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March 1, 2018

VIA EMAIL

Matthew Bassi, Planning Director
City of Wildomar Planning Department
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Re: Wildomar Crossing Retail Center Project (PA No. 16-0134)

Dear Mr. Bassi:

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This law firm represents the Southwest Regional Council of Carpenters (Southwest Carpenters) and submits this letter on the above-referenced project on its behalf.

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Southwest Carpenters represents 50,000 union carpenters in six states, including in Southern California, and has a strong interest in the environmental impacts of development projects, such as the Wildomar Crossing Retail Center Project (Project). The City of Wildomar (City) released a Notice of Intent to Adopt a Mitigated Negative Declaration on January 31, 2018. The City has determined the Project will not have a significant effect on the environment after certain potentially significant impacts are mitigated.

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The comments below focus on various environmental impacts of concern. Even with the City's proposed mitigations, the Project has the potential to cause a significant impact on the environment, warranting preparation of an EIR. As explained *infra*, a fair argument exists that this project may have a significant impact on the environment. Preparation of an EIR, rather than a Negative Declaration, is required if there is "substantial evidence" in the record of proceedings that supports a "fair argument" that a project "may" have a significant impact on the environment. *See*, Pub. Res. Code §§ 21082.2(a), 21100, 21151; Cal. Code Regs., tit. 14, § 15064(f)(1); *No Oil, Inc. v. City of Los Angeles (No Oil, Inc.)* (1974) 13 Cal.3d 68, 75; 30; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 111-112. "May" in this context means a reasonable possibility. *See, League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309. Evidence supporting a fair argument of any single potentially significant environmental impact triggers preparation of an EIR regardless of whether the record contains contrary evidence in support of

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an agency's decision. *See, City of Oakland, supra*, 52 Cal.App.4th 896; *Sundstrom v. County of Mendocino* (1988), *supra*, 202 Cal.App.3d at 310.

The proposed Project consists of a commercial retail center located on approximately 3.6 acres totaling 26,204 square feet of development consisting of a main building located on the northwesterly portion of the site, two pad buildings along Stable Lanes Road, one pad along Clinton Keith Road, four basins including a bio-filtration basin, and on-site parking. The project would require multiple approvals, including:

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- Change of Zone (CZ): Change of zone from the existing zoning designation of R-R (Rural Residential) to General Commercial (C-1/C-P).
- Tentative Parcel Map (TPM no. 36311): Subdivision of approximately 3.6 acres into 5 lots (including 1 outfall lot) to accommodate the proposed Project.
- Plot Plan (PP): the Project requires approval of a Plot Plan to develop 3.6 acres with 4 commercial retail buildings ranging in size from 2,600 square feet to 10,000 square feet with associated parking and landscaping improvements for a total maximum square footage of 26,204 square feet, 13,383 square foot outfall area, and roadway and drainage improvements.

As an initial matter, the Mitigated Negative Declaration (MND) states that "site preparation activities, including removal of trees and vegetation, shall be avoided to the greatest extent possible during the nesting season." (MND p. 58). However, the Project Description does not set forth how many trees will be removed as part of the Project. "[A]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR." *Washoe Meadows Community v. Department of Parks and Recreation* (2017) 17 Cal.App.5th 277, 287 (citing *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1052). Even though the environmental review document prepared here is not an EIR but a MND, the same principles apply because the environmental review process must not prejudice or interfere with "informed decisionmaking and informed public participation. *Id.* at 290. The MND must contain all actions the Project contemplates as part of the proposal including how many trees are proposed to be removed. Failure to do so provides an inadequate Project Description under CEQA.

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The MND proposed for this Project does not contain a mitigation and monitoring program, which is required in the instance the City adopts the MND. (See Pub. Resource Code § 21081.6; Cal Code Regs., tit. 14, § 15074(d). It would violate CEQA to adopt the MND without inclusion of the required mitigation and monitoring program. The MND identifies the following as environmental factors potentially affected by this Project involving at least one impact that is

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Less than Significant with Mitigation and concluded that all potentially significant impacts have been mitigated to less than significant.

- Biological Resources
- Cultural Resources
- Geology and Soils
- Hazards/Hazardous Materials
- Noise
- Mandatory Findings of Significance

Biological Resources

Regarding Direct Impacts to Special/Sensitive Status Plants, the MND states that Paniculate tarplant (*Deindandra paniculata*) was observed in the grassland on the property. But the impact analysis is incomplete:

While paniculate tarplant is a CNPS Rank 4.2 species, which has a limited distribution in California, it is locally common in western Riverside County and documented in a number of MSHCP Core areas... . Therefore, due to its local abundance, Project impacts to paniculate tarplant would not be significant.

