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VIA E-MAIL AND HAND DELIVERY

June 15, 2019

Chairperson Quiroga and Honorable Members of the Planning Commission
c/o Zai AbuBakar, Director of Community Development
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RE: Banana Avenue Warehouse Project (Master Case No. 18-095, Design Review No. 18-027) and the Addendum to the Southwest Industrial Park (SWIP) Specific Plan Final Environmental Impact Report (SCN #2009091089)

Dear Chairperson Quiroga and Honorable Members of the Planning Commission:

I am writing on behalf of the **Supporters Alliance for Environmental Responsibility ("SAFER")** and its members living in and around the City of Fontana ("SAFER") concerning the Banana Avenue Warehouse Project, and the Addendum to the Southwest Industrial Park (SWIP) Specific Plan Final Environmental Impact Report (SCN #2009091089). The City of Fontana has received an application (entitled Banana Avenue Warehouse Project) for the development of a 133,813 square foot warehouse building on a 6.2-acre site, including 126,313 square feet of warehouse space, 7,500 square feet of supporting office space, eighteen (18) truck docking bays, five (5) truck loading spaces, and ninety-two (92) automobile parking spaces located within the Southwest Industrial Park (SWIP) Specific Plan, Slover West Manufacturing District. (SWD) ("Project"). The matter is scheduled to be considered by the Planning Commission on July 16, 2019.

The City of Fontana ("City") is proposing to approve the Project without review under the California Environmental Quality Act ("CEQA"), Pub. Res. Code section 21000, et seq., based on the assertion that the Project is consistent with the 2009 SWIP Specific Plan Final Environmental Impact Report (SCN #2009091089) ("2009 SWIP EIR"), which was certified in

2012. The City contends that under CEQA Guidelines section 15162 and 15164, no further environmental review is required.

PROJECT DESCRIPTION

The Banana Avenue Industrial Warehouse Project proposes the construction of a 133,813 square foot warehouse building on a 6.2 acre site. The project is proposing 126,313 square feet of warehouse space and 7,500 square feet of supporting office space. The warehouse building will have eighteen (18) truck docking bays and five (5) truck loading spaces. The plan proposes ninety-two (92) automobile parking spaces.

The proposed Project site is located within the Slover East Industrial District of the Southwest Industrial Park Specific Plan (SWIP Specific Plan) Area, and is proposed to be located at 10740 Banana Avenue, Fontana, CA 92337. The Assessor Parcel Number is 0236-081-28 on approximately 6.2 acres.

LEGAL STANDARD

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the fair argument standard. Under that standard, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment. (Pub. Res. Code § 21082.2; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1993) 6 Cal. 4th 1112, 1123 (*Laurel Heights II*); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.)

Preparation of an Addendum Under CEQA

The City relies on CEQA Guidelines § 15162 and 15164 to claim that no CEQA review is required. The court of appeal recently stated, “The addendum is the other side of the coin from the supplement to an EIR. This section provides an interpretation with a label and an explanation of the kind of document that does not need additional public review.” “It must be remembered that an addendum is prepared where ‘(2) **Only minor technical changes or additions are necessary to make the EIR under consideration adequate under CEQA; and (3) The changes to the EIR made by the addendum do not raise important new issues about the significant effects on the environment.**’ ([Guideline] 15164, subd. (a).)” (*Save Our Heritage Org. v. City of San Diego* (2018) 28 Cal.App.5th 656, 664–65 [emphasis added].)

Section 15164(a) of the State CEQA Guidelines states that “the lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary, but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.” Pursuant to Section 15162(a) of the State CEQA Guidelines, a subsequent EIR or Negative Declaration is only required when:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
 - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
 - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - (C) Mitigation measures or alternatives previously found not to be feasible would, in fact, be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
 - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

Tiering Under CEQA

CEQA permits agencies to ‘tier’ EIRs, in which general matters and environmental effects are considered in an EIR “prepared for a policy, plan, program or ordinance followed by narrower or site-specific [EIRs] which incorporate by reference the discussion in any prior [EIR] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR].” (Cal. Pub. Res. Code (“PRC”) § 21068.5.) “[T]iering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous [EIRs].” (PRC § 21093.) The initial general policy-oriented EIR is called a programmatic EIR (“PEIR”) and offers the advantage of allowing “the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.” (14 CCR §15168.) CEQA regulations strongly promote tiering of EIRs, stating that “[EIRs] shall be tiered whenever feasible, as determined by the lead agency.” (PRC § 21093.)

