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Mario Anaya
City of Tulare, Community & Economic Development Department
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RE: City of Tulare Zoning Ordinance Update

Dear Mr. Anaya:

The California Attorney General's Bureau of Environmental Justice respectfully submits these comments regarding the City of Tulare's Zoning Ordinance Update. The City has conducted several workshops regarding the Zoning Ordinance Update, which the City has made available to the Bureau in recorded form. From those workshops, it is our understanding that the City does not currently plan to change the current industrial zoning in the City near the unincorporated disadvantaged community of Matheny Tract. Consequently, we are concerned that continuing the industrial zoning in the area adjacent to Matheny Tract could predictably exacerbate a disproportionate effect on that community. The Bureau submits these comments to provide information and resources to the City as it undergoes the important process of updating its zoning ordinance and complying with state law. The following comments are intended to assist the City as it addresses environmental justice concerns surrounding the Zoning Ordinance Update.

I. Disproportionate Impact on Disadvantaged Community

Matheny Tract is an unincorporated community of approximately 1,048 residents located adjacent to the southern border of the City of Tulare and bordered by agricultural and industrial lands. At the time of Matheny Tract's establishment, the City of Tulare's racially restrictive covenants prevented African American migrants leaving the dust bowl and the Jim Crow south from living in the City, but they were able to settle in Matheny.¹ Over the years, the

¹ Grossi, *The American Dream took root here. Now it's filled with ghosts. But one man's passion won't let it die*, Fresno Bee (March 24, 2017), available at <https://www.fresnobee.com/news/local/article140643763.html>. See also, Gonzalez, *Rooted in exclusion, California towns fight for safe drinking water*, The American Prospect (November 17,

demographics of the once predominantly African American community have changed. Today, nearly 90% of residents of Matheny are Hispanic or Latino, as compared to 62.4% of residents in Tulare County as a whole and 61.7% of residents in the City of Tulare.²

Residents in Matheny Tract suffer from high pollution burdens. According to CalEnviroScreen, the census tract in which Matheny Tract lies has a combined score of 96. Residents in the census tract experience worse particulate matter pollution than 95% of census tracts in California. Ozone pollution in Matheny is worse than 85% of other California census tracts while pesticide exposures are higher than 80% of census tracts in the state.

These pollution burdens are linked to land use. Although Matheny Tract is outside Tulare City limits, the City's zoning decisions impact residents of Matheny. While Matheny Tract is residential, the City has zoned the area immediately to the east of Matheny Tract as heavy industrial and the land immediately north of Matheny Tract as light industrial, allowing for industries such as warehousing, trucking and distribution, and lumber yards. Thus, Matheny Tract is adjacent to industrial uses that include two scrap metal recycling facilities, a logistics company, trucking company, and a demolition center. These industrial uses are separated from homes by a road and a railroad track. Sensitive receptors such as churches are just one quarter of a mile away from scrap metal recycling and trucking companies. The City's solid waste facility is less than 1,000 feet from the nearest homes in Matheny. The City's waste water treatment plant is about one mile away. (Fig. 1.)

2021), *available at* <https://prospect.org/environment/rooted-in-exclusion-california-towns-fight-for-safe-drinking-water/>.

² American Community Survey, U.S. Census, https://data.census.gov/table?q=DP05&g=0500000US06107_1600000US0646223,0680644

Figure 1: City of Tulare’s Industrial Uses Are Adjacent to Matheny Tract Sensitive Receptors



II. Discrimination in Land Use Planning

Because the City has not yet released its draft Zoning Ordinance Update, at this stage, we seek merely to remind the City of laws under which discrimination in zoning could be examined.

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 policy or practice 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); see also *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, 496 (evidence sufficient to support discrimination claim included “specific facts demonstrating city officials’ awareness that the effect of their [action] would ‘bear[] more heavily on one race than another’ in light of historical patterns of segregation by race and class.”); *Committee Concerning Community Improvement v. City of Modesto* (9th Cir. 2009) 583

F.3d 690, 701–702 (permitting discrimination claim based on City’s re-enactment of agreement excluding plaintiff’s neighborhoods from City).)

The disparate impact theory permits challenge to a facially neutral policy which has a disproportionate impact on a protected group; intent is irrelevant. (*Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1419.) A plaintiff must show that “a challenged practice caused or predictably will cause a discriminatory effect.” (Cal. Code Regs., tit. 2, § 12061, subd. (a).)

Upon proof that a policy has a discriminatory effect, it would fall to the defendant to establish a “legally sufficient justification” for the land use policy, which is defined to include four elements: 1) the policy is “necessary to achieve one or more substantial, legitimate, nondiscriminatory purposes”; 2) the policy “effectively carries out the identified purpose”; 3) the identified purpose “is sufficiently compelling to override the discriminatory effect”; and 4) “[t]here is no feasible alternative practice that would equally or better accomplish the identified purpose with a less discriminatory effect.” (Cal. Code Regs., tit. 2, § 12062, subd. (b).)

