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October 18, 2021

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Re: Addendum No. 400127 to Environmental Impact Report No. 80-5-35 (SCH No. 80072117) for Costa Azul Mixed-Use Project (Project No. 400127); CITY COUNCIL AGENDA ITEM 333 (Tues., Oct 19, 2021)

Dear Honorable Members of the San Diego City Council and Ms. Vo:

I am writing on behalf of the **Supporters Alliance for Environmental Responsibility ("SAFER")** and its members living or working in and around the City of San Diego in opposition to the Costa Azul Mixed-Use Project (Project No. 400127) ("Project") and Addendum No. 400127 to Environmental Impact Report ("EIR") No. 80-5-35 (SCH No. 80072117) ("Addendum") to be heard as Agenda Item 333 at the City Council's October 19, 2021 meeting.

This comment letter is a supplement to the previous comment letter submitted by SAFER to the San Diego Planning Commission on July 20, 2021 (submitted to the Council concurrently with this comment via webform). SAFER's July 20 comment included the expert opinions of indoor air quality expert Francis Offerman, CIH, and air quality experts Matt Hagemann, P.G., C.Hg., and Paul E. Rosenfeld, Ph.D., of the Soil/Water/Air Protection Enterprise ("SWAPE"). SAFER's July 20 comment objected to the City's use of the Addendum rather than an EIR for this Project because of new significant impacts to indoor and outdoor air quality that had not been analyzed in the previous EIR as well as availability of new mitigation measures for those impacts that are not being adopted for this Project.

This comment letter includes the expert opinion of wildlife biologist Dr. Shawn Smallwood, Ph.D., attached hereto as Exhibit A. Dr. Smallwood's review of the Addendum found that the Addendum failed to adequately address the Project's impacts to birds and other wildlife. Importantly, "[t]he vast majority of what is known about these types of impacts and how to mitigate them has been learned since the 1983 Precise Plan EIR." (Ex. A, p. 1.) As such, the Addendum is not appropriate under CEQA and the City must prepare an EIR prior to approving the Project.

PROJECT DESCRIPTION AND BACKGROUND

The Project proposes the development of a 77,652-square-foot, 7-story hotel and 96,040-square-foot, 5-story office building with restaurant on an undeveloped 3.306-acre site located at 3501 Valley Centre Drive in San Diego. The Project requires a Vesting Tentative Map, Easement Vacation, Coastal Development Permit, Planned Development Permit and Site Development.

The site is designated by the Carmel Valley (North City West) Community Plan as Visitor Commercial and the North City West Employment Center Precise Plan (Precise Plan) as Neighborhood 2. The Visitor Commercial designation is intended to provide motel/hotel, restaurant, office uses, and related services to the adjacent industrial /office park in the Carmel Valley Employment Center as well as for nearby industrial uses in Sorrento Valley. The parking for the development will include 71 surface parking spaces and a two-level subterranean parking garage with 383 parking spaces, for a total of 454 spaces.

The proposed Vesting Tentative Map will consolidate and subdivide a 9.89-acre property into two Parcels; Parcel One will be 3.2-acres and Parcel Two, 6.7-acres. The Project within Parcel One will include three commercial condominiums, a seven-story hotel, a five-story office building, and subterranean parking (i.e the Project). Parcel Two is currently developed with an office building and parking structure and there is no proposed construction on this site.

The Project site is subject to the 2008 Citywide General Plan, the 1975 Carmel Valley (North City West) Community Plan, and the 1981 North City West Employment Center Precise Plan (1981), which are the adopted land use plans for the site. The subject site is conceptually identified as Visitor Commercial by the Carmel Valley Community Plan (Community Plan) and the Precise Plan. The Community Plan provides a general framework for future planning and development of the commercial visitor area. It states the need for the visitor commercial uses to serve the office and industrial development in Carmel Valley as well as to the south of the community.

The City has prepared an Addendum to the 1981 Precise Plan EIR, as amended by a previous addendum in 1983 ("1983 Precise Plan Addendum"). The Precise Plan EIR evaluated the development of 1,542,000 sq. ft. of industrial floor area. (Precise Plan EIR, p. 1.) The Precise Plan EIR found that significant impacts to the following issue areas would be substantially lessened or avoided if all the proposed mitigation measures recommended in the Final EIR were

implemented: climate and air quality, archaeological resources, geology/soils and urban support services (i.e., energy). The Precise Plan EIR concluded there would be significant and unavoidable impacts to traffic, biological resources, growth inducement, visual quality, and growth inducement. (*Id.*) The Precise Plan EIR concluded that air quality impacts would be less-than-significant by relying on two mitigation measures, bicycle paths and “employment for planned residential communities. (*Id.* at p. 3.)

