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VIA E-MAIL AND US MAIL

October 12, 2020

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Re: Comment on EIR Addendum for 4th & Mortimer Project (SCH NO. 2006071100)

Chair McLoughlin and Members of the Planning Commission:

I am writing on behalf of the Supporters' Alliance for Environmental Responsibility ("SAFER"), a California non-profit organization with members living in and around the City of Santa Ana, regarding the 4th & Mortimer Project, proposed to be located on two city blocks at 409 East 4th Street (Block A), and 509 East 4th Street (Block B). ("Project"). Staff contends that the potential environmental effects of the Project have been fully addressed by the Transit Zoning Code Environmental Impact Report certified a decade ago in 2010 ("2010 EIR"). Fundamentally, the proposed Project is an entirely different project than was analyzed in 2010 EIR ("2010 Project"). The proposed Project is inconsistent with the zoning, massing and land use analyzed in the 2010 EIR, and therefore requires zone changes. The proposed Project includes greater massing and higher population density than analyzed in the 2010 EIR. Also the Proposed Project fails to incorporate numerous mitigation measures required by the 2010 EIR. The Proposed Project will have several new and different environmental impacts that were not analyzed in the 2010 EIR. Finally, the 2010 EIR recognized that the 2010 Project would have many significant and unmitigated environmental impacts. As such a new draft EIR is required to analyze and mitigate the impacts of the proposed Project.

A number of highly qualified experts have reviewed the proposed Project and its environmental effects. Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH, and Dr. Paul Rosenfeld, Ph.D. and Matthew Hagemann, C. Hg. of environmental consulting firm Soil Water Air Protection Enterprise ("SWAPE") have identified a number of significant impacts from the proposed Project including air quality impacts, as well as omissions and flaws in the documents relied upon by staff. These comments are attached as Exhibits A and B.

By opting to proceed with an Addendum instead of the required EIR or supplemental EIR ("SEIR"), the City of Santa Ana ("City") has deprived the members of the public of the public review and circulation requirement available for EIRs. SAFER urges the Commission not to adopt the Addendum or approve the Project, and instead to direct staff to prepare a Draft EIR for the Project, and to circulate the Draft EIR for public review and comment prior to Project approval.

PROJECT DESCRIPTION

The Project involves a residential and commercial development that would consist of 169 residential units and 11,361 square feet of commercial retail space on two city blocks, 409 East 4th Street (Block A) and 509 East 4th Street (Block B).

The City attempts to rely on a decade-old EIR certified in 2010 for the Transit Zoning Code ("TZC"). The TZC area covers over 100 blocks and 450 acres in the central core of Santa Ana. Under the TZC, Block A is currently zoned as "District Center-Downtown subzone," and Block B is zoned as "Urban Neighborhood 2 subzone" (UN-2).

Block B is inconsistent with the zoning, massing and density studied in the 2010 EIR. The UN-2 zoning allows single-family duplexes, triplexes and quadraplexes, courtyard housing and rowhouses. UN-2 does not allow "lined block buildings" such as proposed by the Project. (Addendum 2-11). The Project exceeds the massing allowed in the UN-2 zone and therefore requires a variance from section 41-2023 of the zoning code. In particular, UN-2 requires that floors 3-5 of a building may cover no more than 85% of the ground floor, but the project proposes 100% coverage. (Addendum 2-11). The Project exceeds the density allowed in UN-2. UN-2 allows density of up to 50 dwelling units per acres, but the Project proposes 54 DU/acres. (Addendum 3.6-5). For these reasons, the Project proposes to rezone the property from UN-2 to Urban Center (UC).

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.

A. Addendum Standard.

The City relies on CEQA Guidelines § 15162 and 15164 to claim that no CEQA review is required. The court of appeal recently stated, "The addendum is the other side of the coin from the supplement to an EIR. This section provides an interpretation with a label and an explanation of the kind of document that does not need additional public review." "It must be remembered that an addendum is prepared where '(2) **Only minor technical changes or additions are necessary to make the EIR under consideration adequate under CEQA; and (3) The changes to the EIR made by the addendum do not raise important new issues about the significant effects on the environment.**' ([Guideline] 15164, subd. (a).)" *Save Our Heritage Org. v. City of San Diego*, 28 Cal. App. 5th 656, 664–65 (2018) (emphasis added).

