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***Via E-Mail and posted to
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Re: Times Mirror Square Project FEIR (Case No.: VTT-74761, ENV-2016-4676-EIR, CPC-2016-4675-TDRVCU-MCUP, and SCH No. 2017061083)

Dear Honorable Members of the Los Angeles PLUM Committee:

I am writing on behalf of the **Supporters Alliance for Environmental Responsibility** and its members living in and around the City of Los Angeles (“SAFER”) regarding the Final Environmental Impact Report (“FEIR”) prepared for the Times Mirror Square Project (“Project”) (VTT-74761, ENV-2016-4676-EIR, CPC-2016-4675-TDRVCU-MCUP, and SCH No. 2017061083) in the City of Los Angeles (“City”). SAFER is a California nonprofit public benefit corporation whose purposes include contributing to the preservation and enhancement of the environment and advocating for programs, policies, and development projects that promote not only good jobs but also a healthy natural environment and working environment.

After reviewing the FEIR prepared for the Project, including with the assistance of expert reviews by wildlife biologist Shawn Smallwood, PhD, environmental consulting firm SWAPE, traffic engineer Daniel T. Smith Jr., P.E., and industrial hygienist Bud Offermann, it is clear that the FEIR fails to adequately analyze significant environmental

impacts, fails to adequately respond to comments, and fails to mitigate significant impacts that will occur as a result of the Project. Accordingly, SAFER respectfully requests the City to address these shortcomings in a revised draft environmental impact report (“RDEIR”) and recirculate the RDEIR prior to considering approvals for the Project. We hereby incorporate by reference in their entirety all of our prior comments that have been filed concerning this matter.

I. PROJECT BACKGROUND

The Project proposes to rehabilitate the Los Angeles Times, Plant, and Mirror Buildings and build a mixed-use development on 3.6 acres of land bounded by W. 1st Street, S. Spring Street, W. 2nd Street, and S. Broadway Street in the Central City Plan Area of the City of Los Angeles. The Project would demolish the existing Executive Building at the corner of W. 1st Street and S. Broadway and parking garage at the corner of W. 2nd Street and S. Broadway to allow for the development of the Project’s mixed-use component. The Project will contain up to 1,127 residential units, and approximately 34,572 square feet of commercial space among the 37-story “North Tower” and 53-story “South Tower” constructed above a five-story parking podium. The space below the podium would contain an additional nine levels of subterranean parking. In total, the Project proposes up to 1,511,908 square feet of floor area.

II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report (“EIR”) (except in certain limited circumstances). See, e.g., Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. “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 Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 Cal. Code Regs. (“CEQA Guidelines”) § 15002(a)(1). “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been described as “an environmental ‘alarm bell’ whose

purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.” *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA requires public agencies to avoid or reduce environmental damage when “feasible” by requiring “environmentally superior” alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); see also, *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines §15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.” Pub. Res. Code § 21081; CEQA Guidelines § 15092(b)(2)(A) & (B). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 732 (1990).

The EIR is the very heart of CEQA “and the integrity of the process is dependent on the adequacy of the EIR.” *Berkeley Jets*, 91 Cal. App. 4th 1109, 1355. CEQA requires that a lead agency analyze all potentially significant environmental impacts of its proposed actions in an EIR. Pub. Res. Code § 21100(b)(1); Guidelines § 15126(a); *Berkeley Jets*, 91 Cal.App.4th 1344, 1354. The EIR must not only identify the impacts, but must also provide “information about how adverse the impacts will be.” *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831. The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau*, 221 Cal.App.3d 692, 732. “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*, 103 Cal.App.4th 98, 109.

While the courts review an EIR using an “abuse of discretion” standard, “the reviewing court is not to ‘uncritically rely on every study or analysis presented by a project proponent in support of its position. A ‘clearly inadequate or unsupported study is entitled to no judicial deference.’” *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355

(emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California*, 47 Cal. 3d 376, 391 409, fn. 12 (1988). A prejudicial abuse of discretion occurs “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946. As discussed below, and in the attached expert comment letters of expert wildlife biologist Dr. Shawn Smallwood, expert consulting firm SWAPE, traffic engineer Mr. Daniel T. Smith, PE, and industrial hygienist Francis “Bud” Offermann, the EIR for this Project fails to adequately analyze and mitigate the Project’s impacts.

The lead agency must evaluate comments on the draft EIR and prepare written responses in the final EIR (“FEIR”). Pub. Res. Code § 21091(d). The FEIR must include a “detailed” written response to all “significant environmental issues” raised by commenters. As the court stated in *City of Long Beach v. LA USD* (2009) 176 Cal.App.4th 889, 904:

The requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful.

The FEIR’s responses to comments must be detailed and must provide a reasoned, good faith analysis. CEQA Guidelines § 15088(c). Failure to provide a substantive response to a comment renders the EIR legally inadequate. *Rural Land Owners Assoc. v. City Council* (1983) 143 Cal.App.3d 1013, 1020.

The responses to comments on a draft EIR must state reasons for rejecting suggested mitigation measures and comments on significant environmental issues. “Conclusory statements unsupported by factual information” are not an adequate response. CEQA Guidelines §§ 15088(b), (c); *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3rd 348. The need for a substantive, detailed response is particularly appropriate when comments have been raised by experts or other agencies. *Berkeley Keep Jets*, 91 Cal.App.4th at 1367; *People v. County of Kern* (1976) 62 Cal.App.3d 761. A reasoned analysis of the issue and references to supporting evidence are required for substantive comments raised. *Calif. Oak Found. v. Santa Clarita* (2005) 133 Cal.App.4th 1219.

