ORIGINAL

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-2016-1950-TDR-SPR; ENV-2016-1951-EIR

Project Address: 744 S. Figueroa Street and 829 West 8th Street

Final Date to Appeal: 03/12/2019

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): Southwest Regional Council of Carpenters

Company: Southwest Regional Council of Carpenters

Mailing Address: c/o Wittwer Parkin LLP, 335 Spreckels Drive, Suite H

City: Aptos State: CA Zip: 95003

Telephone: (831) 429-4055 E-mail: nwhipps@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): Nicholas Whipps

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: nwhipps@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: D. R. Hall Date: 03/06/19

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): Kay Sasaki	Date: 3/6/19
Receipt No: 0602013 76	Deemed Complete by (Project Planner):	Date:
☐ Determination authority notified	☐ Original receipt and BTC receipt (if original applicant)	

CPC-2016-1950-TDR-SPR / VTT-74197-1A / ENV-2016-1951-EIR
Attachment to Appeal to Planning Commission

Justification/Reason for Appeal

The EIR fails to adequately disclose and evaluate baseline conditions and direct, indirect and cumulative impacts, including in the categories of aesthetics, air quality, biological resources, cultural and historic resources, greenhouse gases, land use, public services, traffic, and utilities. The City has failed to consider a reasonable range of alternatives and to adopt all feasible mitigation measures, and its proposed findings are not supported by substantial evidence. Because the City has not recirculated an EIR that satisfies the procedural and substantive requirements of CEQA, the City is in violation of CEQA. Furthermore, the City has violated the City Charter and Los Angeles Municipal Code (L.A.M.C.) because it failed to make the required findings to support its approval of a transfer of floor area rights (TFAR), and the City did not adequately evaluate the consistency of the Project with the City's zoning code.

Inaccurate and Unstable Project Description

An accurate and stable Project Description is "the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.)

The City erroneously presents mitigation measures as aspects of the proposed Project. These include mitigation for impacts to aesthetics, greenhouse gas, noise, public services, and traffic, which the City claims are "project design features." (DEIR, pp. I-38-42.) While the City states these are components of the Project, the City presents these as though they were mitigation measures throughout the EIR. These features are presented in the same location as mitigation measures and otherwise meet the definition of "mitigation." (14 Cal. Code Regs. § 15370.) The City failed to correctly identify these as mitigation measures and further failed to properly disclose pre-mitigation Project impacts in these categories of environmental impacts. Incorrectly identifying these "project design features" as something other than mitigation fails to provide decisionmakers and the public with an accurate, stable, and finite Project Description. (14 Cal. Code Regs. § 15126 (lead agency must consider and discuss environmental impacts).)

Inadequate Discussion of Air Quality Impacts

The City states it is in non-attainment for 1-hour ozone, 8-hour ozone, 24-hour PM_{10}, annual PM_{10}, 24-hour $PM_{2.5}$, annual $PM_{2.5}$, and lead. (DEIR, p. IV.B-3.) Regardless, in its EIR, the City claims the Project would not result in cumulatively significant impacts regarding any of these criteria pollutants. The City reasons this is because a project cannot have significant

cumulative air quality impacts unless the City determines Project emissions surpass significance thresholds promulgated for direct and indirect impacts. (DIER, p. IV.B-45-46.) Further, while the City's DEIR initially claimed impacts from NO_x (a precursor to ozone) would be cumulatively significant, it revised this conclusion in its FEIR. (DEIR, p. IV.B-43, FEIR, p. II-22.)

While the City claims SCAQMD adopted the above-referenced cumulative impacts threshold, SCAQMD has never done so. Regardless, the City cannot rely on a threshold that runs counter to the definition of "cumulative impacts." 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." (14 Cal. Code Regs. § 15355.) Critically, "Cumulative impacts can result from ***individually minor but collectively significant projects*** taking place over a period of time." (14 Cal. Code Regs. § 15355 (emphasis added).) Thus, the City fails to properly analyze the significant cumulative impacts of the Project.

Further, the City erroneously failed to recirculate the EIR after the addition of significant new information. (14 Cal. Code Regs. § 15088.5(a).) In the DEIR, the City determined Project NO_x emissions would be individually and cumulatively significant and unavoidable. (DEIR, p. IV.B-43.) However, in the FEIR, the City added a new mitigation measure, AIR-MM-5, which reduced the number of daily haul truck trips "from 200 hauls per day to 135 hauls per day. The duration of the excavation phase would be extended from 3.5 months to 5.5 months in order to remove the required amount of soil with fewer hauls per day." (FEIR, p. II-22.) According to the City, adoption of this mitigation measure would reduce this impact from 140 pounds per day to 99 pounds per day—immediately below the NO_x emissions significance threshold of 100 pounds per day. (FEIR, p. II-22.)