Section 15164(a) of the State CEQA Guidelines states that "the lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary, but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred." Pursuant to Section 15162(a) of the State CEQA Guidelines, a subsequent EIR or Negative Declaration is only required when:

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
    (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
    (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
    (C) Mitigation measures or alternatives previously found not to be feasible would, in fact, be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
    (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more

significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

B. Tiering Under CEQA

CEQA permits agencies to 'tier' EIRs, in which general matters and environmental effects are considered in an EIR "prepared for a policy, plan, program or ordinance followed by narrower or site-specific [EIRs] which incorporate by reference the discussion in any prior [EIR] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR]." (Cal. Pub. Res. Code ("PRC") § 21068.5.) "[T]iering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous [EIRs]." (PRC § 21093.) The initial general policy-oriented EIR is called a programmatic EIR ("PEIR") and offers the advantage of allowing "the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." (14 CCR §15168.) CEQA regulations strongly promote tiering of EIRs, stating that "[EIRs] shall be tiered whenever feasible, as determined by the lead agency." (PRC § 21093.)

"Subsequent activities in the program must be examined in light of the program EIR to determine whether an additional environmental document must be prepared." (14 CCR § 15168(c).) The first consideration is whether the activity proposed is covered by the PEIR. Id. If a later project is outside the scope of the program, then it is treated as a separate project and the PEIR may not be relied upon in further review. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307.) The second consideration is whether the "later activity would have effects that were not examined in the program EIR." (14 CCR §§ 15168(c)(1).) A PEIR may only serve "to the extent that it contemplates and adequately analyzes the potential environmental impacts of the project." (*Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156). If the PEIR does not evaluate the environmental impacts of the project, a tiered EIR must be completed before the project is approved. (Id.)

For these inquiries, the "fair argument test" applies. (*Sierra Club*, 6 Cal.App.4th 1307, 1318; see also *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1164 ("when a prior EIR has been prepared and certified for a program or plan, the question for a court reviewing an agency's decision not to use a tiered EIR for a later project 'is one of law, i.e., the sufficiency of the evidence to support a fair argument.'").) Under the fair argument test, a new EIR must be prepared "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. (Id. at 1316 [quotations omitted].) When applying the fair argument test, "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary." (*Sierra Club*, 6 Cal. App. 4th at 1312.) "[I]f there is substantial evidence in the record that the later project may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of

environmental review and the agency must prepare a new tiered EIR, notwithstanding the existence of contrary evidence." (*Sierra Club*, 6 Cal.App.4th at 1319.)

DISCUSSION

A. CEQA REQUIRES THE CITY TO PREPARE A TIERED EIR FOR THE PROJECT INSTEAD OF AN ADDENDUM

The City has incorrectly applied the CEQA criteria for preparing an addendum when, instead, the City should have applied CEQA's tiering provisions. The City relies on CEQA Guidelines section 15164, which applies to preparing an addendum to an existing EIR for a project. However, the 2010 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 EIR was a comprehensive policy and regulatory guidance document for the private use and development of all properties within the TZC area. Tiering is governed by CEQA Guidelines section 15152, not sections 15162 and 15164.

The 2010 EIR made clear that the City was relying on CEQA's tiering provisions. It states, "**This EIR will be used to tier subsequent environmental analysis for future development included within the Transit Zoning Code boundaries, as allowed by Section 15152 of the CEQA Guidelines**." (2010 DEIR 2-4). There is no question that the 2010 TZC EIR was intended as a first tier CEQA document, and that second tier CEQA documents would be required for specific project proposals. The 2010 EIR states that it will "provide a basis for the preparation of subsequent environmental documentation for future development within the Transit Zoning Code area." (2010 DEIR 2-1). Thus the 2010 EIR clearly contemplated that specific projects would be subject to "subsequent environmental documentation." The 2010 EIR states, "the Transit Zoning Code does not constitute a commitment to any specific project … Thus, the EIR will analyze these future actions at a programmatic level. **Each future development proposal undertaken within the Transit Zoning Code must be approved individually by the City, as appropriate, in compliance with CEQA**." (2020 DEIR 2-2). Despite these clear assurances that the 2010 EIR was a programmatic EIR and that project-specific environmental review would be required for individual projects, the City is now attempting to avoid the very project-specific review that is promised the public in 2010.

