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VIA FAX, EMAIL AND HAND DELIVERY

June 23, 2019

Planning Commission
City of Ontario
Ontario City Hall
303 East B Street
Ontario, CA 91764

Cathy Wahlstrom, Planning Director
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RE: Bridge Acquisitions Warehouse Project (File No. PDEV 18-041, PDEV 18-042; APNs: 0238-221-36 and 0238-221-23) 1155 South Wanamaker Avenue

Honorable Members of the Planning Commission and Director Wahlstrom:

I am writing on behalf of the Supporters Alliance for Environmental Responsibility ("SAFER") and its members living or working in and around the City of Ontario ("SAFER") concerning the Bridge Acquisitions Warehouse Project (File No. PDEV 18-041, PDEV 18-042; APNs: 0238-221-36 and 0238-221-23) 1155 South Wanamaker Avenue, ("Project") and the Addendum to the Addendum to The Ontario Plan (File No. PGPA06-001) Environmental Impact Report (SCH# 2008101140), certified by City Council on January 27, 2010.

The City of Ontario ("City") has received an application for the development of two warehouses on adjacent properties proposed by the Bridge Acquisitions company. The Project proposes to construct one industrial building totaling 90,291 square feet on 4.05 acres of land, located at the northeast corner of Wall Street and Wanamaker Avenue, within the Light Industrial land use district of the Pacific Gate-East Gate Specific Plan; (APN: 0238-221-36). The Project also proposes to construct one industrial building totaling 178,462 square feet on 7.85 acres of land, located at the southeast corner of Wall Street and Wanamaker Avenue, at 1155 South Wanamaker

Avenue, within the Light Industrial land use district of the California Commerce Center Specific Plan; (APN: 0238-221-36). The total proposed construction is over 268,000 square feet. The Project site is currently occupied by the Sandia Amusement Park, and is zoned General Commercial. The Project requires the site to be rezoned as Industrial.

The 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 was analyzed in The Ontario Plan (File No. PGPA06-001) Environmental Impact Report (SCH# 2008101140), certified by City Council on January 27, 2010. ("2010 TOP EIR"). The City contends that under CEQA Guidelines section 15162 and 15164, no further environmental review is required.

An Addendum is not proper for the Project because the Project was not analyzed in the 2010 TOP EIR at all. The 2010 TOP EIR analyzed the Project site for commercial uses, such as the Scandia Fun Center that was on the site. The 2010 TOP EIR did not analyze the Project site for any industrial uses at all. Clearly, a large warehouse of over 268,000 square feet, is dramatically different than a miniature golf course with a batting cage and roller coasters. The proposed Project will generate large amounts of diesel heavy truck traffic, construction emissions, diesel yard equipment such as fork lifts, noise from truck traffic and back-up beepers, and many other impacts that do not exist at a Scandia Fun Center. These impacts must be analyzed and mitigated in an environmental impact report ("EIR").

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. THE PROJECT IS INCONSISTENT WITH THE 2010 TOP EIR, AND THE CITY MAY THEREFORE NOT RELY ON THE 2010 TOP EIR.

Most obviously, the City may not rely on the 2010 TOP EIR because the proposed project is inconsistent with the 2010 TOP EIR. The 2010 TOP EIR analyzed the Project site for commercial uses – such as the Scandia Amusement park. The developer now proposes industrial uses (warehouse) on the site. This was not analyzed at all in the 2010 EIR.

As the California Supreme Court explained in *San Mateo Gardens*, subsequent CEQA review provisions "can apply only if the project has been subject to initial review; they can have no application if the agency has proposed a new project that has not previously been subject to review." *Friends of College of San Mateo Gardens v. San Mateo* (2016) 1 Cal.5th 937, 950 ("*San Mateo Gardens*"). As the Supreme Court explains, "[a] decision to proceed under CEQA's subsequent review provisions must thus necessarily rest on a determination — whether implicit or explicit — that the ***original environmental document*** retains some informational value." *Id*. at 951 (emph. added). Only if the original environmental document retains some informational value despite the proposed changes, changes in circumstances or new substantial information does the agency proceed to decide under CEQA's subsequent review provisions whether such changes or substantial new information will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects. 1 Cal.5th at 952. Reviewing the 2010 TOP EIR, the City cannot reasonably claim that it addresses, *i.e.*, provides some informational value, regarding the potential environmental impacts of the 286,000 square foot industrial development proposed as part of the Project.