The addition of this new mitigation measure represents significant new information requiring recirculation because this mitigation measure caused the City to significantly revise a conclusion in the DEIR, from "significant and unavoidable" to "less than significant." Further, the City failed to evaluate the impacts of this mitigation measure, which will serve to exacerbate other Project impacts by increasing their duration. For instance, in the EIR, the City found Project-related noise resulting from construction hauling is cumulatively significant and unavoidable. (DIER, p. IV.E-50, 55, 62.) Thus, the implementation of this mitigation measure, which will increase the duration of truck hauling by 57 percent (from 3.5 months to 5.5 months) will serve to exacerbate these significant and unavoidable Project noise impacts. Finally, recirculation is especially fitting where, as here, the City relies on this mitigation measure to just barely reduce Project impacts to less than significant—the highest possible Project emissions that can be found less than significant—to reject as unnecessary all feasible mitigation measures proposed by SCAQMD. The City's failure to recirculate the EIR despite this addition of significant new information violates CEQA.

Improper Greenhouse Gas Impacts Analysis

"In the absence of any adopted, quantitative threshold," the City claims that it appropriately relied on a qualitative analysis of consistency with plans not adopted by the City and that were not designed to address greenhouse gas impacts or to be applied at the project-level. (CPC-2016-1950-TDR-SPR Letter of Determination, p. F-28.)

The City is incorrect to assume its reliance on a purely qualitative impacts threshold was informative or adequate in this situation. (Cal. Natural Resources Agency, Final Statement of Reasons for Regulatory Action, Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97, pp. 23-24 (stating that, for large projects, "a lead agency may find it difficult to demonstrate a good faith effort through a purely qualitative analysis"); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comm.* (2001) 91 Cal.App.4th 1344, 1370 (agency must make a good-faith effort at disclosing greenhouse gas impacts).) The City's environmental review addresses greenhouse gas impacts arising from a massive project, including dozens of stories, hundreds of dwelling units, and thousands of square feet of commercial space. Under these circumstances, reliance on a purely qualitative threshold of significance cannot be seen as a good-faith attempt at disclosing Project impacts, as required by CEQA. (14 Cal. Code Regs. § 15064.4(a).) Furthermore, the City's qualitative review of several plans and policies is confusing, uninformative, and does not serve to adequately inform the reader of the Project's impacts on the environment, and this approach does not clearly explain what mitigation, if any, could be used to address any Project impacts. (14 Cal. Code Regs. § 15064.4.)

The City states Project greenhouse gas emissions will be 3,178 metric tons of carbon dioxide equivalent ($MTCO_2e$) per year, which is above the 3,000 $MTCO_2e$/year threshold advanced by SCAQMD and used as a significance threshold by dozens of agencies within the Southern California Air Basin. While the City rejects this as an appropriate significance threshold, it does not replace this threshold with anything more informative. Instead, the City admits it currently does not have a quantitative significance threshold or specific reduction targets, and it has no approved policy regarding greenhouse gas impacts. (*e.g.*, DEIR, p. IV.C-42.) Instead, the City relies on plans and policies adopted by state and regional agencies that were never adopted by the City and that are not designed to be used at the Project-level. The City's evaluation of consistency with plans it has not, itself, adopted runs counter the standards set forth in the CEQA Guidelines and, thus, violates CEQA. (14 Cal. Code Regs. § 15064(h)(3). Per CEQA Guidelines section 15064(h)(3), the City cannot rely on other plans not adopted by it 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 greenhouse gas reduction plan in order to make the finding that the Project will not have

significant impacts to greenhouse gas emissions. (*Center for Biological Diversity* v. *Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 217.) Furthermore, the City's "plan consistency" evaluation with several different plans is confusing, uninformative, and does not serve the disclosure and informational purposes of CEQA.

In addition, the City masks an undisclosed volume of greenhouse gas impacts by claiming mitigation measures are, in fact, parts of the Project. As the City has not made these mitigation measures binding on the Project as part of the Mitigation and Monitoring Program, it cannot rely on these measures to assume Project impacts will be less than significant or otherwise reduced to the levels disclosed in the EIR. (Pub. Resources Code § 21002.1(b); 14 Cal. Code Regs. § 15096(g)(2).) It is a violation of CEQA for the City to fail to accurately disclose or evaluate Project-related greenhouse gas impacts.