“Subsequent activities in the program must be examined in light of the program EIR to determine whether an additional environmental document must be prepared.” (14 CCR § 15168(c).) The first consideration is whether the activity proposed is covered by the PEIR. *Id.* If

a later project is outside the scope of the program, then it is treated as a separate project and the PEIR may not be relied upon in further review. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307.) The second consideration is whether the “later activity would have effects that were not examined in the program EIR.” (14 CCR §§ 15168(c)(1).) A PEIR may only serve “to the extent that it contemplates and adequately analyzes the potential environmental impacts of the project.” (*Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156). If the PEIR does not evaluate the environmental impacts of the project, a tiered EIR must be completed before the project is approved. (*Id.*)

For these inquiries, the “fair argument test” applies. (*Sierra Club*, 6 Cal.App.4th 1307, 1318; *see also Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1164 (“when a prior EIR has been prepared and certified for a program or plan, the question for a court reviewing an agency's decision not to use a tiered EIR for a later project ‘is one of law, i.e., the sufficiency of the evidence to support a fair argument.’”).) Under the fair argument test, a new EIR must be prepared “whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. (*Id.* at 1316 [quotations omitted].) When applying the fair argument test, “deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.” (*Sierra Club*, 6 Cal. App. 4th at 1312.) “[I]f there is substantial evidence in the record that the later project may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, notwithstanding the existence of contrary evidence.” (*Sierra Club*, 6 Cal.App.4th at 1319.)

DISCUSSION

I. CEQA REQUIRES THE CITY TO PREPARE A TIERED EIR FOR THE PROJECT INSTEAD OF AN ADDENDUM

The City has incorrectly applied the CEQA criteria for preparing an addendum when, instead, the City should have applied CEQA’s tiering provisions. The City relies on CEQA Guidelines section 15164, which applies to preparing an addendum to an existing EIR for a project. However, the SWIP EIR was not a project-specific EIR, which the CEQA Guidelines define as an “EIR[which] examines the environmental impacts of a specific development project.” (14 CCR § 15161.) Rather, the SWIP EIR was “a comprehensive policy and regulatory guidance document for the private use and development of all properties within the Specific Plan Update area.” (2011 SWIP DEIR, p. S-2.) As such, the SWIP EIR is a Program EIR, which the CEQA Guidelines define as:

- . . . an EIR which may be prepared on a series of actions that can be characterized as one large project and are related either:
- (1) Geographically,
 - (2) As logical parts in the chain of contemplated actions,
 - (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or

(4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.

(14 CCR § 15168.) Thus, instead of proceeding under the provisions of CEQA Guidelines section 15164, the City should have proceeded under section 15168 provisions for subsequent analysis for a Program EIR rather than an addendum to an existing project-specific EIR.

II. THE ADDENDUM'S CONCLUSIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THERE IS SUBSTANTIAL EVIDENCE OF A FAIR ARGUMENT THAT THE PROJECT WILL HAVE SIGNIFICANT ENVIRONMENTAL IMPACTS.

A. The Project Result in a New Significant Health Risks to Nearby Sensitive Receptors.

The comment of environmental consulting firm SWAPE is attached as Exhibit A. SWAPE's concerns are summarized below.

