

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

ccaro@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. GULESSERIAN  
MARC D. JOSEPH  
RACHAEL E. KOSS  
NATALIE B. KUFFEL  
LINDA T. SOBCHYNSKI

May 24, 2017

*Via Email and Hand Delivery*

Hofmann, Rob, Chairperson  
Honorable Members of the Planning Commission  
City of Davis  
Community Chambers  
23 Russell Boulevard  
Davis, CA 95616  
Email: [PlanningCommission@cityofdavis.org](mailto:PlanningCommission@cityofdavis.org)

**Re: Agenda Item No. 6.A: Certification of Final Environmental  
Impact Report for Mace Ranch Innovation Center Project**

Dear Chairperson Hofmann and Honorable Members of the Planning Commission:

We are writing on behalf of **Davis Residents for Responsible Development** ("Davis Residents") regarding Agenda Item No. 6.A: Certification of Final Environmental Impact Report for Mace Ranch Innovation Center Project ("Project").<sup>1</sup>

The Applicant has asked the City to certify the original January 2016 Final Environmental Impact Report ("FEIR") for the Project, despite the fact that the Project has been on hold and under revision since February 2016. As discussed herein, the City may not certify the FEIR at this time because there is no underlying "project" that is currently "proposed to be approved or carried out" by the City. Additionally, the FEIR fails to accurately describe the Project because the Project's description has been in constant fluctuation since the FEIR was released.

---

<sup>1</sup> Davis Residents submitted comments on the Draft Environmental Impact Report ("DEIR") for the Project on November 12, 2015. Those comments are incorporated herein by reference. Davis Residents reserves the right to supplement these comments at later hearings and proceedings on this Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

Furthermore, the City may not certify the FEIR at this premature stage of Project development because it would constitute a “definite course of action” that may improperly limit the City’s subsequent choice of alternatives or mitigation measures if the final version of the Project deviates from the version originally analyzed in the FEIR.<sup>2</sup> Finally, the Staff Report improperly concludes that certification prior to Project approval will bootstrap the Project approvals into a subsequent CEQA review standard which is only intended to apply to projects that have previously been approved by the lead agency.

The City must revise and recirculate the EIR prior to certification to analyze the most recent version of the Project that was proposed by the Applicant, and to correct outstanding errors in the FEIR. Davis Residents urges the Planning Commission to recommend that the City Council remand the Project to staff to prepare and recirculate a legally adequate revised DEIR for the Project.

## I. STATEMENT OF INTEREST

Davis Residents for Responsible Development (“Davis Residents”) 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 environmental and public service impacts of the Project. The association includes Jorge Gomez, the International Brotherhood of Electrical Workers Local 340, Plumbers and Pipefitters Local 447, Sheet Metal Workers Local 104, and their members and their families who live and/or work in the City of Davis and Yolo County.

Individual members of Davis Residents and its affiliated organizations live, work, recreate, and raise their families in Yolo County, including the City of Davis. 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. Davis Residents 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 it less desirable for businesses to locate and people to live there.

---

<sup>2</sup> *Id.*  
3393-008acp



## II. THE CITY MAY NOT CERTIFY THE FEIR BECAUSE THERE IS NO “PROJECT” CURRENTLY PROPOSED FOR APPROVAL

In order to certify an EIR for a project, the lead agency must make a mandatory finding that the EIR has been “completed in compliance with CEQA.”<sup>3</sup> The threshold requirement for a lead agency to comply with CEQA is that the agency must be considering a “discretionary project[] proposed to be carried out or approved by [the agency].”<sup>4</sup> The Staff Report explains that the Project is currently “on hold” and that the action being considered by the Commission is to certify the FEIR for the Project without considering Project approval. Certification of the FEIR would therefore be improper because there is no Project proposed to be approved by the City or carried out by the Applicant at this time.

