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Via Email and Overnight Mail

September 28, 2020

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Re: 1510 South De Anza Hotel Project (File No. H19-017)
Draft Initial Study/Mitigated Negative Declaration

Dear Director Hughey, Ms. Blanco and Ms. Hawkins:

I am writing on behalf of the Laborers International Union of North America, Local Union 270 and its members living in and around the City of San Jose ("LIUNA") regarding the Initial Study and Mitigated Negative Declaration ("IS/MND") prepared for the 1510 South DeAnza Hotel Project (File No. H19-017) ("Project"). After reviewing the IS/MND, and with the assistance of expert review by environmental consulting firms Indoor Environmental Engineering (Exhibit A), and Wilson Ihrig (Exhibit B), and, the evidence indicates that there is a "fair argument" that the Project may have significant unmitigated adverse environmental impacts or, alternatively, the IS/MND is not supported by substantial evidence. The expert comments as well as the comments below identify substantial evidence of a fair argument that the Project may have significant environmental impacts. Accordingly, an environmental impact report ("EIR") is required to analyze these impacts and to propose all feasible mitigation measures to reduce those impacts. We urge the Planning Director to decline to approve the IS/MND, and to instruct staff to prepare an EIR for the Project prior to any Project approvals.

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I. PROJECT BACKGROUND

The proposed Project includes the demolition of an existing Kelly-Moore Paint store, and construction of a 4-story, 147,134 square foot hotel with 132 guest rooms, rooftop deck and underground parking and associated grading on a 0.86 acre site ("Project") located at the southeast corner of South DeAnza Blvd. and Sharon Drive (APN 372-21-002) ("Project Site"). The Project Site is only 75 feet from a nearby preschool and 120 feet from residences. (IS/MND 33).

II. LEGAL STANDARD

As the California Supreme Court held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." *Communities for a Better Env't v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320 ["CBE v. SCAQMD"], citing, *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505. "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., supra*, 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. Resources Agency* (2002) 103 Cal.App.4th 98, 109 ["*CBE v. CRA*"].

The EIR is the very heart of CEQA. *Bakersfield Citizens for Local Control v. City of Bakersfield (*2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927. The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." *Bakersfield Citizens,* 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 University of California* (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 Cal. Code Regs.§ 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. 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, supra*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904–905.

Under the "fair argument" standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. 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, 150-15; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602. The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. *Pocket Protectors,* 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.

In addition, a negative declaration must accurately describe the proposed project and its environmental setting. *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180; CEQA Guidelines §15071(a). The initial study must "provide documentation of the factual basis for the finding in a Negative Declaration that a project will not have a significant effect on the environment." CEQA Guidelines § 15063(c)(5).

III. There is a Fair Argument that the Project May Have Unmitigated Adverse Environmental Impacts.

A. The Project May Have Adverse Indoor Air Quality Impacts.

Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH, has conducted a review of the Project, the IS/MND and relevant appendices regarding the Project's indoor air emissions. (Indoor Environmental Engineering Comments (Exhibit A)). Mr. Offermann concludes that it is likely that the Project will expose future workers employed at the hotel 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.

Mr. Offermann explains that many composite wood products typically used in hotel construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. The IS/MND states that the Project will use composite wood products. (IS/MND 10). Offermann 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 residential and hotel building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims."

Formaldehyde is a known human carcinogen. Mr. Offermann states that there is a fair argument that full-time workers at the Project will be exposed to a cancer risk from formaldehyde of approximately 16.4 per million. (Exhibit A, p. 4). This is well above the Bay Area Air Quality Management District (BAAQMD) CEQA significance threshold for airborne cancer risk of 10 per million.

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. 12-13. Mr. Offermann suggests several feasible mitigation measures, such as requiring the use of no-added-formaldehyde composite wood products, which are readily available. Offermann Comments, pp. 12-13. Mr. Offermann also suggests requiring air ventilation systems which would reduce formaldehyde levels. *Id*. Since the MND does not analyze this impact at all, none of these or other mitigation measures are considered.

When a Project exceeds a duly adopted CEQA significance threshold, as here, this alone establishes a fair argument that the project will have a significant adverse environmental impact and an EIR is required. 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 made clear the substantial importance that an air district 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"). Since expert evidence demonstrates that the Project will exceed the BAAQMD's CEQA significance threshold, there is a fair argument that the Project will have significant adverse impacts and an EIR is required.

