L5 (page 1 of 12)

P: (626) 381-9248
F: (626) 389-5414
E: mitch@mitchtsailaw.com

Mitchell M. Tsai
Attorney At Law

155 South El Molino Avenue
Suite 104
Pasadena, California 91101

VIA U.S. MAIL & E-MAIL

October 9, 2019

John Mayer, AICP, Senior Planner
Community Development Department
415 S. Ivy Avenue
Monrovia, CA 91016

Email Delivery to: jmayer@ci.monrovia.ca.us

RE: Comments to the 127 Pomona Specific Plan and Mixed-Use Development Initial Study/Mitigated Negative Declaration (IS/MND)

Dear Mr. Mayer,

On behalf of Southwest Regional Council of Carpenters ("**Commenters**" or "**Southwest Carpenters**"), my Office is submitting these comments on the City of Monrovia's ("**City**" or "**Lead Agency**") Initial Study/Mitigated Negative Declaration ("**IS/MND**") for the 127 Pomona Specific Plan and Mixed-Use Development Project ("**Project**").

The Project proposes a mixed-use development with residential and commercial uses on a 1.83-acre site. The residential component consists of 310 apartment units, 25 of which are affordable units set aside for very-low-income and moderate-income households. The development would be seven stories in height (95 ft maximum) with approximately 347,545 square feet of floor area above grade with two levels of underground parking and one level of at-grade parking. IS/MND, p. 1.

The Project also proposes a parcel map to consolidate 7 parcels into a single 1.83-acre parcel: APNs 8507-002-033, 8507-002-034, 8507-002-035, 8507-002-038, 8507-002-039, 8507-002-907, 8507-002-908. IS/MND, p. 2.

The Southwest Carpenters is a labor union representing 50,000 union carpenters in six states, including in southern California, and has a strong interest in well-ordered land use planning and addressing the environmental impacts of development projects.

L5.1

L5 (page 2 of 12)

Individual members of the Southwest Carpenters live, work, and recreate in the City of Monrovia and surrounding communities and would be directly affected by the Project's environmental impacts. Commenters expressly reserve the right to supplement these comments at or prior to hearings on the Project, and at any later hearings and proceedings related to this Project. Cal. Gov. Code § 65009(b); Cal. Pub. Res. Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

Commenters incorporate by reference all comments raising issues regarding the EIR submitted prior to certification of the EIR for the Project. *Citizens for Clean Energy v City of Woodland* (2014) 225 Cal.App.4th 173, 191 (finding that any party who has objected to the Project's environmental documentation may assert any issue timely raised by other parties). L5.1 Cont.

Moreover, Commenter requests that the Lead Agency provide notice for any and all notices referring or related to the Project issued under the California Environmental Quality Act ("**CEQA**"), Cal Public Resources Code ("**PRC**") § 21000 *et seq*, and the California Planning and Zoning Law ("**Planning and Zoning Law**"), Cal. Gov't Code §§ 65000–65010. California Public Resources Code Sections 21092.2, and 21167(f) and Government Code Section 65092 require agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency's governing body.

I. THE PLANNING COMMISSION SHOULD HAVE AN OPPORTUNITY TO REVIEW THE ENTIRETY OF THE IS/MND WITH ALL PUBLIC COMMENTS PRIOR TO DECIDING TO RECOMMEND PROJECT APPROVAL TO THE CITY COUNCIL

The City's Planning Commission will be holding a hearing on the Project to decide whether to recommend approval of the Project to the City Council on October 9, 2019, which coincides with the last day of the comment period for the IS/MND. As a result, neither the Planning Commission nor the planning department staff will have had opportunities to review and digest <u>all</u> public comments submitted regarding the IS/MND *prior* to the October 9 Planning Commission hearing. L5.2

The public comment period began on September 9, 2019, and ends on October 9, 2019 "at the conclusion of the Planning Commission hearing." September 5, 2019,

L5 (page 3 of 12)

Notice of Intent to Adopt a Mitigated Negative Declaration and Notice of Public Hearing.

One of CEQA's basic purposes is to inform government decision-makers and the public about the potential significant environmental effects of proposed projects (14 Cal Code Regs §15002(a)(1)) and to disclose to the public the reasons for approval of a project that may have significant environmental effects (14 Cal Code Regs §15002(a)(4)).

By not giving the City's planning staff and the Planning Commission adequate time to process and consider all public comments submitted regarding the IS/MND within the comment period, the Planning Commission's decision to recommend approval of the Project will be uninformed and render CEQA's circulation and public comment requirements futile.