In 1983, the City Council approved and adopted an amendment to the Precise Plan and the 1983 Precise Plan Addendum. That amendment added 47.9 acres into the Precise Plan for Neighborhood 2, including the Project site. The project site was rezoned from A-1 -1 to VC (Visitor Commercial) through a Planned District Ordinance amendment and designated for Visitor Commercial, consistent with the Community Plan. The 1983 Precise Plan Addendum addressed the changes in land use and increase in the Precise Plan area described above. However, the 14-page 1983 Precise Plan Addendum only discussed potential impacts to traffic circulation and archaeological resources. No other impacts were addressed.

The 1983 Addendum also referenced an EIR prepared in the 1982 for a precise plan (“Neighborhood 4, 5, 6 Plan”), adjacent to the Precise Plan at issue. The 1982 Neighborhood 4, 5, 6 Plan EIR concluded that cumulative impacts to air quality and traffic would be significant and unavoidable.

LEGAL STANDARD

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the fair argument standard. Under that standard, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment. (Pub. Res. Code § 21082.2; *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1993) (“*Laurel Heights IP*”) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.)

Preparation of an Addendum Under CEQA

Here, the City has prepared an Addendum to the previously certified 1981 Precise Plan EIR, as modified by the 193 Precise Plan Addendum. Pursuant to the CEQA Guidelines, an addendum to a previous EIR is proper only where “some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.” (14 CCR § 15164(a).) Looking to Guidelines Section 1512, **an addendum is not appropriate when:**

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to **the involvement of new significant environmental effects or a substantial increase** in the severity of

- previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
 - (3) **New information of substantial importance**, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
 - (A) The project will have **one or more significant effects not discussed in the previous EIR or negative declaration**;
 - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - (C) Mitigation measures or alternatives previously found not to be feasible would, in fact, be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
 - (D) **Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment**, but the project proponents decline to adopt the mitigation measure or alternative.

(14 CCR § 15162.)

Tiering Under CEQA

CEQA permits agencies to ‘tier’ CEQA documents, in which general matters and environmental effects are considered in a document “prepared for a policy, plan, program or ordinance followed by narrower or site-specific [environmental review] which incorporate by reference the discussion in any prior [environmental review] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR].” (Cal. Pub. Res. Code (“PRC”) § 21068.5.) “[T]iering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous [environmental reviews].” (*Id.* § 21093.) CEQA regulations strongly promote tiering of environmental review.

“Later activities in the program must be examined in light of the program [document] to determine whether an additional environmental document must be prepared.” (14 CCR § 15168(c).) The first consideration is whether the activity proposed is covered by the program. (*Id.* § 15168(c)(2).) If a later project is outside the scope of the program, then it is treated as a separate project and the previous environmental review may not be relied upon in further review. (*See Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320–21.) The second

consideration is whether the “later activity would have effects that were not examined in the program.” (14 CCR § 15168(c)(1).) A program environmental review may only serve “to the extent that it contemplates and adequately analyzes the potential environmental impacts of the project” (*Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1171 [quoting *Citizens for Responsible Equitable Env'tl. Dev. v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 615].) If the program environmental review does not evaluate the environmental impacts of the project, a tiered [CEQA document] must be completed before the project is approved. (*Id.* at 1184.)

For these inquiries, the “fair argument test” applies. (*Sierra Club*, 6 Cal.App.4th at 1318; *see also Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1164 (“when a prior EIR has been prepared and certified for a program or plan, the question for a court reviewing an agency’s decision not to use a tiered EIR for a later project ‘is one of law, i.e., ‘the sufficiency of the evidence to support a fair argument.’” [quoting *Sierra Club*, 6 Cal.App.4th at 1318]).) Under the fair argument test, a new EIR must be prepared “whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. (*Sierra Club*, 6 Cal.App.4th at 1316 [quotations and citations omitted].) When applying the fair argument test, “deference to the agency’s determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.” (*Id.* at 1318.) “[I]f there is substantial evidence in the record that the later project may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, notwithstanding the existence of contrary evidence.” (*Id.* at 1319.)

DISCUSSION

I. An EIR is required because the Project will have significant impacts wildlife that were not previously analyzed in the Precise Plan EIR or 1983 Addendum.

As a preliminary matter, the City has improperly relied upon CEQA’s subsequent review provisions (PRC § 21166; 14 CCR §§ 15162, 15164.) Where a previous EIR has been certified for a project, CEQA’s subsequent review provisions determine when “[a] subsequent EIR shall be prepared for *that* project.” (14 CCR 15162 [emphasis added].) Here, no specific project has ever been proposed for the Project site. The 1981 Precise Plan EIR analyzed the full 118-acre plan area for industrial development on 24 lots. (Precise Plan EIR, p. 1.) The 1983 Addendum analyzed the addition of 47.9 acres to the plan area (but only analyzed impacts to traffic and archeological resources). (1983 Addendum, pp. 2, 7-10.) These previous documents are not project-specific documents. Rather, the 1981 Specific Plan EIR and 1983 Addendum are better described as a programmatic EIR (“PEIR”), which is subject to CEQA’s tiering standards rather than subsequent review.

