1989) noted that certain types of birds were not found as common window-caused fatalities, including soaring hawks and waterbirds. Cusa et al. (2015) found that species colliding with buildings surrounded by higher levels of urban greenery were foliage gleaners, and species colliding with buildings surrounded by higher levels of urbanization were ground foragers. Sabo et al. (2016) found no difference in age class, but did find that migrants are more susceptible to collision than resident birds.

(18) Predatory attacks.—Panic flights caused by raptors were mentioned in 16% of window strike reports in Dunn's (1993) study. I have witnessed Cooper's hawks chasing birds into windows, including house finches next door to my home and a northern mocking bird chased directly into my office window.

(19) Aggressive social interactions.—I found no hypothesis-testing of the roles of aggressive social interactions in the literature other than the occasional anecdotal account of birds attacking their self-images reflected from windows. However, I have witnessed birds chasing each other and sometimes these chases resulting in one of the birds hitting a window.

SOLUTIONS

Given the magnitude of bird-window collision impacts, there are obviously great opportunities for reducing and minimizing these impacts going forward. Existing structures can be modified or retrofitted to reduce impacts, and proposed new

structures can be more carefully sited and designed to minimize impacts. However, the costs of some of these measures can be high and can vary greatly, but most importantly the efficacies of many of these measures remain uncertain. Both the costs and effectiveness of all of these measures can be better understood through experimentation and careful scientific investigation. Post-construction fatality monitoring should be an essential feature of any new building project. Below is a listing of mitigation options, along with some notes and findings from the literature.

(1) Retrofitting to reduce impacts

- (1A) Marking windows
- (1B) Managing outdoor landscape vegetation
- (1C) Managing indoor landscape vegetation
- (1D) Managing nocturnal lighting

(1A) Marking windows.—Whereas Klem (1990) found no deterrent effect from decals on windows, Johnson and Hudson (1976) reported a fatality reduction of about 67% after placing decals on windows. Many external and internal glass markers have been tested experimentally, some showing no effect and some showing strong deterrent effects (Klem 1989, 1990, 2009, 2011; Klem and Saenger 2013; Rössler et al. 2015). In an experiment of opportunity, Ocampo-Peñuela et al. (2016) found only 2 of 86 fatalities at one of 6 buildings – the only building with windows treated with a bird deterrent film.

(2) Siting and Designing to minimize impacts

- (2A) Deciding on location of structure
- (2B) Deciding on façade and orientation
- (2C) Selecting type and sizes of windows
- (2D) Designing to minimize transparency through two parallel facades
- (2E) Designing to minimize views of interior plants
- (2F) Landscaping to increase distances between windows and trees and shrubs

GUIDELINES ON BUILDING DESIGN

If the project goes forward, it should at a minimum adhere to available guidelines on building design intended to minimize collision hazards to birds. For example, the American Bird Conservancy produced an excellent set of guidelines recommending: (1) Minimize use of glass; (2) Placing glass behind some type of screening (grilles, shutters, exterior shades); (3) Using glass with inherent properties to reduce collisions, such as patterns, window films, decals or tape; and (4) Turning off lights during migration seasons (Sheppard and Phillips 2015). The City of San Francisco (San Francisco Planning Department 2011) also has a set of building design guidelines, based on the excellent guidelines produced by the New York City Audubon Society (Orff et al. 2007).

CONCLUSION

The proposed project would impose a 260-foot tall high-rise in the aerial habitat of many birds. Birds migrating through Oakland at night, in route to or from the Altamont Pass, down the coast, or into the Diablo Range, would encounter this high-rise. Many of

these nocturnal migrants would be attracted to light emissions from the building or would encounter the building by chance, and many of these birds would perish due to collision with this building. Other birds would encounter the high-rise during daylight hours and would be deceived by the transparency or reflected images in the glass of windows. Many of these birds would perish. At lower stories – those near the ground – windows reflecting planted trees would deceive birds into flying toward the reflected images and to their deaths. The numbers of collision fatalities could be very large, and some of the collision victims could be members of species that are rare or declining, and some could be special-status species, such as Sharp-shinned hawk (*Accipiter striatus*), Cooper's hawk (*Accipiter cooperi*), western burrowing owl (*Athene cunicularia*), Olive-sided flycatcher (*Contopus cooperi*), Least Bell's vireo (*Vireo belli pusillus*), yellow warbler (*Setophaga petechia*), and Lawrence's goldfinch (*Spinus lawrencei*). However, it should be remembered that nearly all birds are protected by the international Migratory Bird Treaty Act. The EIR should be revised to address these potential impacts. Available bird-safe building guidelines should be followed.

Thank you for your consideration,



Shawn Smallwood, Ph.D.

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