
III. Lozeau-Drury December 19, 2019 Comments



T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 15C
Oakland, CA 94612

www.lozeaudrury.com
richard@lozeaudrury.com

Via Email and Overnight Delivery

December 9, 2019

Planning Commission
City of San Bernardino
290 North D Street
San Bernardino, CA 92401
c/o Candice Alvarez, Dep. City Clerk
alvarez_ca@sbcity.org

Oliver Mujica, Planning Division Manager
Community & Economic Development
City of San Bernardino
290 North D St
San Bernardino, CA 92401
mujica_ol@sbcity.org

Chantal Power, Associate Planner
Community & Economic Development
City of San Bernardino
290 North D Street
San Bernardino, CA 92401
power_ch@sbcity.org

**Re: Comment on Initial Study/Mitigated Negative Declaration for the
Olympic Holdings Inland Center Warehouse Project**

Honorable Members of the Planning Commission:

I am writing on behalf of the **Supporters Alliance for Environmental Responsibility ("SAFER")** regarding the Initial Study/Mitigated Negative Declaration ("IS/MND") prepared for the Olympic Holdings Inland Center Warehouse Project, including all actions related or referring to the proposed development of a 101,464 square foot industrial warehouse building located on the southeast side of Inland Center Drive, between Riverwalk Drive and South 1st Street (on Assessor's Parcel Numbers 0141-201-02-0000, 0141-201-05-0000, 0141-201-10-0000 and 0141-201-12-0000), in San Bernardino ("Project")

These comments have been prepared with the assistance of wildlife biologist Dr. Shawn Smallwood, Ph.D., and Dr. Paul Rosenfeld, Ph.D. and Matthew Hagemann, P.G., C.Hg., QSD, QSP, from the environmental consulting firm, Soil Water Air Protection Enterprise (SWAPE). Their comments and curriculum vitae are attached as Exhibit A and Exhibit B and are incorporated by reference in their entirety. The City should respond to the expert comments separately.

SAFER requests that the City withdraw the IS/MND and instead prepare an environmental impact report ("EIR") for the Project, as there is substantial evidence that

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the Project will have significant unmitigated impacts on the environment as discussed below. An EIR is required to analyze these and other impacts and to adopt feasible mitigation measures to reduce the impacts to the extent feasible.

PROJECT DESCRIPTION

The Project includes the construction of a warehouse building intended for light industrial uses, as well as associated parking and landscaping improvements. The proposed building will be a total of 101,464 square feet in size, approximately 6,000 square feet of which will be designated for office use. The Project site is located on the southeast side of Inland Center Drive between Riverwalk Drive and South 1st Street, San Bernardino, California 92410. Assessor's Parcel Numbers 0141- 201-02-0000, 0141-201-05-0000, 0141-201-10-0000 and 0141-201-12-0000. There are single-family homes to the southeast of the Project site; commercial uses to the north; commercial uses and single-family homes to the northeast; single-family homes to the east and south; trailer homes to the southwest; and vacant land to the west.

The Project will be required to obtain the following regulatory permits: Clean Water Act (CWA) Section 404 Nationwide Permit (NWP) from the United States Army Corps of Engineers (USACE), Section 401 Water Quality Certification from the Santa Ana Regional Water Quality Control Board (RWQCB), and Section 1602 Lake and Streambed Alteration Agreement (LSAA) from the California Department of Fish and Wildlife (CDFW).

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 Environment 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.) "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 Environment v. Calif. 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, supra*, 124 Cal.App.4th at 1220.) The EIR also functions as a "document of

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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, supra*, 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." (Pub. Resources Code, § 21080(d); see also *Pocket Protectors, supra*, 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 ["CEQA Guidelines"]), only if there is not even a "fair argument" that the project will have a significant environmental effect. (Pub. Resources Code, §§ 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. (CEQA Guidelines, § 15064(f)(1); *Pocket Protectors, supra*, 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, supra*, 124 Cal.App.4th at 928.)

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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*, *supra*, 124 Cal.App.4th at 928 [emphasis in original].)