The 2010 EIR is a Program EIR, which the CEQA Guidelines define as:

> An EIR which may be prepared on a series of actions that can be characterized as one large project and are related either:
> (1) Geographically,
> (2) As logical parts in the chain of contemplated actions,
> (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or
> (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.

(14 CCR § 15168.) Thus, instead of proceeding under the provisions of CEQA Guidelines section 15164, the City should have proceeded under section 15152 provisions for subsequent analysis for a Program EIR rather than an addendum to an existing project-specific EIR.

B. THE 2010 EIR HAS NO INFORMATIONAL VALUE TO THE PROJECT.

As the California Supreme Court explained in *San Mateo Gardens*, subsequent CEQA review provisions "**can apply only if the project has been subject to initial review; they can have no application if the agency has proposed a new project that has not previously been subject to review**." *Friends of College of San Mateo Gardens v. San Mateo,* 1 Cal.5th 937, 950 (2016) ("*San Mateo Gardens*"); see also, *Martis Camp Cmty. Ass'n v. Cty. of Placer*, 53 Cal. App. 5th 569 (2020). As the Supreme Court explains, "[a] decision to proceed under CEQA's subsequent review provisions must thus necessarily rest on a determination — whether implicit or explicit — that the ***original environmental document*** retains some informational value." *Id*. at 951 (emph. added). Only if the original environmental document retains some informational value despite the proposed changes, changes in circumstances or new substantial information does the agency proceed to decide under CEQA's subsequent review provisions whether such changes or substantial new information will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects. 1 Cal.5th at 952. Reviewing the 2010 EIR, the City cannot reasonably claim that it addresses the Project that exceeds the density and massing analyzed in the 2010 EIR.

Since the Project exceeds the density and massing analyzed in the 2010, and requires a variance, it has never undergone CEQA review, it is a new project, and the City must start from the beginning of the CEQA process under section 21151, conduct an initial study, and determine whether there is substantial evidence of a fair argument that the project will have a significant environmental impact. *Friends of College of San Mateo Gardens v. San Mateo*, 1 Cal.5th at 951. The City Council should require CEQA review for the Project, and not approve the Project until CEQA review is completed.

C. A TIERED EIR IS REQUIRED TO ANALYZE AND MITIGATE SIGNIFICANT UNAVOIDABLE IMPACTS IDENTIFIED IN THE 2010 EIR.

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

- Aesthetics: shadows. (2010 DEIR 1-11)
- Air Quality:
    - inconsistency with 2007 Air Quality Management Plan;
    - construction emissions exceed significance thresholds;
    - mobile source emissions of VOC, NOx, CO and PM-10 exceed significance thresholds;

    - construction and operation emissions are cumulatively considerable in excess of significance thresholds for VOC, NOx, CO and PM-10. (2010 DEIR 1-11).
- Cultural Resources: The TZC area includes historic buildings and an historic district. “The feasibility of retaining a historic structure/resource is determined on a case-by-case basis.” (2010 DEIR 1-12).
- Noise: significant noise and vibration from pile-driving and nearby rail operations. (2010 DEIR 1-12).
- Traffic: Significant traffic impacts, includoing at the 1-5 northbound off-ramp at Santa Ana Blvd. to an unacceptable level of service. (2010 DEIR 1-12).

Since the overall program will have significant unavoidable impacts, the City must conduct project-level supplemental EIRs for specific projects proposed within the program area. The supplemental EIRs are required to determine whether mitigation measures exist to reduce the significant unavoidable impacts identified in the 2010 EIR.

