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

DANIEL L. CARDOZO
CHRISTINA M. CARO
YAIR CHAVER
SARA F. DUDLEY
THOMAS A. ENSLOW
TANYA A. GULESSERIAN
KYLE C. JONES
RACHAEL E. KOSS
NIRIT LOTAN
MILES F. MAURINO

MARC D. JOSEPH
Of Counsel

February 26, 2019

Via Hand Delivery

Agenda Item no. 10-11

Date: February 26, 2019
Submitted in PLUM Committee
Council File No: 18-1235 + S1
Item No.: 10 and 11
~~Deputy~~: Communication from Appellant

Planning and Land Use Management Committee
City Hall, 200 North Spring Street
Los Angeles, CA 90012
clerk.plumcommittee@lacity.org

Re: Response to Department of City Planning Appeal Response regarding the Schrader Hotel Project (Council file Nos. 18-1235; 18-1235-S1)

Dear Honorable Committee members:

We write on behalf of the Coalition for Responsible Equitable Economic Development ("CREED LA"), [1] John Ferruccio, Jorge L. Aceves, John P. Bustos, Gerry Kennon, and Chris S. Macias, to respond to the City of Los Angeles ("City") Department of City Planning Appeal Response ("Appeal Response") prepared for the February 12, 2019 PLUM Committee hearing regarding the Hotel project located at 1600-1616 ½ North Schrader Boulevard and 6533 West Selma Avenue ("Project") (VTT-74521-1A, ENV-2016-3751-MND, CPC-2016-3750-VZC-HD-MCUP-ZAA-SPR).

We filed two separate appeals as required under the City Code for the different Project's entitlements and the CEQA document. The Appeal Response contains responses to some of our appeals' arguments. However, the Appeal Response fails to resolve the issues we raised, as detailed below, and our comments still stand.[2] In short, the MND fails to comply with the requirements of the

[1] 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.

[2] We incorporate our June 7, 2018 comments; July 18, 2018 comments on the City's response to comments; August 13, 2018 Justification for Appeal; September 11, 2018 Response to Appeal Report; November 6, 2018 Response to Second Appeal Report; December 14, 2018 Justification for Appeal to the Los Angeles City Council (VTT-74521-1A; ENV-2016-3751-MND) and December 26, 2018

California Environmental Quality Act[3] ("CEQA") because substantial evidence supports a fair argument that the Project may cause: (1) a significant, unmitigated impact on public health from toxic air contaminants ("TACs"), particularly for school-aged children and (2) a significant, unmitigated impact from noise. In addition, and as a result, the City cannot make the findings under the Los Angeles Municipal Code ("City Code") required for approval of the requested entitlements, including a Master Conditional Use Permit for alcohol sale, Zoning Administrator Adjustment and Site Plan Review.

(A) There is substantial evidence that the MND fails to properly evaluate and mitigate potentially significant impacts on public health from TAC emissions and substantial evidence supports a fair argument that the Project may result in potentially significant impacts on public health.

The MND concludes that the Project would result in a less than significant impact from construction and operational TAC emissions without conducting an assessment of health risk impacts, commonly called a health risk assessment ("HRA"), for the Project. We reviewed the environmental analysis with the assistance of technical experts, Soil Water Air Protection Enterprise ("SWAPE"), which found the City's conclusion unsupported. As SWAPE explained in their previous comment letters, the mere assertion that the Project's construction will be limited in time, and that the Project's operation does not involve significant toxic airborne emissions, is not sufficient to support a conclusion the Project will not result in significant impacts on public health.[4] In order to support such a conclusion, the City must rely on an analysis, such as an HRA.

In the Appeal Response, the City restates its claim that because the Project would be required to comply with the CARB Air Toxics Control Measure, and because it not considered to be a substantial source of diesel particulate matter and not subject to the Air Toxics Hot Spots Information and Assessment Act, "[t]here is no evidence to suggest that the project would generate diesel fuel emissions that are

---

Justification for Appeal to the Los Angeles City Council (CPC-2016-3750-VZC-HD-MCUP-ZAA-SPR) along with their attachments and exhibits, herein by reference.