III. DISCUSSION

A. The EIR Unduly Restrains the Project's Alternatives and Their Implementation

An overly narrow definition of project objectives renders the alternatives analysis inadequate. To narrowly define the primary "objective" of the proposed project itself constitutes a violation of CEQA since such a restrictive formulation would improperly foreclose consideration of alternatives. See, *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, holding that when project objectives are defined too narrowly an EIR's treatment of analysis may also be inadequate. As a leading treatise on CEQA compliance cautions, "[t]he case law makes clear that...overly narrow objectives may unduly circumscribe the agency's consideration of project alternatives." Remy, Thomas, Moose & Manley, *Guide to CEQA* (Solano Books, 2007), p. 589.

CEQA prohibits a project sponsor from limiting its ability to implement the project in a way that precludes it from implementing reasonable alternatives to the project. See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736 (alternatives may not be artificially limited by applicant's prior contractual commitments that would prevent sponsor from implementing reasonable alternative). The fact that a proposed alternative does not meet all of the Project Objectives is not an appropriate basis to eliminate impact-reducing project alternatives from analysis in an EIR. (14 Cal. Code Regs § 15126.6(c), (f)).

The EIR identifies several significant environmental impacts the Project will have, as well as the project alternatives that alleviate these impacts. Yet the City failed to impose a project alternative that would reduce environmental impacts because they do not meet all of the Project's stringent objectives. For example, Alternative 5 would avoid the Project's significant and unavoidable impacts to historical resources, associated with air quality standards, and related to construction noise. DEIR, p. V-205. However, this alternative was not selected in part because it did not meet all of the uses identified in the Project's objectives, and would not meet the objective to restore portions of the existing buildings "to the same extent as under the Project." DEIR, p. V-206. Additionally, Alternative 4 was not selected, although it would lessen or reduce the significant and unavoidable impacts to historical resources, air quality standards, and construction noise, because while it "would meet the Project's underlying purpose and primary objective . . . it would not *fully meet* the Objective's intent to provide publicly

accessible open space and amenities *to the same extent* as the Project” DEIR, p. V-166–V-167.

By refusing to select a Project alternative that mitigates or reduces the Project’s significant environmental impacts simply because the alternative does not entirely meet all of the narrowly defined Project objectives, the City has violated CEQA.

B. The EIR Fails to Adequately Analyze Historic and Cultural Aesthetic Impacts.

The site of the proposed Project includes five historical resources, including the Times, Plant, Mirror, and Executive buildings, as well as the parking structure. Despite these resources, the City asserts Senate Bill (SB) 743 applies to the Project and therefore the Project’s aesthetic impacts are not considered significant impacts on the environment. DEIR, p. II-13–14. It makes this finding despite a subsection of SB 743 that excludes impacts to historical resources from this aesthetic exemption.

Codified within CEQA section 21099 et seq., SB 743 states “[a]esthetic . . . impacts of a residential, mixed-use residential, or employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment.” Pub. Res. Code § 21099(d)(1). However, the City is incorrect in concluding it is exempt from analyzing all aesthetic impacts caused by the Project because SB 743 goes on to state that for the purposes of this section, “aesthetic impacts do not include impacts on historical or cultural resources.” Pub. Res. Code § 21099(d)(2)(B). Therefore, the aesthetic impacts on historical and cultural resources must be considered separately from aesthetic impacts. In relying on SB 743, the City incorrectly assumes that since aesthetic impacts in a transit priority area are not considered significant as a matter of law, there will be no impacts on historical or cultural resources. However, the City cannot use SB 743 as an excuse to not mitigate aesthetic impacts to historical resources that are significant.

CEQA gives historic resources special recognition. See *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 186; *Citizens for a Sustainable Treasure Island v. City & County of San Francisco* (2014) 227 Cal. App. 4th 1036, 1065. Objects of historical significance fall within CEQA’s definition of “environment.” Pub. Res. Code § 21060.5. Therefore, if a project has significant impacts on a historical resource, it has significant environmental impacts.

A substantial adverse change of a historical resource is considered a significant impact on the environment. CEQA Guidelines § 15064.5(b). Substantial adverse changes include “physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings” resulting in the significance of the resource being “materially impaired.” CEQA Guidelines § 15064.5(b)(1). Material impairments of historical resources occur when the project demolishes or adversely materially alters the physical characteristics of the historical resource that either conveys its historical significance and that justify its inclusion in or eligibility for inclusion in the California Register of Historical Resources or the local register of historical resources. *Id.* §§ 15064.5(b)(2)(A)–(C). These material impairments clearly include aesthetic changes to historical resources because physical characteristics of historical resources encompass the façade and structural design of these resources.