In the case of *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 122-125, the court of appeal held that when a “first tier” EIR admits a significant, unavoidable environmental impact, then the agency must prepare second tier EIRs for later phases of the project to ensure that those unmitigated impacts are “mitigated or avoided.” (Id. citing CEQA Guidelines §15152(f)) The court reasoned that the unmitigated impacts were not “adequately addressed” in the first tier EIR since they were not “mitigated or avoided.” (Id.) Thus, significant effects disclosed in first tier EIRs will trigger second tier EIRs unless such effects have been “adequately addressed,” in a way that ensures the effects will be “mitigated or avoided.” (Id.) Such a second tier EIR is required, even if the impact still cannot be fully mitigated and a statement of overriding considerations will be required. The court explained, “The requirement of a statement of overriding considerations is central to CEQA’s role as a public accountability statute; it requires public officials, in approving environmental detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to substantial evidence in support.” (Id. at 124-125) The court specifically rejected a prior version of the CEQA guidelines regarding tiering that would have allowed a statement of overriding considerations for a program-level project to be used for a later specific project within that program. (*Communities for a Better Env’t v. California Res.* Agency (2001) 103 Cal.App.4th 98, 124, disapproved on other grounds by *Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal.4th 1086.) Even though “a prior EIR’s analysis of environmental effects may be subject to being incorporated in a later EIR for a later, more specific project, the responsible public officials must still go on the record and explain specifically why they are approving the later project despite its significant unavoidable impacts.” (Id., pp. 124-25.)

D. THE ADDENDUM'S CONCLUSIONS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND THERE IS SUBSTANTIAL EVIDENCE OF A FAIR ARGUMENT THAT THE PROJECT WILL HAVE SIGNIFICANT ENVIRONMENTAL IMPACTS.

Even if the addendum provisions applied to the Project (which they do not), a supplemental EIR would be required to analyze new significant impacts of the Project resulting from changes to the 2010 Project and new impacts that were not analyzed in the 2010 EIR.

1. There is Substantial Evidence that the Project Will Result in Significant Indoor Air Quality Impacts.

Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH, has conducted a review of the proposed Project and relevant documents regarding the Project's indoor air emissions. Indoor Environmental Engineering Comments (Exhibit A). Mr. Offerman concludes that it is likely that the Project will expose future residents of the Project's residential units to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. Mr. Offermann is one of the world's leading experts on indoor air quality and has published extensively on the topic. *See* attached CV.

Mr. Offermann explains that many composite wood products typically used in modern home construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He states, "The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims." Offermann Comment, pp. 2-3.

Mr. Offermann states:

> Indoor air quality in homes is particularly important because occupants, on average, spend approximately ninety percent of their time indoors with the majority of this time spent at home (EPA, 2011). Some segments of the population that are most susceptible to the effects of poor IAQ, such as the very young and the elderly, occupy their homes almost continuously. Additionally, an increasing number of adults are working from home at least some of the time during the workweek.

Offermann Comment, p. 1.

Formaldehyde is a known human carcinogen. Mr. Offermann states that there is a fair argument that residents of the Project will be exposed to a cancer risk from formaldehyde of between **112 and 180 per million**. (Offermann Comment, pp. 2-3.) This is far above the South Coast Air Quality Management District (SCAQMD) CEQA

significance threshold for airborne cancer risk of 10 per million. Even if the Project uses modern "CARB-compliant" materials, Mr. Offermann concludes that formaldehyde will create a cancer risk more than ten times above the CEQA significance threshold. Offermann Comment, p. 3. Mr. Offermann concludes that this significant environmental impact should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure.

Mr. Offermann concludes that this significant environmental impact should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. *Id*., pp. 4. Mr. Offermann identifies mitigation measures that are available to reduce these significant health risks, including the installation of air filters and a requirement that the applicant use only composite wood materials (e.g. hardwood plywood, medium density fiberboard, particleboard) for all interior finish systems that are made with CARB approved no-added formaldehyde (NAF) resins or ultra-low emitting formaldehyde (ULEF) resins in the buildings' interiors. Offermann Comments, pp. 11-12

The City has a duty to investigate issues relating to a project's potential environmental impacts, especially those issues raised by an expert's comments. *See Cty. Sanitation Dist. No. 2 v. Cty. of Kern*, (2005) 127 Cal.App.4th 1544, 1597–98 ("under CEQA, the lead agency bears a burden to investigate potential environmental impacts"). In addition to assessing the Project's potential health impacts to residents and workers, Mr. Offermann identifies the investigatory path that the City should be following in developing an EIR to more precisely evaluate the Project's future formaldehyde emissions and establishing mitigation measures that reduce the cancer risk below the SCAQMD level. Offermann Comments, pp. 5-9. Such an analysis would be similar in form to the air quality modeling and traffic modeling typically conducted as part of a CEQA review.

