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December 12, 2022

Via Email and Overnight Mail

Honorable Mayor Sam Liccardo

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Re: Agenda Item 10.3 Appeal of the Eterna Mixed Use Project Addendum and Site Development Permit No. H20-026

Dear Honorable Mayor Liccardo, Vice Mayor Jones, and Councilmembers Jimenez, Peralez, Cohen, Carrasco, Davis, Esparza, Arenas, Foley and Mahan, Ms. Blanco, Ms. Meiners, Mr. Manford, and Mr. Burton:

On behalf of **Silicon Valley Residents for Responsible Development** (“Silicon Valley Residents” or “Commenters”), we submit these comments on Appeal of the Planning Director’s reliance on the Eterna Tower Mixed-Use Development Project Addendum (“Addendum”) to the Downtown Strategy 2040 Final Environmental Impact Report (“Downtown Strategy 2040 FEIR”) and approval of the Site Development Permit No. H20-026 for the Eterna Tower Mixed-Use Development Project (“Project”) proposed by ROYGBIV Real Estate Development LLC (“Applicant”). The Site Development Permit (File No. H20-026) would allow the demolition of two on-site two-story buildings and allow the construction of a 26-story, approximately 184,667-gross square foot mixed-use building consisting of 192 residential units and 6,644 square feet of commercial space, on an approximately 0.18-acre site at 17 and 29 East Santa Clara Street in downtown San José. The

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Project would include 192 residential units and approximately 5,217 square feet of office space on the second floor.

The Project is within the DC Downtown Primary Commercial Zoning District, and the Downtown General Plan Designation.¹ The Project is also located within the Downtown Employment Priority Area, which requires a minimum 4.0 FAR of commercial use within residential / commercial mixed-use projects.² Construction of the Project would occur over a period of 29 months.³

We have reviewed the Addendum, the Memorandum prepared in response to this appeal (“Staff Report”),⁴ technical appendices related to the Addendum, and reference documents with assistance of Commenters’ expert consultant James J.J. Clark of Clark & Associates.⁵ Dr. Clark’s comments are attached to this letter along with his curriculum vitae. Based on our review of the Addendum, it is clear that the Addendum fails as an informational document under CEQA and is inappropriate under CEQA because it identifies significant effects not discussed in the previous EIR, fails to comply with the requirements for program-level environmental review, fails to evaluate the project-level impacts in the areas of public health, air quality, contaminant hazards and historical resources, and lacks substantial, if any, evidence to support the City’s environmental conclusions.

I. STATEMENT OF INTEREST

Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards, and the environmental and public service impacts of the Project. Residents includes International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local

¹ San Jose Zoning Code § 20.70.100.

² City of San Jose, Site Development Permit (H20-026) p. 10 of 28.

³ Addendum p. 6.

⁴ City of San Jose, Memorandum from Christopher Burton Director of Planning, Building & Code Enforcement to Honorable Mayor and City Council (December 1, 2022), <https://sanjose.legistar.com/View.ashx?M=F&ID=11495662&GUID=391132CE-B5BD-465A-9567-E1AA9D1F3D41> (“Staff Report”).

⁵ See Letter from James J.J. Clark, Clark & Associates, to Kelilah Federman re: Comments On Addendum to the San Jose Downtown Strategy 2040 Final Environmental Impact Report (SCH # 2003042127), H20-026 – 17 and 29 East Santa Clara Street, Eterna Tower Mixed-Use Development Project, August 23, 2022 (hereinafter, “Clark Comments”), **Attachment A**.

104, Sprinkler Fitters Local 483, along with their members, their families, and other individuals who live and work in the City of San José.

Individual members of Silicon Valley Residents live, work, recreate, and raise their families in the City and in the surrounding communities. Accordingly, they would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site.

In addition, Silicon Valley Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for businesses and industries to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

When an EIR has previously been prepared that could apply to the Project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.⁶

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, if one or more of the following events occur:

⁶ PRC, § 21166.

