wittwer / parkin

CPC-2016-2601-VZC-HD-CUB-ZAA-SPR

Attachment to Appeal to City Council

Justification/Reason for Appeal

Baseline Analysis is Improper

CEQA requires that an environmental review document "include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, at the time environmental analysis is commenced..." (CEQA Guidelines section 15125(a).) The high court has held that the baseline for a project consists of "the physical conditions actually existing at the time of analysis." (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 316.) In the IS/MND for the Selma Wilcox Hotel (Project), it states that the environmental analysis will use "two baselines, referenced as the Original Baseline and the Current Baseline. The Original Baseline will describe the environmental conditions that originally existed at the time of submittal of Case No. ENV-2015-2672-MND... The Current Baseline will describe existing environmental conditions, which includes the 20,624 square feet of restaurant, partial construction of three-levels of subterranean parking, and an excavated area. The Project would be analyzed against the two baselines and the conditions that exist today, the Current Baseline." (IS/MND Declaration.) The use of two baselines unduly creates confusion in the analysis and is improper. CEQA requires that the baseline for a project consists of the physical environmental conditions as they exist at the time of analysis. The use of the term "Original Baseline" and "Current Baseline" is misleading since the Original Baseline does not reflect the physical environmental conditions as it currently exists. Allowing the use of two baselines in environmental analysis thwarts the information goals of CEQA by creating an impression that an older baseline is valid when it is not.

The IS/MND's Traffic Analysis is Incomplete and Improperly Defers Mitigation Measure to a Future Time

The IS/MND concludes that there will be significant impacts with regard to traffic at the PM Peak Hour in two years, 2020. "The significant impacts occur at Hollywood Boulevard and Wilcox Avenue and at Selma Avenue and Wilcox Avenue. Traffic reduction measures are proposed to mitigate this impact to a level of less than significance." (IS/MND p. 3-196.) The mitigation measure proposed to address the significant traffic impact is illusory and does not ensure measures that reduce impacts to a less than significant level. MM-Traffic-2 is a non-existent Transportation Demand Management and Monitoring Program (TDM). The mitigation

measure states that prior to the issuance of the first building permit for the Project, the Applicant "shall prepare and submit a preliminary [TDM] to the Department of Transportation" and that such TDM is to be approved by the Department of Transportation prior to the issuance of the first certificate of occupancy for the project. (IS/MND p. 3-200.) This constitutes improper deferral of mitigation measures.

Citing to *Citizens for a Sustainable Treasure Island v. City & County of San Francisco* (2014) 227 Cal.App.4th 1036, 1059 and *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 838, the City argues that mitigation for traffic is not deferred. The traffic mitigation proposed in the IS/MND is wholly dissimilar from the mitigation that was upheld in *Citizens for a Sustainable Treasure Island*. In that case, an EIR was prepared. And, the mitigation measure at issue was proposed to address a possible contingency and in the event that cleanup was required to satisfy the contingency, the mitigation measure required cleanup to satisfy the same environmental regulations and regulatory oversight as the Navy. (See *Citizens for a Sustainable Treasure Island, supra*, 227 Cal.App.4th at 1057.) The court in *Citizens for a Sustainable Treasure Island* found that "the EIR here provides ample information regarding the standards that will be applied, the techniques used, and the oversight provided in the event the City assumes future responsibility for remediation. Specifically, the EIR identifies the standards used by regulatory agencies to determine the efficacy of the cleanup efforts undertaken at each parcel." (*Citizens for a Sustainable Treasure Island, supra*, (2014) 227 Cal.App.4th 1060-1061.) And reliance on *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 838 is likewise unavailing because the EIR in that case had specified 11 pollution prevention measures that have been "'widely employed and... demonstrated to be effective means at controlling and preventing pollution from entering downstream waterways,' and implement "Best Management Practices" in controlling storm water runoff quality."

By contrast, the mitigation measure proposed here to address the significant traffic impacts is both unlawfully deferred and ephemeral. First, the TDM is deferred because it does not currently exist and no member of the public can comment on the efficacy of the proposed TDM at the time of environmental review. Instead, the TDM will be submitted to the Department of Transportation only after environmental review is complete. In short, the public is deprived of reviewing what the TDM entails. This is contrary to the requirements of CEQA which prohibits deferral of mitigation measures. "There cannot be meaningful scrutiny of a mitigated negative declaration when the mitigation measures are not set forth at the time of project approval." (*Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 884. See also, Pub. Resources Code section 21080(c)(2).)

