T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 150
Oakland, CA 94612

www.lozeaudrury.com
brian@lozeaudrury.com

VIA EMAIL ONLY

April 28, 2020

Planning Commission
c/o Charles Mercier, Principal Planner
Planning Development
City of Ontario
303 East "B" Street
Ontario, CA 91764
CMercier@ontarioca.gov

Planning Commission
c/o Cathy Wahlstrom, Planning Director
Planning Development
City of Ontario
303 East "B" Street
Ontario, CA 91764
cwahlstrom@ontarioca.gov

Sheila Mautz, City Clerk
City Clerk/Records Management
Department
City of Ontario
303 East B Street
Ontario, CA 91764
recordsmanagement@ontarioca.gov

Re: Toyota Ontario Business Park Specific Plan Amendment (PSPA19-004); PLANNING COMMISSION AGENDA ITEM F (April 28, 2020)

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 concerning the Toyota Ontario Business Park Specific Plan Amendment (PSPA19-004) and the Addendum to The Ontario Plan (File No. PGPA06-001) Environmental Impact Report (SCH# 2008101140) ("TOP EIR"), certified by City Council on January 27, 2010.

The City of Ontario ("City") has received an application (PSPA19-004) from MIG, Inc. to amend the Toyota Ontario Business Park Specific Plan to revise the current land use district covering Planning Area 1, from Office/Research & Development (Office/R&D) to Industrial Mixed Use, allowing for both Office/R&D and warehouse/distribution/manufacturing land uses on the site. Planning Area 1 is approximately 14.4 acres in size and is located at the northwest corner of the Specific Plan area. The City has received another application (PDEV19-042) from MIG, Inc. to construct two industrial buildings totaling 169,573 square feet in Planning Area 1 in the northwest corner of the Specific Plan area.

Rather than conducting the whole of the Project, including the development of the two industrial buildings, the City has conducted environmental review by preparing an Addendum to the 2010 TOP EIR. The Addendum makes no reference to the proposed two building industrial development for the site nor does it make reference to the environmental impact report ("EIR") certified specifically for the Toyota Ontario Business Park in 1993. By proceeding in this manner, the City has violated CEQA's prohibition against piecemealing and has improperly applied the addendum provisions of CEQA Guidelines 15164. As such, the Planning Commission should refrain from recommending approval of the Addendum until the deficiencies described below are remedied.

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) ("*Laurel Heights II*") 6 Cal.4th 1112, 1123; *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.)

CEQA's Prohibition Against Piecemealing

The courts have repeatedly held that "an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient [CEQA document]." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) Thus, CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones -- each with a minimal potential impact on the environment - which cumulatively may have disastrous consequences." (*Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283-84; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452.) Before undertaking a project, the lead agency must assess the environmental impacts of all reasonably foreseeable phases of a project and a public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences. As the Court of Appeal stated:

> The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, **covering the entire project, from start to finish**. . . the purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.

(*Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 271 [emphasis added]). Similarly, an initial study must consider the "whole of an action." (14 Cal. Code Regs § 15378(a).) That means:

> [T]he environmental review accompanying the first discretionary approval must evaluate the impacts of the ultimate development authorized by that approval. … Even though further discretionary approvals may be required before development can occur, the agency's environmental review must extend to the development envisioned by the initial approvals. It is irrelevant that the development may not receive all necessary entitlements or may not be built. **Piecemeal environmental review that ignores the environmental impacts of the end result will not be permitted.**

(Kostka et al., Practice Under the California Environmental Quality Act, § 6.52, p. 298 [emphasis added].)

<u>Preparation of an Addendum Under CEQA</u>

The City relies on CEQA Guidelines §§ 15162 and 15164 to claim that no CEQA review is required. The court of appeal recently stated, "[t]he 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." (*Save Our Heritage Org. v. City of San Diego* (2018) 28 Cal.App.5th 656, 665.) "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.**' (*Id.* [quoting *Fund for Envtl. Def. v. County of Orange* (1988) 204 Cal.App.3d 1538, 1553, [quoting [Guideline] § 15164(a)]] [emphasis added].)

