

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660

FAX: (650) 589-5062

nlotan@adamsbroadwell.com

SACRAMENTO OFFICE

520 CAPITOL MALL SUITE 350
SACRAMENTO CA 95814-4721

TEL: (916) 444-6201

FAX: (916) 444-6209

MILA A. BUCKNER
DANIEL L. CARDOZO
CHRISTINA M. CARO
THOMAS A. ENSLOW
TANYA A. GULESSER AN
MARC D. JOSEPH
RACHAEL E. KOSS
COLLIN S. MCCARTHY
LINDA T. SOB CZYNSK

June 11, 2018

VIA EMAIL AND U.S. MAIL

Jonathan Chang, City Planning Associate
City of Los Angeles
Department of City Planning Major Projects
221 North Figueroa St, Suite 1450
Los Angeles, CA 90012
Email: jonathan.chang@lacity.org

Re: Comments on the Draft Environmental Impact Report – Fig & 8th Project
(ENV-2016-1951-EIR; CPC-2016-1950-TDR-SPR-MSO; VTT- 74197)

Dear Mr. Chang:

Please accept these comments on behalf of the **Coalition for Responsible Equitable Economic Development** (“CREED LA”) regarding the City of Los Angeles’ (“City”) Draft Environmental Impact Report (“DEIR”) prepared for the Fig & 8th Project (ENV-2016-1951-EIR; CPC-2016-1950-TDR-SPR-MSO; VTT-7497) (“Project”), proposed by MFA 8th & Figueroa LLC (“Applicant”).

The Project proposes to develop a mixed-use project on a 50,335-square-foot site (1.16 gross acres or 1.07 net acres) located at 744 South Figueroa Street within the Central City Community Plan area of the City of Los Angeles. The Project includes up to 438 residential units, up to 7,500 square feet of commercial retail and restaurant uses, and 522 vehicle parking spaces. The proposed uses would be located within a new 41-story mixed-use building with four subterranean levels. Overall, the new building would comprise up to 481,753 square feet of floor area.

According to the DEIR, Project implementation would require a number of discretionary entitlements and related approvals, including (1) Transfer of Floor Area Rights (TFAR), pursuant to LAMC applicable sections; (2) Vesting Tentative Tract Map, pursuant to LAMC Section 17.15; (3) Site Plan Review, pursuant to LAMC Section 16.05; (4) Haul route permit, as may be required; (5) Construction

3951-005j

June 11, 2018

Page 2

permits, including building, grading, excavation, foundation, temporary street closures, and associated permits; and (6) Other discretionary and ministerial permits and approvals that may be deemed necessary.

Based upon our review of the DEIR, appendices, and other relevant records, we conclude that the DEIR fails to meet the requirements of CEQA, because the City failed to properly disclose, analyze and mitigate significant impacts on air quality and public health created by the Project. First, the City lacks substantial evidence to support its conclusion that the Project would result in less than significant public health impacts. Moreover, substantial evidence shows that the Project will result in a significant, undisclosed and unmitigated lifetime cancer risk from exposure to contaminants generated by Project construction. Finally, the City lacks substantial evidence to support a finding of overriding considerations for significant and unavoidable impacts from construction-related NO_x emissions.

We prepared these comments with the assistance of air quality expert Matt Hagemann, P.G., C.Hg. and Hadley Nolan of Soil / Water / Air Protection Enterprise ("SWAPE). Their technical comments and *curricula vitae* are attached hereto as Exhibit A and are fully incorporated herein.

We urge the City to reject the DEIR and direct staff to prepare and recirculate a revised Draft EIR that properly analyzes, addresses and mitigates the Project's potentially significant impacts, as required by CEQA.

I. STATEMENT OF INTEREST

CREED LA is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. The coalition includes the Sheet Metal Workers Local 105, International Brotherhood of Electrical Workers Local 11, Southern California Pipe Trades District Council 16, and District Council of Iron Workers of the State of California, along with their members, their families, and other individuals who live and work in the City of Los Angeles.

Individual members of CREED LA and its member organizations include John Ferruccio, Jorge L. Aceves, John P. Bustos, Gerry Kennon, and Chris S. Macias. These individuals live, work, recreate, and raise their families in the City of Los Angeles and surrounding communities. Accordingly, they would be directly

affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist onsite.

In addition, CREED LA has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

I. THE DEIR FAILS TO ADEQUATELY DISCLOSE, ANALYZE, AND MITIGATE SIGNIFICANT IMPACTS ON AIR QUALITY

A. Legal Background

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).¹ The EIR is the very heart of CEQA.² "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."³

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.⁴ "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."⁵ 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."⁶

¹ See, e.g., PRC § 21100.

² *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

³ *Comtys. for a Better Env' v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 ("*CBE v. CRA*").