As a matter of law, "substantial evidence includes . . . expert opinion." (Pub. Resources Code, § 21080(e)(1); CEQA Guidelines, § 15064(f)(5).) CEQA Guidelines demand that where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the environmental effects to be significant and prepare an EIR. (CEQA Guidelines § 15064(f)(5); Pub. Res. Code § 21080(e)(1); *Pocket Protectors*, *supra*, 124 Cal.App.4th at 935.) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." (Pub. Resources Code, § 21068; see also CEQA Guidelines, § 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.) In *Pocket Protectors*, the court explained how expert opinion is considered. The Court limited agencies and courts to weighing the admissibility of the evidence. (*Pocket Protectors*, *supra*, 124 Cal.App.4th at 935.) In the context of reviewing a negative declaration, "neither the lead agency nor a court may 'weigh' conflicting substantial evidence to determine whether an EIR must be prepared in the first instance." (*Id.*) Where a disagreement arises regarding the validity of a negative declaration, the courts require an EIR. As the Court explained, "[I]t is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." (*Id.*)

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DISCUSSION

A. AN EIR IS REQUIRED BECAUSE THE PROJECT WILL MAY HAVE SIGNIFICANT UNMITIGATED ENVIRONMENTAL IMPACTS.

An EIR is required whenever substantial evidence in the entire record before the agency supports a fair argument that a project may have a significant effect on the environment. (*CBE v. SCAQMD*, *supra*, 48 Cal.4th at 319-20; Public Resources Code § 21080(d); *see also*, *Pocket Protectors*, *supra*, 124 Cal.App.4th at 927.) As set forth below, there is a fair argument supported by substantial evidence that the Project may result in significant environmental impacts from the operation of the Project. Therefore, the City is required to prepare an EIR to evaluate the Project's impacts and analyze mitigation measures needed to reduce such impacts to a less than significant level.

1. The Project Will Have Significant Unmitigated Biological Impacts.

Wildlife biologist, Dr. Shawn Smallwood, Ph.D., visited the Project site on December 1, 2019. Dr. Smallwood personally identified and photographed several special status species on the Project site, including Red-tailed hawk, Merlin, California gull, Great-horned owl. (Exhibit A, p.2). Of particular note, the Initial Study/Mitigated Negative Declaration (IS/MND) concluded that the Merlin was not likely to occur on the Project site, yet Dr. Smallwood identified and photographed this species on the Project site. (Id. p. 3). Dr. Smallwood further concludes that a biological survey conducted on Aug. 8, 2018 identified California ground squirrels, and as a result, there is a possibility of borrowing owl use of the site. (Id. p. 5).

Dr. Smallwood concludes that "significant impacts would occur if the project destroyed any birds or bird nests protected under California Fish and Game Code," and "the project could cause significant impacts to several species of bats." He concludes that "Detection surveys should be performed for nesting birds and for bats. An EIR should be prepared to address potential impact on bats." (Id. p. 5). Dr. Smallwood concludes that there is a high likelihood of the occurrence of 47 special status species on the Project site.

Dr. Smallwood concludes that the Project is likely to have an adverse impact on wildlife movement. Dr. Smallwood states:

A site such as the proposed project site is critically important for wildlife movement because it composes an increasingly diminishing patch of open space within a growing expanse of anthropogenic uses, forcing more volant wildlife to use the site as stopover and staging habitat during migration, dispersal, and home range patrol (Warnock 2010, Taylor et al. 2011, Runge et al. 2014). The project would cut wildlife off from stopover and staging habitat, forcing volant wildlife to travel even farther between remaining stopover habitat patches. The

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project would therefore interfere with wildlife movement in the region. An EIR needs to be prepared to address the project's impacts on wildlife movement in the region. (Id. p. 9).

Dr. Smallwood further concludes that traffic generated by the Project may have an adverse impact on wildlife fatalities. He states, "there is at least a fair argument that the project may have adverse impacts on special status species due to traffic-related wildlife fatalities. These impacts should be analyzed in an EIR, and mitigation measures should be proposed." (Id. p. 10).

Finally, Dr. Smallwood concludes that the IS/MND's mitigation measures are not sufficient to reduce the Project's impacts to less than significant. (Id. p. 11). Dr. Smallwood recommends additional mitigation measures that should be considered in an EIR. (Id. p. 12). An EIR must analyze these measures and impose the measures unless there is substantive evidence that the measures are infeasible. *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 368.