Neither the SWIP EIR nor the Addendum conducted a health risk assessment (HRA) to evaluate the health risk of diesel particulate matter ("DPM") to nearby sensitive receptors during construction and operation of the Project. As noted by SWAPE, the Addendum concludes that because emissions generated during construction and operation would not exceed the Localized Significance Thresholds established by the South Coast Air Quality Management District, the Project would not substantially affect nearby receptors, thus making the health risk associated with diesel particulate matter (DPM) emissions emitted during construction and operation less than significant. However, the Localized Significance Thresholds ("LST") methodology is applicable only to NO_x, CO, PM10, and PM2.5 emissions and not applicable to DPM. Thus, the SWIP EIR and the Addendum fail to provide a comprehensive analysis of the sensitive receptor impacts that may occur as a result of exposure to substantial air pollutants.

The California Office of Environmental Health Hazard Assessment ("OEHHA") recommends that all short-term projects, such as Project construction, lasting at least two months be evaluated for cancer risks to nearby sensitive receptors and that exposure from projects lasting more than six months should be evaluated for the duration of the project and recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident.

In order to quantify and evaluate the health risk posed by the Project from DPM, SWAPE conducted a screening-level HRA. (SWAPE, pp. 3-6.) Due to the close proximity of residences (only 50 meters from the proposed Project site), SWAPE found that the excess cancer risk posed by the Project would be 71 per million. This far exceeds the South Coast Air Quality Management District ("SCAQMD") significance threshold of 10 in one million. Because the SWIP EIR and the Addendum failed to conduct an HRA, the Addendum fails to provide substantial evidence that the health risk posed by the Project's construction and operation is less-

than-significant. Moreover, because the SWIP EIR never conducted an HRA, the health risk posed by the Project is new information which must be analyzed in an EIR or a Mitigated Negative Declaration rather than an Addendum.

B. The Project Will Have Significant Air Quality Impacts.

SWAPE calculates that air quality emissions from Project construction will exceed CEQA significance thresholds. Although the Addendum includes a CalEEMod analysis, SWAPE has determined that the analysis is inconsistent with the Project description in the Addendum itself. The Addendum states that Project construction will take place over 8 months. However, the CalEEMod analysis assumes construction over 1.22 years. As a result, the CalEEMod improperly underestimates construction phase emissions. (SWAPE, p. 2).

SWAPE corrected the errors in the CalEEMod analysis and determined that the Project will have significant air quality impacts. (SWAPE, p.3). When corrected, site-specific input parameters are used to model emissions, we find that the Project's construction-related VOC emissions exceed the 100 lbs/day thresholds set forth by the South Coast Air Quality Management District (SCAQMD) (see table below).

Maximum Daily Construction Emissions (lbs/day)	
Model	ROG
Addendum	64
SWAPE	106
Percent Increase	65.6%
SCAQMD Thresholds	75
<i>Exceed?</i>	<i>Yes</i>

As demonstrated above, when correct, site-specific input parameters are used to model emissions, construction-related VOC emissions would exceed SCAQMD thresholds. Our modeling demonstrates that emissions will be more significant than is stated in the Addendum. As a result, a DEIR should be prepared that includes an updated air pollution model to adequately estimate the Project's emissions, and additional mitigation should be incorporated to reduce these emissions to the maximum extent possible.

C. The Project Will Have Significant Noise Impacts.

The Project is proposed to be located only 50 meters from a residential community. Acoustical engineer, Derek Watry, of the acoustical engineering consulting firm, Wilson Ihrig, concludes that the Project will have significant noise impacts that must be analyzed and mitigated in a supplemental or tiered EIR. Mr. Watry calculates that the Project will create construction noise far above applicable significance thresholds. His conclusions are summarized below. (Watry, p. 3).

