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Re: Comment on the Mitigated Negative Declaration for the Sunflower Legacy Apartments Project.

Dear Honorable Members of the Santa Ana Planning Commission:

I am writing on behalf the Sustainers Alliance For Environmental Responsibility ("SAFER") concerning the Mitigated Negative Declaration ("MND") for the Sunflower Legacy Apartments Project ("Project") in Santa Ana. After reviewing the MND, we conclude that it fails as an informational document and fails to rely on substantial evidence. Therefore, we request that the City of Santa Ana prepare an Environmental Impact Report ("EIR") for the Project pursuant to the California Environmental Quality Act, Public Resources Code section 21000, et seq.

I. PROJECT DESCRIPTION

The Project applicant proposes the development of 226 multi-family apartments on a 3.59-acre site located at 651 Sunflower Avenue. The property is developed with the Sound Church and would be demolished. The Project proposes 226 apartments in a five-story building. A six level parking structure, which includes one level of subterranean parking and five levels above ground, is proposed for the middle of the site along the northern project boundary with a five- story apartment building wrapped around the five level parking structure on three sides.

The Project includes 35 studio apartments, 114 one-bedroom apartments and 77 two-bedroom apartments. The apartment building would be 75 feet in height to the top of roof and the parking structure would be 70 feet in height. The Project proposes 452 parking spaces, including 10 subterranean parking spaces, and handicap spaces. Four bicycle parking spaces are proposed. The Project proposes 57,957 square feet of open space including 22,781 square feet of passive open space, 24,096 square feet of active open space and 11,080 square feet of private open space. A total of 227 storage units are proposed for all five levels in the parking structure, including 20 storage units in the subterranean parking level, for use by the residents.

The Project is scheduled to be constructed in two phases. Project construction would start in the first quarter of 2020 and the first phase completed in October 2021. The second phase is scheduled to be completed in December 2021 or early 2022.

II. LEGAL STANDARD

As the California Supreme Court held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities for a Better Env't v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320 ["*CBE v. SCAQMD*"], citing, *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505.) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." (Pub. Res. Code ["PRC"] § 21068; *see also* 14 CCR § 15382.) An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." (*No Oil, Inc., supra*, 13 Cal.3d at 83.) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Env't v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 ["*CBE v. CRA*"].)

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.) The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." (*Bakersfield Citizens*, 124 Cal.App.4th at 1220.) The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*Laurel Heights Improvements Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) The EIR process "protects not only the environment but also informed self-government." (*Pocket Protectors*, 124 Cal.App.4th at 927.)

An EIR is required if "there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." (PRC § 21080(d); *see also Pocket Protectors*, 124 Cal.App.4th at 927.) In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement

briefly indicating that a project will have no significant impact thus requiring no EIR (14 Cal. Code Regs.§ 15371), only if there is not even a "fair argument" that the project will have a significant environmental effect. (PRC, §§ 21100, 21064.) Since "[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process," by allowing the agency "to dispense with the duty [to prepare an EIR]," negative declarations are allowed only in cases where "the proposed project will not affect the environment at all." (*Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.)

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study "to a point where clearly no significant effect on the environment would occur, and…there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (Public Resources Code §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331.) In that context, "may" means a *reasonable possibility* of a significant effect on the environment. (Pub. Resources Code, §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors, supra,* 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–905.)

Under the "fair argument" standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. (14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-15; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.) The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. (*Pocket Protectors*, 124 Cal.App.4th at 928.)

The "fair argument" standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

> This 'fair argument' standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact. The lead agency's decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

(Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273-274.) The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a **preference for resolving doubts**

in favor of environmental review." (*Pocket Protectors*, 124 Cal.App.4th at 928 [emphasis in original].)

III. DISCUSSION

A. The MND Fails to Disclose, Analyze, and Mitigate Potentially Significant Impacts of the Project due to Hazardous Materials.