[3] Pub. Resources Code §§ 21000 et seq.; 14 Cal. Code Regs. §§ 15000 et seq. ("CEQA Guidelines").

[4] Letter from Hadley Nolan to Christina Caro re: Comments on the Schrader Hotel Project, June 7, 2018.

excessive or above acceptable levels" and a detailed HRA is not required.[5] In addition, the City makes specific claims regarding the information and assumption relied upon in the analysis conducted by SWAPE that was presented to the City, arguing it does not constitute a fair argument that a significant impact would occur.

With regard to the City's arguments on flaws in SWAPE's analysis, SWAPE provided a response explaining their assumptions.[6] In short, SWAPE explain that they updated their analysis to reflect the City's assumption regarding the number of hours school children spend in school by using a Fraction of Time at Home (FAH) value to reflect 7 hours on school grounds.[7] SWAPE also explain that contrary to the City's argument, their analysis does not assume lifetime exposure but is reflective of the expected construction and operations duration, and that an adjustment factor (AF) was used to reflect the hours during the day when construction emissions are expected to occur.[8] Regarding the time children spend outside and inside while in school, SWAPE note that there is no information regarding the air filtering systems used in the two nearby schools and their maintenance, so the City cannot rely on assumptions regarding their effectiveness in mitigating emissions.[9]

SWAPE show that after updating their analysis to reflect the assumptions above they found that the excess cancer risk from the Project posed to a school child from ages five to fourteen years old is approximately *190 in one million.*[10] This greatly exceeds the SCAQMD's threshold of 10 in one million. As a result, the Project's construction and operational emissions present a potentially significant impact to nearby sensitive receptors at the Selma Avenue Elementary School.

SWAPE noted that a screening level analysis is known to be more conservative and tends to err on the side of health protection. However, it shows that a more refined HRA needs to be conducted, as the screening-level HRA

---

[5] Department of City Planning, Appeal Response; Council file nos. 18-1235; 18-1235-S1, February 7, 2019 ("Appeal Response") p. 3.
[6] See **Exhibit 1**: letter from SWAPE to Nirit Lotan re: Response to Comments on the Schrader Hotel Project, February 11, 2019.
[7] Exhibit 1, p. 3.
[8] Exhibit 1, p. 4.
[9] Exhibit 1, p. 3-4.
[10] Exhibit 1, p. 5.

demonstrates that construction and operation of the Project may result in a potentially significant health risk impact.[11]

With regard to the City's duty to properly analyze the potential health impacts of the project, that City argues that:

> [T]the project MND does discuss the correlation of TAC emissions and human health impacts. The project MND acknowledges health risks based on the concentration of the substance and duration of exposure, but concludes the project would result in a less than significant impact related to construction TACs.[12]

First, the City ignores the courts' ruling regarding the standard of review for an MND. When an agency prepares an MND and experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the effects to be significant and prepare an EIR. In short, when "expert opinions clash, an EIR should be done." "It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." Therefore. SWAPE's analysis, which is supported by the evidence and indicates a significant impact may occur, is substantial evidence creating a duty on the part of the lead agency to prepare an EIR.

Second, the fact that the MND "discuss the correlation of TAC emissions and human health impacts" is not enough to show the City fulfilled its duty to disclose and analyze the Project's impacts properly.

An EIR "protects not only the environment but also informed self-government."[13] The Courts have repeatedly ruled that "[a]n EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project."[14] In the

---

[11] Exhibit 1, p. 6.
[12] Appeal Response, p. 2.
[13] *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564.
[14] Laurel Heights Improvement Assn. v. Regents of Univ. of California, 47 Cal. 3d 376, 405, 764 P.2d 278, 291 (1988), as modified on denial of reh'g (Jan. 26, 1989)

