



T 510.836.4200  
F 510.836.4205

1939 Harrison Street, Ste. 150  
Oakland, CA 94612

www.lozeaudrury.com  
paige@lozeaudrury.com

BY E-MAIL

September 28, 2020

Michelle Lieberman, Chairperson  
Kimberly Keys, Chairperson Pro-  
Tempore

John Armstrong, Commissioner  
Natalie Meeks, Commissioner  
Rosa Mulleady, Commissioner  
Dave Vadodaria, Commissioner  
Steve White, Commissioner  
City of Anaheim Planning Commission  
200 S Anaheim Boulevard, Suite 162  
Anaheim, CA 92805  
Email: [planningcommission@anaheim.net](mailto:planningcommission@anaheim.net)

Scott Koehm, Project Planner  
[skoehm@anaheim.net](mailto:skoehm@anaheim.net)

Re: Comment on the Initial Study/Mitigated Negative Declaration for The  
Invitation Project; DEV2019-00087; RCL2019-00324; CUP2019-06040

Dear Honorable Members of the City of Anaheim Planning Commission and Mr. Koehm:

I am writing on behalf of **Supporters' Alliance for Environmental Responsibility** and its members living in and around the City of Anaheim ("SAFER"). These comments support SAFER's appeal of the Initial Study/Mitigated Negative Declaration ("IS/MND") for The Invitation Project, a multi-family rental residential development proposed for a 4.49-acre lot area located at 1122 North Anaheim Boulevard in the City of Anaheim, and the related project approvals (the "Project").

SAFER previously submitted comments to the City of Anaheim ("City") pointing out that the Project may have significant unmitigated environmental impacts and that the IS/MND fails to impose all feasible mitigation measures to address these impacts. See Certified Industrial Hygienist Francis Offermann's comments dated August 10, 2020, and environmental consulting firm Soil/Water/Air Protection Enterprise's ("SWAPE") comments dated August 19, 2020.

After reviewing the Project, IS/MND, and the City's responses to our comments, a "fair argument" remains that the Project may have unmitigated adverse environmental impacts. Therefore, pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, et seq., the City must prepare an environmental impact report ("EIR") for the Project.

## I. PROJECT DESCRIPTION

The Project proposes to develop a multi-family rental residential project on a 4.49-acre site consisting: 1) 269 for-rent multi-family dwelling units; 2) wrap-style building with four levels of residential units and common building areas totaling 302,011 square feet ("sq. ft."); and 3) six levels of parking structure area totaling 226,545 sq. ft.. The Project would have a density of 60 dwelling units per acre (du/ac), and provide 49 studio units, 119 one-bedroom units, and 101 two-bedroom units ranging from 594 square feet to 1,144 square feet with a net rentable space of 230,103 sq. ft. The Project also involves demolishing the existing tow yard facility – totaling 16,750 sq. ft. of building space in four buildings, a carport, and associated surface asphalt paving.

## II. LEGAL STANDARD

As the California Supreme Court has held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320 (*CBE v. SCAQMD*) (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505). "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." Pub. Res. Code ("PRC") § 21068; see also 14 CCR § 15382. An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." *No Oil, Inc.*, 13 Cal.3d at 83. "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Communities for a Better Env't v. Cal. Res. 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 (*Bakersfield Citizens*); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927. The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." *Bakersfield Citizens*, 124 Cal.App.4th at 1220. The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." *Laurel Heights Improvements Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392. The EIR process "protects not only the environment but also informed self-government."

*Pocket Protectors*, 124 Cal.App.4th at 927.

An EIR is required if “there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.” PRC § 21080(d); see also *Pocket Protectors*, 124 Cal.App.4th at 927. In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 CCR § 15371), only if there is not even a “fair argument” that the project will have a significant environmental effect. PRC, §§ 21100, 21064. Since “[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process,” by allowing the agency “to dispense with the duty [to prepare an EIR],” negative declarations are allowed only in cases where “the proposed project will not affect the environment at all.” *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated negative declaration is proper *only* if the project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and . . . there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” PRC §§ 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. PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Res. v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–05.

Under the “fair argument” standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency’s decision. 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-51; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602. The “fair argument” standard creates a “low threshold” favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors*, 124 Cal.App.4th at 928.

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

This ‘fair argument’ standard is very different from the standard normally followed by public agencies in making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better

argument concerning the likelihood or extent of a potential environmental impact. The lead agency's decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

Kostka & Zishcke, *Practice Under CEQA*, §6.29, pp. 273-274. The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with a *preference for resolving doubts in favor of environmental review.*" *Pocket Protectors*, 124 Cal.App.4th at 928 (emphasis in original).

CEQA requires that an environmental document include a description of the project's environmental setting or "baseline." CEQA Guidelines § 15063(d)(2). The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *CBE v. SCAQMD*, 48 Cal.4th at 321. CEQA Guidelines section 15125(a) states, in pertinent part, that a lead agency's environmental review under CEQA:

...must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time [environmental analysis] is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant.

