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Via E-mail

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Bob Blumenfield, Councilmember
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City of Los Angeles
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Re: Comment in Support of Appeal of Initial Study/Mitigated Negative Declaration for the 3440 Wilshire Project; CPC-2016-3692-VZC-MCUP-SPR-1A; ENV-2016-3693-MND; VTT-74602-2A

Dear Chair Harris-Dawson and Honorable Members of the Los Angeles Planning and Land Use Management Committee:

I am writing on behalf of **Supporters Alliance for Environmental Responsibility** and its members living in and around the City of Los Angeles (**"SAFER"**) regarding the 3440 Wilshire Project, a mixed use development proposed for a 7.3-acre lot area located at 3432-3470 Wilshire Boulevard in Los Angeles, and the related project approvals (the "Project"). This letter is in support of SAFER's appeal of the Planning Commission's decision to adopt an initial study/mitigated negative declaration ("IS/MND") and mitigation monitoring plan ("MMP") for the Project, and sustaining the Advisory Agency's determination approving Vesting Tentative Tract Map NO. VTT-74602. The IS/MND fails to analyze all environmental impacts and to implement all necessary mitigation measures. As a result, SAFER respectfully requests that the City of Los Angeles ("City") grant our appeal and require staff to prepare an Environmental Impact Report ("EIR") in order to incorporate our concerns discussed below.

SAFER provided detailed comments on the IS/MND on May 1, 2020. Those comments included the expert comments of Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH, Soil/Water/Air Protection Enterprise ("SWAPE"), ecologist Shawn Smallwood, and environmental consulting firm Soil/Water/Air Protection Enterprise ("SWAPE").

The Applicant submitted a report by CAJA Environmental Services, LLC dated May 12, 2020 responding to the issues raised in our May 1, 2020 Comment (“CAJA Report”).

This comment supplements and incorporates by reference our May 1, 2020 comments, and responds to the CAJA Report’s response to our previous comments. This comment has been prepared with the assistance of traffic engineer Dan Smith, P.E. Mr. Smith’s original comments and curriculum vitae are attached hereto as Exhibit A, while his supplemental comments are attached hereto as Exhibit B. This comment was also prepared with the assistance of the environmental consulting firm Soil/Water/Air Protection Enterprise (“SWAPE”). SWAPE’s supplemental comments are attached hereto as Exhibit C. Finally, this comment was prepared with the assistance of the acoustical consulting firm Accentech, whose comments are attached hereto as Exhibit D. Each of these comments are incorporated herein by reference in their entirety.

As explained below nothing in the CAJA Report, or anywhere else in the record, changes the fact that an EIR must be prepared for this Project. “[I]f there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR.” *Sierra Club v. County of Sonoma*, 6 Cal.App.4th at pp. 1316–1317; *Moss v. Cty. of Humboldt* (2008) 162 Cal. App. 4th 1041, 1049.

I. PROJECT DESCRIPTION

The Project proposes to develop a mixed-use project on a 7.3-acre site consisting: 1) 640 apartment units; 2) 10,738 square feet (“sq. ft.”) of commercial floor area; and 2) 1,921 vehicle parking spaces. The Project site is currently developed with four commercial office buildings with ground floor retail uses that front West Wilshire Boulevard and South Irolo Street (the “Existing Office Buildings”), a three-story parking garage, a five-story parking structure, two vehicle driveways, and internal private roadways. The Project involves demolishing the existing three-story parking structure, constructing two commercial kiosks, and constructing a 23-story mixed-use building and a 28-story mixed-use building on top of a podium that is four stories above grade and two stories subterranean. The commercial space will consist of 5,538 sq. ft. of retail area and 5,200 sq. ft. of restaurant area. The restaurant area will consist of 3,700 sq. ft. with 138 indoor and outdoor patio seats of high-turnover restaurant and 1,500 sq. ft. with 68 indoor and outdoor patio seats of fast-food restaurant.

II. LEGAL STANDARD

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. 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. City Council of San Diego (1982) 129 Cal.App.3d 436, 440. A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project “would not have a significant effect on the environment.” *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; § 21080(c). Such a determination may be made, however, only if “[t]here is *no* substantial evidence in light of the whole record before the lead agency” that such an impact *may* occur. *Id.*, § 21080(c)(1) (emphasis added).

A negative declaration is improper, and an EIR is required, whenever substantial evidence in the record supports a “fair argument” that significant impacts may occur. Pub. Res. Code § 21082.2. This is true even if other substantial evidence in the record supports the opposite conclusion. *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens*, 29 Cal.App.4th 1597. 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. *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754. As a matter of law, “substantial evidence includes . . . expert opinion.” Pub. Res. Code § 21080(e)(1); 14 Cal Code Regs § 15064(f)(5). An agency’s decision not to require an EIR can be upheld only when there is no credible evidence to the contrary. *Sierra Club v. County of Sonoma*, (1992) 6 Cal.App.4th, 1307, 1318.

Here, substantial evidence presented in this comment letter, and the supporting technical comments, supports a fair argument that the Project will have significant environmental impacts on indoor air quality, noise, air quality, human health, and greenhouse gas emissions. For these reasons, the City should grant the Appeal, withdraw the MND, and prepare an EIR for the Project.

III. AN EIR IS REQUIRED BECAUSE SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT WILL HAVE SIGNIFICANT EFFECTS ON THE ENVIRONMENT.

A. There is Substantial Evidence of a Fair Argument that the Project Will Have a Significant Health Risk Impact from its Indoor Air Quality Impacts.

As explained in SAFER’s May 1, 2020 Comments, the expert comments of Certified Industrial Hygienist, Francis “Bud” Offermann, PE, CIH, constitute substantial evidence that the Project may have significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde.

The record contains a document dated September 24, 2020 entitled “Responses #3 to Appeal on 3440 Wilshire Project,” prepared by CAJA Environmental Services, LLC on behalf of the Project Applicant (“CAJA Report”). The CAJA Report responds to the issues raised in SAFER’s May 1, 2020 comments, as well as Mr. Offermann’s comments. CAJA Report, pp. 6-10. However, the CAJA Report does not sufficiently address the issues raised.