A lead agency may tier EIRs where multiple individual projects or phased (or “tiered”) projects are to be undertaken, and the individual projects are linked geographically, temporally, or in an otherwise logical manner. (14 CCR §§ 15165, 15168.) Here, there is no doubt that the

project areas within the Precise Plan are linked in a “logical manner” and that the 1981 Precise Plan EIR, as modified, is a PEIR subject to CEQA Guidelines section 15168. Under Section 15168, “*if a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration.*” (14 CCR § 15168(c)(1) [emphasis added].) Importantly, in reviewing an agency’s decision whether to prepare a tiered EIR, the “fair argument” test applies. (*Sierra Club v. Cnty. of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.) Under the fair argument test, a new EIR must be prepared “whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.” (*Id.* at 1316; see *Friends of Coll. of San Mateo Gardens v. San Mateo Cnty. Comm. College Dist.* (2016) 1 Cal.5th 937, 960.) A PEIR may only serve for subsequent actions “to the extent that it *contemplates and adequately analyzes* the potential environmental impacts of the project. . . .” (*Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1171[emphasis added] [citations omitted].) Here, because there is a fair argument that the Project will result in impacts not analyzed in the 1981 Precise Plan EIR and 1983 Addendum, an EIR is required.

A. An EIR is required because the Project will have significant impacts on birds from collisions with windows that were not previously analyzed in the Precise Plan EIR or 1983 Addendum.

As explained by Dr. Smallwood, neither the Addendum nor the Precise Plan EIR addressed the impacts to birds from collisions with glass windows. (Ex. A, p. 9.) Due to the 59 special-status species of birds that are known to occur at or near the Project site, the impact that the Project may have on these species should be addressed. Analyzing the potential impact on wildlife of window collisions is especially important because “[w]indow collisions are often characterized as either the second or third largest source of human-caused bird mortality.” (Ex. A, p. 3.) Nevertheless, the Project’s amount of glass façades and panels are inconsistent with the Bird-Safe guidelines reviewed by Dr. Smallwood. As a result, the impacts to birds from window collisions remain unaddressed and unmitigated by the Addendum.

Dr. Smallwood reviewed a number of studies in order to calculate the number of bird collisions per m² of glass windows per year. (Ex. A, p. 9.) According to his calculations, each m² of glass would result in 0.073 bird deaths per year. (*Id.*) Dr. Smallwood then looked at the building design for the Project and estimated that the Project would include approximately 3,400 m² of glass windows. (*Id.*) Based on the average rates of glass used in 13 recently proposed office buildings and hotels in California, Dr. Smallwood estimates that the Project would contain 5,388 m² of glass and would result in result in 394 bird deaths per year, resulting in “significant unmitigated impacts. (*Id.*)

In order to mitigate the impact of the window collisions on bird species, Dr. Smallwood has suggested several possible mitigation measures. For mitigation measures involving retrofitting the existing project, Dr. Smallwood suggests: (1) marking the windows (e.g. decals, film, fritted glass); (2) managing outdoor landscape to reduce reflection of vegetation; (3) managing indoor landscape; and (4) managing nocturnal lighting. (Ex. A, p. 15.) For mitigation

measures involving the siting and design of the Project, Dr. Smallwood suggests: (1) deciding on the location of structures; (2) deciding on the façade and orientation of structures; (3) selecting types and sizes of windows; (4) minimizing transparency through two parallel façades; (5) minimizing views of interior plants; and (6) landscaping so as to increase distance between windows and vegetation. (*Id.*) Dr. Smallwood also suggests that the City also look to the guidelines developed by the American Bird Conservancy, San Francisco, and New York City to minimize injuries and fatalities to bird species. (*Id.* at p. 18.)

B. An EIR is required because the Project will have significant impacts on wildlife from collisions with vehicles that were not previously analyzed in the Precise Plan EIR or 1983 Addendum.

As explained by Dr. Smallwood, neither the Addendum nor 1983 Precise Plan EIR addressed the impacts to wildlife from collisions with vehicles. (Ex. A, p. 15.) Vehicle collisions kill many thousands of animal species a year and the US estimate of mortality to birds alone is 2,200 to 8,405 deaths per 100 km of road per year (89 million to 340 million total per year). (Ex. A, p.16.) Factors that affect the rate of vehicle collision with wildlife include: the type of roadway, human population density, temperature, extent of vegetation cover, and intersections with streams and riparian vegetation. (*Id.*)

Although the Addendum did not provide an estimate of vehicle miles traveled (“VMT”) for the Project, Dr. Smallwood estimated that the Project’s 3,159 daily vehicle trips would result in 23,060,700 VMT annually. (Ex. A, p. 16.) Based on Dr. Smallwood’s calculations, the Project would result in 12,636 wildlife fatalities pre year from vehicle collisions. (Ex. A, p. 18.) Over 50 years, operation of the Project would result in 631,800 wildlife fatalities. (*Id.*) This impact was not addressed or mitigated in the Addendum or Precise Plan EIR. A full analysis of the Project’s impacts to wildlife must be included in an EIR prior to approval of the Project.

