CITY OF
SAN JOSE
CAPITAL OF SILICON VALLEY

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City of Milpitas City Council
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Transmitted by first-class mail
postage pre-paid and by e-mail.

Re: **September 20, 2016 Council Agenda Item 12 – Trash Hauling Contract**

Dear Mayor Esteves and Council Members:

The City of San José respectfully requests that the Milpitas City Council ("Council") delay further consideration of the proposed trash hauling contract ("Project") until such time as a legally adequate Environmental Impact Report ("EIR") is prepared that complies with the California Environmental Quality Act ("CEQA"). The Council Agenda was first made available to the public on Friday, September 17, 2016. The City of San Jose's comments are brief and do not touch on all issues because of the very limited opportunity to evaluate and comment on this significant item.

The City of San Jose ("San Jose") reiterates its strong opposition to the Project as proposed, which would place traffic, noise, and vehicle emissions burdens on roadways within the City of San Jose by adding a significant number of vehicle miles travelled per week to already congested freeway segments, roads and intersections, and residential neighborhoods.

It is clear that the City of Milpitas has not performed adequate review of the project under CEQA. The City of Milpitas appears to rely on two exemptions in the CEQA Guidelines in satisfaction of its obligations to perform adequate environmental review of the Project under CEQA. Milpitas relies upon a Class 1 Categorical Exemption under CEQA Guidelines section 15301 for "existing facilities" for the environmental clearance for this Project. Milpitas also appears to rely upon CEQA Guidelines section 15061(b)(3) which states that a project is exempt from CEQA where "it can be seen with certainty that there is no possibility that the activity in question may

have a significant effect on the environment..." (See March 15, 2016 Milpitas City Council Agenda, Item 12 staff report).

1. Milpitas's Reliance on the Categorical Exemption is Improper.

Categorical exemptions are only authorized by state law where a certain class of projects is deemed not to have a significant effect on the environment. Public Resources Code section 21084 and 14 Cal. Code of Regs. § 15300. CEQA exemptions are not appropriate where, as with the instant Project, there may be a significant effect on the environment. Where there is a reasonably possibility that a project or activity may have a significant effect on the environment, an exemption is improper. *Azusa Land Reclamation Co. v. San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1191, quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206.

a. Guidelines §15310 Does Not Exempt Trash Hauling

Milpitas describes the CEQA review of this Project as follows:

> **California Environmental Quality Act:** As stated in the memo (included in the agenda packet) "Results of Assessing Air Quality and Greenhouse Gas Emissions Impact of Solid Waste Diversion Scenarios":
>
> "...even when considering the emissions impact associated with the worst case scenario for the City-approved waste disposal contract (disposal project) in conjunction with the diversion project, the total emissions still fall well below the *criteria pollutant* thresholds. With respect to GHG emissions, recycling and composting provide lifecycle benefits that far outweigh the impacts from transporting and processing of both the landfilled materials and the materials diverted from landfill... the City of Milpitas' new and proposed contractual arrangements for hauling, landfill disposal, and diversion of solid waste materials (the combined disposal and diversion projects considered herein) are exempt from CEQA per CEQA Guidelines section 15301, as the contracted activities represent the continued operation of existing public facilities that involve "negligible" or no expansion of use beyond that existing at the time of the lead agency's determination." (September 20, 2016 Milpitas City Council meeting agenda, p. 18.)

But with this Project, Milpitas is proposing to transport solid waste to the Guadalupe Mines Landfill in southwestern San Jose. There is absolutely nothing about the act of hauling solid waste that would exempt the hauling contract and its related impacts from CEQA using the Class 1 "existing facilities" exemption.

CEQA Guidelines section 15301 is limited to providing an exemption for "existing facilities," which typically include the operation, repair, maintenance, permitting, leasing,

licensing, or minor alteration of existing public or private structure or facilities, mechanical equipment, or topographical features involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The key consideration as to whether a Project may be exempted under this category is whether the project involves negligible or no expansion of an existing use. Section 15301 lists the types of projects that may be exempt, all but one of which involve physical alteration or maintenance of an existing physical improvement.