Finally, we remind the City that Government Code, Section 8899.50 imposes a “mandatory duty” upon a public agency 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...)”³

Matheny Tract, which was founded in response to overt racial exclusion by the City, bears a disproportionate pollution burden. We are concerned that continuing the industrial zoning predictably could “exacerbate[] a disproportionate effect.” (Cal. Code Regs., tit. 2, § 12061, subd. (a); *Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District* (9th Cir. 2021) 17 F.4th 950, 962 (permitting challenge where a policy “exacerbated a discriminatory effect”).)

III. Heat Impacts/Greenspaces and Trees

In addition, we provide an overview of the disproportionate impacts of exposure to extreme heat and lack of greenspace and trees, since a lack of parks has been a top concern of Matheny Tract residents and the City’s land use decisions can further exacerbate or help alleviate these impacts.

³ California Department of Housing and Community Development, *Affirmatively Furthering Fair Housing: Guidance for All Public Entities and for Housing Elements* (April 2021 Update), p. 16.

Heat is the deadliest weather phenomenon in the U.S. and vulnerability to and exposure to heat are disproportionate.⁴ Nationwide, communities consisting of predominantly Black, Asian, or Latino individuals are more vulnerable to higher temperatures compared to communities that are predominantly White.⁵ A study of southwestern metropolitan areas found that in California, low-income neighborhoods and neighborhoods that are predominantly Latinx are several degrees hotter than wealthier and whiter neighborhoods.⁶

Trees, parks, and greenspaces can have a cooling effect and also help reduce air pollution⁷, yet the very same communities that are vulnerable to heat exposures also disproportionately lack tree canopy and parks.⁸

Matheny Tract is illustrative of the disproportionate impacts of heat and lack of tree canopy. The community has a median household income of \$30,565, about 40% of the state's median household income.⁹ Nearly 90% of its residents identify as Hispanic or Latino. Residents of Matheny Tract face high pollution burdens and are susceptible to increasingly hotter temperatures. By the end of the century, Matheny Tract is expected to have between 58 and 105 extreme heat days (defined as temperatures of 104.2 or higher) per year.¹⁰ Yet, there is not a single public park in Matheny Tract; the nearest park is several miles away in the City of Tulare,

⁴ Phillips et al., *Extreme Heat is One of the Deadliest Consequences of Climate Change But California Undercounts the Human Toll*, L.A. Times (October 7, 2021), available at <https://www.latimes.com/projects/california-extreme-heat-deaths-show-climate-change-risks/>.

⁵ Jesdale, et al., *The Racial/Ethnic Distribution of Heat Risk-Related Land Cover in Relation to Residential Segregation*, (May 14, 2013) 121 *Env'tl Health Perspectives* 811, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3701995/>.

⁶ Dialessandro, et al., *Dimensions of Thermal Inequity: Neighborhood Social Demographics and Urban Heat in the Southwestern U.S.* (January 22, 2021), 18 *Int'l J. Env't'l Res. & Pub. Health* 941, available at <https://www.mdpi.com/1660-4601/18/3/941>.

⁷See, e.g., EnviroAtlas, *Percent Particulate Matter (2.5) Removed Annually by Tree Cover* (July 2020), available at <https://enviroatlas.epa.gov/enviroatlas/DataFactSheets/pdf/ESC/PercentparticulatematterPM25removedannuallybytreecover.pdf>.

⁸ See Jesdale, *supra*, p. 814.

⁹ Tulare County Resource Management Agency, *Matheny Tract Legacy Plan* (2017), p. 31, available at <http://generalplan.co.tulare.ca.us/documents/GP/001Adopted%20Tulare%20County%20General%20Plan%20Materials/180Part%20III%20Legacy%20Plans%207%20of%207/004Matheny/GP A%2017-29%20MATHENY%20TRACT%20LEGACY%20PLAN.pdf>.

¹⁰ County of Tulare, *Matheny Tract Climate Adaptation Plan Draft* (2020), p. 93, available at <https://tularecounty.ca.gov/rma/rma-documents/planning-documents/tulare-county-environmental-justice/matheny-tract-climate-adaptation-plan/>.

despite residents of Matheny Tract consistently expressing the desire for a public park as a key priority.¹¹ Matheny Tract also has lower than average tree canopy at just 3.58%.¹² This is lower than both the average tree canopy across Tulare County (5%) and statewide (8%).¹³

While Matheny Tract is not within the City's boundaries, the City's land use decisions impact Matheny residents and in particular their exposure to heat impacts and access to greenspace. For instance, among its options, the City could examine rezoning its adjacent undeveloped industrial land to allow for increased tree canopy and green space for Matheny residents. It could require vegetative buffers as a condition for certain industrial uses, which would help provide both cooling and air filtration effects. The City could also examine making some of the more harmful uses that are currently allowed by right in industrial zones to uses that are only allowed with a permit. For instance, under the current zoning code, food and dairy processing, trucking/transportation/distribution, and warehousing and wholesaling are all uses that are permitted by right in both light and heavy industrial zones.¹⁴ Requiring conditional use permits for these and other polluting uses would give the City the opportunity to impose conditions for development to further public health and allow residents more opportunity to participate in planning decisions.