The IS/MND relies on improper deferred mitigation to mitigated significant impacts. For example, BIO-2 states that if roosting bats are found on the Project site, "CDFW shall be contacted about how to proceed." (IS/MND, p. IS 34). The Court rejected nearly identical deferred mitigation in the case of *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1396 (1995). In *Gentry*, the MND contained a mitigation measure for potential impacts to Kangaroo Rats that required the developer to obtain a biological report and comply with its recommendations. The court explained that this was inadequate since the mitigation measures must be set forth in the CEQA document so that the public can review and comment on their adequacy.

CEQA does not allow a lead agency to defer development of mitigation measures until after project approval and after approval of the CEQA document. Specific mitigation measures must be set forth in the CEQA document so that the public can analyze whether those measures will be sufficient to reduce Project impacts to below significance. "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.) "[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.) A lead agency's adoption of an EIR's proposed mitigation measure for a significant environmental effect that merely states a "generalized goal" to mitigate a significant effect without committing to any specific criteria or standard of performance violates CEQA by improperly deferring the

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formulation and adoption of enforceable mitigation measures. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670; *Communities, supra*, 184 Cal.App.4th at p. 93 ["EIR merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a handful of cursorily described mitigation measures for future consideration that might serve to mitigate the project's significant environmental effects."]).

2. The Project Will Have Significant Unmitigated Traffic Impacts.

The IS/MDN admits that the Project will have significant traffic impacts. The IS concludes that the Project will degrade traffic flow at Scenic Drive/Inland Center Drive to LOS F, which is a significant impact. (IS 95). The IS proposes mitigation measures that allegedly will reduce this impact to less than significant, however, these measures are inadequate under CEQA. The IS proposes that the developer will make "fair share contributions" to TRA-2, towards restriping the southbound off-ramp approach from one left-turn lane, one shared left-turn/through lane and one shared through/right-turn lane to consist of one shared left-turn/through lane, one shared through/right-turn lane and one right-turn lane. Mitigation Measure TRA-3 requires the applicant to make a fair share contribution towards restriping the northbound off-ramp approach from one left-turn lane, one shared through/right-turn lane, and one right-turn lane to consist of one left-turn lane, one shared left-turn/through lane, and right-turn lane. With implementation of Mitigation Measures TRA-2 and TRA-3, the IS concludes that cumulative impacts to these intersections would be reduced to less than significant.

However, there is no assurance that these measures will actually be implemented. Mitigation fees are not adequate mitigation unless the lead agency can show that the fees will fund a specific mitigation plan that will actually be implemented in its entirety. *Napa Citizens for Honest Gov. v. Bd. Of Supervisors* (2001) 91 Cal.App.4th 342 (no evidence that impacts will be mitigated simply by paying a fee); *Anderson First Coal. v. City of Anderson* (2005) 130 Ca.App.4th 1173 (traffic mitigation fee is inadequate because it does not ensure that mitigation measure will actually be implemented). Since there is no assurance that the mitigation measures will actually be implemented, the impacts must be considered significant and an EIR must be prepared.

3. The Project May Have Significant Hazardous Material Impacts.

There is a fair argument that the Project may have significant hazardous materials impacts related to disturbing potentially contaminated soil. SWAPE notes that no Phase I Environmental Site Assessment (ESA) has been conducted for the Project. "Phase I ESAs are commonly included in CEQA documentation to identify hazardous waste issues that may pose a risk to the public, workers, or the environment, and which may require further investigation, including environmental sampling and cleanup." (Exhibit B, p. 2). In the absence of a Phase I ESA, it cannot be determined whether the soil at the Project sits is contaminated.

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CEQA requires the agency to describe the "environmental setting" of the Project. CEQA Guidelines §15063(d)(2); *Mejia v. City of Los Angeles*, 130 Cal. App. 4th 322 (2005). The "environmental setting" is defined as "the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." Guidelines, § 15360; see § 21060.5; *Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal. App. 4th 1170, 1192 (2005). By failing to conduct a Phase I ESA, the document fails to adequately describe the environmental setting.

"[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; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal. App. 4th 1544.

The City should require preparation of a Phase I ESA, and disclose any soil contamination on the Project site. By failing to prepare a Phase I ESA, the City has enlarged the scope of the fair argument.