For the sake of argument only, perhaps the Milpitas Council's March 2016 approval of the agreement for use of the Guadalupe Mines facility might fall under this exemption, but certainly the separate hauling contract cannot take advantage of this exemption. CEQA exemption categories are not to be expanded or broadened beyond the reasonable scope of their statutory language. *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827,842; *Azusa Land Reclamation Co. v. San Gabriel Basin Watermaster*, *supra*, 52 Cal.App. 4th at pp. 1192-1193.

The City of Milpitas's reliance on the Class 1 categorical exemption under CEQA is entirely misplaced. The hauling of garbage is not an existing facility. The landfill where the garbage is to be hauled may be an existing facility, but the subsequent decision by the Council about where to haul (among other choices it is considering) and how to get there is not appropriately exempt as an existing facility. Rather, CEQA requires that Milpitas perform adequate environmental review of its hauling contract Project.

b. Milpitas Fails To Evaluate Traffic and Noise Impacts

There is absolutely no analysis of traffic on impacted freeway segments, no analysis of traffic on the City of San Jose streets and intersections where the trash will be transported (note that these trucks cannot use State Route 85 because trucks of this vehicle weight are prohibited on that highway), and no analysis of traffic and noise on the residential streets that are impacted by such transport. Milpitas has completely failed to evaluate the traffic and noise impacts, among other significant impacts, that will result from the transport of all of the solid waste from a City of 70,000 residents, not to mention its numerous industries and businesses, using an approximately 40 mile round trip per trash truck to and from the Guadalupe Mines site.

c. The Analysis of Air Pollutants and GGE Is Inadequate.

The CEQA exemption language on page 18 of tonight's Council agenda makes the poorly supported conclusion that emissions fall well below criteria pollutant thresholds. Milpitas represents that it relies upon the September 12, 2016 "Results of Assessing Air Quality and Greenhouse Gas Emissions Impact of Solid Waste Diversion Scenarios" prepared by consultant ESA Community Development as its basis for the categorical exemption. However, the September 12 analysis is limited to the "four

shortlisted diversion proposals" – single-stream recyclables, green waste, food waste, and construction and demolition (C&D) waste (pp. 1-2). These four waste streams will be transported to Newby Island landfill which the report indicates is approximately 3.7 miles one-way from Milpitas (p. 2). Furthest destinations for the diverted waste are also evaluated, but nothing is evaluated for the solid waste hauling component of the contract.

The "Results of Assessing Air Quality and Greenhouse Gas Emissions Impact of Solid Waste Diversion Scenarios" (9/12/16) document indicates in Footnote 1 on page 3 of the report that solid waste transport was evaluated in ESA's March 2016 memo to Milpitas. A copy of that earlier memo is attached to the March 15, 2016 Milpitas City Council agenda, but it relies heavily upon a 2016 analysis of transportation emissions by Edgar & Associates which is not included with the agenda documents for the March or September 2016 hearings (see Footnote 1, p. 4).

The "Summary of Analysis" section on pages 1 and 2 of the February 19, 2016 document attached to the March 15 Council agenda appears to state that there are no cumulative significant impacts ("from all on road transportation sources in the Bay Area"). However, the "Summary of Observations" on page 9 of the February 9 report indicates that emissions for the Waste Management scenario to the Guadalupe Mines landfill site range from 504% to 867% of Baseline Scenario emissions. Emissions associated with the competitor's transport proposal to the Marina landfill are between 1000% to 4000% higher than Baseline.

The February 19, 2016 ESA memorandum completely fails to identify the thresholds of significance for air quality and GGE used by ESA in its analysis. Rather, there are conclusions in the report that identify percentage increases in emissions that do not explain how the percentages are calculated. Nor does the report identify the elements used to calculate the emissions increase percentages. In short, there is insufficient information by which to verify the methodology and conclusions of the report.