The key point is that an addendum is only allowed when an EIR has already been prepared for a particular project, and minor modifications are made to that project. (*Friends of Coll. of San Mateo Gardens v. San Mateo County Cmty. Coll. Dist. ("San Mateo Gardens")* (2016) 1 Cal.5th 937, 960.) The general plan is not the same project as the Toyota Ontario Business Park Specific Plan, so the addendum provisions do not even apply. If a later project is outside the scope of the program, then it is treated as a separate project and the plan EIR may not be relied upon in further review. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307.)

Section 15164(a) of the State CEQA Guidelines states that "[t]he 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." (14 CCR § 15164(a).) Pursuant to Section 15162(a) of the State CEQA Guidelines, **"[w]hen an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for *that project*"** unless the agency determines one or more of the following exists:

(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.

(14 CCR § 15162(a) [emphasis added].)

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]." (*Id.* § 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(a).) CEQA regulations strongly promote tiering of EIRs, stating that "[EIRs] shall be tiered whenever feasible, as determined by the lead agency." (PRC § 21093.)

"Later 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.* § 15168(c)(2).) 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. (*See Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320–21.) 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, 1171 [quoting *Citizens for Responsible Equitable Envtl. Dev. v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 615].) If the PEIR does not evaluate the environmental impacts of the project, a tiered EIR must be completed before the project is approved. (*Id.* at 1184.)

For these inquiries, the "fair argument test" applies. (*Sierra Club*, 6 Cal.App.4th at 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.'" [quoting *Sierra Club*, 6 Cal.App.4th at 1318]).) 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. (*Sierra Club*, 6 Cal.App.4th at 1316 [quotations and citations 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." (*Id.* at 1318.) "[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." (*Id.* at 1319.)

DISCUSSION

I. THE CITY HAS IMPROPERLY PIECEMEALED THIS PROJECT BY NOT ANALYZING PDEV19-042 IN CONJUNCTION WITH PSPA19-004.

CEQA requires that the City analyze "the entire project, from start to finish." (*Natural Resources Defense Council, supra*, 103 Cal.App.4th at 271.) Therefore, it was inappropriate for the City to prepare an addendum that makes no mention of the specific 169,573 square feet industrial building development for the site proposed by PDEV19-042. Indeed, both applications were even received by the City on the same day. The specific development envisioned for Planning Area 1 of the Toyota Ontario Business Park is not some abstract concept. In order to ensure that the environmental impacts are fully considered and that the public has been adequately informed of the true scope of the Project, CEQA prohibits the City from reviewing PSPA19-004 in isolation from PDEV19-042.

Prior to approving any CEQA document for PSPA19-004, the City must ensure that the CEQA document describes, discloses, and analyzes the specific development proposed by PDEV19-042 for the land use designation changes of PSPA19-004. No CEQA document—whether an EIR, negative declaration, or addendum—is appropriate here unless the specific development proposed by PDEV19-042 is considered in the City's analysis of PSPA19-004.

II. THE CITY IS REQUIRED TO PROCEED UNDER CEQA'S TIERING PROVISIONS.

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. Furthermore, the City previously prepared an EIR for the Toyota Ontario Business Park Specific Plan in 1993 ("1993 Toyota Specific Plan EIR") (SCH No. 1993012066). In effect, the 1993 Toyota Specific Plan EIR serves as the program EIR for the specific plan area. As such, subsequent projects proposed for the specific plan area must be analyzed under the tiering provisions of CEQA Guidelines section 15168.

The Agenda for the Planning Commission's April 28, 2020 hearing could not be any clearer: the Project under consideration is "an amendment to the 95.35-acre Toyota Ontario Business Park." The City cannot ignore that the Toyota Ontario Business Park underwent CEQA review in the 1993 Toyota Specific Plan EIR and that PSPA19-004 in conjunction with PDEV19-042 now propose the development of 169,573 square feet of industrial buildings not considered 1993 Toyota Specific Plan EIR. Furthermore, the City cannot ignore that PSPA19-004 and PDEV19-042 are more than a "minor technical change or addition" allowing for the preparation of an addendum. Indeed, PSPA19-004 and PDEV19-042 propose a land use and industrial development not contemplated in the 1993 Toyota Specific Plan EIR.