The CAJA Report claims that health risk impacts from indoor air quality issues do not

need to be addressed because “[t]here are no requirements or guidance from SCAQMD or relevant agencies to evaluate such risk and the Project does not represent a unique or special development that needs addressing in CEQA.” CAJA Report, p. 8. This explanation is inconsistent with CEQA. The fact that SCAQMD has not provided guidelines does not alleviate the City of its mandatory duty to analyze this potentially significant impact.

Moreover, under both CEQA and the CEQA Guidelines, an EIR must be prepared when certain specified impacts result from a Project. PRC § 21083(b); 14 CCR § 15065(a). Specifically, an agency must find that a Project may have a significant effect on the environment and must prepare an EIR if the Project has environmental effects that will cause substantial adverse effects on human beings, directly or indirectly. PRC § 21083(b)(3); 14 CCR § 15065(a)(4).

The CAJA Report then claims that no indoor air quality analysis is needed because the Project will comply with various existing laws. CAJA Report, p. 8. Compliance with laws is not evidence that the Project will not have a significant impact. *Kings Co v. Hanford* (1990)221 CA3d 692, 712-718. In addition, Mr. Offermann’s comments explain that even assuming all materials are compliant with California Air Resources Board’s formaldehyde airborne toxics control measure, future residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 112 per million.

The CAJA Report also claims that no analysis is needed of the Project’s indoor air quality because SAFER “provides no credible evidence that the Project will be constructed with building materials with significant amounts of formaldehyde.” CAJA Report, p. 9. This is both incorrect and fails to understand the City’s duty to investigate environmental impact under CEQA. Newly constructed residential buildings, such as the Project, regularly use materials and products containing and releasing formaldehyde. Offermann Comment, pp. 2-3. “The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particleboard. These materials are commonly used in building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims.” *Id.* In addition, the City has a duty to investigate issues relating to a project’s potential environmental impacts, especially those issues raised by an expert’s comments. *See Cty. Sanitation Dist. No. 2 v. Cty. of Kern*, (2005) 127 Cal.App.4th 1544, 1597–98 (“under CEQA, the lead agency bears a burden to investigate potential environmental impacts”). The IS/MND should disclose the types of materials that will be used in construction so that the public and decision makers and fully assess the Project’s impacts.

Finally, the CAJA Report states that “We are not aware of credible or peer reviewed studies which assessed long-term indoor concentrations and associated lifetime exposure to formaldehyde in new homes and commercial spaces in California that suggest the existing rules and regulations on formaldehyde in building materials is a concern.” CAJA Report, p. 9. However, the California New Home Study, referenced in Mr. Offermann’s comments, is a peer-reviewed study assessing that exact topic. Mr. Offermann’s comments provide a link to that study, which is available here: <https://www.arb.ca.gov/research/apr/past/04-310.pdf>. See also

Exhibit E, “Indoor Air Quality in New California Homes with Mechanical Ventilation,” by Chan, et al.

Because Mr. Offermann’s expert review is substantial evidence of a fair argument of a significant environmental impact to future users of the project, an EIR must be prepared to disclose and mitigate those impacts.

B. The IS/MND’s Traffic Analysis is Not Supported by Substantial Evidence and Fails to Disclose that the Project may have a Significant Traffic Impact.

A significant transportation impact would occur if roadways and intersections that would carry project-generated traffic would exceed adopted City of Los Angeles Department of Transportation thresholds of significance. IS/MND, B-215. The IS/MND’s conclusion that the Project will not result in significant transportation impacts is not supported by substantial evidence.

Attached hereto as Exhibit A are the expert comments of traffic engineer Dan Smith, dated April 20, 2020. These comments were referenced and described in SAFER’s May 1, 2020, but were inadvertently left out of the comments as an exhibit. In addition to Mr. Smith’s April 20, 2020 comments, attached hereto as Exhibit B are the supplemental comments of Mr. Smith, dated November 2, 2020 (Smith Nov. 2 Comment). In his November 2 Comment, Mr. Smith responds to the CAJA Report.

As described in our May 1, 2020 comments, and explained further below, the IS/MND greatly underestimates the vehicle trips generated by the Project. Mr. Smith concludes that there is “overwhelming evidence that there is fair argument that demonstrates that the Project’s impacts are not fully disclosed and mitigated in the IS/MND. Consequently, the Project cannot be approved under a mitigated negative declaration and a full EIR must be prepared.” Smith April 20 Comment, p. 5.

1. The IS/MND underestimates traffic generated from the retail component of the Project.

The Project includes 5,538 square feet of commercial retail space. The IS/MND estimates the gross number of trips generated from this retail space based on *Trip Generation, 10th Edition’s* average rates for Land Use Category 820, which is the land use category for “Shopping Center.” Smith April 20 Comment, p. 2. But Traffic Engineer Dan Smith explains in his expert comments, that this land use is inapplicable to the Project because 5,538 square feet of retail space is not a shopping center. *Id.* To generate the average trip rates used for the Shopping Center land use category requires approximately 400,000 square feet of floor area. *Id.* Mr. Smith determined that a convenience market would be a much more accurate land use category to use. *Id.* Using the *Trip Generation, 10th Edition*, shopping centers generate daily vehicle trips at an average rate of 37.75 trips per thousand square feet of floor area, where as convenience markets generate 762.28 trips per thousand square feet. *Id.* This amounts to 20 times more traffic generated from the retail space than was disclosed in the IS/MND. The same

flaw is reflected in the IS/MND’s peak hour trip analysis.

In Response to SAFER-9, CAJA deceptively presents only a partial quote of SAFER’s May 1, 2020 Comment, so that it appears SAFER argued that a retail complex must be at or above 400,000 square feet of floor area to be analyzed as a Category 820 Shopping Center based on ITE *Trip Generation, 10th Edition*. CAJA, p. 17. CAJA goes on to note that the majority of data entries for this category in the ITE *Trip Generation, 10th Edition* for Category 820 are less than 400,000 square feet, and many are less than 50,000. *Id.* As a result, CAJA concludes this is the correct land use category.