The failure to address the project's formaldehyde emissions is contrary to the California Supreme Court's decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("*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 800-801. 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 required 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).)

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. Residents will be users of the residential units, and employees will be users of the hotel and offices. Currently, there is presumably little if any formaldehyde emissions at the site.

Once the Project is built, emissions will begin at levels that pose significant health risks. Rather than excusing the City from addressing the impacts of carcinogens emitted into the indoor air from the project, the Supreme Court in *CBIA* expressly finds that this type of effect by the project on the environment and a "project's users and residents" must be addressed in the CEQA process.

The Supreme Court's reasoning is well-grounded in CEQA's statutory language. CEQA expressly includes a project's effects on human beings as an effect on the environment that must be addressed in an environmental review. "Section 21083(b)(3)'s express language, for example, requires a finding of a 'significant effect on the environment' (§ 21083(b)) whenever the 'environmental effects of a project will cause substantial adverse effects *on human beings,* either directly or indirectly.'" *CBIA*, 62 Cal.4th at 800 (emphasis in original). Likewise, "the Legislature has made clear—in declarations accompanying CEQA's enactment—that public health and safety are of great importance in the statutory scheme." *Id.*, citing e.g., §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d). It goes without saying that the thousands of future residents and employees at the Project are human beings and the health and safety of those workers is as important to CEQA's safeguards as nearby residents currently living near the project site.

The Addendum fails to disclose, analyze, or mitigate these new significant impacts. 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.

2. The Project Will Have Significant Impacts Due to Inconsistencies with the Planning and Zoning Code.

The proposed Project exceeds massing and density allowed by the zoning code. Urban Neighborhood zone (UN-2) allows single-family, duplexes, triplexes, and quadplexes, courtyard housing and rowhouses. The Project is much more intense than quadplexes. UN-2 does not permit Lined Block buildings, such as the Project. (Addendum 2-11). The Project requires a variance for massing since Zoning Code section 41-2023 requires floors 3-5 may occupy no more than 85% of ground floor, but the Project proposes 100% coverage. (Addedum 2-11). The UN-2 zone allows density up to 50 dwelling units per acre, but this Project has 54 DU/acre. (Addendum 3.6-5).

These inconsistencies with the zoning code and zoning designations are significant impacts under CEQA that must be analyzed and mitigated in a supplemental EIR. Of course, these impacts were not analyzed in the 2010 EIR since that document assumed that future projects would comply with the designated zoning and land use laws.

Where a local or regional policy of general applicability, such as an ordinance, is adopted in order to avoid or mitigate environmental effects, a conflict with that policy in itself indicates a potentially significant impact on the environment. (*Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.) Indeed, any inconsistencies between a proposed project and applicable plans must be discussed in an EIR. (14 CCR §

15125(d); *City of Long Beach v. Los Angeles Unif. School Dist*. (2009) 176 Cal. App. 4th 889, 918*; Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).) A Project's inconsistencies with local plans and policies constitute significant impacts under CEQA. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4, 32 Cal.Rptr.3d 177; see also, *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376 (fact that a project may be consistent with a plan, such as an air plan, does not necessarily mean that it does not have significant impacts).) *Californians for Alternatives to Toxics v. Department of Food and Agriculture* (2005) 136 Ca1.App.4th 1, 17 ("[c]ompliance with the law is not enough to support a finding of no significant impact under the CEQA."). The recent *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358 echoes *Pocket Protectors*. These both apply the fair argument standard to a potential inconsistency with a plan adopted for environmental protection. *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099 holds that an EIR needs to analyze any topic for which a fair argument of significant impact is raised.

Since the proposed Project is inconsistent with the zoning code, and requires a zone change and variance, it will have significant impacts that must be analyzed in a tiered EIR. These impacts were not analyzed in the 2010 EIR.

