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Sent via e-mail

RE: Comment on Southwest Fresno Rezone Project, Plan Amendment Application No. P20-01665, Rezone Application No. P20-01665 and the related Environmental Assessment No. P20-01665

Ms. Clark:

The Office of the California Attorney General submits these comments regarding legal deficiencies in the Southwest Fresno Rezone Project (Project), including Plan Amendment Application No. P20-01665, Rezone Application No. P20-01665 and the related Environmental Assessment No. P20-01665. This Project application was submitted in 2020 by an attorney on behalf of a collection of industrial property owners and corporations in southwest Fresno, including “SDG Fresno 570” (collectively, Applicants). The Applicants seek to rezone 92.53 acres of property from Neighborhood Mixed Use to Light Industrial. The Project site proposed to be zoned Light Industrial is in southwest Fresno, a community already disproportionately suffering one of the highest pollution burdens in all of California. The Project site is further located within the area covered by the Southwest Fresno Specific Plan (SWFSP), a planning vision established by Fresno in 2017 to combat and reverse the historical inequities and underinvestment in the southwest Fresno community due to policies—including redlining¹—that led to industrial uses being clustered near these low-income communities.

¹ Beginning in the 1930s, federal housing policy directed investment away from Black, immigrant, and working-class communities by color-coding neighborhoods according to the purported “riskiness” of loaning to their residents. In California cities where such “redlining” maps were drawn, nearly all of the communities where industrial uses are now concentrated were formerly coded “red,” signifying the least desirable areas where investment was to be avoided. See University of Richmond Digital Scholarship Lab, Mapping Inequality, <https://dsl.richmond.edu/panorama/redlining/#loc=12/36.751/-119.86&city=fresno-ca>.

The Project Applicants request that the City reverse its prior decision in 2017 to rezone Light Industrial property in the SWFSP as more neighborhood-friendly Neighborhood Mixed Use zoning. While still allowed to continue their existing industrial operations unimpeded as legally-existing non-conforming uses, the Applicants allege that the Neighborhood Mixed Use zoning designation should be changed due to their suffering of alleged “encumbrances to financial investment” that remain unidentified by the City (October 13, 2022, Staff Report, p. 7). Despite having elected not to participate in the years-long SWFSP public process, the Applicants are now asking the City to carve out their properties from the land use policies adopted in the SWFSP through that community-driven process, and rezone their specific properties back to Light Industrial.

The Attorney General’s Office urges the City not to turn its back on the commitment made to the southwest Fresno community in the SWFSP, and it notes several legal deficiencies in the Project. The Addendum to the SWFSP Environmental Impact Report (EIR) runs afoul of the California Environmental Quality Act (CEQA) by failing to consider the whole of the Project, ignoring foreseeable indirect Project impacts, and inaccurately asserting that the Project is in compliance with local, regional, and state plans. Additional, accurate environmental review of the Project is required under CEQA. Further, serious concerns remain unaddressed with regard to the Project’s compliance with the Housing Crisis Act (also known as SB 330), the California Fair Employment and Housing Act (FEHA), and the City’s mandatory duty to affirmatively further fair housing. We urge the City to reject this misguided and potentially unlawful Project proposal.

I. BACKGROUND

A. Southwest Fresno Community

The Project is located in southwest Fresno, one of California’s most over-burdened and under-invested environmental justice communities. According to CalEnviroScreen 4.0,² this census tract and all surrounding census tracts suffer a pollution burden amongst the top 3% of all Californians. Immediately to the west of the Project lies a residential community that is over 95% non-white, experiencing extremely high rates of poverty and unemployment, and facing serious shortages of affordable housing. The community further suffers from some of the highest asthma, low birth weight, and cardiovascular disease levels in the State.