Commenter requests that the Planning Commission continue this hearing to consider the Project and the IS/MND until such time it could adequately consider all public comments submitted regarding the IS/MND.

L5.2 Cont.

II. THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

A. Background Concerning the California Environmental Quality Act

CEQA has two basic purposes. First, CEQA is designed to inform decision-makers and the public about the potential, significant environmental effects of a project. 14 California Code of Regulations ("**CCR**" or "**CEQA Guidelines**") § 15002(a)(1). "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR 'protects not only the environment but also informed self-government.' [Citation.]" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. CEQA Guidelines § 15002(a)(2) and (3). *See also, Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta*

L5 (page 4 of 12)

Valley v. Board of Supervisors (1990) 52 Cal.3d 553; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400. The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to "identify ways that environmental damage can be avoided or significantly reduced." CEQA Guidelines § 15002(a)(2). If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns" specified in CEQA section 21081. CEQA Guidelines § 15092(b)(2)(A–B).

B. The City Should Prepare an EIR for the Project

A strong presumption in favor of requiring preparation of an EIR is built into CEQA. This presumption is reflected in what is known as the "fair argument" standard, under which an agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the environment. *Quail Botanical Gardens Found., Inc. v City of Encinitas* (1994) 29 CA4th 1597, 1602; *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988, 1002.

The fair argument test stems from the statutory mandate that an EIR be prepared for any project that "may have a significant effect on the environment." Pub Res C §21151; *No Oil, Inc. v City of Los Angeles* (1974) 13 C3d 68, 75; *Jensen v City of Santa Rosa* (2018) 23 CA5th 877, 884. Under this test, if a proposed project is not exempt and *may* cause a significant effect on the environment, the lead agency *must* prepare an EIR. Pub Res C §§21100(a), 21151; 14 Cal Code Regs §15064(a)(1), (f)(1). An EIR may be dispensed with only if the lead agency finds no substantial evidence in the initial study or elsewhere in the record that the project may have a significant effect on the environment. *Parker Shattuck Neighbors v Berkeley City Council* (2013) 222 CA4th 768, 785. In such a situation, the agency must adopt a negative declaration. Pub Res C §21080(c)(1); 14 Cal Code Regs §§15063(b)(2), 15064(f)(3). L5.3

"Significant effect upon the environment" is defined as "a substantial or potentially substantial adverse change in the environment." Pub Res C §21068; 14 Cal Code Regs §15382. See §13.2. A project "may" have a significant effect on the environment if there is a "reasonable probability" that it will result in a significant impact. *No Oil, Inc. v City of Los Angeles*, 13 C3d at 83 n16; *Sundstrom v County of Mendocino* (1988) 202 CA3d 296, 309. If any aspect of the project may result in a significant impact on the

L5 (page 5 of 12)

environment, an EIR must be prepared even if the overall effect of the project is beneficial. 14 Cal Code Regs §15063(b)(1). See *County Sanitation Dist. No. 2 v County of Kern* (2005) 127 CA4th 1544, 1580.

This standard sets a "low threshold" for the preparation of an EIR. *Consolidated Irrig. Dist. v City of Selma* (2012) 204 CA4th 187, 207; *Nelson v County of Kern* (2010) 190 CA4th 252; *Pocket Protectors v City of Sacramento* (2004) 124 CA4th 903, 928; *Bowman v City of Berkeley* (2004) 122 CA4th 572, 580; *Citizen Action to Serve All Students v Thornley* (1990) 222 CA3d 748, 754; *Sundstrom v County of Mendocino* (1988) 202 CA3d 296, 310. If substantial evidence in the record supports a fair argument that the project may have a significant environmental effect, the lead agency must prepare an EIR even if other substantial evidence before it indicates the project will have no significant effect. See *Jensen v City of Santa Rosa* (2018) 23 CA5th 877, 886; *Clews Land & Livestock v City of San Diego* (2017) 19 CA5th 161, 183; *Stanislaus Audubon Soc'y, Inc. v County of Stanislaus* (1995) 33 CA4th 144, 150; *Brentwood Ass'n for No Drilling, Inc. v City of Los Angeles* (1982) 134 CA3d 491; *Friends of "B" St. v City of Hayward* (1980) 106 CA3d 988. See also 14 Cal Code Regs §15064(f)(1).

L5.3 Cont.

As explained in full below, there is a fair argument that the Project will have a significant effect on the environment. As a result, the "low threshold" for preparation of an EIR has been met and the City must prepare an EIR.