Here, the Project proposes to demolish the Executive Building and the accompanying parking structure. Since both structures are eligible for inclusion in the California Register of Historic Resources and their physical characteristics that make them eligible for such listing will be demolished, the Project will result in a material impairment of these historical resources. Additionally the Times, Plant, and Mirror Buildings are included in the local register of historic resources and are in the immediate surroundings of the Executive Building and parking structure. If the Project moves forward as planned, the impacts on the aesthetic quality of these buildings will be significant because the demolition of the Executive Building and parking structure will make room for two very large apartment buildings that will dwarf the Times, Plant, and Mirror Buildings and minimize the visibility of these historic resources. Although the aesthetic impacts to a mixed-use project in a transit priority area are not significant as a matter of law, impacts to historic resources are not considered aesthetic impacts under SB 743. Therefore, while the Project will have aesthetic impacts on historical resources, those historical impacts are significant and the City must analyze these impacts separately from merely aesthetic impacts and mitigate these significant impacts.

C. The EIR Failed to Make Full and Accurate Responses to Comments Concerning Aesthetic Impacts to Historical Resources.

While public participation is an essential part of the CEQA process, so is an agency’s evaluation and response to public comments. Failure to comply with the requirement can lead to disapproval of a project. CEQA Guidelines Discussion, § 15088. An agency’s responses to comments must specifically explain the reasons for rejecting suggestions received in comments and for proceeding with a project despite its environmental impacts. Such explanations must be fully supported with specific

references to empirical information, scientific authority, and/or explanatory information. *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357. The responses, moreover, must manifest a good faith, reasoned analysis; conclusory statements unsupported by factual information will not suffice. *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841.

Here, the City continued to hide behind SB 743 when it responded in a cursory and inadequate way to a comment regarding the inadequacy of the EIR's analysis of aesthetic impacts on historical resources. See FEIR, p. 2-80–2-81. The City again pointed to SB 743 to assert that “the Project would result in the removal of the existing Executive Building and the parking structure, which are historic resources and, as such, may be considered to contribute to the aesthetic character under the [Los Angeles CEQA] Thresholds Guide. However, per ZI No. 2452 [which adopted SB 743], aesthetic impacts shall not be considered a significant impact for a qualifying mixed-use project in a Transit Priority Area, such as the Project.” FEIR, p. 2-81. This response, as identified in the section above, is incorrect and erroneous because the City's reliance on SB 743 is inappropriate given the reading of the entire section, which requires agency's to still consider aesthetic impacts to historical resources.

The City's response is legally inadequate because its analysis is based on an erroneous reading of SB 743 and ignores the rest of the statute excluding historical resources from the aesthetic impact exemption. This inadequate and conclusory response to a comment fails to meet CEQA's requirements. Responses such as this require the City to revise its EIR so that it fully evaluates and responds to public comments.

D. The EIR Fails to Adequately Analyze Impacts on Biological Resources.

SAFER previously submitted comments on the City's failure to adequately analyze the Project's impacts on biological resources and the potential significant impact on birds resulting from collisions with the Project's windows. See SAFER Comments dated October 16, 2019, May 4, 2020, and July 1, 2020.

SAFER's concerns regarding the Project's impacts on biological resources are based on the expert analysis and opinions of ecologist Dr. Shawn Smallwood. See Biological Resources Comment dated October 13, 2019 (October 2019 Smallwood Comment). Based on project-specific information, Dr. Smallwood predicted the Project would result in significant impacts to birds colliding with the Project's clear glass

windows. See October 2019 Smallwood Comment, p. 8. Specifically, Dr. Smallwood predicted there would be 2,310 bird deaths per year due to the Project. *Id.* In order to assess the Project's impacts on biological resources, Dr. Smallwood determined that, based on eBird records, "43 special-status species of birds occur near the site of the [Project], 14 of which were seen on property immediately adjacent to the site. Fifteen species have been known to collide with windows." *Id.*, p. 2. Dr. Smallwood also noted that the EIR was not prepared with the benefit of survey visits by wildlife biologists, so it inadequately informed the public about the avian use of the area. *Id.* Dr. Smallwood cited many sources in making his scientific prediction of the Project's impacts to birds from window collisions, as well as to identify bird-window collision factors. See *id.*, pp. 2–12.

Despite the City's duty to investigate issues relating to a project's potential environmental impacts, the City and the EIR have, thus far, attempted to deny Dr. Smallwood's expert analysis and refuse to consider with any informed expertise the likely impacts of window collisions on birds posed by the Project. See *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597–98 ("[U]nder CEQA, the lead agency bears the burden to investigate potential environmental impacts."). Rather than objectively study this serious impact to birds, staff twice attempted to critique Dr. Smallwood's expert analysis without itself bringing any expertise to bear on the Project's impacts to biological resources from window collisions. See City of Los Angeles Responses to Lozeau Drury LLP Letter, March 2020, pp. 2-21–2-36, and City of Los Angeles Responses to Lozeau Drury LLP Letter, May 2020. Dr. Smallwood reviewed the City's March 2020 comments and responded in SAFER's May 4, 2020 Letter. Dr. Smallwood reviewed the City's May 2020 comments and prepared a response, which is attached as Exhibit A to these comments.

i. Environmental Setting

The City, though its consultant ESA, first attempts to downplay the Project's threat to migrating birds by stating that the "Draft EIR provides a thorough discussion of the 'full environmental context,'" despite Dr. Smallwood's multiple comments describing the importance and lack of analysis on aeroecology. See ESA May 11, 2020 Response to Comments D and E on Biological Resources ("ESA Biological Comment"), p. 1. As Dr. Smallwood reiterates, "[a]eroecology bears on the proposed project because glass-fronted buildings inserted up to 665 feet into the atmosphere will fatally intercept many flying birds. Given what has been learned from fatality searches around buildings wherever monitoring has been implemented (see my earlier comment letters), we know that birds will collide with the buildings if they are built; there is no uncertainty about this

outcome. But there is ample uncertainty about the numbers of collision fatalities, the species affected, and whether and to what degree impacts could be reduced and at what cost.” Ex. A, p. 1.