⁴ 14 CCR § 15002(a)(1).

⁵ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.

⁶ *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.⁷ 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.”⁸ 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.”⁹

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.*”¹⁰ As the courts have explained, “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.”¹¹

1. The City Lacks Substantial Evidence to Support Its Conclusion that the Project Would Result in Less Than Significant Public Health Impacts

The DEIR fails to include a health risk analysis (“HRA”) to disclose the adverse health impacts that will be caused by exposure to toxic air contaminants (“TACs”) from the Project’s construction. As a result, the DEIR fails to disclose the Project’s potentially significant cancer risk posed to nearby residents and children from TACs, and fails to mitigate it. Because the DEIR fails to support its conclusion that the Project will not have significant health impacts from diesel particulate matter (“DPM”) emissions with the necessary analysis, this finding is not supported by substantial evidence.

⁷ 14 CCR§ 15002(a)(2) and (3); *see also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

⁸ 14 CCR §15002(a)(2).

⁹ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹⁰ *Berkeley Jets*, 91 Cal.App.4th 1344, 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 409, fn. 12.

¹¹ *Berkeley Jets*, 91 Cal.App.4th at 1355; *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.

The DEIR attempts to justify the omission of a construction health risk assessment by stating,

“The greatest potential for TAC emissions during construction would be from diesel particulate emissions associated with heavy equipment operations during grading and excavation activities... Because the construction schedule estimates that the phases which require the most heavy-duty diesel vehicle usage, such as site grading/excavation, would last for a much shorter duration, construction of the Project would not result in substantial, long-term (i.e., 70-year) source of TAC emissions... It is therefore, not necessary to evaluate long-term cancer impacts from construction activities which occur over a relatively short duration. In addition, there would be no residual emissions or corresponding individual cancer risk after construction. As such, Project-related TAC impacts during construction would be less than significant.”¹²

As SWAPE explains, this justification for failing to conduct a HRA is incorrect for two reasons.

First, simply because the phase of construction, which would have the most heavy-duty diesel vehicle usage, would be relatively short in duration does not mean a construction HRA is not required. As SWAPE notes,¹³ the South Coast Air Quality Management District (SCAQMD) recommends in its guidance document that health risk impacts for short-term projects also be assessed:

“Since these short-term calculations are only meant for projects with limits on the operating duration, these short-term cancer risk assessments can be thought of as being the equivalent to a 30-year cancer risk estimate and the appropriate thresholds would still apply (i.e. for a 5-year project, the maximum emissions during the 5-year period would be assessed on the more sensitive population, from the third trimester to age 5, after which the project’s emissions would drop to 0 for the remaining 25 years to get the 30-year equivalent cancer risk estimate)”.¹⁴

¹² Fig & 8 Project DEIR, City of Los Angeles, April 2018, p. IV.B-48.

¹³ Exhibit A: SWAPE comments, p. 7.

¹⁴ <http://www.aqmd.gov/docs/default-source/planning/risk-ssessment/riskassprocjune15.pdf?sfvrsn=2>,

SCQMD also provides a specific numerical threshold of 10 in one million for determining a project's health risk impact.¹⁵ Therefore, to support its conclusion with substantial evidence, the DEIR should have conducted an assessment that compares the Project's construction health risks to this threshold in order to determine the Project's health risk impact.

Second, SWAPE explains that failing to conduct a proper HRA conflicts with the most recent guidance published by the Office of Environmental Health Hazard Assessment (OEHHA), the organization responsible for providing recommendations and guidance on how to conduct health risk assessments in California. OEHHA recommends that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors, and that exposure from projects lasting more than 6 months should be evaluated for the duration of the project. Therefore, per OEHHA guidelines, health risk impacts from Project construction and operation should have been evaluated by the DEIR. These recommendations reflect the most recent HRA policy, and as such, an assessment of health risks to nearby sensitive receptors from construction and operation should be included in a revised CEQA evaluation for the Project.¹⁶

In sum, the City lacks substantial evidence to support its conclusion that the Project would result in less than significant public health impacts.

2. The Project Will Result in a Significant, Undisclosed and Unmitigated Lifetime Cancer Risk from Exposure to Contaminants Generated by Project Construction

In order to demonstrate the potential risk posed by the Project's construction to nearby sensitive receptors, SWAPE performed a screening level health risk assessment of the Project's DPM emissions using the AERSCREEN model.¹⁷ AERSCREEN is recommended by OEHHA and the California Air Pollution Control Officers Associated (CAPCOA) guidance as the appropriate air dispersion model for Level 2 health risk screening assessments ("HRSAs").¹⁸ SWAPE evaluated the Project's construction impacts to sensitive receptors using the annual PM₁₀ exhaust estimates from the DEIR's CalEEMod models and the SWAPE's CalEEMod model for full Project operation.