3. The Project Will Have Significant Impacts to Historic Resources.

The proposed Project may have significant impacts to historic resources, and the City has failed to implement applicable mitigation measures from the 2010 EIR with respect to this impact. The downtown zone is a National Historic District (2010 DEIR 1-5). The 2010 DEIR required development to be "context-sensitive infill development." (Id.) The Addendum admits that the Project site includes a historically significant building on the Built Environment Resources Directory ("BERD") database. (Addendum 3.3-3). The historic building is the Santa Ana Car Salon, located at 509-515 East 4th Street. (Addendum Appendix C, Cultural Resources, p.3, 8). The historic resource is a "rare example of the Western False Front Style in Santa Ana." (Id.) This historic building will be demolished as part of the Project, and the Project will therefore have adverse impacts on an historic resource.

The 2010 EIR required a case-by-case historic analysis for future projects, and required that for each project an historic resource expert must be retained to conduct an analysis and to suggest measures to minimize impacts. (2010 DEIR 1-24). However, no such historic resource analysis was done for the Project due to "constraints surrounding COVID-19." (Addendum 3.1-1).

Since the City has failed to implement mitigation measures required by the 2010 EIR, a subsequent EIR is required. If the agency fails to implement mitigation measures required by a prior EIR, this requires CEQA review, even for an otherwise ministerial project. *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, 1507-1508. The purpose of this requirement "is to ensure that feasible mitigation measures will actually be

implemented as a condition of development, and not merely adopted and then neglected or disregarded." *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-1261. The decision to abandon an adopted mitigation measure is a discretionary decision.

An agency fails proceed in a manner required by law when it fails to comply with adopted CEQA mitigation measures. *Lincoln Place*, 130 Cal.App.4th at 1508, 1510 ("[h]aving placed these conditions . . . the city cannot simply ignore them. Mitigating conditions are not mere expressions of hope . . . [i]n the present case the city failed to proceed according to law . . ."). "[T]his rule is applicable even if one of the smaller parts might require only ministerial, rather than discretionary, approval." *Katzeff*, 181 Cal.App.4th at 611; *Lincoln Place*, 130 Cal.App.4th 1491, 1507 n22 ("it cannot be argued CEQA does not apply to the . . . demolition on the ground the demolition permits are ministerial acts.")

Since the Project may have significant impacts to historic resources, and the City has failed to comply with mitigation measures required by the 2010 EIR, a supplemental EIR is required to analyze this impact.

4. The Project Fails to Implement Mitigation Measures Required by the 2010 EIR.

The Project fails to implement several mitigation measures required by the 2010 EIR. As discussed above, the failure to implement mitigation measures set forth in a prior EIR itself requires preparation of a supplemental EIR.

In addition to the historic resources mitigation measure, the Addendum fails to implement energy conservation and greenhouse gas mitigation measure 4.2-22, which requires projects to exceed Title 24 energy standards by 20%. (2010 DEIR 1-18). However, the Addendum fails to implement this measure, since the Project will merely comply with Title 24, not exceed Title 24 by 20%.

The 2010 EIR included numerous air quality mitigation measures that are not required in the Addendum for the Project. (2010 EIR 1-18, MM 4.2-21, 4.2-22). The failure to implement these mitigation measures requires preparation of a supplemental EIR.

5. The Project Will Have Significant Adverse Air Quality and Greenhouse Gas Impacts.

We submit herewith the comments of Dr. Paul Rosenfeld, Ph.D. and Matthew Hagemann, C. Hg, P.G. of the environmental consulting firm SWAPE. They conclude that the Addendum's air quality analysis is riddled with errors due to unsubstantiated input parameters used to estimate Project emissions. (SWAPE 1). Correcting for these errors, SWAPE concludes that the Project will create a cancer risk from airborne pollution of up to 210 per million. (SWAPE 18). This is over twenty times above the South Coast Air

Quality Management District (SCAQMD) CEQA significance threshold of 10 per million. SWAPE also calculates that the Project will have significant greenhouse gas impacts. (SWAPE 23). SWAPE concludes that the Addendum fails to impose all feasible mitigation measures to reduce the Project's air quality impacts.