Instead of actually analyzing this impact, ESA downplays the Project’s threat to migrating birds by characterizing the site as unused by birds. “Neither the Project Site nor the developed, urbanized portions of the Los Angeles basin provide important habitat for migrating birds in the Pacific Flyway .” ESA Biological Comment, p. 2. However, Dr. Smallwood does not believe that birds migrating along the Pacific Flyway bypass the airspace over Los Angeles because “Los Angeles is at the convergence of multiple landscape features along which birds are known to migrate” Ex. A, p. 2. Additionally, ESA explains that birds migrating along the Pacific Flyway stopover in wetlands within or adjacent to urban metroplexes, and identifies the Ballona Wetlands as the stopover habitat in the Los Angeles metroplex. ESA Biological Comment, p. 2. ESA goes on to conclude that the Project would impede no birds heading to or from the Ballona Wetlands, and that the Project site provides no habitat for special-status species of wildlife. *Id.* As Dr. Smallwood notes, however, these conclusions are easily refuted by eBird records and by the annual stop-over of thousands of Vaux’s swifts only a few city blocks from the Project site. Ex. A, p. 2.

Dr. Smallwood again reiterated his issue with the 1-mile radius of eBird records review defended by ESA. See *id.* A 1-mile radius is more appropriate for wildlife that crawl, not for wildlife that flies. *Id.* Due to the speed of birds and nocturnal flights, the scale needs to be broadened to see the migratory patterns of birds. *Id.*

ii. Bird-Building Collisions

ESA disputes Dr. Smallwood’s assertion that high rise buildings pose 10.4 times more collision hazard to birds than other structures because, as Dr. Smallwood notes, all of bird collisions took place in the airspace in which birds travel, which ESA does not recognize as important bird habitat. *Id.* at 4. ESA further critiques Dr. Smallwood’s use and citation of the 2014 Loss et al study because the study was done in the Midwest and East coast, and no documentation of the rate of bird collisions on downtown Los Angeles can be shown. See ESA Biological Comment, p. 3. Dr. Smallwood points out that the 2014 Loss et al study, and his analysis based on it, means that the Project will kill birds and that it will most likely kill many more birds than do homes and low-rise buildings. Ex. A, p. 4. If the Project goes forward as proposed without knowing anything about avian migration patterns through the Los Angeles metroplex, the Project will kill a lot of birds and any mitigation to reduce this impact and bird collision fatalities “would be

more expensive and less effective than had the buildings been constructed in response to knowledge of migration patterns and collision risk.” *Id.* at 4-5.

ESA also claims that the Project site is outside any wildlife corridor, but without being informed by deployment of radar or thermal-imaging cameras, ESA cannot know whether aerial movement of migrating birds is channeled through the airspace over the City. *Id.* at 5. “In fact, as recently as late April 2020, the Cornell University Lab’s Birdcast project documented 66,044 birds/km flying nocturnally within detection range of radar at the KVTX Los Angeles station.” *Id.*; see also <https://birdcast.info/scientific-discussion/migration-update-morning-flight-madness-in-southern-california-22-april-2020/>.

ESA argues that “[b]irds typically fly from one suitable habitat area to the next,” and adds that because no suitable habitat occurs near the Project site, birds will not fly through the Project’s airspace. ESA Biological Comment, p. 3. ESA provides no evidence though that birds stop-over along their migration routes only within its designated natural areas of Ballona Wetlands, Bolsa Chica State Beach, Seal Beach National Wildlife Refuge, and Point Magu. Ex. A, p. 6. Dr. Smallwood admits that migrating birds no doubt do stop-over at these locations, but many birds also stop-over in smaller open spaces and in residential yards throughout the Los Angeles Basin. *Id.* Based on multiple surveys for birds performed across the Los Angeles metroplex over the last twenty years, Dr. Smallwood states that there is no difference in bird species detections per hour among a coastal state park, coastal urban settings, and inland urban settings, *Id.* at 8.

iii. Approach

ESA goes on to criticize Dr. Smallwood’s approach for assessing avian collision risk with high-rises instead to conducting its own analysis. See ESA Biological Comment, p. 3. ESA first characterizes the Loss et al. study as meta-analysis. *Id.* However, the Loss et al. study was a review and synthesis of available collision rate estimates, not a meta-analysis. Ex. A, pp. 8-9. As Dr. Smallwood notes, a meta-analysis involves a combination of effects sizes and their variances drawn from published studies. *Id.* at 9. However, the Loss et al. study combined point estimates without carrying their variances. *Id.*

ESA next asserts that Dr. Smallwood bears the burden of evidence that the proposed Project would kill significant numbers of birds. See ESA Biological Comment, p. 3. However, the City has failed to provide evidence that the building will not kill

significant numbers of birds. Just as the City fails to do, ESA provides no results of fatality monitoring at existing buildings in downtown Los Angeles and fails to provide results from any fatality monitoring study anywhere where the monitoring failed to provide fewer than the range of collision fatality estimates that informed the national-level estimate of the Loss et al. study or that informed Dr. Smallwood's prediction for the Project. Ex. A, p. 9.