In addition, several sensitive receptors are located in the immediate area surrounding the Project site. Immediately adjacent to the Project site is an office administering the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) for the surrounding community. The WIC program serves particularly sensitive receptors, providing food, health care, and nutritional education services to low-income pregnant women, infants, and children

² CalEnviroScreen 4.0, available at:
<https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-40>.

under five. Further, the Project is less than 700 feet from two schools, West Fresno Elementary School and West Fresno Middle School, which together serve approximately 1,000 K-8 students, over 97% of whom are non-white and 98% of whom are eligible for free or reduced-price lunches.³

This area of southwest Fresno is also designated as an AB 617 community. The California Legislature passed AB 617 to focus resources on reducing air emissions in historically disadvantaged communities.⁴ Because of the extremely high levels of air pollution to which this community is disproportionately exposed, the California Air Resources Board (CARB) previously identified it as a top priority for reductions in emissions and improvements in air quality under the AB 617 program. Through a lengthy public process, the community, local policymakers, and the San Joaquin Valley Air Pollution Control District (SJVAPCD) developed the South Central Fresno Community Emission Reduction Program (CERP). The South Central Fresno CERP was approved by CARB in 2020 and is now being implemented to achieve much needed emission reductions in the area surrounding the Project.⁵

B. The Southwest Fresno Specific Plan

Commencing in 2015, the City engaged in a widely-publicized, community-driven process to create a new specific plan to address the historic pollution and socioeconomic burdens that have long plagued the southwest Fresno community. The City held dozens of meetings to solicit feedback from the residents and landowners in southwest Fresno. Specifically, the City provided notice five separate times directly to all southwest Fresno residents and landowners, including the Project Applicants, through mail, including on September 2, 2015; October 6, 2015; February 5, 2016; February 11, 2017; and October 16, 2017. The City also publicized these meetings five separate times in the Fresno Bee, including on October 23, 2016; May 14, 2017; August 8, 2017; October 6, 2017; and October 8, 2017. On their own time and without compensation—over many nights and weekends—hundreds if not thousands of Fresno’s stakeholders participated to shape the future vision for the southwest Fresno community.

³ Statistics from the National Center for Education Statistics in the United States available at: <https://elementaryschools.org/directory/ca/cities/fresno/west-fresno-elementary/60141501785/> and <https://elementaryschools.org/directory/ca/cities/fresno/west-fresno-middle-school/60141501784/>.

⁴ Assembly Bill 617, Garcia, C., Chapter 136, Statutes of 2017, modified the California Health and Safety Code, amending § 40920.6, § 42400, and § 42402, and adding § 39607.1, § 40920.8, § 42411, § 42705.5, and § 44391.2. AB 617 is available at: https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB617.

⁵ Additional information on the South Central Fresno CERP, including progress regarding specific projects to reduce air emissions in this community, can be found here: <https://community.valleyair.org/selected-communities/south-central-fresno>.

After years of collaboration between the City and the local community, the City approved the SWFSP in 2017.⁶ In response to public input and in order to reduce the historic, disproportionate pollution burdens on the southwest Fresno community, the City adopted Land Use Goal 8, directing it to:

Address and mitigate West Fresno’s top ranking as most burdened by multiple sources of pollution by protecting the health and wellness of Southwest Fresno residents through regulating and reducing the negative impacts of industrial businesses and other sources of pollution. (Emphasis added.)

Key to the success of the effort to address and reduce southwest Fresno’s disproportionately high pollution burden and the corresponding health impacts from industrial businesses is Land Use Policy 8.1 (LU-8.1). LU-8.1 directs the City to “Plan and zone employment areas in Southwest Fresno for non-industrial businesses.” As a result of LU-8.1, areas of the SWFSP, including the Project site, were rezoned from Light Industrial to Neighborhood Mixed Use. Neighborhood Mixed Use development encourages desirable ground-floor neighborhood retail uses and upper-level housing or offices, with a mix of small lot single-family houses, townhomes, and multi-family dwelling units, providing for development that is pedestrian-oriented, designed to attract more walking, with small lots and frequent pedestrian connections permitting convenient access by residents to local commercial services. While allowing current industrial uses to continue as legally-existing non-conforming uses, the SWFSP eliminated Light Industrial zoning, so that future projects did not increase the community’s already-disproportionate pollution burden, but rather provided the housing and commercial services that the historically underserved southwest Fresno community deserves.