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(MND p. 57). The test for significant impacts involves looking at the project’s impacts compared to an existing baseline, which is the existing physical condition. The MND does not provide the baseline or analysis as to how the Project would affect the baseline. Even if the paniculate tarplant is “locally abundant” this does not signify as a matter of law that the Project will not result in a significant impact to this biological resource. Without a proper baseline, it is impossible to assess the project’s impacts. “Like an EIR, an initial study or negative declaration “must focus on impacts to the existing environment, not hypothetical situations.” *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 322 (quoting *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 93, 955).

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Regarding Direct Impacts to Riparian Habitat, the MND states that the Project will avoid approximately .16 acres of riparian/riverine habitat but will impact approximately .06 acres of riparian/riverine habitat. The Project site supports a total of .22 acres of Riparian/Riverine habitat on the property. (MND p. 59). The MND states Section 6.1.2 of the Western Riverside County Multiple Species Habitat Conservation Plan (MSHCP) applies to the Project: “Hence, under MSHCP Section 6.1.2, impacts require preparation of a Determination of Biologically Equivalent of Superior Preservation Report (DBESP).” (MND p. 59). However, the MND

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simply skips to the conclusion that an “avoidance alternative is infeasible” without demonstrating the actual process set forth in Section 6.1.2 was followed.

Section 6.1.2 of the MSHCP states that:

Permittees shall ensure that, through the CEQA process, project applicants develop project alternatives demonstrating efforts that first avoid, and then minimize direct and indirect effects to the wetlands mapped pursuant to this section and shall review these alternatives with the Permittee. An avoidance alternative shall be selected, if Feasible. If an avoidance alternative is selected, measures shall be incorporated into the project design to ensure the long-term Conservation of the areas to be avoided, and associated functions and values, through the use of deed restrictions, conservation easement or other appropriate mechanisms.

(MSHCP Avoidance and Minimization, Section 6.1.2). But the City did not ensure that, through the CEQA process, the applicant develop project alternatives demonstrating efforts that first avoid. There is no discussion of any project alternatives in the MND. This process is required: “Permittees *shall*...” Instead, the MND simply concludes without any evidence that: “However, total avoidance of the riparian/riverine resources would result in a reduction of the Project and eliminate the viability of the development on site because of the distribution of the drainages across the site and the types of land uses proposed for the site.” (MND p. 59). Pursuant to the MSCHP, the City must ensure consideration of avoidance project alternative through the CEQA process and the MND must discuss any project alternatives that were considered but proven infeasible.

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In the context of a court challenge to the findings of an environmental review document, the California Supreme Court has admonished: “We further conclude... that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order.” *Topanga Ass’n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515. There is no explanation evidencing the applicant has proposed or that the City has considered project alternatives that would avoid .22 acres of riparian/riverine habitat. There is only a conclusory statement that avoiding .22 of the 3.6 acres is not possible. For this reason, a fair argument exists that significant impacts to the biological resource of riparian/riverine habitat still exists. The City must undergo the process that is set forth under the MSHCP to examine project alternatives that will avoid impact to the riparian/riverine habitat pursuant to the CEQA process.

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Noise

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The MND finds that with mitigation incorporated the noise impacts will be less than significant. But, the MND utilizes a worker noise safety standard to assess off-site impacts construction noise, which is comparing apples to oranges. “The rationale is that if a maximum construction noise level is generally safe for construction workers who are exposed to the noise all day, the noise level should be [sic] also be safe for adjacent residents who are typically farther from the noise source and exposed only briefly during the day.” (MND p. 114). The problem is that the location of the noise impact for worker safety is limited to the Project site. Whereas, the analysis for noise impacts concerns off-site receptors.

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The threshold of significance chosen for noise: worker safety is irrelevant given the actual locations of the noise measurements. All of the noise receiver locations are off-site. A worker safety threshold of significance is useful for analyzing noise impacts on-site but is irrelevant to off-site noise because it does not place off-site noise measurements in any useful context. “A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant...” Cal. Code Regs., tit. 14, § 15064.7. In this instance, the threshold of significance is based on worker-safety standards, but the noise measurements were not taken at locations where workers would be. Thus, this threshold of significance is inapplicable. The Project’s non-compliance or compliance with such worker-safety standard would not indicate anything meaningful about the noise impact to receptors off-site.