iv. Project Design, Construction and Design Features

In his May 4, 2020 comment letter, Dr. Smallwood cited several bird-safe guidelines adopted by major cities including San Francisco and New York. However, ESA attempts to downplay the relevance of these guidelines. See ESA Biological Comment, pp. 4-5. ESA asserts these guidelines were developed due to the cities being in geographical areas with a high likelihood of bird collisions. *Id.* at 4. However, neither of the guideline documents explained that they were prepared in response to San Francisco or New York being located in areas with a high likelihood of bird collisions. Ex. A, p. 10. Instead, both of the documents cite the threat to birds posed by poorly designed buildings in U.S. cities and glazed buildings that make up modern city skylines. *Id.*

ESA then posits that the building design standards are already consistent with the bird-safe guidelines of New York and San Francisco. ESA Biological Comment, p. 5. However, Dr. Smallwood critiques each of the measures listed by ESA since they fail to show that the measures adopted are consistent with the bird-safe guidelines and that they would in fact mitigate bird collisions. See Ex. A, pp. 10-11

Dr. Smallwood has provided ample evidence that the Project will result in significant impacts to birds due to window collisions and the City has a duty to investigate these impacts, which they have thus far failed to do. Additionally, the EIR provides no analysis of cumulative impacts on birds caused by window collisions in the City, not any analysis of the proposed Project's contribution to cumulative impacts of window collisions. An RDEIR is required to fully analyze and mitigate these impacts.

E. The EIR Fails to Adequately Analyze the Project's Air Quality Impacts.

SAFER previously submitted comments on the Project's potential air quality impacts. See SAFER Comments dated October 16, 2019, May 4, 2020, and July 1, 2020. SAFER's concerns regarding the Project's air quality impacts are based on the

expert analysis and opinions of environmental consulting firm SWAPE. SWAPE's comments identified errors in the City's air quality modeling, the City's failure to implement all feasible mitigation measures to reduce the Project's emissions, the City's failure to adequately evaluate the Project's diesel particulate matter health risk emissions, and a potentially significant health risk impact to nearby sensitive receptors. See environmental consultant SWAPE Comment dated October 15, 2019 ("October 15 SWAPE Comment").

Rather than objectively study the serious impacts raised by SWAPE, the City twice attempted to critique SWAPE's expert analyses. See City of Los Angeles Responses to Lozeau Drury LLP Letter, March 2020, pp. 2-37–2-82, and City of Los Angeles Responses to Lozeau Drury LLP Letter, May 2020. SWAPE reviewed the City's March 2020 comments and responded in SAFER's May 4, 2020 Letter. SWAPE reviewed the City's May 2020 comments and prepared a response, which is attached as Exhibit B to these comments.

i. Unsubstantiated Input Parameters Used to Estimate Emissions.

SWAPE previously identified several issues with the City's air model, which artificially reduced the Project's construction and operational emissions. See October 15 SWAPE Comment. After reviewing the technical memo prepared by ESA, SWAPE maintains that the analysis fails to address all of its concerns and fails to accurately estimate the Project's criteria air pollutant emissions. See Ex. B, p. 1. SWAPE asserts that the DEIR's CalEEMod model included unsubstantiated changes to the fuel type of two pieces of off-road construction equipment, from diesel to electrical, and unsubstantiated changes to indoor and outdoor water use rates. *Id.* at 2. ESA's responses to these unsubstantiated changes again failed to adequately justify their inclusion in the air model, and SWAPE maintains that the air quality impact significance determination is incorrect and unsubstantiated. See *id.* at 2-3.

ii. Diesel Particulate Matter Health Risk Emissions Inadequately Evaluated.

SWAPE previously commented on the EIR's incorrect conclusion that the Project would have a less than significant health risk impact without conducting a quantified construction and operational health risk assessment ("HRA"). See October 15 SWAPE Comment. In response, the City prepared construction and operational HRAs and concluded that the maximum combined construction and operational cancer risk would be 0.47 in one million. However, SWAPE concluded that the HRAs were insufficient and maintained that the Project's health risk impact was not adequately evaluated. See

SWAPE Comment dated April 30, 2020. In response, the City, through consultant ESA, asserts that the 2015 OEHHA Guidance does not impose requirements for HRAs for the Project since the intent of the guidance was to provide HRA procedures for use in the Air Toxics Hot Spots Program, and that the South Coast Air Quality Management District (“SCAQMD”) doesn’t impose requirements for HRAs for the Project concerning the use of the 2015 OEHHA Guidance. See ESA May 11, 2020 Response to Comments F, G and I on Air Quality and Greenhouse Gas Emissions (“ESA Air Quality Comment”), p. 4. However, as SWAPE notes, the Project instead attempts to rely on the older OEHHA guidance from 2003, which is incorrect for several reasons. Ex. B, p. 3.