The proper procedure in this context is to proceed under the tiering provisions of CEQA Guidelines section 15168 to analyze the land use change and proposed industrial development in comparison to the environmental analysis of the 1993 Toyota Specific Plan EIR—NOT the 2010 TOP EIR. Under this analysis, the issue is whether the activity proposed industrial development is covered by the 1993 Toyota Specific Plan EIR. (Guidelines § 15168(c)(2).) If the proposed industrial development is outside the scope of the 1993 Toyota Specific Plan EIR, then it is a separate project and the 1993 Toyota Specific Plan EIR may not be relied upon in further review. (*See Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320–21.) The City must also analyze whether the proposed industrial activity would have effects that were not examined in the 1993 Toyota Specific Plan EIR—not the 2010 TOP EIR. (Guidelines § 15168(c)(1).) Until the City compares the proposed industrial development to the 1993 Toyota Specific Plan EIR, the Planning Commission must refrain from recommending approval of the Project.

III. THE CITY IMPROPERLY PREPARED AN ADDENDUM TO THE 2010 TOP EIR INSTEAD OF THE 1993 TOYOTA SPECIFIC PLAN EIR.

Even if an Addendum were proper in this situation (and SAFER contends that it is not), the City has prepared an addendum to the wrong project. CEQA Guidelines section 15164 requires agencies to prepare an addendum to an EIR or negative declaration if none of the conditions in Guideline section 15162 have occurred. (Guidelines § 15164(a).) However, CEQA Guidelines section 15162 only applies if an EIR or negative declaration has been adopted for a

project, allowing an agency to avoid preparing a "subsequent EIR . . . for *that project*" unless one or more of the listed conditions apply. (*Id.* [emphasis added].)

Here, the City has been clear that it is considering an amendment to the 95.35-acre Toyota Ontario Business Park. The 2010 TOP EIR is not an EIR that was prepared for the Toyota Ontario Business Park and, as such, the City's reliance on it is misplaced. The EIR that was prepared for the project which is now being amended is the 1993 Toyota Specific Plan EIR. As such, if the City wants to proceed under the addendum provisions of CEQA Guidelines 15162 and 15164, the City must conduct the analysis by comparing the proposed industrial development to the 1993 Toyota Specific Plan EIR.

Under the proper analysis, the City must address whether the proposed industrial development requires major revisions of the 1993 Toyota Specific Plan EIR, whether the proposed industrial development involves any new significant effects or increases in effects that were not analyzed in the 1993 Toyota Specific Plan EIR, and whether there is any new information regarding the impacts of the proposed industrial development and feasible mitigation measures that were not considered in the 1993 Toyota Specific Plan EIR. Until the City compares the proposed industrial development to the 1993 Toyota Specific Plan EIR, the Planning Commission must refrain from recommending approval of the Project.

IV. THE CITY'S RELIANCE ON THE 2010 TOP EIR IS IMPROPER

In addition to the reasons discussed above, the City's reliance on the 2010 TOP EIR is fundamentally inadequate for the reasons discussed below.

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 specific impacts of specific projects.

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.)
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. 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. 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.

4. 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.

CONCLUSION

The City must proceed under the tiering provisions of CEQA Guidelines 15168 to assess this Project in comparison to the 1993 Toyota Specific Plan EIR. The preparation of an addendum is improper because a change in land-use designation and the construction of industrial facilities is not a minor change or addition. The City cannot rely on the 2010 TOP EIR because it did not analyze this specific Project and because the proposed Project is an amendment to the Toyota Ontario Business Park for which an EIR was prepared in 1993. As such, the Planning Commission must refrain from recommending approval of the Project at this time until proper CEQA review has been conducted.

Sincerely,

Brian B. Flynn
Lozeau Drury LLP