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January 30, 2023

VIA ONLINE SUBMISSION

Acquanetta Warren, Mayor
City Council
c/o Planning Department
City of Fontana
8353 Sierra Avenue
Fontana, CA 92335
Email: planning@fontana.org
Online Portal: <https://cityoffontana.sharefile.com/>

VIA EMAIL

Salvador Quintanilla, Senior Planner
Email: squintanilla@fontana.org

Re: **Appeal of Planning Commission Approval of the Fontana Square Project (Master Case No. 20-083) and Initial Study/Mitigated Negative Declaration – Justification of Appeal**

Dear Mayor Warren, Councilmembers and Mr. Quintanilla:

On behalf of **Californians Allied for a Responsible Economy (“CARE CA”)**, we are writing to appeal the City of Fontana (“City”) Planning Commission’s January 17, 2023 approval of the Fontana Square Project (“Project”), Master Case No. 20-083; Tentative Parcel Map No. 20464 (TPM No. 20-021); Conditional Use Permit No. 20-025; Conditional Use Permit No. 22-018; Conditional Use Permit No. 22-019; Conditional Use Permit No. 22-028; Design Review Project No. 20-031; Variance No. 22-001; and the Commission’s approval of the Initial Study/Mitigated Negative Declaration (“MND”) prepared by the City of Fontana (“City”) for the Project.¹

¹ City of Fontana, Fontana Square Project, Initial Study/Mitigated Negative Declaration (hereinafter “MND”) (December 2022) available at <https://www.fontana.org/DocumentCenter/View/40634/Fontana-Square-Project-Public-Draft-Initial-Study-Mitigated-Negative-Declaration> 6452-011j

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The Project, proposed by Jinder Singh (the “Applicant”), proposes the construction of a banquet hall (“Development A”), a Holiday Inn Express Hotel & Suite and a Staybridge Suites (“Development B”), a convenience (“C-Store”)/Restaurant (“Development C”), and an In-N-Out Burger (“Development D”).² The establishments would be generally located closer to the northern property boundary with most of the vehicle parking stalls along S. Highland Avenue, Citrus Avenue.³ Parking is also provided throughout the site and between the various establishments.⁴

Pursuant to the City’s appeal procedures⁵, we have provided an electronic copy of this Justification for Appeal letter and the Uniform Application. We have also paid the required appeal fee of \$299 and \$31 archive fee via the Department of City Planning Online Application Portal.

The reasons for this appeal are that the Planning Commission abused its discretion and violated the California Environmental Quality Act (“CEQA”) when it approved the Project and the Initial Study/Mitigated Negative Declaration on January 17, 2023.⁶ CEQA requires that the potential impacts of this Project be evaluated in an environmental impact report (“EIR”), not in an MND, because substantial evidence supports a fair argument that the Project may have significant, unmitigated air quality, public health, greenhouse gas emissions, public safety, and noise impacts that are not adequately disclosed or mitigated by the MND. The Planning Commission’s findings approving the Project entitlements were similarly unsupported by substantial evidence because the Project’s unmitigated impacts would be detrimental to the health and safety of nearby residents.

CARE CA’s January 17, 2023, comment letter to the Planning Commission, and accompanying reports prepared by air quality and hazards expert James Clark, Ph.D., of Clark and Associates, and noise expert Derek Watry of Wilson-Ihrig, are

² MND, p. 5.

³ MND, p. 5.

⁴ MND, p. 5.

⁵ Fontana Development Code, Division 5, §§ 30-25. – 30-29.

⁶ City of Fontana, Planning Commission Hearing, Agenda (January 17, 2023) available at <https://fontana.legistar.com/MeetingDetail.aspx?ID=1060134&GUID=C8645234-1EFE-4339-A94E-7C86F6C7A37D&Options=info|&Search=>

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attached hereto and incorporated by reference.⁷ The specific reasons for this appeal are set forth in detail in that letter and summarized below.⁸ In short, the Planning Commission hearing for the Project was premature; an EIR is required for the Project because substantial evidence supports a fair argument that that Project will cause: (1) a significant, unmitigated cancer risk from toxic air contaminant emissions, (2) a potentially significant, unmitigated impact from greenhouse gas emissions, (3) a significant, unmitigated impact from Noise, and (5) significant unmitigated impacts resulting from Cumulative Impacts; and the Planning Commission's approval findings were not supported by substantial evidence.

A. The Planning Commission Hearing Was Premature

The Planning Commission hearing for the Project was premature and in violation of CEQA because the public comment period for the MND was still open at the time the hearing occurred and the Planning Commission did not review or consider all public comments before rendering a decision on the Project. The Planning Commission therefore did not have adequate opportunity to consider all public comments and correct the deficiencies in the City's CEQA document before approving the Project, as required by CEQA.