¹⁵ <http://www.aqmd.gov/docs/default-source/ceqa/handbook/scaqmd-air-quality-significance-thresholds.pdf?sfvrsn=2>

¹⁶ Exhibit A: SWAPE comments, p. 8.

¹⁷ Exhibit A: SWAPE comments, p. 8-9.

¹⁸ Exhibit A: SWAPE comments, p. 9.

The DEIR states that the closest sensitive receptors to the Project site are located approximately 85 meters away.¹⁹ Consistent with recommendations set forth by OEHHA, SWAPE evaluated the cancer risk starting from the 3rd Trimester. The CalEEMod model's annual emissions indicate that construction activities will generate approximately 322 pounds (lbs) of DPM over the 722-day construction period. SWAPE's model and exposure assumptions are detailed in their letter.²⁰ The results of SWAPE's calculations are shown below:

Parameter	Description	Units	3rd Trimester	Infant
Cair	Concentration	$\mu\text{g}/\text{m}^3$	0.4538	0.4538
DBR	Daily breathing rate	L/kg-day	361	1090
EF	Exposure Frequency	days/year	350	350
ED	Exposure Duration	years	0.25	1.73
AT	Averaging Time	days	25550	25550
	Inhaled Dose	(mg/kg-day)	5.6E-07	1.2E-05
CPF	Cancer Potency Factor	1/(mg/kg-day)	1.1	1.1
ASF	Age Sensitivity Factor	-	10	10
FAH	Fraction of Time at Home	-	1	1
Cancer Risk by Age Group			6.2E-06	1.3E-04
Total Construction Cancer Risk				1.4E-04

SWAPE found that the excess cancer risk posed to infants and to 3rd trimester gestations at a sensitive receptor located approximately 75 meters away during Project construction are approximately 130 and 6.2 in one million, respectively. Furthermore, the overall excess cancer risk over the course of construction is approximately 140 in one million. This means that infant and overall construction cancer risks *exceed* the SCAQMD's threshold of 10 in one million, thus resulting in a potentially significant impact not previously addressed or identified by the DEIR.²¹

As noted by SWAPE, a screening-level HRA is known to be more conservative, and is aimed at health protection, but its purpose is to determine if a more refined HRA needs to be conducted. Here, a more refined HRA should be prepared by the City to properly analyze the Project's significant impacts.

¹⁹ Fig & 8 Project DEIR, City of Los Angeles, April 2018, Table IV.B-7, pp. 49

²⁰ Exhibit A: SWAPE comments, p. 9-11.

²¹ Exhibit A: SWAPE comments, p. 10.

Therefore, the DEIR fails to analyze the Project's significant, unmitigated impact on public health from exposure to contaminants generated by the Project. Substantial evidence supports the conclusion that the Project will have significant impacts on public health from construction emissions of TACs. An updated DEIR must be prepared to adequately evaluate the Project's health risk impact and to include additional mitigation measures to reduce these impacts to a less-than-significant level.

3. The DEIR Lacks Substantial Evidence to Support a Finding of Overriding Considerations for Significant and Unavoidable Impacts from Construction-Related NO_x Emissions

NO_x is a criteria air pollutant, which is emitted from various sources, including construction vehicles and construction equipment. With regard to NO_x, the DEIR states:

“NO₂ is a byproduct of fuel combustion and major sources include power plants, large industrial facilities, and motor vehicles. The principal form of nitrogen oxide produced by combustion is nitric oxide (NO), which reacts quickly to form NO₂, creating the mixture of NO and NO₂ commonly called NO_x. NO₂ absorbs blue light and results in a brownish-red cast to the atmosphere and reduced visibility. NO₂ also contributes to the formation of PM₁₀. Nitrogen oxides irritate the nose and throat, and increase one's susceptibility to respiratory infections, especially in people with asthma. The principal concern of NO_x is as a precursor to the formation of ozone.”²²

Despite the serious health impacts created by NO_x emissions, the DEIR fails to adopt all feasible mitigation measures to reduce the Project's significant NO_x emissions impacts to less-than-significant levels before declaring the impacts “significant and unavoidable.” This violates CEQA's requirement that the City mitigate all significant environmental impacts to the greatest extent feasible.

Before it can approve the Project, the City must certify the Project's Final EIR and make mandatory CEQA findings. Those findings must include (1) that the Final EIR complies with CEQA, (2) that the City has mitigated all significant environmental impacts to the greatest extent feasible, and (3) that any remaining significant environmental impacts are acceptable due to overriding considerations.²³

²² Fig & 8 Project DEIR, City of Los Angeles, April 2018, Page IV.B-5.

²³ 14 CCR § 15090 & 15091.