Next, the IS/MND states that the "TDM shall include strategies, ***as determined to be appropriate by the Department of Transportation***, which would have a minimum ten (10) percent effectiveness in reducing new vehicle trips." (IS/MND p. 3-200.) The supposed

standards and performance criteria lack rigor and demonstrated efficacy because all the TDM, which is not yet developed yet, needs to achieve is a 10% effectiveness. The analysis leaves unanswered the question whether a TDM with a "minimum ten (10) percent effectiveness in reducing new vehicle trips" would sufficiently mitigate traffic impacts as a matter of law. There is no indication that such a minimal demonstration of effectiveness will sufficiently mitigate traffic impacts to a less than significant level. In fact, common sense indicates that a mere requirement of **10% effectiveness** in reducing new vehicle trips will result in a TDM that is highly unlikely to mitigate traffic impacts and the TDM will not be effective in mitigating traffic impacts.

The IS/MND's Greenhouse Gas (GHG) Analysis is Insufficient to Support its Conclusion that Impacts from the Project Will be Less Than Significant

On one hand, the City admits that "Currently, there are no applicable California Air Resources Board, South Coast Air Quality Management District (SCAQMD), or City significance thresholds or specific reduction targets and no approved policy or guidance to assist in determining significance at the project or cumulative levels." (Response to Unite Here 5 comments.) However, then the City relies on a CEQA Guideline which is only applicable to the situation where a jurisdiction has a previously approved plan to state that its GHG analysis is consistent with CEQA: "Therefore, consistent with CEQA Guidelines section 15064(h)(3), the City, as lead agency, has determined that the Project's contribution to cumulative GHG emissions and global climate change would be less than significant if the Project is consistent with the applicable regulatory plans policies to reduce GHG emissions, not limited to building efficiency measures." (Response to Unite Here 5 comments.)

CEQA Guidelines section 15064(h)(3) states "A lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan or mitigation program... that provides specific requirements that will avoid or substantially lessen the cumulative problem within the geographic area in which the project is located." Here, the City admits that there is no "previously approved plan or mitigation program" that the is applicable to assist in determining significance at the project or cumulative levels. The City cannot rely on CEQA Guidelines section 15064(h)(3) to conclude that the project will avoid or substantially lessen the cumulative problem of greenhouse gases when there is no plan to analyze the Project against. The City must adopt a GHG reduction plan in order to make the finding that the Project will not have significant impacts to greenhouse gas emissions.

The City has not adopted a Climate Action Plan or any other plans and policies to reduce greenhouse gas emissions, so the City must 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. In that case, the California Supreme Court invalidated an EIR that incorrectly relied on the California Air Resources Board Scoping Plan. *Id.* at 216. This is because "neither Assembly Bill 32 nor the 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.

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.

In the IS/MND, the GHG analysis "compares the Project's GHG emissions to the emissions that would be generated by the Project in the absence of any GHG reduction measures (i.e., the No Action Taken [NAT] Scenario). This approach mirrors the concepts used in the CARB's Scoping Plan for the implementation of AB 32." (IS/MND p. 3-70.) But comparing the Project's GHG emissions that would be generated by the Project in the absence of any GHG reduction measures with GHG emissions generated with GHG reduction measures does not provide the analytical route necessary to determine what is required from individual projects in order to ensure consistency with statewide reduction efforts and whether the Project is aligned with those objectives.

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. The IS/MND commits the same error identified in *Center for*

Biological Diversity because it fails to quantify the amount of reduction required from individual projects. Instead, it simply forwards a conclusory statement without any substantial evidence in its support: "While the AB 32 Scoping Plan's cumulative statewide objectives were not intended to serve as the basis for project-level assessments, this analysis finds that its NAT Scenario comparison based on the Scoping Plan is appropriate because the Project would contribute to statewide GHG reduction goals." (IS/MND p. 3-71.) A fair argument exists that the Project would result in significant impacts to greenhouse gas emissions.

The IS/MND Fails to Evaluate Cumulative Impacts

Perhaps the biggest flaw in the IS/MND is the failure to analyze cumulative impacts. The IS/MND identifies "136 related projects that are potentially under construction concurrent with the Project" with five that are 350 feet or less from the Project site:

> [S]everal projects are proposed within a two-block radius, including:
>
> - No. 2 – 1600 Schrader, approximately 300 feet from the Project Site, would have 168 hotel rooms and 4,000 square feet of restaurant
> - No. 5 – 6516 Selma Avenue, approximately 100 feet from the Project Site, would have 212 hotel rooms, 2,308 square feet café, 11,148 square feet restaurant/bar.
> - No. 28 – 1541 Wilcox Avenue, approximately 275 feet from the Project Site, a 220-room hotel with 13,004 square feet of restaurants, 1,432 square feet of meeting rooms, and 1,020 square feet of related uses.
> - No. 33 – 6417 Selma Avenue, adjacent to the Project Site, would have 180 hotel rooms. This Project is finished construction and expected to be open in summer 2017.