Dan Smith explains in his November 2 comment why CAJA is wrong. *Trip Generation, 10th Edition* average trip rates for Category 820 lump all leasable floor area sizes of retail as one category – from very small like the Project which is only 5,538 square feet, to retail spaces with more than 2 million square feet. Smith Nov. 2 Comment, p. 2. Mr. Smith explains that the plot of each of these data points used in the “Category 820 data base shows that, considering data entries for centers about the same size, the number and amplitude of those falling above and below the average rate line only becomes about equal when retail centers are at or above about 250,000 square feet. For daily trips, the fitted curve equation for the data set coincides with the average rate line at a retail center size of about 400,000 square feet. This can be seen in Figures 1 and 2 below, which show the data plots from *Trip Generation, 10th Edition* Category 820 daily and PM peak hour trips. *Id.* For projects less than 200,000 square feet, nearly all of the actual trip data falls “above to well above the average rate line.” *Id.*

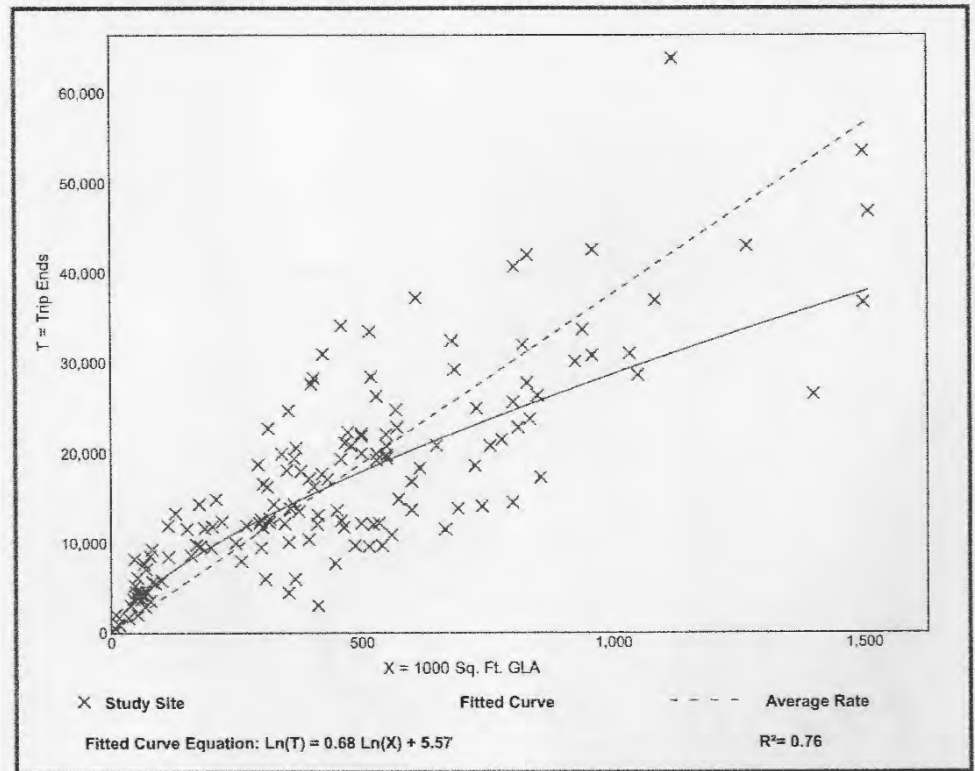
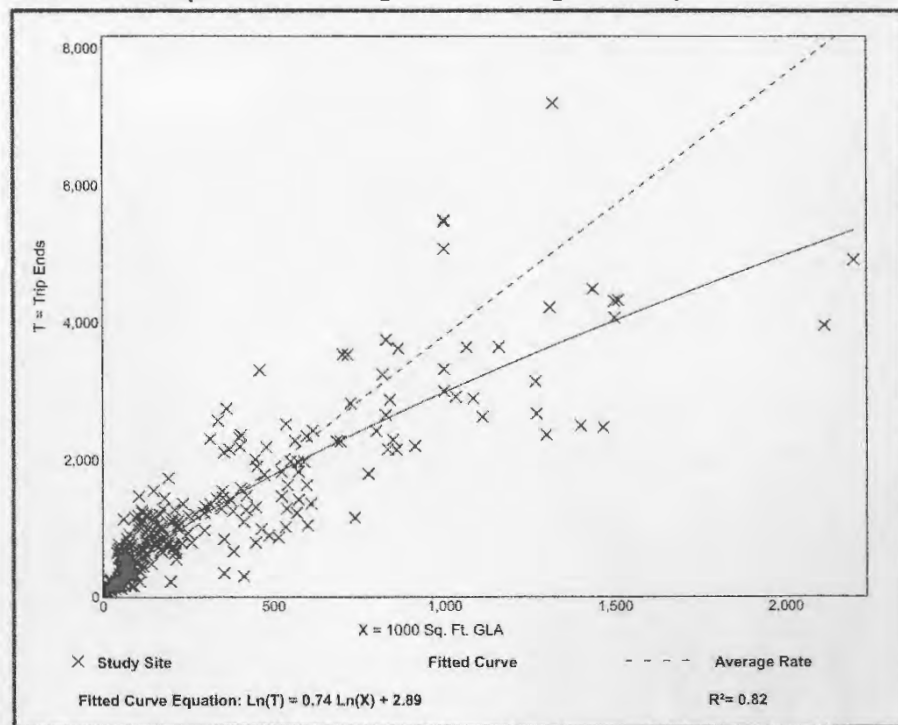


FIGURE 1: Daily Shopping Center Trip Data By Leasable Area

FIGURE 2: PM Peak Shop Center Trip Data By Leasable Area

Since the tenant is unknown, in order to disclose the Project's full potential traffic impact, the IS/MND should have used the fitted curve rather than the average rate for Category 820, or it should have assumed the most likely occupant of a 5,538 square foot retail space, which would be a Convenience Market (ITE Category 851) or a single or combination fast food establishment (ITE Category 933). Smith Nov. 2 Comment, p. 2. Under any of these scenarios, gross trip generation from the retail component would far exceed what the IS/MND discloses. *Id.*