Friant Ranch Supreme Court decision that was recently published,[15] the Court restated the rule that an EIR must include sufficient information to make the issues it considers clear, and that an agency must make a "reasonable effort to substantively connect" projects' impacts to their likely health consequences.[16] The Court also made clear it will review the EIR to see not only if substantial evidence supports its conclusions, but also to make sure the EIR provided the required information to enable meaningful participation.[17]

While the *Friant Ranch* ruling discussed an EIR, the rational, requiring the City to "substantively connect" projects' impacts to their likely health consequences, remains the same. Here, to do that and in light of the evidence provided by SWAPE, the City should have performed a refined health risk assessment to provide concrete information regarding the Project's potential impacts on the public' health for those sensitive receptors around the Project, including the nearby school children.

(B) There is substantial evidence that the MND fails to properly evaluate and mitigate potentially significant impacts on noise and substantial evidence supports a fair argument that the Project may result in potentially significant impacts from noise.

The Appeal Response repeats the City's claim it did not compress the analysis of impacts and mitigation measures. The City argues that the digital audio processor (DAP) in Project Design Feature 2 (PDF-2) is not a mitigation measure and is not relied upon as mitigation and that the City does not need to provide an analysis of the project's noise impacts before and after implementation of PDF-2 because it is a Project Design Feature, not a mitigation measure.[18] The City also repeats the claim all noise impacts will be mitigated below the threshold of significance.

As explained in our previous comments, the courts have determined that to decide whether an agency improperly compressed analysis and mitigation

---

[15] Sierra Club v. Cty. of Fresno, 6 Cal. 5th 502, 431 P.3d 1151 (2018)
[16] Sierra Club v. Cty. of Fresno, 6 Cal. 5th 502, 431 P.3d 1151, 1158 (2018).
[17] Sierra Club v. Cty. of Fresno, 6 Cal. 5th 502, 431 P.3d 1151, 1161 (2018).
[18] Appeal Response, p. 3.

measures, they look to see if the analysis "obfuscates required disclosure of the project's environmental impacts and analysis of potential mitigation measures."[19] This is exactly what the city did here.

In the Appeal Response, the City expressly states that other specific measures included in PDF-4 "would be implemented in the event external audio equipment produces noise levels that exceed the identified threshold levels."[20] The City admits therefore both that external audio equipment not controlled by the DAP would be allowed in the hotel *and* that the noise it produces can exceed the identified threshold. However, the MND analysis of noise impacts completely relies on the assumption of an always-effective DAP: The Noise Appendix calculations assume noise levels at the 11th floor do not exceed 84.32 dBA,[21] which is the level that the DAP should achieve. Otherwise, the MND itself states, noise levels will in fact be much higher – reaching up to 104 dBA.[22]

In *Lotus v. Department of Transportation*,[23] the Court of Appeal found that an EIR had "disregard[ed] the requirements of CEQA" by "compressing the analysis of impacts and mitigation measures into a single issue." The Court continued, stating "[a]bsent a determination regarding the significance of the impacts ... it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered."[24] Similar to the inadequate analysis contained in the *Lotus* EIR, the MND asserts that incorporation of the PDFs would reduce the Project's noise impacts to less than significant levels prior to mitigation. The public has no way of telling what the noise impact of the Project would be *without* the design feature and cannot properly evaluate whether the design feature would be effective in reducing the potentially significant impact and what other measures might be needed. This flaw is not theoretical – the city itself admits that equipment not controlled by the DAP will be allowed in the hotel and that noise it produces may exceed the thresholds. But no analysis of the noise impacts without the DAP "design feature" is provided.

---

[19] *Mission Bay All. v. Office of Cmty. Inv. & Infrastructure*, 6 Cal. App. 5th 160, 185, 211.
[20] Appeal Response, p. 3.
[21] See Neil Shaw comments, September 7, p. 1. To these levels, the MND adds further reductions from distance and from the glass barrier.
[22] MND, p. III-106.
[23] *Lotus v. Dep't of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.
[24] *Id.*

In addition, the appeal and the comment letters filed to the City constitute a fair argument, supported by substantial evidence, that the Project may have significant impact from noise. Substantial evidence, for purposes of the fair argument standard, includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."[25] As explained in the expert reports filed by Neil Shaw, an expert on acoustics, the design features and mitigation measures will not be able to mitigate impacts created from live entertainment using outside audio equipment and acoustic instruments. The City must therefore prepare an EIR which will properly analyze the operational noise impacts from the Project and will include sufficient mitigation, as required under CEQA.