As the Staff Report explains, the Applicant is “*not asking for approval of a project at this time.*”<sup>5</sup> The Applicant informed the City on June 16, 2016 that it was “ceasing its processing efforts” for the Project.<sup>6</sup> It was not until four months later, and without reopening its Project application, that the Applicant made the instant request to the City to certify the FEIR for the Original Project.<sup>7</sup> The Staff Report further explains that the purpose of the proposed FEIR certification would be to “attract tenants and investors” to a potential future project, not to facilitate approval of the Project that was analyzed in the FEIR.<sup>8</sup> The Staff Report acknowledges that it is uncertain which, if any, proposed version of the Project may ever be presented to the City for final approval.<sup>9</sup> Therefore, there is no “discretionary project” that is “proposed to be carried out or approved” by the City at this time, as required by CEQA.<sup>10</sup>

CEQA does not authorize the City to certify an EIR for a theoretical project that is not currently pending before the agency.<sup>11</sup> Certification of FEIR at this time

---

<sup>3</sup> 14 CCR § 15090(a)(1).

<sup>4</sup> PRC § 21080(a).

<sup>5</sup> See Staff Report, pp. 6A-2, 6A-3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Staff Report, p. 06A-4.

<sup>9</sup> *Id.*

<sup>10</sup> PRC § 21080(a)

<sup>11</sup> *Id.*

would violate this basic requirement. Therefore, the City may not certify the FEIR until there is a definite Project proposed for approval.<sup>12</sup>

### **III. THE CITY MAY NOT CERTIFY THE FEIR BECAUSE IT FAILS TO ACCURATELY DESCRIBE THE PROJECT**

The FEIR fails to adequately describe either the Project identified in the FEIR or the most recent versions of the Project that the Applicant has asked the City to consider. The City may not certify the FEIR until it corrects these errors in a revised and recirculated DEIR.

An accurate and complete project description is necessary to perform an evaluation of the potential environmental effects of a proposed project.<sup>13</sup> For this reason, CEQA requires the lead agency to describe a project with enough particularity to enable environmental review.<sup>14</sup> Without a complete project description, an agency's environmental analysis is impermissibly narrow, thus minimizing the project's impacts and undercutting public review, in violation of CEQA.<sup>15</sup> The courts have repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]."<sup>16</sup> Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal's benefit against its environmental costs.<sup>17</sup> As articulated by the court in *County of Inyo v. City of Los Angeles*, "a curtailed, enigmatic or unstable project description draws a red herring across the path of public input."<sup>18</sup>

The Project described in the FEIR is not currently before the City for approval. As the Staff Report explains, the Applicant has fluctuated between proposals for three versions of the Project, without pursuing final approvals for any

---

<sup>12</sup> For the same reasons, certification of the FEIR for an undefined Project would constitute an improper "definite course of action" by the City because it may limit the choice of alternatives or mitigation measures that are ultimately selected as part of the Project. See *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 135, 139; *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal. App. 4th 1186.

<sup>13</sup> See, e.g., *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.

<sup>14</sup> *Id.* at 192.

<sup>15</sup> See *id.*

<sup>16</sup> *County of Inyo v. County of Los Angeles* (1977) 71 Cal.App.3d 185, 193.

<sup>17</sup> *Id.* at 192-193.

<sup>18</sup> *Id.* at 198.



of them. The most recent version of the Project includes a phased proposal that would relocate several Project components, and postdates the FEIR.<sup>19</sup> The FEIR also contains an inadequate description of the prior versions of the Project which it purportedly analyzed.

The original Project proposed the development of a 2,654,000 square-foot commercial center for conference center, office, research and development ("R&D"), and retail uses ("Original Project"). The Original Project was analyzed in the FEIR. Davis Residents' DEIR comments identified numerous deficiencies in the DEIR's description of several aspects of the Original Project, including (1) the vague and conceptual nature of the MRIC site design which failed to provide adequate assurance regarding the allowable scope of future design changes; (2) the lack of any preliminary plan describing the Mace Triangle site redevelopment component; and (3) uncertainty related to offsite Project components.<sup>20</sup> These deficiencies were not corrected in the FEIR and therefore remain.