Mr. Smith explains that many other authoritative trip generation data sources reflect the fact that *Trip Generation, 10th Edition* average retail trip rates are not representative of retail spaces with small square footage. *Id.* For example, the City of San Diego trip generation manual and the City of San Jose Traffic Impact Analysis Manual both subdivide trip generation rates by size of the retail center. *Id.* The San Diego Trip Generation Manual splits retail uses into Regional Shopping Centers (greater than 300,000 square feet), Community Shopping Centers (100,000 to 300,000 square feet) and Neighborhood Shopping Centers (30,000 to 100,000 square feet) with smaller retail uses assumed to be a specific known use or combination of the known or logical uses of the space involved. *Id.* Similarly, the San Jose Traffic Impact Analysis Manual subdivides retail uses by size category, with categories including "Super Regional Shopping Centers" (over 600,000 square feet), "Regional Shopping Centers (300,000 to 600,000 square feet)", "Community Shopping" Centers (100,000 to 300,000 square feet) and "Neighborhood Shopping" Centers (less than 100,000 square feet). Smith Nov. 2 Comment, pp. 2-3. In each of these documents, "the smaller the retail square footage, the higher the trip rate."

Id. at 3.

In addition to using an incorrect trip generation rate for this small retail space, the IS/MND also dramatically discounts gross trip generation by 68 percent. *Id.* at 3. This reduction is based on 15 percent for trips internal to the Project, 25 percent as transit trips, and 50 percent as trips attached to passerby traffic. *Id.* As Mr. Smith explains, these reductions do not hold up to scrutiny.

Looking at the passerby attraction rate, Mr. Smith said that “the notion that the convenience retail would attract 50 percent of its patronage from existing passerby vehicle traffic is absurd.” Smith April 20 Comment, p. 2. Mr. Smith explains that these types of passerby attraction rates are normally attained by convenience markets on busy urban or suburban streets and where the retail store has its own surface parking lot. *Id.* Here, in contrast, the retail space is contained within a larger building, where the passerby is forced to enter and leave a large parking garage. *Id.* Moreover, the retail space is not visible from either Wilshire Boulevard or Irolo. It is only visible from S. Mariposa Avenue and/or W. 7th Street. *Id.* The IS/MND discloses that S. Mariposa carries only 680 vehicles past the Project site in the A.M. peak hour and 672 in the P.M. peak hour, while W. 7th Street carries only 349 vehicles past the Project site in the A.M. peak hour and 542 in the P.M. peak hour. IS/MND Appendix K-1, Figure 1. Mr. Smith concludes that “These totals are insufficient to support the claimed passerby attraction discount, particularly where the on-street parking spaces are usually occupied and passers-by would be forced to enter and leave a parking garage.” *Id.*

CAJA responded that the passer-by discount is a “surrogate” measure for visits at the retail by people walking to/from nearby buildings. Mr. Smith agrees that there is some expectation of walk-in retail trade in this area, but “nowhere has the City or the analysts documented through observation that it would achieve levels similar to suburban passerby *vehicle* trip attraction.” Smith Nov. 2 Comment, p. 3.

Looking at the 25% transit discount, Mr. Smith notes that “The notion that 25 percent of the people visiting a convenience market would make purposeful transit trips to reach that market is similarly implausible. This is likely to be true only of a handful of employees of the market.” Smith April 20 Comment, p. 2. “The only way the transit discount is applicable is where people make a transit trip for the specific purpose of visiting the subject retail use. And virtually nobody will make a specific transit trip for the purpose of patronizing a 5,538 square foot convenience market or fast food complex.” *Id.* Moreover, any stops at the retail space made by someone who lives or works at the Project on their way to or from transit would have already been accounted for in the internalization discount. *Id.*

The CAJA Response notes that a 25% credit is appropriate because it is allowed by the LADOT Transportation Impact Study Guidelines when a project is located near a rail transit station, like this Project is. CAJA Report, p. 17. But Mr. Smith says this response is not consistent with CEQA’s requirements to disclose a Project’s environmental impacts. Just because such a credit is allowed “does not empower analysts and City reviewers to abandon reason and logic in applying the credit.” *Id.* Moreover, just because it is “allowed” for purposes

of traffic analysis does not mean that it should be discounted in calculating the Project's air quality and greenhouse gas emissions.

2. The IS/MND underestimates traffic generated from the fast-casual restaurant component of the Project.

Like the retail space, the IS/MND assumes again that 68 percent of the fast casual restaurant's gross trip generation will not add to traffic except at Project driveways. Just as with the retail space, the IS/MND reduces traffic by 68 percent, with 50 percent attracted from passer-by traffic, 25 percent from transit, and 15 percent internal. Smith April 20 Comment, p. 3. "All of the discussion above with respect to the discounting of trips to a convenience market is similarly applicable to the fast casual restaurant." *Id.* Mr. Smith explains that "few persons would make a transit trip for the purpose of patronizing a specific fast casual restaurant." Smith Nov. 2 Comment, p. 5. Moreover, as mentioned above, residents or employees in the Project buildings who stop at the restaurant on their way to or from public transit have already been accounted for in the internalization discount. *Id.*

3. The IS/MND underestimates traffic generated from the high-turnover sit-down restaurant component of the Project.

The Project also includes a high-turnover sit-down restaurant. For this component of the Project, the IS/MND discounts 49 percent of the trip generation, which includes 25 percent for transit, 20 percent passer-by attraction, and 15 percent internal. *Id.* But Mr. Smith points out that "[e]xcept for negligible numbers of restaurant employees, few if any people would take transit in a purposeful trip to reach or depart from a restaurant of this type. Certainly, patrons of the restaurant will include persons who arrived and will depart the area via transit but these comprise part if not most of the attracted passer-by category." Smith April 20 Comment, p. 3. The need for drivers to park inside a parking garage and the fact that the restaurant will only be visible from the lightly trafficked S. Mariposa and W. 7th street further minimizes the patrons that will be attracted from street traffic. *Id.*

In Response to SAFER-11, CAJA claims that SAFER does not provide substantial evidence that the restaurant minimizes the amount of traffic generated because will would only be visible from the lightly trafficked streets. CAJA, p. 18. This misrepresents the comment. What SAFER and Mr. Smith are arguing is that "the restaurant would be unlikely to attract this percentage of its trips from passerby traffic because it would only be visible from the lightly trafficked streets and the substantial evidence of this is the floor plan presented in the IS/MND." Smith Nov. 2 Comment, p. 6.