The MND states that "[t]here is the potential for asbestos containing materials (ACMs) and/or lead based paint to be present" yet also admits that "[a]sbestos and lead based paint surveys were not included in the Phase I ESA." (MND, p. 56.) The omission of such surveys fails to satisfy CEQA's requirement to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*Laurel Heights*, 47 Cal.3d at p. 392.) Instead, the City impermissibly defers further analysis of asbestos and lead paint until the Project applies for demolition permits. "A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.) The City must conduct surveys to determine whether asbestos or lead paint are present on the Project site and disclose such findings to the public prior to approving the Project.

B. The IS/MND Fails to Adequately Evaluate Health Risks from Diesel Particulate Matter Emissions

The MND concludes that the health risk posed to nearby sensitive receptors from exposure to toxic air contaminant ("TAC") emissions and diesel particulate matter ("DPM") from the Project would be less than significant. (MND, p. 43-45). However, no effort is made to justify this conclusion with a quantitative health risk assessment ("HRA"). The MND's back-of-the envelope approach to evaluating a Project's health impacts to existing nearby residences is inconsistent with the approach recommended by the California Office of Environmental Health Hazard Assessment ("OEHHA") and the California Air Pollution Control Officers Association ("CAPCOA").

OEHHA guidance makes clear that all short-term projects lasting at least two months be evaluated for cancer risks to nearby sensitive receptors. OEHHA also recommends a health risk assessment of a project's operational emissions for projects that will be in place for more than 6 months. Projects lasting more than 6 months should be evaluated for the duration of the project, and an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident. The Project would last at least 30 years and certainly much longer than six months. The construction phase alone is expected to last over 24 months – more than four time longer than the OEHHA threshold of 6 months.

In order for the MND to be reasonable under CEQA, the MND's assertions regarding the Project's health impacts on nearby residences must be substantiated with a health risk

assessment. Based on all of the guidance available from the expert agencies, a health risk assessment must be prepared for the Project.

D. The MND Fails to Disclose, Analyze, and Mitigate Potential Adverse Impacts of the Project on Indoor Air Quality.

Formaldehyde is a known human carcinogen. Many composite wood products typically used in residential and office building construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in residential and office building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims. Given the prominence of materials with formaldehyde-based resins that will be used in constructing the Project and the residential buildings, there is a significant likelihood that the Project's emissions of formaldehyde to air will result in very significant cancer risks to future residents and workers in the buildings. Even if the materials used within the buildings comply with the Airborne Toxic Control Measures (ATCM) of the California Air Resources Board (CARB), significant emissions of formaldehyde may still occur.

The residential buildings may have significant impacts on air quality and health risks by emitting cancer-causing levels of formaldehyde into the air that may expose workers and residents to cancer risks in excess of SCAQMD's threshold of significance. A 2018 study by Chan et al. (attached as Exhibit B) measured formaldehyde levels in new structures constructed after the 2009 CARB rules went into effect. Even though new buildings conforming to CARB's ATCM had a 30% lower median indoor formaldehyde concentration and cancer risk than buildings built prior to the enactment of the ATCM, the levels of formaldehyde may still pose cancer risks greater than 100 in a million, well above the 10 in one million significance threshold established by the SCAQMD.

Based on published studies, and assuming all the Project's and the residential building materials will be compliant with the California Air Resources Board's formaldehyde airborne toxics control measure, future residents and employees using the Project may be exposed to a cancer risk from formaldehyde greater than the SCAQMD's CEQA significance threshold for airborne cancer risk of 10 per million.

The City has a duty to investigate issues relating to a project's potential environmental impacts. (*See County Sanitation Dist. No. 2 v. County of Kern*, (2005) 127 Cal.App.4th 1544, 1597–98. ["[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts."].) "If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.) Given the lack of study conducted by the City on the health risks posed by emissions of formaldehyde from new residential projects, a fair argument exists that such emissions from the Project may pose significant health risks. As a result, the City must prepare

an EIR which calculates the health risks that the formaldehyde emissions may have on future residents and workers and identifies appropriate mitigation measures.

IV. CONCLUSION

For the foregoing reasons, SAFER urges the City to prepare and circulate an EIR to properly disclose, analyze, and mitigate the Project's significant impacts. Thank you for your attention to these comments. Please include this letter in the record of proceedings for this project.

Sincerely,

Brian Flynn
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