C. CEQA Requires Revision and Recirculation of a Mitigated Negative Declaration When Substantial Changes or New Information Comes to Light

Once a negative declaration has been circulated, it may need to be recirculated for another round of review and comment if it is "substantially revised" after the public notice of the first circulation period has been given. CEQA Guidelines § 15073.5(a).

A substantial revision includes two situations (14 Cal Code Regs §15073.5(b)):

- A new, avoidable significant effect is identified, and to reduce that effect to a level of insignificance, mitigation measures or project revisions must be added.
- The lead agency finds that the mitigation measures or project revisions originally included in the negative declaration will not reduce potentially significant impacts to a level of insignificance, and new mitigation measures or project revisions are required.

L5.4

L5 (page 6 of 12)

New information will require recirculation when it amounts to a substantial revision of the negative declaration, which is defined to mean the identification of new significant environmental impacts or the addition of new mitigation that is required to avoid a significant environmental impact. 14 Cal Code Regs §15073.5(b). If the new information reveals a new significant impact that cannot be mitigated or avoided, then the lead agency must prepare an EIR before approving the project. 14 Cal Code Regs §15073.5(d).

Revisions to a project to mitigate potentially significant environmental effects must be included in the negative declaration that is circulated for public review. Pub Res C §21080(c)(2); 14 Cal Code Regs §§15070(b), 15071(e).

Based on the arguments set forth below, in the alternative, Commenter requests that the City recirculate the IS/MND upon making any revisions.

L5.4 Cont.

D. The IS/MND Fails to Adequately Describe the Project.

It is well-established that "[a]n accurate, stable and finite 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. "A curtailed, enigmatic or unstable project description draws a red herring across the path of public input." *Id.* at p. 198.

1. The IS/MND Fails to Adequately Describe the Project's Eligibility for the Density Bonus, Incentives/Concessions and Waivers

The IS/MND fails to adequately describe the Project's eligibility for Density Bonus Laws. The IS/MND concludes that the Project is eligible for a 20% density bonus based on the Project's inclusion of 13 very-low-income housing units.

Based on the IS/MND, the California Density Bonus Law purports to grant the Project with several benefits. First, the IS/MND claims the Project qualifies for a 20% density bonus, allowing it to include more units over the Project's base density. Second, the IS/MND lists one incentive/concession to allow for the preparation of a specific plan for a mixed-use project in the Western Gateway subarea on a site less than two acres in size. Third, the IS/MND states that the Project will benefit from one waiver of development standard to increase the maximum floor-area ratio (FAR) from 2.5 to 3.8, allowing the Project to be much denser than it would otherwise be allowed. IS/MND, p. 92.

L5.5

L5 (page 7 of 12)

Whether the 20% density bonus amount of 20% and the number of incentives/concessions were properly calculated pursuant to Government Code sections 65915 largely depends on what the base density the Project is permitted to have without any density bonus. However, the IS/MND does not provide the base density – i.e. how many of the 310 total residential units would be the base density and how many are density bonus units. Since the IS/MND does not provide the Project's base density, the public is forced to speculate it. Thus, the IS/MND's description of the Project's eligibility for density bonus is inadequate and misleading.

L5.5 Cont.

E. The IS/MND Fails to Adequately Disclose, Analyze and Mitigate the Project's Significant Noise Impacts

The IS/MND discloses that the Project will have significant construction noise impacts and proposes mitigation measures. However, the IS/MND fails to adequately disclose all potential noise impacts of the Project and as a result, fails to adequately mitigate such impacts to a less than significant level.

1. The IS/MND Fails to Adequately Disclose the Project's Noise Impacts

The IS/MND states that Monrovia Municipal Code (MMC) Chapter 9.44 establishes allowable noise standards for residential uses, indicating that noise levels on residential properties shall not exceed 55 dBA between 7:00 AM and 9:00 PM and 50 dBA between 9:00 PM and 7:00 AM. MMC Chapter 9.44 exempts very short-term increases for "bursts of noise" from the aforementioned noise standards for certain activities including construction or demolition work but only during weekdays, 7:00 AM to 7:00 PM. IS/MND, pp. 98-99.

L5.6

Despite the fact that construction or demolition work outside of weekday hours are not exempted from MMC's noise standards, the IS/MND admits that "some Saturday construction could be expected. On Saturdays, construction activity is not exempted from the City's noise regulations." IS/MND, p. 101.

As a result, in light of the IS/MND's allowance of weekend construction activity, the IS/MND fails to disclose that the Project's foreseeable weekend construction activities will violate MCC Chapter 9.44's allowable noise standards not to exceed 55 dBA during the day. Because the IS/MND states that construction noise "will range between 61 dBA and 81 dBA throughout the construction process," the Project will violate the MMC's noise standards on weekends and the IS/MND fails to disclose such significant impacts. IS/MND, p. 102.