Mr. Offermann also notes that the high cancer risk that may be posed by the Project's indoor air emissions likely will be exacerbated by the additional cancer risk that exists from vehicle emissions from the nearby South DeAnza Blvd, and Sharon Drive.

In similar circumstances, City staff claimed that a California Supreme Court decision – *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("*CBIA"*) – ruled that this type of air quality impact need not be addressed under CEQA because future residents of a mixed use project are part of the project and CEQA does not require evaluation of health or other impacts of a project on itself. To the extent staff again takes the position that future workers are not worthy of considering health protections under CEQA because they are part of the Project, staff's responses would be incorrect as a matter of law. Indeed, rather than support staff's response, the California Supreme Court in *CBIA* expressly holds that potential adverse

impacts to future users and residents from pollution generated by a proposed project ***must be addressed*** under CEQA.

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. Employees will be users of the hotel. Currently, there is presumably little if any formaldehyde emissions at the site. Once the Project, 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 hundreds of future 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 adjacent to the Project site.

B. The Project May Have Adverse Noise Impacts.

Derek Watry of Acoutiscal engineer firm, Wilson Ihrig, has reviewed the IS/MND and concludes that the Project will have significant unmitigated noise impacts. (Exhibit B). An EIR is required to analyze and mitigate these impacts.

The Noise Assessment and IS/MND both recognize that unchecked construction noise would cause a significant impact. (Noise Assessment at p. 20; IS/MND 127). To reduce this impact to less than significant, the IS/MND includes Mitigation Measure NOI-1.2 which contains 14 actions or potential actions that would serve to either reduce noise levels or, at a minimum, be “good neighbor” actions that would foster a better relationship with the noise-sensitive receptors in the vicinity.

Mr. Watry concludes that the mitigation measures proposed are inadequate to reduce the Project’s significant noise impacts to less than significant either because they are ineffective, or unenforceable. Mr. Watry states that the following measures will not substantively reduce noise levels (Exhibit B, p. 3) :

- Limiting the hours of construction to 7:00 AM to 7:00 PM on Mondays through Fridays.
- Ensuring that all equipment with internal combustion engines are fitted with mufflers.
- Strictly prohibiting unnecessary idling of internal combustion engines.
- Ensuring that radios are not audible at nearby residences.
- Notifying all adjacent businesses, residences, and other noise-sensitive neighbors of noise construction activities in writing.
- Designating a “disturbance coordinator” and both posting and distributing a telephone number for people to call.

To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions. Here, the IS/MND included no facts or analysis to support the inference that the mitigation measures will have a quantifiable “substantial” impact on reducing the adverse effects. (*Sierra Club v. Cty. of Fresno*, 6 Cal. 5th 502, 522 (2018)). Since the IS/MND does not calculate how much the above measures will reduce noise impacts, if at all, the City cannot rely on those measures to reduce impacts to less than significant.

Mr. Watry concludes that the following mitigation measures are either impractical or unenforceable (Mr. Watry's comments are underlined):

- Utilizing the best available noise suppression devices and techniques – This is a vague standard that is essentially unenforceable.

- Locating stationary noise-generating equipment as far as possible from sensitive receptors – The qualifier "as possible" renders this action meaningless as a practical matter. While the contractor very well may be able to do this in some circumstances, who is to determine if it is possible in circumstances where the equipment is placed, for example, near the eastern property line? How would this be enforced?

- Utilizing "quiet" air compressors and other stationary equipment where technology exists – Similar to the previous action, who is to make this determination and when? How would this be enforced?

- Locating construction staging areas to create the greatest distance from noise-sensitive receptors during all project construction – The contractor will be constrained as to where the staging areas on the project site can be, and this will change as construction proceeds. I believe this is impractical and unenforceable.

- Locating stockpiles as far from residential receptors as feasible – The qualifier "as feasible" renders this measure vague and unenforceable.

- Preparing a detailed construction schedule for major noise-generating activities and coordinating with the residential neighbors so that construction activities can be schedule to minimize noise disturbance – While preparing a detailed schedule and discussing that with residential neighbors is a good idea, it is impractical to assert that all construction activities will be scheduled to minimize disturbance. It may be possible in some instances.