C. Applicants’ Request to Carve Out a Special Exemption to LU-8.1.

As a result of the SWFSP, the Project site was rezoned from Light Industrial to Neighborhood Mixed Use. Despite the zoning change, the Fresno Municipal Code preserved the Applicants’ ability to continue the already-operating industrial uses as legally existing, non-conforming uses, with certain restrictions on their ability to expand or intensify the legacy, existing industrial uses. (See Fresno Development Code Sec. 15-404, Legal Non-Conforming Uses.) The explicit purpose of Fresno’s rules for such non-conforming uses is “to permit continued utility and economic viability of uses, structures, site features, and lots that were created lawfully prior to the adoption of this Code, but do not conform to its provisions, while preventing new non-conformities.” (Fresno Development Code Sec. 15-401, Purpose). However, the Applicants that own these industrial facilities—who made no objections during the years-long, well-publicized SWFSP process—now allege that this zoning change is causing them economic harm. They now insist that the City rezone this 93-acre area back to Light Industrial so that industrial uses located in the SWFSP will continue in perpetuity and potentially expand.

⁶ The SWFSP and related documents can be found here:
<https://www.fresno.gov/darm/general-plan-development-code/#tab-13>.

Rather than the future community-friendly development envisioned by the SWFSP, the Project proposes future Light Industrial uses including warehouse and distribution facilities—like the nearby Amazon Fulfillment Center—in addition to manufacturing and processing facilities, utility equipment and service yards, and research and development facilities. According to the City, such rezoning would decrease the amount of the community-focused Neighborhood Mixed Use zoning in the SWFSP by 68 percent.

Because such rezoning would directly violate the mandate in SWSFP LU-8.1 prohibiting industrial zoning, the Applicants are further asking the City for a special exemption so that the SWSFP LU-8.1 no longer applies to the parcels they own. Specifically, the Applicants propose that Fresno amend its General Plan so that SWSFP LU-8.1 excludes “the 92-acre area [Project site]... in order to allow the continuation of legally established and non-polluting uses established and operating as of February 18, 2021.” (October 13, 2022, Staff Report at p. 3, emphasis added.) Applicants and the City allege that such language limiting future development to so-called “non-polluting uses” will prevent future expansion of existing industrial uses at the Project site. However, the Fresno Municipal Code does not define the term “non-polluting uses,” and the City has provided no clarification as to what future industrial uses will qualify as alleged “non-polluting” industrial facilities.

After years of collaboration with stakeholders and landowners to develop the SWFSP, the Attorney General’s Office urges the City not to carve out special rules to enable the Applicants to potentially expand future industrial uses. Applicants are already permitted under the existing rules to continue operating as legally-established non-conforming uses. Approval of this Project is unnecessary and would directly contradict the much-needed policies adopted in the SWSFP to reduce the highly-detrimental pollution burden on the southwest Fresno community. The City should not abandon the commitments it made to southwest Fresno only a few short years ago.

II. THE CITY HAS NOT ADEQUATELY DISCLOSED HOW THE PROJECT WILL SATISFY THE HOUSING CRISIS ACT.

Due to California’s housing crisis and the need for additional residential development, the California Legislature passed SB 330, the Housing Crisis Act of 2019. In addition to other changes, the Housing Crisis Act prohibits changes in residential land use designations that would lessen the availability of housing capacity (Gov. Code, § 66300, subd. (b)(1)(A)), as this Project proposes to do. The exception to this rule is if the local government makes a concurrent change to other parcels to ensure that there is “no net loss in residential capacity.” (Gov. Code, § 66300, subd. (i)(1).) On multiple prior occasions, the City asserted that the Project violated the Housing Crisis Act because changing the zoning at the Project site from Neighborhood Mixed Use—which allows for residential development—to Light Industrial—which does not—would remove 1,480 residential units from the SWFSP and the City’s housing inventory more broadly. (See June 1, 2022, Planning Commission Staff Report). In all previous staff reports, including at the time the Project was brought to the Planning Commission, the City asserted that the Project was illegal because Applicants had failed to submit a concurrent application to replace the residential

units the Project proposed to eliminate. Specifically, in the June 1, 2022, Staff Report, the City stated the following:

