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VIA EMAIL and OVERNIGHT MAIL

May 25, 2021

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Re: Comment on CEQA Addendum for Vogel Properties Warehouse, Planning Commission Agenda Items E and F (File No. PSPA20-003; PDEV 20-008)

Honorable Planning Commissioners, Director Zeledon and Mr. Chen,

I am writing on behalf of Supporters Alliance for Environmental Responsibility ("SAFER") regarding the 200,291 square foot warehouse project proposed to be located at the northeast corner of Haven Avenue and Airport Drive (APN 0211-222-66) ("Project") proposed by Vogel Properties, Inc., including a Specific Plan Amendment changing the land use designation from Commercial/Food/Hotel to Light Industrial (PSPA 20-003); a development plan to construct a 200,291 square foot industrial building on 10.64 acres of land (PDEV 20-008), and an Addendum under the California Environmental Quality Act ("CEQA") to The Ontario Plan environmental impact report, which was certified in 2010 ("2010 TOP EIR").

The City's proposed CEQA Addendum is inadequate because the Project was not analyzed in the 2010 TOP EIR at all. The Ontario Plan is the General Plan for the entire City of Ontario, and the 2010 TOP EIR analyzed environmental impacts at an extremely general level - not at a project-specific level. The proposed Project will generate large amounts of diesel heavy truck traffic, construction emissions, diesel yard equipment such as fork lifts, noise from truck traffic and back-up beepers, and many other impacts. None of these project-specific impacts were analyzed in the 2010 TOP

EIR. These impacts must be analyzed and mitigated in a project-level environmental impact report ("EIR").

I. 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. Preparation of an Addendum Under CEQA

The City contends that the Project was already analyzed in the 2010 TOP EIR. However, the 2010 TOP EIR does not even mention this Project. Furthermore, even if the 2010 TOP EIR analyzed this Project (which it did not), a Supplemental EIR ("SEIR") would be required pursuant to CEQA section 21166 and CEQA Guidelines section 15162. At the very least a CEQA addendum should have been prepared pursuant to CEQA Guidelines section 15164.

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).)

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]." (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.)

II. DISCUSSION

A. THE CITY CANNOT APPROVE THE PROJECT BECAUSE NO EIR OR NEGATIVE DECLARATION HAS BEEN ADOPTED FOR THIS PROJECT.

Most obviously, the City may not approve the Project because the proposed Project has not been subject to CEQA review and no EIR or negative declaration has ever been adopted for 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 Coll. of San Mateo Gardens v. San Mateo County Cmty. Coll. Dist.* ("*San Mateo Gardens*") (2016) 1 Cal.5th 937, 950.) Agencies can prepare addenda for project modifications or revisions and avoid further environmental review, but only if the project has a previously certified EIR. (See *Save our Heritage v. City of San Diego* (2018) 28 Cal.App.5th 656, 667.) Further, the Resource Agency designed the CEQA Guideline's addendum provision as a device to "mak[e] minor corrections in EIRs without recirculating the EIR." (Id. at 664-65 [referencing Resources Agency, Amendments to the State CEQA Guidelines, Text of Adopted Amendments with Statement of Reasons (Dec. 30, 1982), 100-01].)

The City contends that the Project was analyzed in the 2010 TOP EIR. However, this Project is nowhere mentioned in the 2010 TOP EIR. CEQA Guideline 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. (14 CCR § 15164(a).) However, Guideline 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].) Therefore, an agency can only prepare an addendum and avoid preparing an EIR for a project that has already undergone CEQA review, and for which an EIR has been certified or a negative declaration has been adopted for, so long as one of the conditions does not apply.

Here, the proposed Project has never undergone CEQA review. The proposed project was not mentioned or discussed in the 2010 TOP EIR and was not considered in the initial CEQA review the City points to for its use of the addendum provision. The City can therefore not rely on the 2010 TOP EIR to avoid CEQA review for the Project. Further, the proposed Project does not modify or revise the 2010 TOP EIR. In fact, the Project has no impact at all on the 2010 TOP EIR.

Since the City cannot rely on CEQA section 21166, or CEQA Guidelines sections 15162 or 15164 to avoid CEQA review for this Project, the Project must therefore undergo CEQA review and follow the tiering process.

B. CEQA REQUIRES THE CITY TO PREPARE A TIERED EIR FOR THE PROJECT.

The 2010 TOP EIR was a programmatic EIR, 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.) The 2010 TOP EIR was programmatic EIR for the City's General Plan, governing zoning across the entire City. The CEQA Guidelines define a programmatic EIR 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 sections 15162 or 15164, the City should have proceeded under section 15168 provisions for subsequent analysis for a Program EIR.