CAJA also states that "trip generation adjustments are supported by LADOT, which concurred with the analysis." CAJA, p. 18. But there is no evidence that LADOT did anything other than provide a general approval of the analysis, which included the trip generation, because the trip discounts taken fell within the general LADOT guidelines. Smith Nov. 2 Comment, p. 6. For example, "[t]here is no evidence whether, for instance, LADOT staff applied reasoned thought to the matter of whether the full 25 percent transit discount should be applied to the high

turnover sit-down restaurant component, given that people who live or work in the Project who happen to patronize the restaurant while leaving to or coming from transit are already accounted for in the internalization discount, that hardly anyone would make transit trips for the specific purpose of getting to and departing a particular high turnover, sit-down restaurant except the restaurant staff and that restaurant staff generally travel outside of peak hours.” *Id.*

4. The IS/MND fails to account for trips by transportation network company services.

Mr. Smith explains that the rise of transportation network companies (“TNCs”) (also known as ride hailing services) like Uber and Lyft, has substantially changed the nature of transportation in urban areas. Smith April 20 Comment, p. 4. Recent research has shown that TNCs are problematic because: “a) a large part of the transportation demand they serve is drawn from trips that would otherwise been carried out by walking, bicycling or transit, b) a large share of the trips they serve are induced trips – trips that would not be made at all were the service not available or trips to distant destinations that would have been satisfied locally by walking absent the service and c) each passenger service trip actually involves 2 vehicle trips – the trip from where the vehicle is circulating or waiting to the point of call and the trip from the point of call to the actual destination.” *Id.* Despite the major impact of TNCs on transportation in Los Angeles and elsewhere, the IS/MND makes no effort to estimate the transportation impacts of TNC services related to the Project. Without counting any trips generated by TNCs, the IS/MND underestimates the Project’s transportation impact.

CAJA claims in Response to SAFER-13, that the IS/MND was not required to analyze potential impacts of TNC services because the impact is too speculative. CAJA, pp. 19-20. But Mr. Smith explains that the City has been relying on this same excuse for years, despite a now extensive body of research on the topic. Smith Nov. 2 Comment, p. 6.

Then, despite claiming the impact is too speculative, CAJA notes that even if the Project’s restaurant and retail trips were increased by 10% and residential by 5% to account for TNC trips, the transportation impact conclusions would not change. CAJA, p. 19. There are a number of problems with this. First, these numbers are completely made up and not based on any evidence. Second, according to Mr. Smith, research suggests that TNC companies have a much larger impact. Smith Nov. 2 Comment, p. 6. For example, in San Francisco research documents that roughly half of all VMT growth between 2010 and 2016 was caused by TNCs, virtually the same as all VMT caused by population and employment growth and transportation network changes.” *Id.* (citing *TNCs and Congestion*, San Francisco County Transportation Authority, October, 2018, attached hereto as Exhibit F). Finally, this issue has to be considered together with the other deficiencies noted by Mr. Smith, not just in isolation. *Id.*

Mr. Smith’s comments constitute substantial evidence that the Project’s traffic impact have been significantly underestimated and that the Project may have a significant transportation impact. An EIR must be prepared to analyze and mitigate this impact.

C. The IS/MND Relied on Unsubstantiated Input Parameters to Estimate Project

Emissions and Thus Failed to Adequately Analyze the Project's Air Quality Impacts.

The IS/MND for the Project relies on emissions calculated from the California Emissions Estimator Model Version CalEEMod.2016.3.2 ("CalEEMod"). This model relies on recommended default values for on-site specific information related to a number of factors. The model is used to generate a project's construction and operational emissions. As explained in SAFER's May 1, 2020 Comment, SWAPE reviewed the Project's CalEEMod output files and found that the values input into the model were unsubstantiated or inconsistent with information provided in the IS/MND. This resulted in an underestimation of the Project's emissions. In the Applicant's Response, CAJA provides explanations for the issues raised by SWAPE. CAJA, pp. 22-27. SWAPE prepared supplemental Comments, attached hereto as Exhibit C, explaining why CAJA's responses do not sufficiently address the issues.

D. The IS/MND Failed to Adequately Evaluate Health Risks from Diesel Particulate Matter Emissions

SAFER's May 1, 2020 Comment also notes that the IS/MND lacks substantial evidence to support its finding that the Project's emissions will not cause a significant health impact because a health risk assessment ("HRA") was not conducted. In addition, based on SWAPE's expert analysis, SAFER explained that there is substantial evidence that the Project will have a significant health risk impact. In the Applicant's Response, CAJA responds to each of these claims as well. However, nothing in the CAJA Report or elsewhere change the fact that record contains SWAPE's expert comments that the Project will have a significant and unmitigated impact on human health.

E. Contrary to the IS/MND's Conclusion, the Project Will Have a Significant GHG Impact.

Nothing in the CAJA Report changes SAFER's May 1, 2020 Comments that the IS/MND's greenhouse gas ("GHG") analysis violates CEQA and the Project will have a significant greenhouse gas impact. SWAPE's supplemental comments provide a details response to each point raised in the CAJA Report. See Exhibit C.

F. There is Substantial Evidence that the Project may have a Significant Noise Impact that was not Disclosed or Mitigated.

There are a myriad of problems with the IS/MND's analysis of potential noise impacts including the failure to conduct a construction noise analysis, failure to accurately evaluate ambient noise, and failure to address the LA CEQA Threshold Guide, among others. The end result is that there is no evidence to conclude that the Project will not have a significant noise impact on surrounding residential uses. In contrast, the expert evidence of the acoustical firm Acentech, attached hereto as Exhibit D (the "Acentech Report"), constitutes substantial evidence that the Project may have a significant noise impact that has not been mitigated. As a result, an EIR must be prepared.