(IS/MND p. 3-29.)

In the mandatory findings of significance section, the IS/MND also identifies 1525 Cahuenga Boulevard, approximately 350 feet from the Project Site, with 69 hotel rooms, and 1,500 square feet of office space as a near and related project. (IS/MND p. 3-251.) The IS/MND concludes that "[e]ach of these related projects would be subject to their own CEQA analysis (MND or EIR) to evaluate potential impacts and provide mitigation measure where appropriate." (IS/MND p. 3-251.) The fact that each of the other nearby hotel developments may have their own environmental review is irrelevant to this Project's cumulative impacts analysis. The IS/MND fails to engage in a meaningful cumulative impacts analysis because it does not even ask the right question, regarding whether there will be cumulative effect to traffic, GHG emissions, and noise, for example by looking at the incremental effects of this individual Project in connection with past, current, and probable future projects. Instead, it unlawfully defers this analysis by justifying that environmental review will occur for these other projects.

"When assessing whether a cumulative effect requires an EIR, the lead agency shall consider whether the cumulative impact is significant and whether the effects of the project are cumulatively considerable. An EIR must be prepared if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable. 'Cumulatively considerable' means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probably future projects." (CEQA Guidelines section 15064(h)(1).)

In the context of traffic impacts, because this Project will have a significant impact on at least two intersections and there are several other hotel developments within a two-block radius of the Project, traffic impacts for this Project will be cumulatively considerable when viewed in connection with all of the other nearby hotel development projects. The IS/MND forwards a conclusory statement that the "other related projects have several intervening buildings and major roadways/freeway in between, and are at least 2 blocks away or more, which will ensure that any other localized impacts of the related project would not combine with the Project." (IS/MND, p. 3-251.) This unsupported statement does not demonstrate that the Project will not have a cumulative traffic effect.

The IS/MND's cumulative effect sections regarding Greenhouse Gas Emissions and Noise are similarly paltry and fail to serve as sufficient environmental documents under CEQA. With regard to Greenhouse Gas Emissions, the IS/MND simply concludes that the "the Project's generation of GHG emissions would not make a cumulatively considerable contribution to GHG emissions and impacts will be less than significant." But, there is no analysis of the GHG contributions of past, current, and probable future hotel development projects in the surrounding vicinity. Furthermore, as discussed *infra*, the City has not adopted any GHG thresholds on which to base its analysis and so it cannot rely on CEQA Guidelines section 15064(h)(3) to conclude that the Project's incremental contribution to a cumulative effect is not cumulatively considerable. Finally, the cumulative impacts analysis does not analyze the possible cumulative effect of the Project's operational noise, especially with the rooftop bar/lounge feature, in light of the other surrounding nearby hotel projects. In fact, it only analyzes the project's construction-related and traffic-related noise. (IS/MND p. 3-255.)

It is the City's burden of environmental investigation, not the public's. As discussed above, the IS/MND's discussion of cumulative impacts is woefully inadequate. In addition, because the IS/MND already concluded that there will be a significant impact to traffic, and there are several developments nearby which will also contribute to traffic, the cumulative impact to traffic is significant. Furthermore, the lack of environmental investigation for cumulative effect to noise and greenhouse gas emissions strongly indicate that an EIR is required as well. Finally,

a fair argument exists that impacts to traffic and greenhouse gases emissions have not been mitigated to less than significant. For these reasons, the Project requires preparation of an EIR.

Aggrieved by Decision

Southwest Carpenters live and work in the City of Los Angeles and is concerned about the environmental impacts of this Project. Without an adequate environmental review document, an EIR, Southwest Carpenters is aggrieved because the Project's environmental impacts have not been fully disclosed. Similarly, Southwest Carpenters has a keen interest in seeing adequate mitigation provided to properly address environmental impacts through preparation of an EIR.

Decision-Maker Error

The Planning Commission erred in approving the IS/MND for the Project when a fair argument exists that the Project as proposed may have a significant environmental impact, requiring preparation of an EIR. (See *League for Protection of Oakland's Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.) This failure to prepare the proper environmental document as required under CEQA, CEQA Guidelines, and case law constitutes an abuse of discretion.