The applicant has not submitted an application for a separate Plan Amendment and Rezone that would offset the loss of potential dwelling units for the subject area, consistent with SB 330. Staff has not received any communication from the applicant that would indicate proactive steps towards completing this required concurrent application. Staff will not be able to support approval of the application for the Plan Amendment and Rezone by the City Council without a concurrent application that would result in no net loss of housing capacity. (June 1, 2022, Staff Report, at p. 4.)

The impression given publicly was that—absent an application from the Project Applicants—this Project would violate the Housing Crisis Act.

The Applicants still have not submitted any application to cure the Project’s legal deficiencies. However, earlier this year, the City initiated its own separate project, the Mixed Use Text Amendment, to remove all density caps throughout the entirety of the City’s mixed use zoning areas, including those in the SWFSP (Project Application No. P22-02413, hereafter referred to as “Density Cap Removal Project”). The City now appears poised to claim that this Density Cap Removal Project—scheduled for concurrent approval with this Project—will cure any of this Project’s Housing Crisis Act violations. Notably, the environmental analysis for the Density Cap Removal Project—which typically takes several months to prepare—was released on June 6, 2022, a mere five days after the City claimed at the Planning Commission hearing that the Project would violate the Housing Crisis Act absent further action by Applicants. While the Density Cap Removal Project had clearly been planned for months, it appears the City chose not to disclose its intent to attempt to fix the Project’s legal violations without any action by Applicants. In other words, while the City was telling the public at the Fresno Planning Commission on June 1, 2022, that Applicants would have to submit a separate application to comply with the Housing Crisis Act, the City had already initiated its own Density Cap Removal Project that would make this requirement moot. Even now, in the Staff Report released on October 7, the City completely ignores the relationship between the Project and the Density Cap Removal Project. The City should have disclosed the obvious relationship between these projects months ago, when the City knew it would be initiating a separate project to attempt to address the violations of the Housing Crisis Act that would otherwise prohibit this Project’s approval. Nevertheless, as discussed further below, the City must analyze the potential impacts from transferring residential units from the Project site to other areas covered by the SWFSP or to the City generally at higher densities.

III. THE PROJECT ADDENDUM TO THE SWFSP EIR DOES NOT ADEQUATELY SATISFY THE CITY’S OBLIGATIONS UNDER CEQA.

The City should reject the Project because the environmental analysis it prepared fails to properly analyze the Project’s environmental impacts as required by CEQA. Rather than

preparing a subsequent environmental analysis, the City merely drafted an Addendum to the SWFSP Environmental Impact Report (EIR) certified in 2017. The City justifies this approach by declaring that the Project simply constitutes a “minor modification” to the SWFSP that “would not substantially increase the severity of impacts identified in the SWFSP EIR, and would not require major revisions to the SWFSP EIR.” (Addendum, at p.3.) But the Addendum only reaches this conclusion by limiting the scope of its analysis and assuming that the Project would not cause any industrial expansion capable of creating significant environmental impacts, ignoring the foreseeable indirect effects of rezoning this nearly 100-acre site to Light Industrial. Because the CEQA Addendum does not accurately analyze the Project’s potential impacts, the conclusion that the Project will not have significant impacts is unsupported by substantial evidence. As set forth below, additional environmental analysis that accurately accounts for the Project’s significant environmental impacts is necessary.