CEQA requires the lead agency to receive and consider all public comments received on the MND.⁹ The purpose of the public comment period is to foster public participation.¹⁰ CEQA Guidelines § 15074(b) states:

Prior to approving a project, the decision-making body of the lead agency shall consider the proposed negative declaration or mitigated negative declaration **together with any comments received during the public review process.** The decision-making body shall adopt the proposed negative declaration or mitigated negative declaration **only if it finds on the basis of the whole record before it (including the initial study and any comments**

⁷ See **Exhibit 1:** Letter from Kevin Carmichael to City of Fontana Planning Commission re: Planning Commission Agenda Item PH-A: Fontana Square Project (Master Case No. 20-083); Initial Study/Mitigated Negative Declaration (January 17, 2023).

⁸ We reserve the right to supplement these comments at later hearings and proceedings on the Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

⁹ 14 Cal. Code Regs. § 15074(b).

¹⁰ 14 Cal. Code Regs § 15201.

received), that there is no substantial evidence that the project will have a significant effect on the environment and that the negative declaration or mitigated negative declaration reflects the lead agency's independent judgment and analysis.¹¹

The Planning Commission is the decision maker for the Project's entitlements, and was therefore the decision making body charged with considering public comments on the CEQA document before approving the Project.¹² The January 17, 2023 Planning Commission hearing was held during the last day of the MND public comment period, and the Planning Commission's decision was rendered before the close of the comment period, without reviewing or considering CARE CA's MND comments and without allowing the public comment period to conclude.¹³ The Commission therefore failed to consider all comments received on the MND before rendering a decision on the Project, and did not exercise independent judgement and analysis in approving the Project, as required by CEQA. The Planning Commission's actions also thwarted meaningful participation by the public and the detailed consideration of the Project's environmental impacts that CEQA requires.

CARE CA respectfully requests that the City Council set aside the Planning Commission's premature decision to approve the Project, and require the City to prepare an EIR for the Project for the reasons set forth in CARE CA's MND comments.

B. The Project May Cause a Significant, Unmitigated Cancer Risk from Toxic Air Contaminants Emissions

The MND concludes that the health risk posed to nearby sensitive receptors from exposure toxic air contaminants ("TAC"), including diesel particulate matter ("DPM") emissions, from Project construction and operation would be less than

¹¹ 14 Cal. Code Regs. § 15074(b) (emphasis added).

¹² *Id.*; FMC §§ 30-120, 30-150.

¹³ CARE CA's MND comments were timely submitted on January 17, 2023. The Notice of Intent to adopt the MND set January 17, 2023, as the last day to submit comments on the MND, but did not set a cutoff time for submission, indicating that comments could be submitted anytime of the day or evening. The Planning Commission hearing was conducted at 6:00 p.m. during the last day of the public comment period. The hearing therefore occurred before the close of the MND public comment period. The Planning Commission did not review or respond to CARE CA's comments before voting to approve the Project.

significant. CARE CA previously explained that the MND's conclusion was unsupported because the City failed to quantify the risk and compare it to applicable thresholds of significance. CARE CA also provided substantial evidence that the Project would result in potentially significant health risks from vehicle emissions. To date, the City has failed to adequately address these concerns.

CARE CA's expert provided substantial evidence supporting a fair argument that the Project emissions from DPM will result in significant cancer risks. Dr. Clark found that the cumulative risk for exposure of residents during the 30 years of operation assuming the averaged DPM concentration of 0.039 ug/m³ is 33.8 in 1,000,000. Thus, the operational cancer risk stemming from the Project will exceed the 10 in one million threshold at several homes in the neighborhoods to the south of the Project site, resulting in a significant impact.

The Planning Commission's decision to adopt the MND without requiring the City to prepare a quantitative health risk analysis ("HRA") was a violation of CEQA's disclosure requirements, and resulted in an unsupported conclusion that the Project's health risk impacts would be less than significant.¹⁴ The City has not prepared an HRA and, as a result, has failed to disclose and analyze the Project's significant health risks from operational emissions from passenger vehicles and construction DPM emissions from trucks and off-road heavy equipment.

The City Council should vacate the Planning Commission's decision and require staff to prepare an EIR that includes a quantitative HRA to disclose and analyze the Project's health risks from air pollutants, compare the risks to applicable thresholds of significance, and require mitigation for impacts that exceed thresholds.

C. The Project May Result in Significant, Unmitigated Health Risk Impacts from Disturbance of Contaminated Soils

CARE CA's comments detail that the MND incorrectly concluded that the Project would not create a significant hazard to the public or the environment from the release of hazardous materials. Dr. Clark found that the Project site is within the fallout zone of the Kaiser Steel Mill, which blanketed the area with large

¹⁴ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 518–522. The South Coast Air Quality Management District ("SCAQMD") similarly recommends that HRAs be prepared for development projects subject to CEQA..

quantities of carcinogenic compounds that persist in the environment. The MND failed to include a Phase I or Phase II environmental site assessment (“ESA”) and failed to analyze the potential for soil contamination onsite. Soil will be disturbed during the Project’s excavation and construction phases. Disturbance of any residual, unmitigated contamination in the soil may present a significant public health risk to construction workers working on the Project, and the public nearby.