TABLE A CONSTRUCTION NOISE – SUMMARY OF MAXIMUM NOISE LEVEL IMPACTS

Address	Maximum Construction Noise Level	Existing Maximum Ambient Noise Level	Municipal Code Section 30-259 Limit	Significant Noise Impact?
10832 Banana Ave.	68 – 93 dBA	83 dBA (Exceeded by up to 10 dBA)	65 dBA (Exceeded by up to 28 dBA)	Yes
10741 Altura St. 10761 Altura St. 13969 Cameo St.	62 – 87 dBA (Incl atten by soundwall)	79 dBA (Exceeded by up to 8 dBA)	65 dBA (Exceeded by up to 22 dBA)	Yes
10709 Altura St. 10725 Altura St.	66 – 91 dBA (Incl partial atten by wall)	77 dBA (Exceeded by up to 14 dBA)	65 dBA (Exceeded by up to 26 dBA)	Yes

Mr. Watry also concludes that operational noise levels will be significant during both daytime and nighttime operation of the Project. His conclusions are summarized below. (Watry, p. 6).

TABLE C-1 OPERATIONAL NOISE – SUMMARY OF MAXIMUM NOISE LEVEL IMPACTS

Address	Max Level (dBA)	Sound Wall	Municipal Code Section 30-259 Limits			
			Day	Night	Day	Night
10832 Banana Ave.	70 – 75	None	65 dBA	70 dBA	Yes	Yes
13969 Cameo St.	70 – 76	12 ft	65 dBA	70 dBA	Yes	Yes

Mr. Watry concludes that mitigation measures in the Addendum, including a noise wall, will not be sufficient to reduce noise levels to below significance. (Watry, p. 4).

An EIR is required to analyze and mitigate the Project’s significant noise impacts.

D. The SWIP EIR Concluded that the Program Would have Significant Unavoidable Impacts. Therefore, a Tiered EIR is Required to Mitigate Those Impacts.

The SWIP EIR admitted that the program would have significant unavoidable impacts in the areas of

- Aesthetics, Light and Glare (Impact 4.1-1)
- Air Quality and Climate Change (Impacts 4.2-1, 4.2-2 and 4.2-4);

- Noise (Impact 4.7-3);
- Public Services, Utilities and Infrastructure (Impact 4.8-5); and
- Traffic and Circulation (Impact 4.9-1).

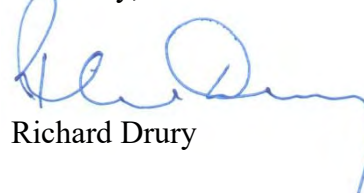
Since the overall program will have significant unavoidable impacts, the City must conduct project-level supplemental EIRs for specific projects proposed within the program area. The supplemental EIRs are required to determine whether mitigation measures exist to reduce the significant unavoidable impacts identified in the SWIP EIR.

In the case of *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 122-125, the court of appeal held that when a “first tier” EIR admits a significant, unavoidable environmental impact, then the agency must prepare second tier EIRs for later phases of the project to ensure that those unmitigated impacts are “mitigated or avoided.” (Id. citing CEQA Guidelines §15152(f)) The court reasoned that the unmitigated impacts were not “adequately addressed” in the first tier EIR since they were not “mitigated or avoided.” (Id.) Thus, significant effects disclosed in first tier EIRs will trigger second tier EIRs unless such effects have been “adequately addressed,” in a way that ensures the effects will be “mitigated or avoided.” (Id.) Such a second tier EIR is required, even if the impact still cannot be fully mitigated and a statement of overriding considerations will be required. The court explained, “The requirement of a statement of overriding considerations is central to CEQA’s role as a public accountability statute; it requires public officials, in approving environmental detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to substantial evidence in support.” (Id. at 124-125) The court specifically rejected a prior version of the CEQA guidelines regarding tiering that would have allowed a statement of overriding considerations for a program-level project to be used for a later specific project within that program. (*Communities for a Better Env’t v. California Res. Agency* (2001) 103 Cal.App.4th 98, 124, disapproved on other grounds by *Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal.4th 1086.) Even though “a prior EIR’s analysis of environmental effects may be subject to being incorporated in a later EIR for a later, more specific project, the responsible public officials must still go on the record and explain specifically why they are approving the later project despite its significant unavoidable impacts.” (Id., pp. 124-25.)

CONCLUSION

For the above and other reasons, the Commission should grant this appeal and direct Planning Staff to prepare and circulate an EIR for the Project for public review.

Sincerely,



Richard Drury