1. The MND did not use LA's CEQA Thresholds Guide.

Without explanation, the IS/MND never mentions the Los Angeles CEQA Thresholds Guide ("LA CEQA Guide")¹. This Guide is intended to provide "screening and significance criteria" for projects being evaluated under CEQA in Los Angeles. LA CEQA Guide, p. 3. "The significance thresholds assist in determining whether a project's impacts would be presumed significant under normal circumstances and, therefore, require mitigation to be identified." *Id.* at vii. According to the LA CEQA Guide, a project has a significant noise impacts if it will result in construction activities lasting more than 10 days in a three month period would exceed existing ambient exterior noise levels by 5 dBA or more at a noise sensitive use. LA CEQA Guide, p. I.1-3. This criteria in the LA CEQA Guide should have been used to determine the significance of the Project's noise impact.

Rather than determine the significance of the Project's construction noise impact based on the City's own adopted CEQA threshold, the IS/MND dismisses the potential for a significant noise impact to occur based on the unsupported claim that the Project will comply with Los Angeles Municipal Code ("LAMC") Section 112.05, which limits noise levels from construction equipment to 75 dBA. IS/MND, p. B-188.

Failure to apply the City's own CEQA threshold and instead rely solely on compliance with municipal code provisions is an abuse of discretion. Compliance with laws is not evidence that the Project will not have a significant impact. *Kings Co v. Hanford* (1990)221 CA3d 692, 712-718. The Municipal Code sections cited prohibit construction during certain hours or above certain noise levels. They do not provide any guidance on the significance of noise impacts under CEQA.

When there is substantial evidence that the Project may have a significant noise impact, an EIR is required even if evidence shows that the Project will not generate noise in excess of a local agency's noise ordinance. *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732. As discussed below, the expert comments of the acoustic firm Accentech, attached hereto as Exhibit D, is substantial evidence that the Project will have a significant noise impact that requires preparation of an EIR.

2. The IS/MND does not contain sufficient evidence to conclude the Project will not have a significant noise impact.

Basic information needed for the public and decision makers to determine the significance of the Project's noise impacts are omitted, and basic best practices and the City's own requirements were not complied with in analyzing the Project's noise impact. For example, the IS/MND does not include a construction schedule, and traffic noise evaluations were not done for Wilshire Boulevard or Irolo Street, and a basic construction noise analysis was never conducted. Acentech, p. 5.

¹Available at <https://planning.lacity.org/eir/CrossroadsHwd/deir/files/references/A07.pdf>

Moreover, insufficient sound measurements were conducted to accurately evaluate ambient noise levels. Acentech, p. 6. The IS/MND relies on “Equivalent Noise Level” or “Leq” to evaluate ambient noise. See IS/MND, p. B-181. According to section 111.01(a) of the LAMC, ambient noise must “be averaged over a period of at least 15 minutes at a location and time of day comparable to that during which the measurement is taken of the particular noise source being measured” The Acentech Report points out that Project construction will occur between 7:00 AM and 9:00 PM Monday through Friday and between 8:00 AM and 6:00 PM on Saturdays, yet the only measurements taken for and reported in the IS/MND were taken during a weekday afternoon. Acentech, p. 3. “These measurements are not sufficient to be considered ‘time of day comparable to that during which the measurement is taken of the particular noise source being measured.’” *Id.* In order to comply with the City’s own standards, the City must take additional ambient noise measurements on a Saturday and in the evening, when less traffic is expected, to evaluate the Project’s impact on nearby sensitive receptors. *Id.* Moreover, the duration of “measurement 2” used to determine ambient noise on Wilshire Boulevard was only 13 minutes, which does not meet the minimum duration for a measurement to evaluate ambient noise levels under Section 111.01(a) of the LAMC.

Without additional information, the City’s lacks substantial evidence to conclude that Project construction will not result in a significant noise impact.

3. Construction sound levels referenced in the IS/MND do not match the sound levels used in the referenced Federal Highway Administrative model.

Table B.13-4 on page B-188 of the IS/MND purports to list maximum noise levels for various pieces of construction equipment. According to this table, the noise levels listed are “derived from the Federal Highway Administration’s Roadway Construction Noise Model, version 1.1 (FHWA RCNM 1.1).” But the sound levels listed do not match the cited source. Compare IS/MND, p. B-188 to Federal Highway Administration’s (“FHA”) Roadway Construction Noise Model, p. 3, Table 1 (available at https://www.fhwa.dot.gov/environment/noise/construction_noise/rcnm/rcnm.pdf). For each piece of equipment listed, the IS/MND significantly understates the noise levels of the construction equipment. Acentech, p. 3. For example, the IS/MND claims that at 50 feet, the maximum noise level for an Auger Drill Rig is 74.4 dBA, while the Federal Highway Administration’s model lists the maximum noise level at 50 feet as 85 dBA. Compare IS/MND, p. B-188 to Federal Highway Administration’s (“FHA”) Roadway Construction Noise Model, p. 3, Table 1. The IS/MND lists the maximum noise for a backhoe at 50 feet as 64.6 dBA, while the Federal Highway Administration’s model lists the maximum noise level at 50 feet as 80 dBA. Moreover, the noise levels listed in the IS/MND for maximum construction noise at 50 feet is also significantly less than the noise level ranges provided in Exhibit I.1-1 to the LA CEQA Guide. LA CEQA Guide, p. I.1-8. The below table compares the noise levels listed in the IS/MND to those listed in the Federal Highway Administration’s model. See Acentech, p. 4.

Table 1: Comparison of Construction Noise Levels Reported in IS/MND to Construction Noise Levels listed in Federal Highway Administration Roadway Construction Noise Model and Los Angeles CEQA Threshold Guide

Noise Source	Noise Level at 50 feet (dBA, Lmax)		
	Reported in IS/MND	Reported in FHA Model	Reported in LA CEQA Guide
Auger Drill Rig	74.4	85	-*
Backhoe	64.6	80	73-95
Crane	72.6	85	75-89
Dozer	68.7	85	-*
Drill Rig Truck	69.1	84	82-95
Excavator	67.7	85	-*
Front-End Loader	66.1	80	73-86
Gradall (Back Hoe)	70.4	85	73-95
Grader	72.0	85	80-93
Scraper	70.6	85	80-93

*The LA CEQA Guide did not provide a specific noise level for this piece of equipment.