The Project includes 286,000 square feet of industrial warehouse development that has never been analyzed in any previous CEQA document. Instead, the 2010 TOP EIR evaluated the environmental impacts of the Scandia Amusement Park, a commercial development. The project considered in the 2010 TOP EIR simply has no relevance to the environmental impact of the proposed industrial warehouse Project.

Since the Project has never undergone CEQA review, it is a new project, and the City must start from the beginning of the CEQA process under section 21151, conduct an initial study, and determine whether there is substantial evidence of a fair argument that the project will have a significant environmental impact. *Friends of College of San Mateo Gardens v. San Mateo*, 1 Cal.5th at 951. The City Council should require CEQA review for the Project, and not approve the Project until CEQA review is completed.

Indeed, the inconsistency with the 2010 General Plan is itself a significant impact requiring analysis under CEQA. Where a local or regional policy of general applicability, such as a general plan, is adopted in order to avoid or mitigate environmental effects, a

conflict with that policy in itself indicates a potentially significant impact on the environment. (*Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.) Any inconsistencies between a proposed project and applicable plans must be discussed in an EIR. (14 CCR § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918*; Friends of the Eel River v. Sonoma County Water* Agency (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).) A Project's inconsistencies with local plans and policies constitute significant impacts under CEQA. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4; see also, *County of El Dorado v. Dept. of Transp*. (2005) 133 Cal.App.4th 1376 (fact that a project may be consistent with a plan, such as an air plan, does not necessarily mean that it does not have significant impacts).) The recent *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358 echoes *Pocket Protectors*. These both apply the fair argument standard to a potential inconsistency with a plan adopted for environmental protection. *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099 says an EIR needs to analyze any topic for which a fair argument of significant impact is raised. Since the proposed Project is inconsistent with the 2010 General Plan, an EIR is required to analyze this inconsistency.

The City attempts to gloss over this glaring inconsistency with the very General Plan EIR that the City now attempts to rely upon, by arguing that the addition of 286,298 square feet of industrial space represents "less than 0.001% increase in industrial space over the 179 million square feet of industrial (business park/industrial) space that is existing an/or planned throughout the City." (Planning Commission Staff Report, p. 3 of 23, Item F-H-3 of 164). First, the 2010 TOP EIR only analyzed 159,998,711 square feet of industrial space. (2010 TOP EIR, p. 3-42). Therefore, if the City has already approved 179 million square feet of industrial development, it is out of compliance with the General Plan, may not approve additional industrial development, and must prepare a general plan update and related EIR. The "propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements." (*Citizens of Goleta Valley v. Bd. of Sups*. (1990) 52 C.3d 553, 570). Furthermore, any project will appear de minimis when compared to all other development in an entire city. As such, CEQA rejects this type of "drop in the bucket" analysis. For example, in *Friends of Oroville v. City of Oroville*, 219 Cal. App. 4th 832, 842 (2013), the Court of Appeal held that the agency failed to adequately analyze a project's cumulative contribution to significant greenhouse gas ("GHG") impacts by concluding, without adequate analysis, that the project's "miniscule" emissions were insignificant in light of the state's cumulative, state-wide GHG emissions, thus "applying a meaningless, relative number to determine insignificant impact."

In short, the City may not rely on the 2010 TOP EIR because the Project is flatly inconsistent with the 2010 TOP EIR.

II. 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 2010 TOP 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 2010 TOP EIR was a General Plan EIR governing zoning across the entire City. As such, the 2010 TOP 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.