L5 (page 8 of 12)

2. *The IS/MND Improperly Defers the Formulation of Noise Mitigation Measure MM-NOI-3*

The IS/MND fails to adequately mitigate the Project's significant noise impacts by deferring the formulation of Mitigation Measure MM NOI-3.

Section 15126.4(a)(1)(B) of the CEQA Guidelines states "[f]ormulation of mitigation measures shall not be deferred until some future time." While specific details of mitigation measure may be deferred, an agency is required to (1) commit itself to mitigation, (2) adopt specific performance standards the mitigation will achieve, and (3) identify the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure. *See Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 671.

The IS/MND proposes MM NOI-3 to mitigate the Project's construction noise impacts. However, the IS/MND allows the deferral of the formulation of "a construction management plan" to address the construction noise issues. IS/MND, p. 104. In addition, MM NOI-3 fails to provide specific performance standards for the mitigation measure to achieve and for the preparation of the "construction management plan." The IS/MND uses vague phrases including (1) requiring "suitable" noise attenuation devices, (2) requiring the use of a "quieter equipment" as opposed to "noisier equipment" "to the maximum extent feasible," (3) route construction traffic via designated truck routes "to the maximum extent feasible," and (4) prohibit construction-related heavy truck traffic in residential areas "where feasible." IS/MND, p. 104. The use of these vague terms and phrases is the opposite of the specific performance standard that CEQA requires.

As a result, MM NOI-3 fails to provide sufficiently specific performance criteria to determine whether the mitigation measure could actually and effectively mitigate the Project's significant construction noise impacts to a less than significant level, leaving "a fair argument" that the Project will have a significant impact on the environment.

L5.7

F. The IS/MND Fails to Adequately Analyze and Mitigate the Project's HazardsImpacts

The IS/MND discloses that the Project Site contains hazardous materials and the Phase II ESA detected phenol in the soil of the Project Site. IS/MND, p. 84. The IS/MND further admits that evidence of a release is subject to CERCLA. As such,

L5.8

L5 (page 9 of 12)

the IS/MND admits that the Project's potential hazardous materials release impact is significant and seeks to mitigate such significant impacts. *Id.* Commenters are especially concerned about the potential release of phenol contained in the Project Site's soil, which will be disturbed during construction.

Rather than conducting further site investigations and consulting with the California Environmental Protection Agency (CalEPA) *before Project approval*, the IS/MND allows such consultation and notification to CalEPA to happen after Project approval. IS/MND, p. 84. As a result, the IS/MND fails to adequately analyze the extent of the Project's impacts with the potential for release of hazardous materials.

L5.8 Cont.

1. The IS/MND Defers Mitigation of the Project's Hazards Impacts

The IS/MND fails to adequately mitigate the Project's significant hazards impacts by deferring the formulation of Mitigation Measure MM HAZ-1.

Section 15126.4(a)(1)(B) of the CEQA Guidelines states "[f]ormulation of mitigation measures shall not be deferred until some future time." While specific details of mitigation measure may be deferred, an agency is required to (1) commit itself to mitigation, (2) adopt specific performance standards the mitigation will achieve, and (3) identify the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure. *See Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 671.

L5.9

The IS/MND proposes MM HAZ-1 to mitigate the Project's hazards impacts. However, what the IS/MND defers is the adequate determination of site conditions and extent of hazardous materials present at the Project Site prior to project approval. Moreover, the IS/MND allows the deferral of the formulation of "a Site Management Plan" to address the Project's potential release of hazardous materials. IS/MND, p. 84. However, MM HAZ-1 fails to provide specific performance standards for the mitigation measure to achieve and for the preparation of the "Site Management Plan" and does not even require a qualified hazardous materials consultant to review the Phase II ESA. IS/MND, p. 84. As a result, it is impossible to determine whether the mitigation measure MM HAZ-1 could actually and effectively mitigate the Project's significant hazards impacts.

Thus, MM HAZ-1 fails to provide sufficiently specific performance criteria to determine whether the mitigation measure could actually and effectively mitigate the

L5 (page 10 of 12)

Project's significant hazards impacts to a less than significant level, leaving "a fair argument" that the Project will have a significant impact on the environment.

L5.9 Cont.

II. THE PROJECT IS INCONSISTENT WITH THE GENERAL PLAN

The IS/MND provides that the Project site lies within Area PD-12. The IS/MND states that developments in Area PD-12 are required to comply with the general and specific provisions of Area PD-12 Development Guidelines, which is part of the City's General Plan.