A. The City Has Not Analyzed the Whole of the Project.

Under CEQA, the City must analyze the Project’s impacts, which include “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (CEQA Guideline § 15378; *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1220.) This requires that the City not just look at the specific proposal before it, but consider foreseeable indirect impacts that the project will create in the future. This standard is consistent with the principle that “environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396.)

1. The Addendum does not Analyze the Project’s Foreseeable Indirect Impacts, including the Expansion of Industrial Uses

The City claims that reverting the Project site back to Light Industrial zoning will not have any environmental impacts because the Applicants do not currently propose changes or expansions to the existing industrial uses. However, that assertion ignores both cementing these industrial uses in perpetuity rather than the future Neighborhood Mixed Uses envisioned in the SWFSP, in addition to the ability to expand and intensify the industrial uses as now prohibited by the SWFSP. Currently, as a legally-existing non-conforming use, these facilities are permitted to continue operations but are restricted with regard to expansion and intensification of uses pursuant to the Fresno Municipal Code. If the City approves the Project, those restrictions would disappear, and expanded or more intense uses of these properties would be allowed. While it appears no changes at the Project site are currently proposed by Applicants, the City must analyze the foreseeable environmental impacts of allowing this expanded future industrial development at these parcels.

Despite the City's repeated statements to the contrary, the Project allows for the future expansion of industrial uses that could create new, significant environmental impacts. The City broadly claims that, "assuming a limitation of future use of the subject property to a manner consistent with existing uses (as analyzed by the SWFSP PEIR), the proposed project does not have potential to result in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the existing environment." (October 13, 2022, Staff Report, at p.7.) The City further claims that future uses "are required to be as or less intensive as those uses that presently exist and operate in the subject area" (*Id.*) But a statement in a staff report based on an unenforceable "assumption" is not an actual requirement that future uses be no more intense than present uses.

The only actual limitation on the expansion of future industrial uses at the Project site is unclear at best, and, at worst, will allow for significant future expansion of industrial uses. Specifically, the City proposes to continue to allow at the Project Site "non-polluting uses established and operating as of March 4, 2021, within existing buildings." (October 13, 2022, Staff Report, at p. 3.) But the City fails to define what exactly constitutes a "non-polluting use." Further, the City appears to presume that the current industrial uses are "non-polluting," despite their clear contribution of some level of pollution to the community and environment. The City's claim that the present uses—including warehousing and distribution facilities and recycling/waste disposal facilities—are "non-polluting" is unfounded. While the City has not studied the environmental impacts of these facilities for the Project, the City previously asserted in the SWFSP EIR that these same existing industrial uses "have led to incompatible uses and noise and air quality concerns." (2017 SWFSP DEIR 3-3.) Since the City has previously claimed that such industrial uses are incompatible with the SWFSP in part because they give rise to air quality concerns, such uses cannot now be classified as "non-polluting" industrial uses. At the very least, the City must explain this discrepancy.

If the City believes that the already-existing industrial uses are "non-polluting," the obvious question remains what other alleged "non-polluting" industrial uses will the City permit at the site if the Project is approved? The City leaves this critical question unanswered, opening the door for future industrial development that could add substantial amounts of pollution to the SWFSP. Troublingly, the City has previously approved several multi-million square foot warehouse facilities, including the Amazon Fulfillment Center on Central Avenue, claiming that those projects would not create any new significant environmental impacts. (See, e.g., Mitigated Negative Declaration, Environmental Assessment No. TPM-2012-06.) The City has also approved a 2.1 million square foot warehouse and distribution complex based on the claim that it would create no significant impacts. This resulted in a CEQA lawsuit, brought by a local community organization and the Attorney General, that ultimately caused the City to withdraw the permit (and pay substantial attorneys' fees). (See Mitigated Negative Declaration, Development Permit Application No. D-16-109.) Would these distribution and warehouse uses be classified as "non-polluting" under the City's view? The Addendum ignores this potential additional pollution, thereby violating CEQA's mandate to analyze not only a Project's direct impacts but also its foreseeable indirect impacts.