Noise

The City erroneously discounted cumulative Project noise impacts. The City only considered cumulative impacts from six of the 181 cumulative Projects located within the direct vicinity of the Project, thereby failing to consider the cumulative impacts arising from the vast majority of nearby past, present, and reasonably foreseeable future projects. (FIER, p. II-89.) Of the six projects the City supposedly evaluated for cumulative impacts, the City further erroneously ignored cumulative operational impacts from these projects, thus narrowing its disclosure of cumulative impacts to only two other projects. (FEIR, p. II-91.) The City's decision to consider only a fraction of cumulative impacts fails the informational purposes of CEQA, fails to adequately consider the significance of Project impacts, and fails to provide mitigation to address significant Project-related impacts.

As with greenhouse gases, the City failed to accurately disclose pre-mitigation Project-related noise impacts by erroneously claiming certain mitigation measures are "project design features." (DEIR, p. IV.E-26.) This served to mask Project impacts and fails the informational purposes of CEQA.

Traffic

The City failed to accurately disclose pre-mitigation Project-related traffic impacts by evaluating certain traffic mitigation measures as "project design features." (DEIR p. IV.G.-34-35.) These "project design features" were clearly designed to mitigate Project-related traffic impacts, which impacts should have been evaluated, disclosed, and mitigated in the EIR. The City's approach served to mask Project impacts and fails the informational purposes of CEQA.

Mitigation Measures

The EIR's mitigation measures and Mitigation Monitoring Program fail to comply with CEQA. The City's findings that the Project would result in less than significant impacts to air quality, climate change, noise, and traffic are not supported by evidence in the record. (Cal. Pub. Resources Code § 21168 [requiring CEQA findings to be supported by substantial evidence in the record].) The City's mitigation measures and mitigation monitoring program for these impacts, therefore, also are not based on substantial evidence. (*Ibid.*; FEIR, § IV.) As such, the City has failed to provide appropriate and enforceable mitigation for Project impacts in violation of CEQA. (14 Cal. Code Regs § 15126.4(a)(1) ["An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy"]; 14 Cal. Code Regs. § 15126.4(a)(2).)

Alternatives

CEQA provides a "***substantive mandate*** that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures" that can lessen the environmental impact of proposed projects. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134, citing Pub. Resources Code, § 21081 [emphasis added].) It compels government to mitigate adverse effects through the selection of feasible alternatives. (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233, see also Pub. Resources Code, § 21002.) Under CEQA, the City may not approve the Project as proposed if there are feasible alternatives available that would substantially lessen the Project's significant environmental impacts. (14 Cal. Code Regs. § 15091.)

The EIR's alternatives analysis is problematic for several reasons. First, the EIR's conclusions regarding the significance of impacts is not supported by the evidence. As a result, the EIR's alternatives analysis does not correctly compare the potential impacts of the selected alternatives with the impacts of the Project. (*See generally*, DEIR § V.) Second, the proposed alternatives would substantially lessen the Project's significant environmental impacts, yet the City failed to select such alternatives. (*Ibid.*) Third, because the City's conclusions that the Project would not have significant impacts are not supported by substantial evidence, it incorrectly concluded that the Project would not have significant impacts. The city has, thus, sidestepped its obligation to reduce significant impacts by selecting a feasible and less impactful alternative. (Pub. Resources Code, § 21002.1(b); 14 Cal. Code Regs. § 15092.)

Finally, findings that an alternative is infeasible must be supported by substantial evidence in the record. (*California Native Plant Soc'y v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 997, as modified (Oct. 2009); see also *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 559 [agency decision "to reject the alternatives as infeasible

was supported by substantial and tenable evidence"].) The agency must also articulate its analysis and how the agency reached its determination. (*See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 203.) In this case, the City failed to articulate why alternatives that were not selected were infeasible. (DEIR, pp. V-2 – V-4; see DEIR, § V.)

Variance

A TFAR is a variance, which can only be approved if the City makes findings required by the L.A.M.C, which the City did not make, here. "[A] variance is a permit to build a structure or engage in an activity that would not otherwise be allowed under the zoning ordinance." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1007; see *Hamilton v. Board of Supervisors* (1969) 269 Cal.App.2d 64, 66.) "A variance is a zoning exception [that] provides an applicant relief from a zoning regulation and allows the applicant to … use its property in a way that varies from the otherwise applicable zoning code." (Continuing Education of the Bar, *California Land Use Practice* § 7.2.)

The Project is zoned C2-4D. (Advisory Agency's November 16, 2018 Determination Letter, p. 92.) This zoning designation only permits a Floor Area Ratio ("FAR") of up to 6:1. (*Ibid.*) The Project Applicant, however, has requested a TFAR from the Los Angeles Convention Center site, which is owned by the City of Los Angeles. (*Ibid.*) This TFAR would provide the Applicant with an exception to the zoning requirements, and would permit the Project Applicant to use their property in a way that varies from the zoning code – to build to a maximum density of 8.43:1 FAR. (*Ibid.*) This is a variance.