First, ESA’s claim that the 2015 OEHHA guidance is inapplicable because it was intended to be used in the Air Toxics Hot Spots Program directly contradicts the Project’s use of the 2003 OEHHA Guidance. See *id.* at 4. Second, the 2015 OEHHA guidance has been recommended and utilized by the SCAQMD and other air quality management districts. *Id.* As such, the updated guidance is the standard across air districts in the state and should be used for the Project. *Id.* Lastly, SWAPE recommends the use of the 2015 OEHHA guidance since it conducts a more health protective analysis than the 2003 guidance through the use of Age Sensitivity Factors (“ASFs”). *Id.* According to the guidance, OEHHA developed ASFs to take into account the increased sensitivity to carcinogens during early-in-life exposure. *Id.*; see also OEHHA (Feb 2015) Risk Assessment Guidelines Guidance Manual for Preparation of Health Risk Assessments, p. 8-4, <https://oehha.ca.gov/media/downloads/cnr/2015guidancemanual.pdf>; see also OEHHA (May 2009) Technical Support Document for Cancer Potency Factors, p. 40, <https://oehha.ca.gov/media/downloads/cnr/tsdcancerpotency.pdf>. According to OEHHA’s 2009 Technical Support Document that first introduced ASFs, “the ASFs are a default to use when you have no chemical-specific data on influence of age-at-exposure on potency in order to protect public health.” OEHHA (May 2009) Technical Support Document for Cancer Potency Factors, p. 53, <https://oehha.ca.gov/media/downloads/cnr/tsdcancerpotency.pdf>. As such, using ASFs is the most conservative, health-protective analysis, as required by CEQA, and therefore SWAPE recommends the use of OEHHA’s most updated guidance from 2015. Ex. B, pp. 4-5.

For these reasons, SWAPE continues to find the Project’s construction and operational HRAs insufficient and maintain that the Project’s health risk impact has not been adequately evaluated.

F. The EIR Fails to Adequately Analyze the Project's Greenhouse Gas Impacts.

SAFER previously submitted comments on the Project's potential greenhouse gas ("GHG") impacts. SAFER's concerns regarding the Project's GHG impacts are also based on the expert analysis and opinions of environmental consulting firm SWAPE. See October 15 SWAPE Comment, pp. 23–33. In reviewing the EIR, SWAPE found that the EIR incorrectly relied upon CARB's 2017 Scoping Plan, SCAG's 2016 RTP/SCS, the City's *LA Green Plan*, and Sustainable City pLAN to determine the Project's significance. SWAPE also found that while the City quantified the Project's GHG emissions, it failed to compare the Project's emissions to the appropriate SCAQMD bright-line and service population efficiency thresholds. SWAPE conducted an updated GHG analysis, which demonstrated that the Project's emissions significantly exceeded the applicable SCAQMD bright-line and efficiency thresholds. See October 15 SWAPE Comment, pp. 30–33. In its April 30, 2020 comment letter, SWAPE reiterated that the City should have used the SCAQMD Interim Thresholds to evaluate the Project's GHG emissions, and concluded that the EIR failed to demonstrate consistency with the CARB Scoping Plan or SCAG's 2016 RTP/SCS. See SWAPE Comment dated April 30, 2020.

In response, ESA reiterates that the SCAQMD Interim Thresholds were not adopted and concludes that the Project may utilize a qualitative threshold based on the Project's consistency with several plans and policies. See ESA Air Quality Comment, p. 5. However, as SWAPE states, the SCAQMD Interim Thresholds are consistent with the methods of analysis that is regularly practiced by other air districts and furthers CEQA's demand for conservative analyses to afford the fullest possible protection of the environment and therefore cannot be ignored. Ex. B, p. 6. SWAPE maintains that the EIR's GHG analysis is not consistent with evolving standards and the conclusion that the Project has a less than significant GHG impact is not supported by substantial evidence. *Id.*

Regarding the City's failure to demonstrate consistency with the CARB Scoping Plan and SCAG's 2016 RTP/SCS, ESA discusses a few measures that are implemented by the Project that would align with the CARB Scoping Plan and SCAG's 2016 RP/SCS. See ESA Air Quality Comment, p. 5-6. However, it fails to discuss all of the Project-specific measures required by said plans and detailed in SWAPE's April 30 comment letter. Ex. B, p. 7. SWAPE again outlined the measures in the CARB Scoping Plan and SCAG's 2016 RTP/SCS with which the City has failed to show consistency. See *id.* at 7-16. SWAPE therefore maintains its comment that the City fails to demonstrate the Project's consistency with the CARB Scoping Plan and SCAG's 2016

RTP/SCS and concludes that the City failed to conduct an adequate analysis of the Project's GHG emissions. *Id.* at 7.

G. The EIR Fails to Accurately Disclose and Analyze Traffic Impacts.

SAFER previously submitted comments on the EIR's failure to adequately disclose and analyze the Project's traffic impacts. See SAFER Comments dated October 16, 2019, May 4, 2020, and July 1, 2020. SAFER's concerns regarding the Project's traffic impacts are based on the expert analysis and opinions of civil traffic engineer Daniel T. Smith Jr., P.E. See Dan Smith's Comment dated October 11, 2019 ("October 11 Smith Comment"). Rather than objectively study the issues raised by Mr. Smith, the City twice attempted to critique Mr. Smith's expert analysis without itself bringing any expertise to bear on the Project's traffic impacts raised by Mr. Smith. See City of Los Angeles Responses to Lozeau Drury LLP Letter, March 2020, pp. 2-55-2-68, and City of Los Angeles Responses to Lozeau Drury LLP Letter, May 2020. Mr. Smith reviewed the City's March 2020 comments and responded in SAFER's May 4, 2020 Letter. Mr. Smith reviewed the City's May 2020 comments and prepared a response, which is attached as Exhibit C to these comments.