One of the PD-12 General Provisions provide that "in order to encourage the inclusion of affordable residential units, deviations in unit size, recreation space and parking based on the Zoning Ordinance can be considered if at least 15 % of the units are designated for moderate-income or 10 % low income or 5 % very low income. Units designated as affordable shall be restricted for a minimum of 55 years." IS/MND, p. 94. However, the IS/MND admits that the Project only designates 4.2% of its units as very-low-income, not 5%. Therefore, the proposed Project is inconsistent with PD-12's General Provisions.

L5.10

PD-12 General Provisions also require that (1) a minimum of two acres is required for a specific plan and (2) the increase in FAR to 2.5:1 is allowed as an incentive to provide underground or structured parking as part of a new development. IS/MND, p. 94-95. As analyzed below, the Project qualifies for one incentive/concession. As a result, the Project is inconsistent with at least one of these two PD-12 General Provisions that cannot be claimed as an incentive/concession.

L5.11

III. THE PROJECT VIOLATES THE DENSITY BONUS LAWS

The Project is a large mixed-use development that proposes 310 residential apartment units, 25 of which will be "affordable" units. However, only 13 of the 25 affordable units will be very-low-income units.

As explained above, the IS/MND fails to adequately describe how the Project qualifies for the following under the Density Bonus Law: (1) a 20% market rate density bonus above the base density, (2) one development incentive/concession and (3) one waiver of development to accommodate the Project. IS/MND, p. 6. Based on the project description, the Project's eligibility for the density bonus along with the incentives and waivers are unclear.

L5.12

A. The IS/MND's Density Bonus Calculations is Misleading

L5 (page 11 of 12)

As stated above, based on the IS/MND, the California Density Bonus Law purports to grant the Project with several benefits. First, the IS/MND claims the Project qualifies for a 20% density bonus, allowing it to include more units over the Project's base density. Second, the IS/MND lists one incentive/concession to allow for the preparation of a specific plan for a mixed-use project in the Western Gateway subarea on a site less than two acres in size. Third, the IS/MND states that the Project will benefit from one waiver of development standard to increase the maximum floor-area ratio (FAR) from 2.5 to 3.8, allowing the Project to be much denser than it would otherwise be allowed. IS/MND, p. 92.

L5.12 Cont.

Whether the 20% density bonus amount was calculated correctly pursuant to Government Code sections 65915(b) and (f) largely depends on what the base density the Project is permitted to have without any density bonus. However, the IS/MND does not provide the base density – i.e. how many of the 310 total residential units would be the base density and how many are density bonus units? Since the IS/MND does not provide the Project's base density, the public is forced to speculate it. Thus, the IS/MND's analysis of the Project's eligibility of density bonus is misleading.

B. <u>The IS/MND Improperly Claims Two Incentives/Concessions Under Density Bonus Law.</u>

Assuming that the Project is eligible for a 20% density bonus based on its dedication of 13 units for very-low-income units. the Project is eligible for only one incentive/concession. Government Code section 65915(d)(2)(A) provides that "the applicant shall receive" "one incentive or concession for projects that include…at least 5 percent for very low-income households…"

However, the IS/MND provides that the Project seeks two (2) incentives/concessions, one of which is requested under the guise of a "waiver of development." One incentive/concession to allow for the preparation of a specific plan for a mixed-use project (with residential above the ground floor) in the Western Gateway subarea on a site less than two acres in size (the Land Use Element requires a minimum site size of two acres). IS/MND, p. 92. Next, the IS/MND claims another incentive/concession as a "waiver of development standard" to increase the maximum floor-area ratio (FAR) from 2.5 to 3.8. *Id.*

L5.13

In fact, in another part of the IS/MND, the IS/MND admits that the increase in FAR is actually a concession rather than a waiver of development under Government Code

L5 (page 12 of 12)

section 65915(e). IS/MND, p. 95 ("The proposed project has a FAR of 3.8. A concession from the 2.5 limit has been requested pursuant to State Density Bonus Law.")

As a result, the IS/MND misapplied the State Density Bonus Law to allow two incentives or concessions rather than the one it qualifies for. In conclusion, the Project as proposed in the IS/MND violates the Density Bonus Law.

L5.13 Cont.

III. CONCLUSION

Commenters request that the City revise and recirculate the Project's environmental impact report to address the aforementioned concerns. If the City has any questions or concerns, feel free to contact my office.

L5.14

Sincerely,

Mitchell M. Tsai
Attorneys for Southwest Regional Council of Carpenters