In February 2016, the Applicant asked the City to focus the Project approval process on a Project alternative that included housing (the "Mixed-Use Alternative"). The Mixed-Use Alternative proposed to add 850 residential units to the Project, intended to support the innovation center's employee-generated demand for housing.<sup>21</sup> While the FEIR included a chapter on the Mixed-Use Alternative, it omitted an accurate analysis of several key components of this alternative, including construction air quality impacts, noise impacts, health risk from exposure to toxic air contaminants, and public services.<sup>22</sup>

Finally, in June 2016, the Applicant proposed a revised Project phasing concept that included innovation center uses on the southerly 102 acres, urban reserve on the northerly 110 acres, and the Mace Triangle component. The applicant also proposed a bifurcated Measure R vote, recommending that the urban reserve phase not be brought to the voters in 2016 but rather at an unspecified later date (collectively, "Revised Project").<sup>23</sup> The City did not perform any CEQA analysis of the Revised Project.

---

<sup>19</sup> See Staff Report, p. 6A-2.

<sup>20</sup> See DEIR Comments, p. 4.

<sup>21</sup> See DEIR, p. 8-1.

<sup>22</sup> See Davis Residents' DEIR comments, pp. 29-30.

<sup>23</sup> See Staff Report, p. 06A-2.

The Applicant subsequently informed the City in on June 16, 2016 that it was “ceasing its processing efforts” for the Project. Four months later, and without reopening its Project application, the Applicant made the instant request to the City to certify the FEIR for the Original Project.

The Staff Report makes clear that there is substantial uncertainty surrounding the current Project description, and that the Applicant’s request for FEIR certification is tied to an interest in attracting tenants and investors, and not to approval of the Project.<sup>24</sup> The Staff Report further admits that “additional analysis will need to be undertaken at such time that an updated application is brought forward for consideration.”<sup>25</sup> These statements demonstrate that the Project described in the FEIR is not the Project that will ultimately be approved by the City (if any). The FEIR therefore fails to accurately describe the Project being proposed for certification. CEQA mandates that certification may not occur until the Project is fully and accurately described in the EIR.<sup>26</sup> The FEIR lacks that certainty. The City therefore lacks substantial evidence to support the certification findings required by CEQA.”<sup>27</sup>

#### **IV. CHANGES IN THE PROJECT DESCRIPTION AND IMPACTS THAT WERE INADEQUATELY DISCLOSED IN THE DEIR REQUIRE RECIRCULATION PRIOR TO CERTIFICATION**

If changed circumstances or significant new information relevant to a project emerge prior to certification of an EIR, recirculation is required. CEQA Guidelines Section 15088.5 provides that an EIR must be recirculated if: (1) it reveals new substantial environmental impacts not disclosed in the draft EIR; (2) it reveals a substantial increase in the severity of impacts (unless mitigated); (3) comments have been received that identify new feasible mitigation measures, but the feasible mitigation measures are not adopted; or (4) it is so fundamentally and basically inadequate and conclusory in nature that public comment on the draft EIR was essentially meaningless.<sup>28</sup> The courts have held that the failure to recirculate an EIR turns the process of environmental evaluation into a “useless ritual” which could jeopardize “responsible decision-making.”<sup>29</sup> Both the opportunity to comment

---

<sup>24</sup> See Staff Report, p. 06A-4.

<sup>25</sup> See Staff Report, p. 06A-4.

<sup>26</sup> *Laurel Heights Improvement Association*, 47 Cal.3d 376.

<sup>27</sup> 14 CCR § 15090(a)(1)-(3).

<sup>28</sup> CEQA Guidelines § 15088.5, subd. (a).

<sup>29</sup> *Sutter Sensible Planning v. Sutter County Board*, (1981) 122 Cal.App.3d 813, 822.



and the preparation of written responses to those comments are crucial parts of the EIR process.