Exceedance of Air District thresholds establishes a significant impact under CEQA. Indeed, in many instances, such air quality thresholds are the only criteria reviewed and treated as dispositive in evaluating the significance of a project's air quality impacts. See, e.g. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"). See also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 ("A 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant"). The California Supreme Court recently made clear the substantial importance that a BAAQMD significance threshold plays in providing substantial evidence of a significant adverse impact. *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327 ("As the [South Coast Air Quality Management] District's established significance threshold for NOx is 55 pounds per day, these estimates [of NOx emissions of 201 to 456 pounds per day] constitute substantial evidence supporting a fair argument for a significant adverse impact").

An EIR is required to analyze and mitigate the Project's significant air quality and greenhouse gas impacts.

E. EVEN IF THE 2010 EIR WERE STILL RELEVANT TO THE PROJECT, A SUPPLEMENTAL OR SUBSEQUENT EIR IS NECESSARY BECAUSE SUBSTANTIAL CHANGES WILL RESULT IN NEW AND MORE SIGNIFICANT ENVIRONMENTAL IMPACTS.

Even assuming that the 2010 EIR had some relevance to evaluating the environmental impacts of this Project, numerous substantial changes in the development plans have occurred such as the increase in massing and density, new information of substantial importance has arisen, and substantial changes in circumstances have taken place that require a wholesale revision of the dated 2010 EIR.

When changes to a project's circumstances or new substantial information comes to light subsequent to the certification of an EIR for a project, the agency must prepare a subsequent or supplemental EIR if the changes are "[s]ubstantial" and require "major revisions" of the previous EIR. *Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.* (2016) 1 Cal.5th 937, 943. "[W]hen there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations "turn[ ] on the value of the new information to

the still pending decisionmaking process." *Id.*, 1 Cal.5th at 951–52. The agency must "decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects." *Id.*, 1 Cal.5th at 952. Section 21166 and CEQA Guidelines § 15162 "do[] not permit agencies to avoid their obligation to prepare subsequent or supplemental EIRs to address new, and previously unstudied, potentially significant environmental effects." *Id.*, 1 Cal.5th at 958.

The evidence indicates that the project considered by the 2010 EIR has undergone significant changes to the project and its circumstances requiring substantial revisions to that 10-year old EIR.

A. A New EIR is Required Because the Increase in Massing and Density is a Substantial Change from the 2010 Project and there is Substantial Evidence that the Project Will Result in Emissions of Formaldehyde to the Air that Will Have a Significant Health Impact on Future Residents.

Even if the 201 EIR were somehow relevant to the current Project, the City would still be required to prepare an SEIR. The increase in massing and density, the failure to conduct a historic resource analysis, and zoning changes and variances required as part of the Project is a substantial change from the 2010 project. "The purpose behind the requirement of a subsequent or supplemental EIR or negative declaration is to explore environmental impacts not considered in the original environmental document." *Friends of College of San Mateo Gardens v. San Mateo* (2016) 1 Cal.5th 937, 949 (quoting *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1296). For example, in the case of *Ventura Foothill Neighbors*, a mere increase in the height of a building by 15 feet required a supplemental EIR, not an addendum. *Ventura Foothill Neighbors v. Cty. of Ventura*, 232 Cal. App. 4th 429 (2014).

As discussed above, the expert opinion of Mr. Offermann constitutes substantial evidence that the residential component of the Project will result in a significant air quality impact to residential occupants of the Project. This impact is significant and new. It could not have been known in 2010 because the science in this area did not exist until 2015. Accordingly, the City violated CEQA by not preparing an SEIR to analyze and mitigate this new significant impact.

There is no substantial evidence in the record to support a conclusion that the Project will not have a new significant indoor air quality impact as a result of significant changes to the Project when compared to the project analyzed in the 2010 EIR. Accordingly, the City's decision to prepare an Addendum rather than an SEIR is not supported by substantial evidence, and approval of the Project based on the Addendum would constitute an abuse of discretion.

CONCLUSION

For the above and other reasons, the Planning Commission should decline to recommend the City Council approve the Addendum, and instead direct Planning Staff to

prepare and circulate an EIR for public review. The City may not rely on the 10-year old 2010 EIR.

Sincerely,

Richard Toshiyuki Drury
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