L.A.M.C. section 12.27(D) requires that the City make findings required by City Charter section 562 before issuing a variance. City Charter section 562 requires that the City make the following findings:

(1) that the strict application of the provisions of the zoning ordinance would result in practical difficulties or unnecessary hardships inconsistent with the general purposes and intent of the zoning regulations;
(2) that there are special circumstances applicable to the subject property such as size, shape, topography, location or surroundings that do not apply generally to other property in the same zone and vicinity;
(3) that the variance is necessary for the preservation and enjoyment of a substantial property right or use generally possessed by other property in the same zone and vicinity but which, because of the special circumstances and practical difficulties or unnecessary hardships, is denied to the property in question;

(4) that the granting of the variance will not be materially detrimental to the public welfare, or injurious to the property or improvements in the same zone or vicinity in which the property is located; and

(5) that the granting of the variance will not adversely affect any element of the General Plan.

The City has not made the findings required by City Charter section 562. "Any act that is violative of or not in compliance with the charter is void." (*City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756, 789.) The City's approval of the TFAR without the support of findings required by City Charter section 562 constitutes legal error that must be reversed.

Consistency with the Zoning Code

In its Letters of Determination, the City admits it has failed to evaluate the consistency of the Project with applicable zoning regulations. Failure to consider Project consistency with zoning constitutes an abuse of discretion. (Cal. Code Civ. Proc., § 1094.5.)

The City failed to make a final determination as to whether the Project, as proposed, complies with zoning regulations in conjunction with the VTT determination. (See October 24, 2018 Planning Department Staff Report ["Staff Report"], p. 9.) The Staff Report states: "[t]he subdivider is hereby advised that the LAMC [sic] may not permit this maximum approved density... verification should be obtained from the Department of Building and Safety." (*Id.* at p. 9 [emphasis in original].) The Advisory Agency Determination Letter confirms: "any proposed structures or uses on the site have not been checked for... Zoning Code requirements." (Advisory Agency Determination Letter, p. 3.) Again, in the Planning Commission's February 25, 2019 Letter of Determination, the City states, "The Advisory Agency approval is the maximum number of units permitted under the tract action. However the existing or proposed zoning may not permit this number of units." (VTT-74197-1A DL Letter of Determination, p. C-11.)

The Subdivision Map Act ("SMA") governs the approval of subdivisions and tentative tract maps in Los Angeles. (See Cal. Gov. Code, § 66474.60.) Under the SMA, local agencies may only approve tract maps that are consistent with applicable land use standards, including "local ordinances dealing with subdivisions." (See *ibid*; L.A.M.C. § 17.00 et seq.) Subdivision approvals must be in compliance with applicable zoning (existing or as changed by project approval) and "shall substantially conform to all other elements of the General Plan." (L.A.M.C., § 17.05.C; see also Cal. Gov. Code § 66474.61(a)-(b) [requiring consistency with applicable land use plans].)

The City was required both by CEQA and the Subdivision Map Act to determine and disclose whether the proposed Project complies with the City's zoning regulations *prior* to circulating its DEIR for the Project. Because the Planning Commission did not make a final determination regarding whether the Project complies with zoning regulations, it failed to comply with L.A.M.C. section 12.36, and thus failed to proceed in a manner required by law. (See Cal. Code Civ. Proc., § 1094.5.) Without determining whether the Project's proposed density is in conformance with applicable zoning, the City could not lawfully approve the VTT. (See Cal. Gov. Code, § 66474.60; L.A.M.C., § 17.05.C.) As it is clear the City has not determined whether the Project is consistent with zoning for the Project site, its analysis both in the EIR and pursuant to the Subdivision Map Act lacks evidentiary support in the record. Absent revising and recirculating the EIR, the City cannot now remedy this flaw in its environmental review.

Aggrieved by Decision

Southwest Carpenters live and work in the City of Los Angeles and are concerned about the environmental and land use impacts of this Project. Without an adequate environmental review document, Southwest Carpenters is aggrieved because the Project's environmental impacts have not been fully disclosed and the City has failed to provide adequate mitigation or to properly address environmental impacts through preparation of a legally adequate EIR. Similarly, Southwest Carpenters has a keen interest in ensuring orderly land use and planning and is further aggrieved by the City's failure to adhere to relevant land use provisions of state and local law.

Decisionmaker Error

The Planning Commission erred in approving the EIR for the Project when the EIR fails the procedural requirements and informative purposes of CEQA, the City's findings are not supported by substantial evidence, and the EIR does not adopt all feasible mitigation measures. This failure to conduct adequate environmental review as required under CEQA, CEQA Guidelines, and case law constitutes an abuse of discretion. Furthermore, the Planning Commission erred in approving the Project without properly adhering to state and local land use laws.