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified 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 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.⁷**

Only where *none* of the conditions described above calling for preparation of

⁷ 14 CCR, § 15162(a)(1)-(3) (emphasis added).

a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an addendum or no further documentation.⁸ For addenda specifically, CEQA allows an addendum to a previously certified EIR if minor changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.⁹ The City's decision not to prepare a Subsequent EIR must be supported by substantial evidence.¹⁰

Here, the City lacks substantial evidence for its decision not to prepare a Subsequent EIR because at least one of the triggering conditions in Section 15162 has occurred. As explained below, substantial evidence shows that the Project may have one or more significant effects not discussed in the Downtown Strategy 2040 EIR. Specifically, the Project may have significant impacts associated with, air quality and public health, as described by Dr. Clark. Moreover, the Addendum specifically recognizes potentially significant impacts with respect to air quality, soil and groundwater hazards, and noise and vibration that were not addressed in the 2040 Downtown Strategy EIR. This fact alone makes an addendum inappropriate under CEQA.

Accordingly, Dr. Clark's substantial evidence, and the City's own recognition of potentially significant impacts not previously addressed, require that the City prepare and circulate for public comment a Subsequent EIR that adequately addresses all of the Project's potentially significant impacts and proposes appropriate mitigation measures.¹¹

III. THE CITY RELIED ON AN ADDENDUM IN VIOLATION OF CEQA

An addendum to an EIR is only appropriate if some changes or additions to the prior EIR are necessary, and none of the conditions described in Guidelines section 15162 have occurred. Where, as here, the project will have one or more significant impacts not discussed in the previous EIR, an addendum is inappropriate. The Addendum specifically identifies several potentially significant

⁸ 14 CCR, § 15162(b).

⁹ 14 CCR, § 15164.

¹⁰ *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).

¹¹ 14 CCR, § 15162 (“no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one of more of the following [triggering actions has occurred]”); § 15164 (“The [agency’s] explanation [to not prepare a subsequent EIR pursuant to Section 15162] must be supported by substantial evidence.”).

impacts not discussed in the Downtown Strategy 2040 EIR, including Impact AQ-1 (infant cancer risk from exposure to diesel particulate matter during project construction), Impact HAZ-1 (exposure of construction workers and the public to soil and groundwater contaminants), Impact NSE-1 (construction noise in excess of the City's General Plan thresholds) and Impact NSE-2 (vibrations from construction exceeding the City's General Plan thresholds).

The Staff Report states that “the comments submitted by Silicon Valley Residents represent an opinion and do not demonstrate with facts and analysis for a fair argument that a new environmental document is required pursuant to CEQA Guidelines Sections 15162.”¹² The comments submitted by Silicon Valley Residents include expert opinions supported by facts. Dr. Clark is a highly skilled and qualified technical expert with extensive experience in the field of air quality and public health impacts. His conclusions are supported by well-documented, credible evidence. Dr. Clark's opinions therefore constitute substantial evidence within the meaning of the law.¹³ The Staff Report's assertion that Silicon Valley Residents presented opinions unsupported by facts and analysis, is patently false. Moreover, the Addendum's inclusion of several potentially significant impacts not addressed in the Downtown Strategy 2040 EIR is a fact, not an opinion. Silicon Valley Residents provided the City with substantial evidence supporting a fair argument that the Project results in potentially new significant impacts not previously addressed, such that the City must prepare and circulate for public comment a Subsequent EIR that adequately analyzes all of the Project's potentially significant impacts and proposes appropriate mitigation measures.¹⁴

¹² Staff Report, p. 14.

¹³ 14 C.C.R. § 15384(b) (“Substantial evidence” includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts); *Architectural Heritage v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1117-18 (expert's opinion is “credible” if it constitutes “fact-based observations by people apparently qualified to speak to the question [at issue.] That testimony constitutes substantial evidence, because it consists of “facts, reasonable assumptions, and expert opinion supported by facts.”).

¹⁴ 14 CCR, § 15162 (“no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one of more of the following [triggering actions has occurred]”); § 15164 (“The [agency's] explanation [to not prepare a subsequent EIR pursuant to Section 15162] must be supported by substantial evidence.”).

A. The Project Results in New Significant Air Quality and Health Risk Impacts

An Addendum is inappropriate because the Project results in new potentially significant impacts from air quality and health risk. The Project's emissions from the backup generator onsite may exceed BAAQMD thresholds. But the Addendum fails to accurately model the backup generators' air emissions and thus fails to analyze the full extent of the Project's operational air emissions. The Addendum fails to analyze any emissions associated with the backup generator during Project operation.