4. The Project May Have Significant Air Quality Impacts.

SWAPE points out several errors in the IS/MND's air quality analysis. For example, the IS/MND assumes that only 20% of total vehicle trips generated by the Project will be truck trips. However, the South Coast Air Quality Management District ("SCAQMD") "recommends that lead agencies conservatively assume that an average of 40% of total trips are truck trips $[(0.48 \times 10 + 0.2 \times 4) / (10 + 4) = 0.4]$."¹ (SWAPE, pp. 3-4). As a result, the IS/MND underestimates truck traffic from the Project by approximately half.

SWAPE concludes that the underestimation of truck traffic results in an underestimation of Project emissions in the CalEEMod air model relied upon by the IS/MND. SWAPE points out other errors in the CalEEMod, such as the changing of the CalEEMod reduction in PM-10 and PM-2.5 emissions due to mitigation from 61% to 67%. All of these errors result in an underestimation of airborne Project impacts.

5. The Project Will Have Significant Airborne Cancer Risk Impacts.

¹ "Appendix E Technical Source Documentation." CalEEMod User's Guide, July 2013, available at: <http://www.aqmd.gov/docs/default-source/ceqa/handbook/high-cube-warehouse-trip-rate-study-for-air-quality-analysis/high-cube-resource-calmod-appendix-e.pdf?sfvrsn=2>, pp. 15

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SWAPE concludes that the Project may have significant cancer risks from airborne pollutants. The IS/MND concludes that the Project will create an airborne cancer risk of 8.89 per million (IS p. 28), which is only slightly below the SCAQMD's CEQA significance threshold of 10 per million.

However, SWAPE points out that there are several errors on this IS/MND's analysis. First, as discussed above, the IS/MND underestimates Project traffic by approximately half. Second, the IS/MND calculated diesel emissions only from trucks, ignoring emissions from on-road mobile vehicle traffic, fugitive dust associated with roads, architectural coating activities, off-road equipment used during operation, landscaping equipment, emergency generators, fire pumps, process boilers, consumer products, parking lot degreasers, fertilizers/pesticides, cleaning supplies, electricity usage in buildings, electricity usage from lighting in parking lots and lighting, water usage, and solid waste disposal. By only conducting an HRA for the Project's operational diesel truck traffic, the model underestimates the Project's operational emissions and excess cancer risk to nearby sensitive receptors. (SWAPE, p. 7). SWAPE also points out that the IS/MND's health risk assessment (HRA) fails to comply with the most recent guidance from the California Office of Environmental Health Hazard Assessment (OEHHA). (Id.)

Correcting for these errors, SWAPE calculates, "The excess cancer risk over the course of a residential lifetime (30 years) at the nearest sensitive receptor is approximately **260 in one million.**" (SWAPE, p. 11 (emphasis added)). This far exceeds the SCAQMD CEQA significance threshold of 10 per million. An EIR is required to analyze this impact and propose feasible mitigation measures to reduce the Project's health risks.

6. The Project Will Have Significant Greenhouse Gas Impacts.

SWAPE concludes that the Project will have significant greenhouse gas (GHG) impacts. SWAPE concludes that since the Project includes office as well as industrial uses, the use of the SCAQMD's GHG CEQA significance threshold of 10,000 metric tons per year ("TPY") is improper. Instead, the proper threshold is 3,000 TPY and 3.0 service population efficiency. SWAPE calculates that total Project GHG emissions will be 2950 TPY, just slightly below the 3000 TPY threshold. However, the service population efficiency is 29.50 TPY – which is far above the 3.0 threshold. As a result, SWAPE concludes that the Project will have significant GHG impacts. (SWAPE p. 16).

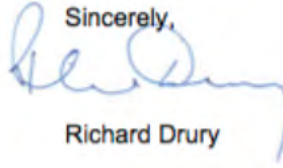
SWAPE suggests numerous feasible GHG mitigation measures that have been implemented on other projects. Many of these measures will reduce not only GHG emissions, but also emissions of criteria pollutants and emissions of cancer-causing pollutants. An EIR should be prepared to analyze these mitigation measures.

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CONCLUSION

For the foregoing reasons, the IS/MND for the Project should be withdrawn, an EIR should be prepared and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering our comments.

Sincerely,



Richard Drury