II. Under CEQA’s subsequent review provisions, the Addendum is improper because of new information regarding significant impacts and new available mitigation measures since certification of the 1981 Precise Plan EIR and 1983 Addendum.

Under CEQA, an addendum is not allowed when “[n]ew information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified” shows that (1) the project will have one or more significant effects not discussed in the previous EIR or (2) mitigation measures considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment. (14 CCR §§15162, 15164.) Under that standard, the Addendum is improper because the information about the severity of wildlife impacts from collisions with vehicles and windows were not known when the 1981 Precise Plan EIR was certified or when the 1983 Addendum was approved. Furthermore, the Addendum is improper because of mitigation measures available to mitigate the Project’s impacts to wildlife that are considerably different from those analyzed in the Precise Plan EIR.

For window collisions, Dr. Smallwood notes the proliferation of glass windows on building façades, as indicated by the 20% increase in glass manufacturing worldwide for building construction since 2016. (Ex. A, p. 9.) The fact that glass façades would become so prolific simply could not have been known in 1981 or 1983. As such, the significant impact resulting from window collisions could not have been known and must now be addressed and mitigated in an EIR rather than an Addendum. Furthermore, the mitigation measures proposed by Dr. Smallwood are considerably different from the 1981 EIR and 1983 Addendum. Even though the 1981 EIR concluded that cumulative impacts to biological resources would be significant and unavoidable, the EIR *failed to propose any measures to mitigate the impact*. (Addendum, p. 8.) Dr. Smallwood proposed several ways to mitigate the Project’s impacts. (Ex. A, pp. 14-15, 18.) Since the 1981 EIR failed to consider any mitigation measures for the significant impact, a new EIR must be prepared for the Project to evaluate and implement these mitigation measures prior to approval of the Project.

For collision with vehicles, the severity of the impact to wildlife was not known in 1981 or 1983. Indeed, Dr. Smallwood’s estimate of wildlife mortality from vehicle collisions is based on research that was not published until 2009, nearly 2 decades *after* the 1981 Precise Plan EIR and 1983 Addendum. (Ex. A, p. 18.) When scientific information was not available at the time of prior CEQA review, more recent studies showing that a project may have more serious environmental impacts constitute significant new information requiring a subsequent EIR rather than an addendum. (*Security Env’tl Sys. v South Coast Air Quality Mgmt. Dist.* (1991) 229 Cal.App.3d 110, 124; *Meridian Ocean Sys. v. State Lands Com.* (1990) 222 Cal.App.3d 153, 169.) A new EIR must be prepared for the Project that addresses and mitigates this impact prior to approval of the Project.

III. The Project’s Proposed Office Building is Not Consistent With “Visitor Commercial” Zoning.

The Project site is zoned as Visitor Commercial (“CV”). Pursuant to the San Diego Municipal Code, “[t]he purpose of the CV zones is to provide areas for *establishments catering to the lodging, dining, and recreational needs* of both tourists and the local population.” (SDMC Ch. 13, Art. 1, Div. 5, § 131.0505(a) [emphasis added].) Although CV zones are intended to be “*near* employment centers,” there is no indication that the Municipal Code allows for employment centers *within* the zone. (*Id.*) Rather, the zoning only allows for “a mix of large-scale, visitor serving uses and residential uses”—not office uses. (*Id.* at § 131.0505(b).) Unless there is a zone change for the Project site, the office building is inconsistent with the Municipal Code. This inconsistency must be resolved prior to approval of the Project.

CONCLUSION

The Addendum is not appropriate under CEQA because CEQA’s tiering provisions require an EIR where there is a fair argument that the Project may result in significant impacts that were not analyzed in the 1981 Precise Plan EIR or 1983 Addendum. Furthermore, even if the City were allowed to proceed under CEQA’s subsequent review provisions rather than its

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tiering provisions, the Addendum is still improper because of new information showing new significant impacts and new feasible mitigation measures. Furthermore, the Project's proposed office building is inconsistent with the applicable zoning.

As such, SAFER respectfully requests that the City Council refrain from approval of the Project and Addendum at this time. Rather, SAFER respectfully requests that the Project be sent back to staff to prepare an EIR prior to approval of the Project.

Sincerely,



Brian B. Flynn
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