Revisions to the Project that have been proposed since the FEIR was released in January 2016 require recirculation. The Revised Project proposes phasing and reorganizing of several Project components, and was proposed by the Applicant following completion of the FEIR. The Revised Project is therefore the most recent version of the Project, but it was not analyzed in the FEIR. Modifications proposed by the Revised Project, such as modifying the location for the proposed innovation center and delaying the creation of an urban reserve, may have new or substantially more severe impacts than those originally analyzed in the FEIR. Since the Revised Project proposal was never formally withdrawn, it remains the most current proposal for the Project. Accordingly, the City must prepare and recirculate a revised DEIR that analyzes the impacts caused by the Revised Project proposal.

Additionally, Davis Residents' DEIR comments identified substantial environmental impacts that were either not discussed at all in the DEIR or were not meaningfully considered, including direct and cumulative impacts on air quality, biological resources, and hazardous materials. The City failed to revise and recirculate the DEIR prior to release of the FEIR, and the FEIR failed to correct these deficiencies. The FEIR must be withdrawn, revised and recirculated to properly evaluate these impacts.<sup>30</sup>

## **V. THE PROJECT'S ORIGINAL APPROVALS ARE NOT SUBJECT TO CEQA'S SUBSEQUENT REVIEW STANDARDS**

The Staff Report asserts that, once the FEIR is certified, any subsequent environmental review required prior to Project approval would be triggered by CEQA's "subsequent review" standards.<sup>31</sup> This assertion is incorrect, because CEQA's subsequent review standards are intended to apply to projects that have been previously approved by a lead agency, not to projects which are undergoing their initial round of approvals, and not to information or impacts related to a project that were known to the lead agency prior to certification of the original EIR.

Unlike the standards which trigger preparation of an EIR in the first instance, subsequent environmental review for projects that have previously been

---

<sup>30</sup> CEQA Guidelines § 15088.5, subd. (a).

<sup>31</sup> *Id.*; PRC § 21166; 14 CCR § 15162(a)(1)-(3).

approved is required by CEQA only in narrow circumstances where changed circumstances, new information, or substantially more severe impacts are identified in the modified project than in the version that was originally analyzed and approved under CEQA.<sup>32</sup> As a leading CEQA treatise explains:

After the lead agency approves a project, other approvals may be required from responsible agencies or additional approvals may be required from the lead agency....In connection with these approvals, the agency may have to determine whether additional CEQA review is required.<sup>33</sup>

While it may be appropriate to apply CEQA Section 21166 and 15162 standards to subsequent Project approvals, those standards are not triggered until a project has undergone its original approvals. That is not the case here. Here, the City is proposing to certify the FEIR without any request to approve the underlying Project. The City is aware that the Project will require modification before it is approved. Some of those modifications have already been identified (e.g. the Revised Project). The City cannot bootstrap its original Project approvals into a subsequent review scenario when it knows full well that the EIR proposed for certification is not representative of the Project that will ultimately be approved.

Furthermore, the City cannot simply ignore the changed circumstances, new information, and substantially more severe impacts that have already been identified by Davis Residents, other members of the public, and the Applicant itself, simply to subject those issues to a more narrow standard of review. Such actions would violate the City's present duty to fully analyze all impacts of the Project, and would undermine CEQA's informational purposes.

## VI. CONCLUSION

Given the present uncertainty of the Project, and the existing deficiencies in the FEIR, the proper course of action for the City to take at this stage would be to revise and recirculate the original FEIR once a concrete Project application is pending for approval before the City. For the reasons discussed herein, Davis Residents respectfully requests that the Planning Commission recommend that the

---

<sup>32</sup> See PRC § 21166; 14 CCR § 15162(a)(1)-(3);.

<sup>33</sup> See Kostke, Zischke, *Practice Under the California Environmental Quality Act* (CEB, 2017), Section 1.10.



May 24, 2017  
Page 9

City Council remand the Project to Staff to prepare and recirculate a legally adequate EIR for the Project.

Thank you for your consideration of these comments. Please place them in the record of proceedings for the Project.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Christina M. Caro', is written over the word 'Sincerely,'.

Christina M. Caro

CMC:acp