It has long been established that a General Plan EIR is not a project-specific EIR and does not eliminate the need to prepare project-specific EIRs for particular projects. (*Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350; *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 149 Cal. App. 4th 683, 698). The General Plan EIR simply does not analyze the impacts of specific projects.

SAFER hereby requests that the City prepare an environmental impact report ("EIR") to analyze the significant environmental impacts of the Project and to propose all feasible mitigation measures and alternatives to reduce those impacts. The City may not rely on the 2010 TOP EIR for several reasons, including but not limited to the following:

1. The 2010 TOP EIR did not analyze this Project. It conducted only very broad program level analysis and did not analyze Project-level impacts. A prior CEQA document may only be used for a later project that is "essentially the same project" as was analyzed in the prior document. *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320; *American Canyon Community*

v. American Canyon, 145 Cal.App.4th 1062. The 2010 EIR did not analyze the Project at all.

2. The 2010 TOP EIR included many mitigation measures that were never implemented, including traffic mitigation measures. Since the City has failed to implement the mitigation measures required by the 2010 EIR, it may not now rely on that document. See, *Katzeff v. Dept. of Forestry* (2010) 181 Cal.App.4th 601, 611, 614; *Lincoln Place Tenants v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1507 n22.

3. The Project will have significant environmental impacts that were not analyzed in the 2010 TOP EIR. For example, the Project will have significant air quality, traffic and noise impacts from diesel trucks and other sources. These impacts must be analyzed under the Office of Environmental Health Hazard Assessment ("OEHHA") guidelines, which have been updated since the 2010 TOP EIR.

4. There are many mitigation measures that are now feasible that were not feasible or did not exist in 2009, when the 2010 TOP EIR was prepared. For example, the Project could offset its air pollution and greenhouse gas emissions in part by installing solar photovoltaic panels, using Tier 4 construction equipment, operating only 2010 or better diesel trucks, using electrified forklifts and related equipment, and many other measures that were not feasible in 2009. For example, Tier 4 construction equipment was not available until 2015, and is not required for the Project. A new EIR is required to analyze these measures. Also, greenhouse gas mitigation measures are now feasible that were not feasible in 2009, such as electric vehicles, electric forklifts, solar panels, and other measures.

5. There are numerous changed circumstances that have occurred since 2010 that require renewed environmental review. For example, traffic in the area is much heavier not than in 2009, when the area was at the height of a recession, population has grown in the area, etc.

III. THE 2010 TOP EIR CONCLUDED THAT THE PROGRAM WOULD HAVE MANY SIGNIFICANT UNAVOIDABLE IMPACTS. THEREFORE A TIERED EIR IS REQUIRED TO MITIGATE THOSE IMPACTS.

The 2010 TOP EIR concluded that the program would have significant unavoidable impacts in the areas of:

- Agricultural Resources;
- Air Quality (including VOC, CO, NOx, PM-10, PM-2.5);
- Cultural Resources;
- Climate Change;
- Noise;
- Traffic;

(2010 TOP Draft EIR, pp. 1-19 through 1-36).

Since the overall program will have significant unavoidable impacts, the City must prepare a project-level supplemental EIR for the proposed Project to determine whether mitigation measures exist to reduce the significant unavoidable impacts identified in the 2010 TOP EIR.

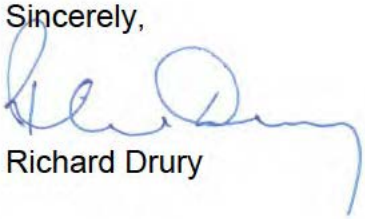
In the case of *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 122-125, the court of appeal held that when a "first tier" EIR admits a significant, unavoidable environmental impact, then the agency must prepare second tier EIRs for later phases of the project 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 City must prepare an EIR to analyze and mitigate the impacts of the Project. The City may not rely on the decade-old 2010 TOP EIR, which did not even analyze the proposed Project.

Sincerely,



Richard Drury

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