The Planning Commission lacked substantial evidence to adopt the MND’s unsupported conclusion that soil disturbance would result in a less than significant impact under CEQA.¹⁵ The City Council should vacate the Planning Commission’s decision and remand the Project to staff to prepare an EIR that analyzes the extent of soil contamination that will be released as a result of Project construction and provide adequate mitigation for potential exposure of workers and nearby residents.

D. The Project May Result in a Significant, Unmitigated Impact from Noise

CARE CA’s noise expert provided substantial evidence showing the MND’s omission of an existing residential receptor located at 15911 Highland Avenue invalidated the Project’s noise analysis. The MND failed to properly analyze the noise impacts from construction of the Project on all nearby sensitive receptors.

Mr. Watry explained that construction of Development B which will occur 39 feet from the residence and found that construction noise will exceed the FTA’s threshold of 80 dBA during the demolition, site preparation, grading and building construction phases of the Project without mitigation. This is the same threshold used in the MND to determine whether the Project will result in a significant impact.¹⁶ Therefore, the MND should have disclosed that Project construction will result in a significant noise impact on nearby sensitive receptors, and should have required mitigation to reduce this impact to less than significant levels, but failed to do so. Construction noise therefore remains a significant, unmitigated impact that the City failed to disclose.

The Planning Commission’s decision to adopt the MND and approve the Project with significant, unmitigated noise impacts was a failure to proceed in the manner required by law. The City Council should vacate the Commission’s decision

¹⁵ *CBIA v. BAAQMD*, 196 Cal.Rptr.3d 94, 105-106; 14 CCR § 15126.2(a).

¹⁶ MND, p. 156.
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and require staff to prepare an EIR to accurately disclose the Project's construction noise impacts in relation to the residence at 15911 Highland Avenue and propose additional mitigation to reduce the Project's potentially significant noise impacts.

E. The Project May Result in Significant Unmitigated Public Safety Impacts

The MND contained inconsistent information about the severity of the Project's public safety impacts. On the one hand, the MND stated, without support, that additional police services would not be necessary for the Project and that potential impacts on police protection due to implementation of the Project would therefore be less than significant.¹⁷ The MND later admitted that "Project buildout would consequently increase the demand for police protection services in the city."¹⁸ However, the MND failed to quantify the amount of additional police protection needed for the Project, and failed to substantiate its claim that the Project's design and development impact fees will not require additional police resources.

For example, the MND's metric of one police officer per 1000 residents does not address how police services are distributed to commercial uses like the Project. Nor does the MND provide any discussion of how many officers currently use the existing police facilities in the City, or whether the additional police services needed by the Project will necessitate construction of new facilities to maintain the level of service necessary to serve existing uses plus the Project. The MND's conclusion that the Project's public services impacts would be less than significant was therefore not supported by substantial evidence, and the Planning Commission's reliance on this finding was in error.

The City Council should vacate the Planning Commission's approval and remand the Project to staff to prepare an EIR which includes a meaningful public services impacts analysis, and fully mitigates any potentially significant impacts resulting from development of the Project.

¹⁷ MND, p. 168.

¹⁸ MND, p. 168.
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F. The Planning Commission Abused its Discretion by Approving the Project in Reliance on Unsupported Findings.

The Planning Commission's findings that the Project complied with applicable land use codes was not supported by substantial evidence and should be vacated by the Council.

Pursuant to the City of FMC § 30-150, the City Planning Commission was required to make the following findings for approval of the Project's conditional use permit applications:

- (1) The proposed use is allowed within the applicable zoning district and complies with all other applicable provisions of the Zoning and Development Code, Municipal Code, general plan, any applicable specific plan or area plan, and City regulations/standards.
- (2) The site is physically suited for the type, density, and intensity of the proposed use including access, utilities, and the absence of physical constraints and can be conditioned to meet all related performance criteria and development standards.
- (3) Granting the permit would not be detrimental to the public interest, health, safety, convenience, welfare, or materially injurious to persons, property, or improvements in the vicinity in which the project is located.

CARE CA's MND comments provided the City with substantial evidence demonstrating that the Project will conflict with finding number three. Specifically, the Project will result in significant air quality impacts during operations that would be detrimental to the health and safety of nearby residents. Additionally, the Project's construction noise impacts on previously undisclosed nearby sensitive receptors will result in significant impacts. These impacts precluded the Planning Commission from making the findings required under the Code.

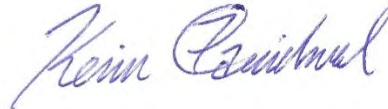
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I. CONCLUSION

As a result of these errors, the City Planning Commission's adoption of the MND, and the approval of Master Case No. 20-083 violated CEQA and must be overturned. We urge the City Council to grant our appeal and order the preparation of an EIR for the Project. Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in blue ink that reads "Kevin Carmichael". The signature is written in a cursive, flowing style.

Kevin Carmichael

KTC:ljl