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Exhibit 10-A of Appendix 10, which shows the noise receiver locations at six sites. R1: 58 feet from the project site, R2: 59 feet from the project site, R3: 71 feet from the project site, R4: 425 feet from the project site, R5: 685 feet from the project site, and R6: 749 feet from the project site. The MND concludes that “the peak construction noise levels at the potentially impacted receiver locations are expected to approach 73.0 dBA Leq which will satisfy the 85 dBA Leq significance thresholds during temporary Project construction activities.” (MND p. 117). Again, because 85 dBA is a threshold of significance for worker safety (on-site noise threshold) it is irrelevant in gauging the significance of off-site noise impacts.

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It is also patently unclear where the MND obtains its significance criteria for operational noise. CEQA Guidelines state that “[t]hresholds of significance to be adopted for general use as part of the lead agency’s environmental review process must be adopted by ordinance, resolution, rule, or regulation, and developed through a public review process and be supported by substantial evidence.” (Cal. Code Regs., tit. 14, § 15064.7.) The MND refers to various thresholds of significance set forth by various agencies, but none of these have been adopted by

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the City of Wildomar itself. The MND's significance criteria is arbitrary and capricious. The evaluation of noise impacts must be revisited through evaluating impacts with an applicable threshold of significance.

Greenhouse Gas Emissions

G-14 The MND's analysis of greenhouse gas emissions is paltry and does not offer a meaningful discussion of the Project's impacts. First, there is no discussion of the current environmental setting, whether the City is on track to meet its GHG emissions reduction targets. The MND concludes that there will be less than significant impact because of a "bright-line, numeric threshold of 3,000 metric tons of carbon dioxide equivalent as a threshold for all land uses." (MND p. 86). It is unclear what this threshold signifies because there is simply no context provided. Furthermore, the MND states that the City of Wildomar is "a participating agency of the Western Riverside Council of Government's (WRCOG) Climate Action Plan (CAP). The WRCOG CAP establishes a community-wide emissions reduction target of 15 percent below 2010 levels by the year 2020, following guidance from CARB and the Governor's Office of Planning and Research." (MND p. 88).

G-15 The City has not adopted a Climate Action Plan or any other plans and policies to reduce greenhouse gas emissions, so the City must exercise caution when analyzing greenhouse gas-related impacts and carefully disclose how the Project will impact statewide goals. The City must consider in its greenhouse gas analysis:

- (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting;
- (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project; and
- (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. Such requirements must be adopted by the relevant public agency through a public review process and must reduce or mitigate the project's incremental contribution of greenhouse gas emissions

Center for Biological Diversity v. Department of Fish & Wildlife (2015) 62 Cal.4th 204, 217.

G-16 The City may be unique in its continued reliance on the California Air Resource Board's Scoping Plan, post-*Center for Biological Diversity*. In that case, the California Supreme Court invalidated an Environmental Impact Report that incorrectly relied on the California Air Resources Board Scoping Plan. *Id.* at 216. This is because "neither Assembly Bill 32 nor the

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Air Board’s Scoping Plan set out a mandate or method for CEQA analysis of greenhouse gas emissions from a proposed project.” *Id.* at 216-217.

The Scoping Plan adopted pursuant to Assembly Bill 32 is a plan for reducing greenhouse gas emissions, but does not itself establish the regulations by which it is to be implemented; rather, it sets out how existing regulations, and new ones yet to be adopted at the time of the Scoping Plan, will be used to reach Assembly Bill 32’s emission reduction goal. At the time the Natural Resources Agency promulgated Guidelines section 15064.4, the agency explained that the Scoping Plan “may not be appropriate for use in determining the significance of individual projects ... because it is conceptual at this stage and relies on the future development of regulations to implement the strategies identified in the Scoping Plan.”

Id. at 222. “In short, neither Assembly Bill 32 nor the Scoping Plan establishes regulations implementing, for specific projects, the Legislature’s statewide goals for reducing greenhouse gas emissions. Neither constitutes a set of “regulations or requirements adopted to implement” a statewide reduction plan within the meaning of Guidelines section 15064.4, subdivision (b)(3).” *Id.* at 223.