Mr. Smith criticizes the Fehr & Peers memo prepared in response to his comments, describing it as a "reassertion of support analyses and assumptions that are illogical, unsupported and unsupportable." Ex. C, p. 1. Mr. Smith points to his previous comment that objected to the application of a 25 percent deduction in the Project's motor vehicle trip generation in the 2017 Existing + Project analysis based on assumed presence of a future rail transit station that did not exist in 2017. *Id.* When the clear error was pointed out by Mr. Smith, the error should have been corrected, which Mr. Smith states the City has failed to do. *Id.* at 1-2.

Mr. Smith also criticizes the City's lack of consideration of the increasing effect of reliance on TNCs in the DEIR. *Id.* at 2. The Fehr & Peers memo contains a new analysis that assumes the Project's retail and restaurant trips might be increased 10 percent and office and retail trips increased 5 percent to reflect TNC use (such as Uber and Lyft), and concludes that the outcome of the Project's traffic analysis would be unchanged. See Fehr & Peers Memo, p. 3. However, as Mr. Smith notes, these percentages of trips by TNCs are not substantiated or based on research. Ex. C, p. 2. Mr. Smith references a San Francisco study of TNCs published in October 2018 that compared the relative responsibility for traffic delay and VTM growth between 2010 when there was no appreciable TNC use and 2016 when TNCs had emerged as a significant mode of travel. *Id.* "The study apportions delay and VMT growth to 4 factors:

population growth, employment growth, street network changes and TNC travel.” *Id.*
The study’s findings include:

- TNCs accounted for 73 percent of the growth in vehicle hours of delay in the City’s densest district and 45 percent in the next densest district.
- TNCs accounted for 65 percent of the growth in VMT in the City’s densest district and 41 percent in the next densest district.
- In the AM commute peak period, TNCs accounted for 41 percent of the growth in VMT City-wide and 42 percent in the PM commute period.
- In the AM commute peak period, TNCs accounted for 42 percent of the growth in vehicle-hours of delay City-wide and 44 percent in the PM commute period.

Id. As Mr. Smith states, these changes are indicative of far greater changes in urban travel habits due to TNCs than the 5 and 10 percent adjustments presumed by Fehr & Peers and that the TNC usage significantly affects commute peak travel rather than being mostly for “occasional discretionary trips” as Fehr & Peers asserts.

By failing to correct the error in the traffic analysis raised by Mr. Smith, as well as the lack of analysis on TNCs, the City’s traffic impact conclusions are not supported by substantial evidence.

H. The EIR Fails to Analyze the Potential Significant Indoor Air Quality Impacts on the Health of Future Residents and Employees of the Project.

SAFER previously submitted comments on the City’s failure to analyze the Project’s potential significant health impacts on future residents and employees from formaldehyde emissions that will be emitted by finishing materials used to construct interiors of the residential units and office buildings. See SAFER Comments dated October 16, 2019, May 4, 2020, and July 1, 2020.

SAFER’s concerns regarding the health risks posed by the Project’s formaldehyde emissions are based on a 2019 study conducted by Chan et al., which measured formaldehyde levels in new structures constructed after the 2009 California Air Resources Board’s rules went into effect, as well as the expert analysis and opinions of Certified Industrial Hygienist Francis Offermann, PE CIH. See Indoor Air Quality Comment dated April 22, 2020 (April 2020 Offermann Comment). Based on project-specific information, Mr. Offermann predicted the Project would pose a significant

cancer risk to residents and employees of the Project. See April 2020 Offermann Comment, pp. 2-3. Specifically, Mr. Offermann calculated that residents' continuous exposure represents a cancer risk of 112 per million, which is 11 times greater than the South Coast Air Quality Management District's ("SCAQMD") CEQA cancer risk threshold of 10 per million. *Id.* at 3. Additionally, for employees of the commercial spaces of the Project, the expected exposure represents a cancer risk of 16.4 per million, which is 1.64 times the SCAQMD's CEQA cancer risk threshold of 10 per million. *Id.*

Despite the City's duty to investigate issues relating to a project's potential environmental impacts, the City and the EIR have, thus far, attempted to deny Mr. Offermann's expert analysis and refuse to consider with any informed expertise the likely impacts of indoor formaldehyde emissions posed by the Project to future residents and employees. See *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597-98 ("[U]nder CEQA, the lead agency bears the burden to investigate potential environmental impacts."). Rather than objectively study this serious impact to the Project's future residents and employees, the City's consultant ESA attempted to critique the 2019 Chan et al. study and Mr. Offermann's expert analysis without itself bringing any expertise to bear on the Project's formaldehyde emissions. See City of Los Angeles Responses to Lozeau Drury LLP Letter, March 2020, pp. 2-18-2-19, and City of Los Angeles Responses to Lozeau Drury LLP Letter, May 2020. Mr. Offermann reviewed the City's March 2020 comments and responded in SAFER's May 4, 2020 Letter. Mr. Offermann reviewed the City's May 2020 comments and prepared a response, which is attached as Exhibit D to these comments.