While Applicants may not currently plan to expand future industrial uses, several of the Applicants have repeatedly stated that the Project’s proposed rezoning is needed to increase the resale value of these parcels. If the Project is approved and these parcels are subsequently sold, nothing in the amended SWFSP will prevent the buyers from expanding industrial uses in the near future, thereby increasing the pollution burden on the community. Further, at the September 1, 2022, City Council hearing, a property owner representative stated in support of the Project that because his parcel is not zoned Light Industrial, he was unable to lease his parcel to FedEx for a “last mile distribution facility,” a term for high-cube warehouse delivery hubs that distribute packages to Fresnoans. The implication was that, but for the Neighborhood Mixed Use zoning this Project would change, a FedEx last mile facility and other similar uses would be permissible uses. But such high-cube warehouse distribution facilities typically attract hundreds, if not thousands, of additional truck trips per day, dramatically impacting air quality, traffic, pedestrian safety, and myriad other potential significant environmental impacts.⁷ This type of proposed project—apparently already being contemplated by certain Applicants—would directly contradict the SWFSP’s goal of developing complete neighborhoods. It also provides an example of how more intense industrial uses may be contemplated at the Project site, contributing additional pollution to the SWSFP area.

2. The City does not Address the Related Density Cap Removal Project in its CEQA Analysis.

The City’s CEQA analysis also fails to disclose, analyze, or mitigate the Project’s legally-mandated requirements under the Housing Crisis Act. The Project will prohibit the future development of up to 1,480 additional residential units in the SWFSP area. It appears that the City intends to replace these units through its Density Cap Removal Project, which will shift over a thousand planned residential units from the Project site to other areas in the SWFSP, or the City at large. Yet the Project Addendum makes no mention of this impact.

Because this Project and the Density Cap Removal Project will relocate future residential development to other areas of the SWFSP that were not previously studied, the City must analyze the potential impacts from transferring these units from the Project site to other areas covered by the SWFSP or to the City generally at higher densities. Neither the environmental analysis completed for this Project nor the analysis for the Density Cap Removal Project accurately and adequately analyzes this substantial change from what was studied in the SWFSP EIR. This failure to analyze and mitigate such a potential impact violates CEQA.

While the Density Cap Removal Project is legally required for this Project to proceed without violating the Housing Crisis Act, the City’s CEQA analysis fails to publicly disclose the

⁷ See High-Cube Warehouse Vehicle Trip Generation Analysis, Institute of Transportation Engineers (October 2016), prepared for South Coast Air Quality Management District, available at: <http://library.ite.org/pub/a3e6679a-e3a8-bf38-7f29-2961becdd498>.

relationship between the two projects. Even when the Project Addendum was recirculated in August 2022, a month after the Density Cap Removal Project environmental analysis was released, the Addendum failed to discuss the Density Cap Removal Project or disclose the relationship between the two projects. Given that the City knew well in advance that it would be proceeding with its own Density Cap Removal Project, the Addendum should have evaluated whether this shift in residential development from the Project site to other areas of Fresno had the potential for significant environmental impacts. The failure to disclose and consider the full scope of the Project, including those from the related Density Cap Removal Project, violates CEQA's mandates.

B. The Addendum's Truncated Environmental Analysis Violates CEQA, Making a New, Accurate Analysis of the Project's Impacts Necessary.

The City has prepared an Addendum to the 2017 SWFSP EIR that concludes the Project will have no environmental impacts because no changes in use are currently anticipated by the Applicants. The City justifies the Addendum's conclusion on the ground that "there is no proposed new construction that would result from the subject project applications." (October 13, 2022, Staff Report, at p. 7). But whether or not this specific Project contemplates industrial expansion, this conclusion fails to analyze the indirect impacts resulting from the elimination of the potential future mixed use development contemplated in the SWFSP, in addition to the potential for future intensified and expanded industrial uses in southwest Fresno at the Project site. The Addendum also fails to consider the City's previous reliance on the reduced environmental impacts resulting from the Neighborhood Mixed Use zoning designation to make the findings required by CEQA for the SWFSP EIR. The City's Addendum is unsupported by substantial evidence, and additional environmental review is required under CEQA.