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As was the case in *Center for Biological Diversity*, the City has not “related that statewide level of reduction effort to the percentage of reduction that would or should be required from individual projects, and nothing . . . cited in the administrative record indicates the required [analysis] is the same for an individual project as for the entire state population and economy.” *Id.* at 225-226. Therefore, the City’s conclusory statement that “No aspect of the proposed Project would conflict with or inhibit the City of Wildomar’s commitment to its GHG-reducing measures under the WRCOG CAP” is wholly unsupported by any evidence. (MND p. 88.) A fair argument exists that the Project would result in significant impacts to greenhouse gas emissions.

Air Quality

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The MND’s Air Quality analysis is insufficient. The MND acknowledges that the South Coast Air Basin (SCAB) is in nonattainment for several criteria pollutants under the South Coast Air Quality Management District’s (SCAQMD) jurisdiction. The basin is in nonattainment for the following criteria pollutants: Ozone O₃, coarse particulate matter PM₁₀, and fine particulate matter PM_{2.5}. Despite this baseline of nonattainment, the MND concludes that the project will not conflict with any applicable air quality plan. The MND relies on Consistency Criterion Nos. 1 and 2 to reach this conclusion but there is no evidence supporting that the Project would be consistent with these criteria.

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Consistency Criterion No. 1: The proposed Project will not result in an increase in the frequency or severity of existing air quality violations, or cause or contribute to new violations, or delay the timely attainment of air quality standards or the interim emissions reduction specified in the AQMP.

Instead of assessing the Project under this consistency criterion, the MND looks at whether the Project will exceed either long-term or short-term construction standards. (MND p. 48). But that is an incorrect inquiry. Because the basin is already in nonattainment for several criteria pollutants, any additional emissions of ozone, coarse particulate matter, or fine particulate matter will necessarily increase the severity of existing air quality violations. Similarly, the analysis under Consistency Criterion No. 2 does not allow a reasonable person to discern whether the Project is consistent.

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Consistency Criterion No.2: The proposed Project will not exceed the assumptions in the AQMP based on the years of project buildout phase.

The MND does not state what the AQMP assumptions applicable to this Project are. Similarly, the MND broadly refers to “reduction strategies,” “growth projections,” and “regional growth forecasts” but does not specify what any of these are. There is neither adequate baseline information nor a valid threshold of significance specified. Furthermore, unsubstantiated opinion such as the conclusory remarks provided in the MND does not constitute substantial evidence. Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts” but not “[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment.” Cal. Code Regs., tit. 14, § 15384(a), (b). There is simply no evidence or analysis presented indicating that the Project would not violate existing air quality standards given that the basin is already in nonattainment. A fair argument exists that the Project may have a significant impact on air quality.

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In addition, the City’s analysis of cumulative impacts is inadequate. On one hand the MND acknowledges that the Project “could contribute to an existing or projected air quality exceedance because the SCAB is currently in nonattainment for ozone, coarse particulate matter, and fine particulate matter.” (MND p. 52). But, the MND states that “SCAQMD recommends that any given project’s potential contribution to cumulative impacts be assessed using the same significance criteria as for project-specific impacts.” (MND p. 52). This is a statement that contradicts the basic principle of cumulative impacts analysis under CEQA.

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CEQA Guidelines define “cumulative impacts” as “two or more individual effects, [which] when considered together, are considerable or which compound or increase other environmental impacts.” Cal. Code Regs., tit. 14, § 15355. Critically, “Cumulative impacts can result from *individually minor but collectively significant projects* taking place over a period of time.” 14 Cal. Code Regs., tit. 14, § 15355(b) (emphasis added). The City has taken the approach that air quality impacts are only cumulatively significant if they are individually significant. This approach violates the spirit and letter of CEQA’s cumulative impacts analysis and is a violation of CEQA and its implementing Guidelines.

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As plainly stated in the definition of cumulative impacts, a project-related impact may be individually less than significant but cumulatively significant. Cal. Code Regs., tit. 14, § 15355. The City’s approach towards its cumulative impacts analysis defeats the purpose of this analysis and must be revised. Because the Project is located in an area that is in nonattainment for multiple criteria pollutants, the Project’s emissions are cumulatively significant in that they “Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is in nonattainment.” The MND’s conclusion that because the “Project will not exceed the applicable SCAQMD regional thresholds for construction and operational-source emissions....the Project will result in a cumulatively less than significant impact” is unsupported by the law.

Conclusion

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Southwest Carpenters looks forward to the City’s response to the comments to the MND during the public review process. Please send all future notices relating to this Project to pkan@wittwerparkin.com. Thank you for your consideration of these comments.

Very truly yours,
WITTWER PARKIN LLP


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