The air quality and emissions analysis for the solid waste hauling component of this Project also fails because there is no evidence in the record that Milpitas and its consultants have performed a traffic impact analysis relating to the transport of solid waste to the Guadalupe Mines landfill site. The failure to include relevant information about number of trips,[1] traffic delays, idling, and the like in these reports indicates that even the air quality and GGE analysis may be incorrectly reported or underreported for the environmental impacts of the hauling contract. For all of the reasons stated above, Milpitas cannot rely on the CEQA exemption for this Project.

[1] The report indicates the volume of trash to be hauled, but not the number of vehicle trips or the route.

2. Milpitas's Reliance on the "Common Sense" Exemption is Improper.

Milpitas also appears to rely upon CEQA Guidelines section 15061(b)(3), which proves that a project is exempt from CEQA where "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment..." (March 15, 2016 Milpitas City Council Agenda, Item 12 staff report; and September 12, 2016 "Results of Assessing Air Quality and Greenhouse Gas Emissions Impact of Solid Waste Diversion Scenarios" by ESA, Footnote 1, p.3). It is baffling how Milpitas can find "*with certainty*" that there is "*no possibility*" that the hauling of all its solid waste from Milpitas to southwestern San Jose may have a significant effect on the environment. As stated above, Milpitas completely fails to evaluate the traffic impacts of its Project. Nor does it evaluate the noise impacts, among other impacts, of this Project. Nor does it adequately address the two issues – greenhouse gas emissions and air quality -- where its consultant ESA performs some environmental analysis but does so without disclosing methodology and providing confusing results, and failing to evaluate any of the essential information that would be generally be gleaned from a traffic impact study. Rather, ESA appears to rely on Google Maps for much of its transportation and traffic related information (February 19, 2016 ESA Solid Waste Transport Analysis, Table 3, p.4).

The Common Sense exemption can be used "only in those situations where its absolute and precise language clearly applies." *Myers v. Bd. of Supervisors* (1976) 58 Cal.App.3d 413, 425. Milpitas bears the burden of producing evidence to support its determination that there is no possibility of significant environmental effects from the Project. There is an abuse of discretion when there is a failure to support the exemption determination with substantial evidence. *Davidon Homes v. City of San* Jose (1997) 54 Cal.App.4th 106. The showing of a party challenging an exemption under CEQA Guidelines section 15061(b)(3) is slight because that exemption requires the agency to be certain that there is no possibility the project may cause significant environmental impacts. *Id.* at p. 17. "If a reasonable argument is made to suggest a possibility that a project will cause a significant environmental impact, the agency must refute that claim *to a certainty* before finding that the exemption applies." *Id.* at p. 18 (italics in original). Because of Milpitas's failure to address potentially significant impacts of its Project,

Milpitas cannot make the appropriate findings based on substantial evidence in the record that would support its use of the Common Sense exemption. Milpitas needs to perform appropriate environmental review in the form of an EIR for its trash hauling Project.

3. CONCLUSION.

Milpitas's consideration of a project that will create a significant amount of vehicle trips and associated noise from trash trucks over a much longer haul route than is

currently used by Milpitas will result in a host of significant environmental impacts to area traffic, air quality, and noise, and will require San José and its residents to bear the burden of such impacts. The exemptions upon which Milpitas relies for environmental clearance under CEQA are inapplicable and inappropriate. We urge the Milpitas City Council to take a step back and to continue its consideration of the Project by directing its staff to prepare an EIR in order to rectify the severe deficiencies identified by San José. This process will adequately inform the Council, San Jose, and the public about the impacts of the Project and will allow the Council to consider mitigation measures and alternatives to the Project. San Jose looks forward to working with the City of Milpitas to ensure each of its concerns are sufficiently addressed in an appropriate environmental document.

Very truly yours,

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