The City's reliance on an EIR addendum is inadequate. An addendum to an EIR is not appropriate when substantial changes are proposed to a project that would require major revisions of the environmental impact report. (Cal. Code Regs., tit. 14, § 15162, subd. (a)(1).) Substantial changes that require major revisions include, but are not limited to, changing the use or intensity of the use of a proposed project or changing the parameters of a proposed project. (See *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062 (finding that a proposed change from a shopping center to a supercenter required an environmental review); *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429 (holding that increasing the height of a building required a supplemental EIR).)

As outlined above, because the Project would allow for more intense industrial uses, it constitutes a substantial change to the SWFSP requiring at minimum a supplemental EIR. The Project provides for both a change in use and an increased intensity of industrial uses, triggering the requirement to analyze these potentially significant environmental impacts. Yet the City's environmental analysis under CEQA fails to conduct such an analysis. Further, the Addendum fails to consider the impact of potential new industrial development on currently vacant parcels

within the Project site, including the site at APN 328-240-32. While a smaller parcel, industrial development on this site certainly has the potential to create significant environmental impacts. The City dismisses this possibility, seemingly because the parcel is “located behind two existing buildings, resulting in a visibility screening [sic]...” (October 13, 2022, Staff Report, at p. 4.) While new industrial uses may be screened from the nearby community, an aesthetic impact is only one of many potential environmental impacts caused by brand-new industrial development in the SWFSP area.

Additional analysis is needed especially because the SWFSP EIR specifically relied on the zoning change from Light Industrial to Neighborhood Mixed Use to make the requisite environmental findings. As noted above, the City asserted in the SWFSP EIR that the existing industrial uses “have led to incompatible uses and noise and air quality concerns.” (2017 SWFSP DEIR 3-3.) To mitigate this harm, the City emphasized that zoning parcels as Neighborhood Mixed Use “would promote complete streets, mixed-use and transit oriented neighborhoods, and increased capacity for alternative transportation modes, which would help reduce air pollutant emissions.” (2017 SWFSP DEIR 3-30.) This measure to reduce emissions was critical to the EIR’s ability to meet state and local air quality regulations, including emissions standards, particulate matter reduction requirements, nuisance odor limitations, the local air district’s thresholds, and more. Should the City approve the Project and rezone the area back to Light Industrial, those reductions will no longer occur, creating a potentially significant environmental impact not previously disclosed and requiring additional environmental review. Further, because no Light Industrial zoning is included in the SWFSP, the re-creation of such Light Industrial zoning requires the City to consider additional mitigation measures to study this previously unanalyzed impact.

C. The Project is Inconsistent with Several State, Local, and Regional Plans.

The Project stands in direct contradiction with the Fresno General Plan, which incorporates the SWFSP policy prohibiting industrial zoning in this area. The City deploys vague allusions to unidentified policies in order to avoid this obvious conclusion. While noting that the SWFSP “has specific policies that prohibit industrial uses,” the City’s proposed Project findings nonetheless conclude that zoning these parcels back to Light Industrial “may comply with the intent of the Vision for the SWFSP.” (Fresno Municipal Code Findings, at p.1.) In its October 13, 2022, Staff Report, the City suggests that the Project “seems to comply” with the SWFSP. But the necessary findings are not whether the Project “may” comply or “seems to comply” with the Fresno General Plan—it is whether the Project is inconsistent with the Fresno General Plan, which it clearly is. While it is uncertain to which unidentified SWFSP “Vision” the City refers, the Project directly violates LU-8.1, which prohibits industrial zoning. The City’s claim that the Project “may” somehow still be consistent with the “intent of the Vision” of the SWFSP strains credulity.