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 impacts of specific projects.

The instant Project is nowhere described in the TOP EIR or any other CEQA document. Without a clear and accurate description of the proposed Project, there is no CEQA review at all. As the Court of Appeal recently affirmed, "'[a]n accurate, stable, and [consistent] project description is the *sin[e] qua non* of an informative and legally sufficient EIR' because a shifting project description may confuse the public and public decision-makers, thus vitiating the EIR's usefulness as a vehicle for intelligent public participation. Accordingly, a project description 'should be sufficiently detailed to provide a foundation for a complete analysis of the environmental impacts,' and it should include all project components and 'apprise the parties of the true scope of the project.'" (*Stopthemillenniumhollywood.com v. City of Los Angeles*, 39 Cal. App. 5th 1, (2019) ("*Millenium*"); quoting*, County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185.) Put simply, since the instant Project is not described in any prior CEQA document, there has been no adequate CEQA review for the Project. There would have been no way for the public to intelligently comment on the Project in 2010 because the Project was not described, discussed or proposed at that time. See, *Millenium*; *Washoe Meadows Community v. Dept. of Parks & Recreation* (2017) 17 Cal.App.5th 277.

SAFER hereby requests that the City prepare an environmental impact report ("EIR") to analyze the significant environmental impacts of the Project and to propose all feasible mitigation measures and alternatives to reduce those impacts. The City may not rely on the 2010 TOP EIR for several reasons, including but not limited to the following:

- 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; *American Canyon Community v. American Canyon*, 145 Cal.App.4th 1062. The 2010 EIR did not analyze the Project at all.

- The 2010 TOP EIR included 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.

- The Project will have significant environmental impacts that were not analyzed in the 2010 TOP EIR. For example, the Project will have significant air quality, traffic and noise impacts from diesel trucks and other sources that would not have existed in the former Commercial/Food/Hotel land use designation.

- CEQA was amended to require traffic analysis using vehicle miles travelled (VMT) rather than level of service (LOS). CEQA Guidelines Section 15064.3. By July 1, 2020, all CEQA lead agencies must analyze a project's transportation impacts using vehicle miles traveled (VMT). VMT measures the per capita number of car trips generated by a project and distances cars will travel to and from a project, rather than congestion levels at intersections (level of service or "LOS," graded on a scale of A – F). The 2010 TOP EIR used LOS analysis, not VMT. The Project's traffic impacts must be analyzed under the new VMT methodology consistent with Section 15064.3.

- 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, operating only 2010 or better diesel trucks, and many other measures that were not feasible in 2009. The Addendum recommends the use of only Tier 3 construction equipment. (Addendum 18, 49). However, Tier 4 equipment became available in 2015 and is now readily available. Tier 4 equipment is about 85% cleaner than Tier 3 equipment and would dramatically reduce the Project's air quality impacts. A new EIR is required to analyze these measures.

- The TOP EIR did not analyze energy impacts at all. (Addendum 21). The CEQA Addendum contains a short one paragraph energy analysis which fails to comply with CEQA's informational requirements. A new EIR is required to analyze the Project's energy impacts and to propose feasible mitigation measures such as solar panels, vehicle electrification, etc.

- 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.

C. EVEN IF THE 2010 TOP EIR IS STILL RELEVANT TO THE PROJECT, A TIERED EIR IS REQUIRED TO MITIGATE THE SIGNIFICANT UNAVOIDABLE IMPACTS OF THE PROGRAM IDENTIFIED IN THE 2010 TOP EIR.

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

- Agricultural Resources;
- Air Quality (including VOC, CO, NOx, PM-10, PM-2.5);
- Cultural Resources;
- Climate Change;
- Noise;
- Traffic.

(2010 TOP Draft EIR, pp. 1-19 through 1-36).

Since the overall program will have significant unavoidable impacts, the City must prepare a project-level supplemental EIR for the proposed Project to determine whether mitigation measures exist to reduce the significant unavoidable impacts identified in the 2010 TOP EIR.

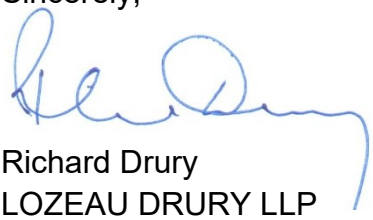
In the case of *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 122-125, the court of appeal held that when a "first tier" EIR admits a significant, unavoidable environmental impact, then the agency must prepare second tier EIRs for later phases of the project 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.)

III. CONCLUSION

For the above and other reasons, the City must prepare an EIR to analyze and mitigate the impacts of the Project. The City may not rely on the decade-old 2010 TOP EIR, which did not even analyze the proposed Project.

Sincerely,



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