See *Save Our Peninsula Committee v. County of Monterey* (2001) 87 Cal.App.4th 99, 124–25 ("*Save Our Peninsula*").) As the court of appeal has explained, "the impacts of the project must be measured against the 'real conditions on the ground,'" and not against hypothetical permitted levels. *Id.* at 121–23.

### III. DISCUSSION

#### A. **Substantial Evidence Exists to Support a Fair Argument that the Project Will Have a Significant Health Risk Impact from the Project's Indoor Air Quality.**

SAFER previously submitted comments on the Project's potential significant health impacts on future residents from formaldehyde emissions that will be emitted by finishing materials used to construct interiors of the residential as well as the reasonably foreseeable emissions of formaldehyde from furniture and other materials that will be brought into the residences and office buildings. See Indoor Environmental Engineering Comment dated August 10, 2020 ("August 10 Offermann Comment").

SAFER's concerns regarding health risks posed by the Project's formaldehyde emissions are based on the expert analysis and opinions of industrial hygienist and engineer Francis Offermann, PE CIH. Formaldehyde is a potent carcinogen and toxic air contaminant ("TAC"). Mr. Offermann's comments identified a significant health risk posed by the Project's emissions of formaldehyde from composite wood products typically used in residential building construction containing formaldehyde-based glues which off-gas formaldehyde over a very long time period. The formaldehyde emissions are from composite wood products manufactured with ureaformaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims. *Id.*, p. 3. In his August 10 comments, Mr. Offermann concluded that it is likely that the Project will expose future residents of the Project to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. *Id.*, p. 4. Mr. Offermann calculated that the residential exposure represents a cancer risk of 112 per million, assuming all materials are compliant with the California Air Resources Board's ("CARB") formaldehyde airborne toxics control measure ("ATCM"). *Id.*, p. 4. This is more than 11 times SCAQMD's CEQA significance threshold for airborne cancer risk of 10 per million. *Id.*

Despite the City's duty to investigate issues relating to a project's potential environmental impacts, the City has, thus far, attempted to deny the indoor air quality analysis and refuse to consider with any informed expertise the likely impacts of indoor formaldehyde emissions posed by the Project to future residents. See *County Sanitation Dist. No. 2 v. County of Kern*, (2005) 127 Cal.App.4th 1544, 1597–98, ("[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts."). Rather than objectively study this serious health threat, staff denies Mr. Offermann's expert analysis and the 2019 Chan study he cites without itself bringing any expertise to bear on the Project's formaldehyde emissions. See City's September 28, 2020 Staff Report p. 2-39.

Instead of analyzing the Project's formaldehyde emissions, the City concludes that the Project will comply with the California Green Building Standards Code (CALGreen), which requires that all composite wood products used on the interior of a building to meet CARB ATCM for composite wood, and therefore, the Project will not have significant indoor air quality impacts. *Id.* However, this response ignores Mr. Offermann's expert analysis and the Chan study. The Chan study analyzed the indoor concentrations of formaldehyde for homes built between 2011 and 2015, of which most of the homes in the study were constructed with materials that complied with CARB's ATCM Phase 2 compliant materials. The Chan study showed that while these buildings had a lower median formaldehyde concentration and cancer risk, the median lifetime cancer risk for homes built with CARB Phase 2 compliant composite wood products still greatly exceeded the OEHHA 10 in a million cancer risk threshold. Mr. Offermann relied in part on the indoor formaldehyde concentrations determined in the Chan study to conclude that the Project will have similar indoor concentrations of formaldehyde as observed in the Chan study and exceed the CEQA significance threshold for airborne cancer risk. Mr. Offermann's expert analysis and calculations of the Project's CARB compliant building

materials finding the Project will have significant indoor air quality impacts is substantial evidence of a fair argument that the Project will have a significant impact and the City is required to analyze and mitigate this impact in an EIR.

The City also states that impacts on future residents of the Project are not an impact cognizable under CEQA. See City's September 28, 2020 Staff Report p. 2-39. This is based on an erroneous reading of *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("CBIA"). The failure to address the Project's indoor air quality impacts is contrary to the California Supreme Court's decision in *CBIA*. At issue in *CBIA* was whether the Air District could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of adjacent environmental conditions on a project. The Supreme Court held that CEQA does not generally require lead agencies to consider the environment's effects on a project. *CBIA*, 62 Cal.4th at 800-01. However, to the extent a project may exacerbate existing adverse environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id.* at 801 ("CEQA calls upon an agency to evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present"). In so holding, the Court expressly held that CEQA's statutory language requires lead agencies to disclose and analyze "impacts on **a project's users or residents** that arise **from the project's effects** on the environment." *Id.* at 800 (emphasis added). Here, the carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition – they are created by the Project. Therefore, these impacts must be analyzed in an EIR.

Because Mr. Offermann's expert review is substantial evidence of a fair argument of a significant environmental impact to future users of the project, an EIR must be prepared to disclose and mitigate those impacts.

#### IV. CONCLUSION

In light of the above comments, the City must prepare an EIR for the Project and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,



Paige Fennie  
LOZEAU DRURY LLP