The Project is also inconsistent with the broader vision of the Fresno General Plan. The Fresno General Plan promotes complete neighborhoods that connect housing, jobs, retail,

recreation, and services for the surrounding communities. The current Neighborhood Mixed Use Zoning at the Project site provides for exactly this type of development. The Light Industrial Zoning contemplated by the Project would prevent this type of future development in lieu of continued industrial uses that directly contradict the City's goal to develop the Southwest Fresno community into a complete neighborhood. The City's conclusion that this Project is consistent with the Fresno General Plan is unsupported by substantial evidence.

The Project also directly contradicts the intent of the South Fresno CERP approved under AB 617. The South Fresno CERP invests significant resources in south Fresno's environmental justice communities to reduce the historic impacts of industrial zoning. This Project does the opposite, solidifying and even expanding these industrial uses within the South Fresno AB 617 community boundaries. While City must analyze the Project to identify inconsistencies between the Project and applicable plans, including the CERP (CEQA Guidelines, § 15125, subd. (d)), the Project Addendum makes no mention of AB 617 or the South Fresno CERP. Allowing for potentially more intense industrial uses in perpetuity will create an increase in emissions beyond existing conditions, and Fresno must recognize the impact of this increase on the goals of the CERP.

IV. THE PROJECT MUST COMPLY WITH CALIFORNIA HOUSING LAWS.

The Project will eliminate 1,480 potential future residential units in southwest Fresno in favor of continued industrial development and uses, shifting this potential residential development to other areas of the City. The California Fair Employment and Housing Act (FEHA), Government Code section 12900 et seq., prohibits discrimination either intentionally or through the imposition of a neutral authorization, such as the zoning law proposed here, with a discriminatory effect that "make housing opportunities unavailable" based on race, national origin, or other protected characteristics. (Gov. Code, § 12955, subd. (l).) This prohibition includes any land use practice that "[r]esults in the location of toxic, polluting and/or hazardous land uses in a manner that ... adversely impacts ... the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or in connection with housing opportunities or existing or proposed dwellings." (Cal. Code Regs., tit. 2, § 12161, subd. (b)(10).) The City here has entirely failed to analyze the impacts of transferring future residential development from the Project site to areas outside of southwest Fresno, a community whose residents are over 95% non-White. It must consider whether the Project creates a discriminatory effect that makes housing opportunities unavailable in this community.

Government Code section 8899.50 also imposes a "mandatory duty" upon the City to "take no action that is materially inconsistent with its obligation to affirmatively further fair housing." (Gov. Code, § 8899.50, subd. (b)(1)-(2).) Examples of "materially inconsistent actions include those that... [h]ave a disparate impact on protected classes (e.g., zoning or siting toxic or

polluting land uses or projects near a disadvantaged community...).”⁸ Again, the City’s Project analysis entirely ignores its obligation to affirmatively further fair housing and prevent actions that have a disparate impact on residential opportunities for protected classes. The City must adequately analyze this potential impact before approving the Project.

V. CONCLUSION

The Fresno community, City staff, and the Fresno City Council collaborated for years on the SWFSP, a critical plan to address the longstanding significant pollution burdens impacting southwest Fresno. This much-lauded process resulted in a fair compromise that planned for future complete neighborhoods through Neighborhood Mixed Use Zoning while allowing existing industrial uses to continue unimpeded. Applicants now ask the City to reverse this progress and allow for continued and expanded industrial uses in perpetuity. The Attorney General’s Office urges the City not to approve this legally-deficient Project, and to stay the course it set in the SWFSP.

Sincerely,



SCOTT LICHTIG
Deputy Attorney General

For ROB BONTA
Attorney General

cc: Council Member District 1, Esmeralda Soria
Councilmember District 2, Mike Karbassi
Councilmember District 3, Miguel Arias
Council Vice-President District 4, Tyler Maxwell
Councilmember District 5, Luis Chavez
Councilmember District 6, Garry Bredefeld
Council President District 7, Nelson Esparza

⁸ “Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements (April 2021 Update),” *California Department of Housing and Community Development*, at p. 16.