APPLICATIONS

APPEAL APPLICATION

This application is to be used for any appeals authorized by the Los Angeles Municipal Code (LAMC) for discretionary actions administered by the Department of City Planning.

1. APPELLANT BODY/CASE INFORMATION

Appellant Body:

☐ Area Planning Commission ☐ City Planning Commission ☑ City Council ☐ Director of Planning

Regarding Case Number: CPC-2016-2601-VZC-HD-CUB-ZAA-SPR

Project Address: 6421-6429 1/2 West Selma Avenue and 1600-1604 North Wilcox Avenue

Final Date to Appeal: 09/06/2018

Type of Appeal:
☐ Appeal by Applicant/Owner
☑ Appeal by a person, other than the Applicant/Owner, claiming to be aggrieved
☐ Appeal from a determination made by the Department of Building and Safety

2. APPELLANT INFORMATION

Appellant's name (print): Alexis Olbrei, Southwest Carpenters

Company: Southwest Regional Council of Carpenters

Mailing Address: *c/o* Wittwer Parkin LLP, 147 S. River Street, Suite 221

City: Santa Cruz State: CA Zip: 95060

Telephone: (831) 429-4055 E-mail: pkan@wittwerparkin.com

- Is the appeal being filed on your behalf or on behalf of another party, organization or company?

  ☑ Self ☐ Other:

- Is the appeal being filed to support the original applicant's position? ☐ Yes ☑ No

3. REPRESENTATIVE/AGENT INFORMATION

Representative/Agent name (if applicable): Pearl Kan

Company: Wittwer Parkin LLP

Mailing Address: 147 S. River Street, Suite 221

City: Santa Cruz State: CA Zip: 95060

Telephone: (831) 429-4055 E-mail: pkan@wittwerparkin.com

4. JUSTIFICATION/REASON FOR APPEAL

Is the entire decision, or only parts of it being appealed? ☑ Entire ☐ Part

Are specific conditions of approval being appealed? ☐ Yes ☑ No

If Yes, list the condition number(s) here: _____

Attach a separate sheet providing your reasons for the appeal. Your reason must state:

- The reason for the appeal
- How you are aggrieved by the decision
- Specifically the points at issue
- Why you believe the decision-maker erred or abused their discretion

5. APPLICANT'S AFFIDAVIT

I certify that the statements contained in this application are complete and true:

Appellant Signature: _____ Date: 9/29/18

6. FILING REQUIREMENTS/ADDITIONAL INFORMATION

- Eight (8) sets of the following documents are required for each appeal filed (1 original and 7 duplicates):
  - Appeal Application (form CP-7769)
  - Justification/Reason for Appeal
  - Copies of Original Determination Letter
- A Filing Fee must be paid at the time of filing the appeal per LAMC Section 19.01 B.
  - Original applicants must provide a copy of the original application receipt(s) (required to calculate their 85% appeal filing fee).
- All appeals require noticing per the applicable LAMC section(s). Original Applicants must provide noticing per the LAMC, pay mailing fees to City Planning's mailing contractor (BTC) and submit a copy of the receipt.
- Appellants filing an appeal from a determination made by the Department of Building and Safety per LAMC 12.26 K are considered Original Applicants and must provide noticing per LAMC 12.26 K.7, pay mailing fees to City Planning's mailing contractor (BTC) and submit a copy of receipt.
- A Certified Neighborhood Council (CNC) or a person identified as a member of a CNC or as representing the CNC may not file an appeal on behalf of the Neighborhood Council; persons affiliated with a CNC may only file as an individual on behalf of self.
- Appeals of Density Bonus cases can only be filed by adjacent owners or tenants (must have documentation).
- Appeals to the City Council from a determination on a Tentative Tract (TT or VTT) by the Area or City Planning Commission must be filed within 10 days of the date of the written determination of said Commission.
- A CEQA document can only be appealed if a non-elected decision-making body (ZA, APC, CPC, etc.) makes a determination for a project that is not further appealable. [CA Public Resources Code ' 21151 (c)].

This Section for City Planning Staff Use Only		
Base Fee: $89.00	Reviewed & Accepted by (DSC Planner):	Date: 10/5/18
Receipt No: 0100936573	Deemed Complete by (Project Planner):	Date:
☐ Determination authority notified	☐ Original receipt and BTC receipt (if original applicant)	