The IS/MND provides no explanation for this severe discrepancy. Without any explanation of what the IS/MND’s artificially low noise levels are based on, there is no evidence to support the IS/MND’s construction-related noise analysis, since it is based on these inaccurate numbers.

4. Noise mitigation measures violate CEQA because they are not adequately described, are not mandatory, and there is no evidence of their feasibility.

The IS/MND states that:

Standard, industry-wide “best practices” for construction in urban or otherwise noise-sensitive areas would ensure the Project’s construction noise stays below the City’s 75 dBA threshold of significance. “Best practices” utilized by the Project would include equipping heavy equipment with noise-reducing mufflers and warming-up or staging equipment away from sensitive receptors. Additionally, temporary noise barriers would be erected between the Project Site and nearby residences located along 7th Street and Mariposa Avenue

IS/MND, p. B-188.

There are a number of problems with these statements. First, the MND does not provide any details regarding how, where, when, or how effective any of these measures will be. In addition, none of these measures are included as Conditions of Approval for the Project, and therefore should not be included as part of the Project’s impact analysis.

As for the mufflers, Acentech notes in its comments that California air quality laws exclude the ability to use mufflers on heavy construction equipment because of the static pressure introduced by the air quality restrictions. Acentech, p. 3. As a result, “[i]mplying mufflers will be used is misleading.” *Id.*

Finally, the barrier mitigation referenced in the MND “will not provide any acoustical attenuation to a number of the Noise Sensitive Receptors and is misleading.” *Id.* The IS/MND does not specify the height of any barrier that would be used for noise attenuation purposes. In order to have any noise attenuation impact, a noise barrier must block the line of site to the noise source. *Id.* The residences across 7th Street range from 3 to 8 stories. *Id.* While no site line study is included in the IS/MND, a preliminary study indicates that the barrier would need to be between 32 and 45 feet tall. *Id.* There is no evidence that the Project includes a 45 foot tall sound wall on the southern side of the Project. While a sound barrier may reduce noise levels for the Mariposa Avenue Residences because they are only two-story buildings, they will not benefit sensitive receptors at the Piccadilly Apartments and the 7th Street Residences because of the height of those buildings. *Id.* at 4.

6. There is substantial evidence that the Project will have a significant noise impact that has not been mitigated.

While the IS/MND does not provide sufficient detail about the Project’s construction schedule and equipment that will be used, Acentech was able to perform a general analysis, based on the LA CEQA Thresholds Guide. Acentech, pp. 5-6.

According to the LA CEQA Guide, the Project would have a significant noise impact if:

- Construction activities lasting more than one day would exceed existing ambient exterior noise levels by 10 dBA or more at a noise sensitive use; or
- Construction activities lasting more than 10 days in a three month period would exceed existing ambient exterior noise levels by 5 dBA or more at a noise sensitive use; or

LA CEQA Thresholds Guide, p. I.1-3. These criteria are never mentioned in the IS/MND.

Since Project construction will last more than 10 days in a three month period, the Project will have a significant impact if it would exceed existing ambient exterior noise levels by 5 dBA or more at a noise sensitive use. *Id.*; Acentech, p. 4. Acentech analyzed the Project’s construction-related noise based on the method described in the LA CEQA Guide assuming construction noise levels listed in the LA CEQA Guide, and assuming mufflers are used. *Id.*

Acentech concluded that the Project will have a significant construction noise impact at Piccadilly Apartments, Mariposa Avenue Residence, and the 7th Street Residences because Project construction will exceed existing ambient exterior noise levels by 5 dBA or more at each of these locations. Acentech, pp. 4-5. The Acentech Report constitutes substantial evidence that

the Project will have a significant noise impact that must be fully analyzed and mitigated in an EIR.

G. The Project Lacks Sufficient Affordable Housing in Conflict with Ballot Measure JJJ.

Only 5% (32 units) of the Project's 640 units will be set aside for affordable housing. IS/MND, p. B-174. All 32 of the affordable housing units will be considered Moderate Income housing, using the State's level of affordability and Los Angeles Housing Community Investment Department's schedule of rents. Not a single unit being made available for Low Income, Very Low Income, or Extremely Low-Income tenants. This lack of affordable housing units violates t Measure JJJ.

Measure JJJ, as codified at Los Angeles Municipal Code ("LAMC") section 11.5.11, was approved by Los Angeles voters on November 8, 2016 and became effective on December 13, 2016. The residential affordability requirements of Measure JJJ apply to projects with ten or more residential units which seek: (1) a discretionary General Plan Amendment; (2) any zone change or height-district change that results in increased allowable residential floor area, density, or height; or (3) a residential use where such use was not allowed previously. (LAMC § 11.5.11(a).)

Pursuant to Measure JJJ, "Rental Projects" which satisfy at least one of the above provisions must provide the following:

- (i) No less than the affordability percentage corresponding to the level of density increase as provided in California Government Code Section 65915(f), inclusive of any Replacement Units; or
- (ii) If the General Plan amendment, zone change or height district change results in a residential density increase greater than 35%, then the Project shall provide no less than 5% of the total units at rents affordable to Extremely Low Income households, and either 6% of the total units at rents affordable to Very Low Income households or 15% of the total units at rents affordable to Lower Income households, inclusive of any Replacement Units; or
- (iii) If the General Plan amendment, zone change or height district change allows a residential use where not previously allowed, then the Project shall provide no less than 5% of the total units at rents affordable to Extremely Low Income households, and either 11% of the total units at rents affordable to Very Low Income households or 20% of the total units at rents affordable to Lower Income households, inclusive of any Replacement Units. (LAMC § 11.5.11(a)(1).)