Where, as here, the Project will have a significant effect on the environment, the City may not approve the Project unless 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.”²⁴

The DEIR concludes that emissions generated during construction activity would result in significant NO_x emissions that would exceed established thresholds.²⁵ To reduce the Project’s construction-related NO_x emissions, the DEIR proposes several mitigation measures, but concludes that even with implementation of mitigation, the Project’s impacts would be significant and unavoidable with respect to NO_x emissions generated during construction.²⁶

However, SWAPE reviewed the Project’s proposed mitigation measures, and concluded that *the DEIR fails to require all feasible mitigation available to reduce the Project’s significant impacts from NO_x emissions:*

“Review of the Project’s proposed mitigation measures, however, demonstrates that not all feasible mitigation is being implemented. Therefore, the DEIR’s conclusion that impacts are significant and unavoidable is not supported by substantial evidence.”²⁷

SWAPE states that, in their expert opinion, additional, feasible mitigation is available to further reduce the Project’s NO_x emissions, including, *inter alia*, the following:²⁸

- **Require Implementation of Diesel Control Measures** –The Northeast Diesel Collaborative (NEDC) is a regionally coordinated initiative to reduce diesel emissions, improve public health, and promote clean diesel technology. The NEDC recommends that contracts for all construction projects require certain diesel control measures, including using construction equipment and vehicles equipped with emission control technologies and engines that meet EPA standards, as well as using ultra-low sulfur diesel fuel (ULSD) or a biodiesel blend.²⁹

²⁴ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

²⁵ Fig & 8 Project DEIR, City of Los Angeles, April 2018, p. IV.B-44.

²⁶ Fig & 8 Project DEIR, City of Los Angeles, April 2018, p. IV.B-54 - IV.B-55, p. IV.B-45.

²⁷ Exhibit A: SWAPE comments, p. 2.

²⁸ Exhibit A: SWAPE comments, p. 2-7.

²⁹ Exhibit A: SWAPE comments, p. 2-3.

- **Repower or replace older construction equipment engines** – The NEDC recognizes that availability of equipment that meets the EPA’s newer standards is limited.³⁰ Due to this limitation, the NEDC proposes actions that can be taken to reduce emissions from existing equipment in the *Best Practices for Clean Diesel Construction* report.³¹
- **Install retrofit devices on existing construction equipment** – Particulate matter emissions from alternatively-fueled construction equipment can be further reduced by installing retrofit devices on existing and/or new equipment. The most common retrofit technologies are retrofit devices for engine exhaust after-treatment. These devices are installed in the exhaust system to reduce emissions and should not impact engine or vehicle operation.³²
- **Use electric and hybrid construction equipment** – When construction equipment is powered by grid electricity rather than fossil fuel, direct emissions from fuel combustion are replaced with indirect emissions associated with the electricity used to power the equipment. Furthermore, when construction equipment is powered by hybrid-electric drives, emissions from fuel combustion are also greatly reduced.³³
- **Implement a construction vehicle inventory tracking system** – CAPCOA’s *Quantifying Greenhouse Gas Mitigation Measures*³⁴ report recommends that the Project Applicant provide a detailed plan that discusses a construction vehicle inventory tracking system to ensure compliance with construction mitigation measures. The system should include strategies such as requiring engine run time meters on equipment, documenting the serial number, horsepower, manufacture age, fuel, etc. of all onsite equipment and daily logging of the operating hours of the equipment.³⁵

As SWAPE explains, these measures “offer a cost-effective, feasible way to incorporate lower-emitting equipment into the Project’s construction fleet, which subsequently reduces NOx emissions released during Project construction.”³⁶

³⁰<http://northeastdiesel.org/pdf/BestPractices4CleanDieselConstructionAug2012.pdf>

³¹ Exhibit A: SWAPE comments, p 3.

³² Exhibit A: SWAPE comments, p 4.

³³ Exhibit A: SWAPE comments, p 4.

³⁴<http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf>

³⁵ Exhibit A: SWAPE comments, p 5-7.

³⁶ Exhibit A: SWAPE comments, p 7.

June 11, 2018
Page 11

The DEIR must be revised to consider these mitigation measures and incorporate all feasible measures identified by SWAPE as *binding* mitigation for the Project. Only if the Project's impacts from NO_x emissions remain significant after requiring all such feasible mitigation can the City consider declaring the Project's NO_x emissions impacts to be significant and unavoidable.

II. CONCLUSION

The DEIR is inadequate as an environmental document because it fails to properly disclose, analyze and mitigate the Project's significant impacts on air quality and public health. Therefore, the City cannot approve the Project until it prepares a revised DEIR that resolves these issues and complies with CEQA's requirements.

Thank you for your consideration of these comments.

Sincerely,

Tanya A. Gulesserian
Nirit Lotan



NL:ljl

Attachments