ESA first critiques Mr. Offermann's use of the 2019 Chan et al. study by claiming that the building conditions are dissimilar to the Project and it is misleading to apply results from the study because the study was on single-family detached structures and the homes were built to comply with the 2008 version of the California Title 24 standards. ESA Air Quality Comment, p. 7. However, as Mr. Offermann states, the Project consists of residential and commercial spaces, and with respect to the building materials used for construction, "these buildings are similar to the single-family detached residents since they will be constructed with similar building materials that are commonly used in construction, including formaldehyde resin containing composite wood products, (i.e. plywood, MDF, and particleboard)." Ex. D, pp. 2-3. Additionally, while the 2019 Chan study did study homes built to comply with the 2008 version of the California Title 24 standard, "the Chan 2019 study observed that the mechanical outdoor air delivered to these homes actually exceeded the 2008 version of the California Title 24 standard, and the median outdoor air exchange rate in the homes

studied equaled that required by the current 2019 California Title 24 standard.” *Id.* at 3. Therefore, the building conditions in the research paper are not dissimilar to the Project, but in fact are similar. *Id.*

ESA next asserts that California regulations to limit formaldehyde emissions have been effective in reducing formaldehyde concentrations in homes. ESA Air Quality Comment, p. 7. As Mr. Offermann has stated, that the homes in the 2019 Chan study, built with composite wood products meeting the CARB Phase 2 Formaldehyde ATCM regulations, had a 38% lower median indoor formaldehyde concentration, “the median lifetime cancer risk is still 112 per million for homes built with CARB compliant composite wood products, which is more than 11 times the OEHHA 10 in a million cancer risk threshold.” Ex. D, p. 3.

ESA asserts that the 2019 Chan study does not represent reliable or credible evidence that the Project would pose health risks to residents and workers from indoor air quality, and that Mr. Offermann’s calculations amount to speculation and do not reflect the actual Project uses and are thus unsupported by substantial evidence. ESA Air Quality Comment, p. 7. However, the 2019 Chan study does provide reliable and credible evidence that the Project would pose health risks to residents since the buildings in the Project consist of residential and commercial retail spaces, which will be constructed with similar building materials that are commonly used in construction, including formaldehyde resin containing composite wood products. Ex. D, p. 4. Additionally, the homes in the 2019 Chan study had mechanical outdoor air ventilation rates similar to those in the current Title 24 standards. *Id.* Lastly, while measurements in the 2019 Chan study indicate that indoor formaldehyde concentrations in buildings built with similar materials will pose cancer risks in excess of the CEQA cancer risk threshold of 10 per million, “a determination of the cancer risk that is specific to this project and the materials used to construct these buildings can and should be conducted prior to completion of the environmental review.” *Id.*

ESA relies on CARB’s regulations to assert that the emission standards the Project will comply with are set at low levels intended to protect public health. ESA Air Quality Comment, p. 7. However, as Mr. Offermann points out, ESA’s source for this statement, CARB’s Frequently Asked Questions for Consumers on Reducing Emissions from Composite Wood Products, is from a public health standpoint, whereas the stated purpose of the CARB ATCM regulations is not to assure healthful indoor air quality, but rather to reduce formaldehyde emissions from composite wood products. See Ex. D, p. 5.

Mr. Offermann not only provided the City with a method to determine whether the indoor concentrations resulting from formaldehyde emissions of the specific building materials/furnishings selected for the Project exceed cancer and non-cancer guidelines, but also provided mitigation measures the City could adopt for the Project that would reduce formaldehyde emissions to a less than significant level – composite wood products with no-added formaldehyde (NAF) resins and ultra-low emitting formaldehyde (ULEF) resins. Ex D, p. 6. However, the City instead continues to critique and dismiss Mr. Offermann’s comments and the cancer risk posed to the Project’s residents and employees instead of analyzing the potential impact or requiring the use of feasible mitigation measures.

Lastly, ESA argues that the Project’s effects on its residents is not considered to be an impact under CEQA and does not need to be analyzed in the Project’s EIR. ESA Air Quality Comment, p. 8. To the extent the City believes that CEQA does not require analysis of impacts to future workers or users of a proposed project, the Supreme Court in *California Building Industry Ass’n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 (“*CBIA*”) has ruled to the contrary. *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 386-87. 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 387 (emphasis added); see also *Berkeley Keep Jets*, 91 Cal.App.4th at 1371 (CEQA requires analysis “of the project’s impact on the health of the Airport’s employees and nearby residents...”).

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 386 (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). Of course, workers are as much human beings as nearby or future residents. There is no meaningful distinction suggesting CEQA should ignore a Project’s emissions to air within the Project site that may result in adverse health impacts to future residents or workers. Until such an assessment is completed, the EIR’s failure to address health impacts to future residents and workers and users fails to proceed in the manner required by law and is not supported by substantial evidence.

IV. THE CITY SHOULD PREPARE AND RECIRCULATE A REVISED DEIR

A revised draft environmental impact report (“RDEIR”) should be prepared and circulated for full public review to address the impacts identified above and to propose feasible mitigation measures. CEQA requires re-circulation of an EIR when significant new information is added to the EIR following public review but before certification. Pub. Res. Code § 21092.1. The CEQA Guidelines clarify that new information is significant if “the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project” including, for example, “a disclosure showing that . . . [a] new significant environmental impact would result from the project.” CEQA Guidelines § 15088.5. The above significant environmental impacts have not been analyzed in the EIR and must be addressed in an RDEIR that is re-circulated for public review.

V. CONCLUSION

In light of the above comments, SAFER respectfully requests that the City address these shortcomings in an RDEIR and recirculate the RDEIR prior to considering approvals for the Project. Thank you for considering these comments.

Sincerely,



Paige Fennie
Lozeau Drury LLP