The City's 2014 General Plan includes policies that support a zoning ordinance that would be more protective of the health of Matheny Tract residents than the current zoning. For instance, policy LU-P2.8 requires the City to cooperate with other local governments to address regional issues, including by giving "special consideration" to development proposals on the periphery of the City's urban development boundary. City zoning ordinances "shall be consistent" with the general plan. (Gov. Code, §65860, subs. (a), (c).) Thus, the General Plan already requires the City to consult with the county, which is copied on this correspondence, on development proposals in the area surrounding Matheny. In addition, LU-P6.9 requires the City to buffer industrial land uses from incompatible land uses through techniques such as "dense landscaping, soundwalls, living walls, berms, fencing, open space setbacks, greenbelts, and building orientation." A more protective zoning ordinance would further these land use goals in the City's General Plan and help reduce the disproportionate pollution burdens on Matheny Tract residents.

The current zoning ordinance has some requirements involving setbacks and landscaping, but the design guidelines for industrial development are not specific or stringent. For instance,

¹¹*Id.* at 32.

¹² U.S. Forest Service, *Urban Tree Canopy in California* (2018), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd645759.html.

¹³ California Department of Public Health, *Climate Change and Health Profile Report – Tulare County* (February 2017), p. 15, *available at* https://www.cdph.ca.gov/Programs/OHE/CDPH%20Document%20Library/CHPRs/CHPR107Tulare_County2-23-17.pdf.

¹⁴ City of Tulare, Code of Ordinances (1995) §10.64.030.

the guidelines require setbacks for industrial uses that are adjacent to non-industrial uses, but the guidelines do not require any specified setback distance and do not indicate what type of buffer should be used to mitigate certain effects.¹⁵ Without specific and stringent standards, the City cannot assure Matheny residents that harmful effects will be mitigated.

IV. Suggestions for the City to Consider

In light of the forgoing, the Bureau suggests that the City:

1. Examine the feasibility of rezoning the land adjacent to Matheny Tract and/or prioritizing measures to reduce pollution exposures for Matheny Tract residents including requiring conditional use permits for certain more polluting industrial uses;
2. Consider a General Plan amendment to establish a development impact fee through the procedures set forth in Government Code section 66000 et seq. (Mitigation Fee Act) to create a fund for purposes of providing mitigation to residents within a set distance of any new development projects that include an industrial component. The fee could be used for mitigation such as residential soundproofing barriers like dual-pane windows and electric HVAC systems (including heat pumps) with incorporated air filtration systems. The ordinance enacting the development impact fee must be supported by the necessary nexus findings. (Gov. Code, §66001);
3. Consider enacting a so-called “reach” code that requires building energy efficiency standards above the state minimum especially focused on industrial and commercial development;
4. Increase protections by including more specific screening/buffering standards for industrial and commercial development in the updated Zoning Ordinance, including landscape buffers that provide trees/shade. Our Office has published guidance regarding warehouse developments that could be instructive for warehouse developments and other types of industrial developments as well: “Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act” which can be located on our website here: <https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/warehouse-best-practices.pdf>. More specific buffering standards would also further the City’s General Plan land use goals, specifically LU-P6.9 which requires the City to buffer industrial land uses from incompatible land uses through techniques such as “dense landscaping, soundwalls, living walls, berms, fencing, open space setbacks, greenbelts, and building orientation”; and
5. Ensure that the City complies with its General Plan by considering regional impacts, including by giving “special consideration” to development proposals on the periphery of the City’s urban development boundary. (City of Tulare General Plan, LU-P2.8, LU-P6.9.) The City should consider the impact of development on residents outside of city limits, such as

¹⁵ *Id.* at §10.76.030.

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the residents of Matheny Tract, and consult with the county on development proposals in the area surrounding Matheny Tract.

One critical resource available to the City of Tulare as it goes through this process are the environmental justice communities themselves. The City should engage with local disadvantaged communities throughout its Zoning Ordinance Update process to ensure that the City's policies and ordinances address the needs and concerns of these communities.

We look forward to providing resources to the City of Tulare as it continues its Zoning Ordinance Update process. Please do not hesitate to contact our office if you have any questions.

Sincerely,



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Cc.: Reed Schenke, Director
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