A public agency may not rely on mitigation measures of uncertain efficacy or feasibility. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation measure because no record evidence existed that replacement water was available).) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. (14 CCR § 15364.) Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. (14 CCR § 15126.4(a)(2); *See Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal. App. 4th 683, 730 (project proponent's agreement to a mitigation by itself is

insufficient; mitigation measure must be an enforceable requirement)). Since the above measures are not enforceable, they are not adequate to reduce the Project's significant noise impacts to less than significant.

Mr. Watry concludes that the final three noise mitigation measures are not enforceable:

- Construct temporary noise barriers, where feasible, around the perimeter of the site.
- Construct temporary noise barriers to screen stationary noise-generating equipment when located near sensitive receptors.
- Hang temporary noise control blankets along the façade of 7246 Sharon Drive, if necessary, if conflicts occur.

Mr. Watry notes that "In all of these, the bolded phrases may be construed such that none of these are actually implemented." As discussed above, mitigation measures must be binding and enforceable. As Mr. Watry concludes, the proposed measures meet neither requirement.

Mr. Watry proposes binding measures that would be effective, such as imposing binding performance standards, of placing a noise barrier wall at specific locations near sensitive receptors. These measures must be analyzed in an EIR. (Exhibit B, p. 3).

Finally, Mr. Watry concludes that proposed mitigation measures are not adequate to reduce the Project' admittedly significant vibration impacts to less than significant. (Exhibit B, p. 5). Mr. Watry notes that many of the vibration mitigation measures include the term "where possible," rendering them unenforceable. (Id. citing IS/MND 132-133).

C. The IS/MND Fails to Adequately Mitigate the Project's Significant Air Quality Impacts.

The IS/MND admits that "maximum cancer risks and PM2.5 concentration from the project construction would exceed the BAAQMD single-source thresholds and expose sensitive receptors to significant pollutant concentrations." (IS/MND 1).

The IS/MND proposes MM AQ-1 to address this impact, however, this measures constituted deferred mitigation. The measure states:

> "Prior to issuance of any demolition or grading permits, the project applicant shall submit to the Director of Planning, Building and Code Enforcement or Director's designee, a construction operations plan that includes specifications for the equipment to be used during construction."

CEQA prohibits development of mitigation measures after project approval, subject to review only by City staff. Mitigation measures must be set forth in the CEQA document so that the public can review the measures and comment on their adequacy. Feasible mitigation measures for significant environmental effects must be set forth in a CEQA document for consideration by the lead agency's decision makers and the public before certification of the EIR and approval of a project. The formulation of mitigation measures generally cannot be deferred until after certification of the CEQA document and approval of a project. Guidelines, section 15126.4(a)(1)(B) states: "Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way."

"A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.) "[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.)

An EIR is required to propose specific binding mitigation measures to reduce the Project’s air quality impacts to the extent feasible.

D. The IS/MND Fails to Adequately Mitigate the Project's Significant Hazardous Material Impacts.

The IS/MND admits that the Project will have significant hazardous material impacts, stating, “The proposed project could result in impacts to construction workers during construction due to potentially hazardous soil resulting from the previous agricultural uses on the site.” (IS/MND 3). SAFER is very interested in ensuring that construction workers are adequately protected from potentially hazardous soil conditions.

The IS/MND proposes to address this significant impact by developing a clean-up plan at a later time, if necessary. As discussed above, CEQA prohibits such deferred mitigation. The IS/MND states:

> If contaminated soil is found in concentrations above regulatory environmental screening levels of construction worker safety, the project applicant hsall enter

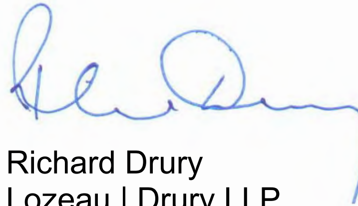
> into the Santa Clara County Department of Environmental Health (SCCDEH) Site Cleanup Program (SCP) and share results of the limited soil sampling. The SCCDEH will then decide upon appropriate further action including but not limited to more testing, and/or the development of a Site Management Plan (SMP), Removal Action Plan (RAP), or equivalent document. (IS/MND 3).

This is a classic example of deferred mitigation. The mitigation measures may or may not be developed at some time in the future. If they are developed, there will be no public review or comment. There is not even any assurance that it will be possible to reduce the impact to less than significant. An EIR is required to analyze this impact and to propose specific, binding mitigation measures.

IV. CONCLUSION

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

Sincerely,



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