(C) The City Cannot Make the Required Findings for the Master Conditional Use to Allow for the Sale and Dispensing of Alcohol on the Site, Because the City Has No Evidence to Support the Required Findings

In the Appeal Response, the City argues it can make the required findings for the MCUP because "the sale and dispensing of alcoholic beverages is anticipated to be an incidental amenity for patrons of the operations of the proposed restaurant and bar/lounge," because it is not anticipated to create a law enforcement issue and because the Project is conditioned to prevent negative impacts.[26] This response, however, is not enough to constitute substantial evidence supporting the required findings.

First, the City ignores in this response the noise and public health impacts the Project may create, as explained above. Until these impacts are addressed, the City cannot make the finding "that the project's location, size, height, operations and other significant features will be compatible with and will not adversely affect or further degrade adjacent properties, the surrounding neighborhood, or the public health, welfare, and safety", as required under section 12.24.E(2) of the Code.

Second, the City cannot find, as required under section 12.24.E(3) "that the project substantially conforms with the purpose, intent and provisions of the General Plan, the applicable community plan, and any applicable specific plan."

---

[25] PRC § 21080(e)(1) (emphasis added); *CREED*, 197 Cal.App.4th at 331.
[26] Appeal Response, p. 6.

That is because, as explained in the appeal, the Noise Element of the City's General Plan requires employing mitigation measures to address noise impacts on sensitive users, in accordance with CEQA. As explained in our appeal, the City failed to comply with CEQA regarding noise impacts of the Project, and therefore cannot make the required finding.

Finally, the City cannot find, as required under section 12.23.W.1(a) of the Code, that granting of the application will not result in an "undue concentration" of alcohol selling premises and that the proposed use will not detrimentally affect nearby residentially zoned communities. As shown in our appeal, the number of existing licenses on the relevant tract *significantly* exceeds the guidelines set by the California Department of Alcoholic Beverage Control ("ABC"). In addition, the crime rate in this crime reporting district is again significantly higher than the area wide average. This fact, combined with the foreseeable noise impacts and the fact that many of the reported crimes have to do with alcohol and peace disturbance, shows that granting the application will indeed result in undue concertation and a detrimental effect. The fact that the Project "has been conditioned to prevent negative impacts"[27] does not change this reality.

(D) <u>The City Cannot Make the Required Findings for the Zoning Administrator's Adjustment to the Required Setbacks, Because the City Has No Evidence to Support the Required Findings</u>

The City cannot make the required finding under Section 12.28 of the City's Code, that the Project "will not adversely affect or further degrade adjacent properties, the surrounding neighborhood, or the public health, welfare and safety." The City's arguments, that "neighboring tenants have been active in their participation in the public process, and no complaints or concerns were expressed regarding this request"[28] is besides the point. Given the significant unmitigated impacts the Project may have from noise and on public health, this finding is not supported.

---

[27] Appeal Response, p. 6.
[28] Appeal Response, p. 7.

(E) <u>The City Cannot Make the Required Findings for the Site Plan Review, Because the City Has No Evidence to Support the Required Findings</u>

The City cannot make the finding required under section 16.05.F of the City's Code. The City cannot find that the "project is in substantial conformance with the purposes, intent and provisions of the General Plan, applicable community plan, and any applicable specific plan" or "that any residential project provides recreational and service amenities to improve habitability for its residents and minimize impacts on neighboring properties." This, as explained in our appeal, is due to the unmitigated significant impacts the Project may cause.

Thank you for your attention to this important matter.

Sincerely,

Nirit Lotan

Nirit Lotan

NL:ljl

4267-026j