Measure JJJ also contains alternative compliance options under which a project can satisfy Measure JJJ's affordability provisions without providing affordable units on-site. These alternative compliance options are (1) construction of affordable units off-site, (2) acquiring

property containing “At-Risk Affordable Units,” or (3) payment of an in-lieu fee. (LAMC § 11.5.11(b).)

The Project site’s General Plan land use designation is currently Regional Center Commercial. The lots that make up the Project site are zoned PB-2, and P-2, which are for parking buildings and surface or underground parking. Residential units are not permitted in PB-2 or P-2 zones. The Project proposes to rezone the entire Project site to C4, which is a commercial zone that may include R4 uses, which include multiple dwelling residential uses. Since the Project will have ten or more residential units and is seeking a zone change that results in increased allowable residential floor area, Measure JJJ applies. LAMC § 11.5.11(a). Specifically, the zone change will allow a residential use where not previously allowed. As a result, “the Project shall provide no less than 5% of the total units at rents affordable to Extremely Low Income households, and either 11% of the total units at rents affordable to Very Low Income households or 20% of the total units at rents affordable to Lower Income households, inclusive of any Replacement Units.” LAMC § 11.5.11(a)(1). The Project does not meet the requirements of Measure JJJ because it will only provide 5% of total units at rents affordable to Moderate Income households. The Project must be revised to comply with the affordable housing requirements of Measure JJJ.

H. The Project Lacks Sufficient Affordable Housing in Conflict with General Plan.

As discussed above, the Project does not include sufficient affordable housing units, in disregard of the applicable General Plan policies. Gen Plan Housing Element Policy 4.1.1 states that the City should “[p]rovide sufficient land use and density to accommodate an adequate supply of housing units by type and cost within each City subregion to meet the 20-year projections of housing needs.” Policies of note include Policy 1.1.3, which states the City should “[f]acilitate new construction and preservation of a range of housing types that address the particular needs of the city’s households.”

Chapter 1, Housing Needs Assessment, identifies Los Angeles’s share of the housing needs established in the Regional Housing Needs Assessment. In particular, Table 1.29, City of Los Angeles Regional Housing Needs Assessment Allocation for the period of 2014–2021, indicates that Los Angeles’ needs assessment allocation includes 82,002 housing units, of which 35,412 units, or 43.2 percent, would be for above moderate-income households. The remaining 56.8 percent of the needed housing units consisting of 13,728 moderate-income units (16.8 percent), 12,435 low-income units (15.2 percent), 10,213 very low-income units (12.5 percent), and 10,213 extremely low-income units (12.5 percent).

The Sustainable City pLAn of April 8, 2015 provides a roadmap achieving sustainability through short-term (by 2017) results and setting long-term (by 2025 and 2035) goals for a cleaner environment and stronger economy. The pLAn sets forth a goal of transforming Los Angeles into an environmentally healthy, economically prosperous, and equitable City over the next 20 years. Key visions for long-term aspirations by 2035 regarding the preferred development in the Project vicinity include the following:

- Housing and Development: We address LA’s housing shortage, ensure that most new units are accessible to high-quality transit, and close the gap between incomes and rents.

The Housing & Development chapter of the Sustainable City pLAn includes the following goals:

- Start constructing 17,000 new units of housing within 1,500 feet of transit by 2017.
- Provide 100,000 new housing units by 2021, leading to 150,000 new housing units by 2025.
- Reduce the number of rent-burdened households by at least 15 percentage points by 2035.

It is well-established that urban decay is a CEQA issue. The lack of affordable housing has led to an increase in homelessness, which is a prime contributor to urban decay. In *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, the court expressly held that an EIR must analyze a project’s potential to cause urban decay if there is substantial evidence showing that the project may lead to such impacts. The court pointed out that CEQA requires the project proponent to discuss the project’s economic and social impacts where “[a]n EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic and social changes.” CEQA Guidelines §§ 15131(a) and 15064(f).

Where a local or regional policy of general applicability, such as an ordinance, is adopted in order to avoid or mitigate environmental effects, a conflict with that policy in itself indicates a potentially significant impact on the environment. *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903. Indeed, any inconsistencies between a proposed project and applicable plans must be discussed in an EIR. 14 CCR § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans). A Project’s inconsistencies with local plans and policies constitute significant impacts under CEQA. *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4, 32 Cal.Rptr.3d 177; see also, *County of El Dorado v. Dept. of Transp.* (2005) 133 Cal.App.4th 1376 (fact that a project may be consistent with a plan, such as an air plan, does not necessarily mean that it does not have significant impacts).

CEQA requires the lead agency to determine whether the “environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly,” (PRC § 21083(b)(3), (d)), and to “take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.” See PRC §21000 et seq.

Furthermore, CEQA Guidelines Appendix G, Section XII provides that a project will have significant impacts where it will:

- Induce substantial population growth or concentration of population in an area, either directly (for example, by proposing new housing or businesses), or indirectly (for example, through extension of roads or other infrastructure);
- Displace substantial numbers of existing housing necessitating the construction of replacement housing elsewhere; or
- Displace substantial numbers of people, necessitating the construction of replacement housing elsewhere. ^{[[1]]}See CEQA Guidelines Appendix G, Section XII.

Here, the Project is likely to lead to gentrification of the area, which will displace local low-income residents, who will be forced to move elsewhere. See Kalama D. Harris, Attorney General, “Environmental Justice at the Local and Regional Level,” May 8, 2012, available at http://oag.ca.gov/sites/all/files/pdfs/environment/ej_fact_sheet_final_050712.pdf.

An EIR must be prepared to analyze the impacts of the Project’s failure to comply with the general plan because of the lack of affordable housing and the impact on urban decay. It should propose feasible mitigation measures, such as requiring more affordable housing in the Project, contributions to low-income housing funding, etc.

IV. CONCLUSION

In light of the above comments, the City must prepare an EIR for the Project and the draft EIR should be circulated for public review and comment in accordance with CEQA. Thank you for considering these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Rebecca L. Davis', with a long horizontal flourish extending to the right.

Rebecca L. Davis
Lozeau | Drury LLP