Dr. Clark concludes that the Addendum's assumption that the backup generator will only be used 50 hours per year for testing is not supported by substantial evidence. In fact, Dr. Clark presented substantial evidence in his prior comments and updated comments including a graphic which shows the current outages in and around San Jose. This evidence shows that power outages are a daily occurrence in San Jose, and would constitute an emergency use for the backup generator, if an outage occurred onsite. The Staff Report's assertion that "the commenter did not provide verifiable and substantial evidence that generators would operate on average more than 50 hours per years over the life span of the project" is not supported by substantial evidence and is patently false. Given that the Project is allowed to use the generator for 50 hours and any number of hours for emergency use, the impacts from the backup generators may be significant and remain unmitigated. Dr. Clark provided substantial evidence in the form of "expert opinions supported by facts"¹⁵ that the backup generator may need to be used more than 150 hours per year, due to increasing Public Safety Power Shutoff ("PSPS") events and extreme heat events.¹⁶

During a PSPS event, the use of stationary generators is permitted as an emergency use.¹⁷ For every PSPS or extreme heat event, significant GHG emissions i.e., carbon dioxide equivalents and diesel particulate matter ("DPM") will be

¹⁵ 14 C.C.R. § 15384(b) ("Substantial evidence" includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts); *Architectural Heritage v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1117-18 (expert's opinion is "credible" if it constitutes "fact-based observations by people apparently qualified to speak to the question [at issue.] That testimony constitutes substantial evidence, because it consists of "facts, reasonable assumptions, and expert opinion supported by facts.").

¹⁶ Clark Comments, p. 9.

¹⁷ 17 CCR 93115.4(a)(30)(A)(2).

released.¹⁸ DPM has been identified as a toxic air contaminant, composed of carbon particles and numerous organic compounds, including forty known cancer-causing organic substances.¹⁹ Dr. Clark notes that the California Air Resources Board found that the 1,810 additional stationary generators during a PSPS in October 2019 generated 126 tons of NO_x, 8.3 tons of particulate matter, and 8.3 tons of DPM.²⁰ Therefore, the GHG, air quality, and DPM emission impacts associated with the use of the Backup Generator are significant, but the Addendum fails to adequately analyze or mitigate such impacts.²¹

The failure to analyze is a failure to proceed in a manner required by law.²² Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.²³ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."²⁴ Even when the substantial evidence standard is applicable to agency decisions to certify an EIR and approve a project, reviewing courts will not "uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference."²⁵

The Addendum must be withdrawn, and the City must circulate a subsequent EIR for public review to adequately analyze impacts associated with emissions from the Backup Generators.

Further, Dr. Clark concludes that the Addendum relies on inaccurate air quality modeling because it fails to incorporate analysis of building downwash in

¹⁸ Clark Comments, p. 9.

¹⁹ *Id.*

²⁰ California Air Resources Board, Potential Emissions Impact of Public Safety Power Shutoff (PSPS), Emission Impact: Additional Generator Usage Associated with Power Outage (January 30, 2020). Available at: https://ww2.arb.ca.gov/sites/default/files/2020-01/Emissions_Inventory_Generator_Demand%20Usage_During_Power_Outage_01_30_20.pdf.

²¹ Clark Comments, p. 9.

²² *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

²³ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

²⁴ *Id.*, *Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

²⁵ *Berkeley Jets*, 91 Cal.App.4th at 1355.

the AERMOD model for receptors at, near, and surrounding the Project.²⁶ Dr. Clark concludes that the omission of the downwash impacts from the air quality and health risk analysis “underestimates the exposure point concentrations for receptors near the building(s).”²⁷ Dr. Clark found that this impact is potentially significant and must be analyzed in a Supplemental EIR.

IV. THE PROJECT RESULTS IN SIGNIFICANT HAZARDS AND HAZARDOUS MATERIALS IMPACTS NOT ANALYZED IN THE DOWNTOWN STRATEGY 2040 EIR

A. The Addendum Fails to Adequately Analyze the Impacts of Hazardous Contamination

The Staff Report does not resolve Silicon Valley Residents’ comments regarding hazards and hazardous materials. CEQA requires EIRs to analyze any significant environmental effects the project might cause or risk exacerbating by bringing development and people into the area affected.²⁸ Both CEQA and the CEQA Guidelines require an analysis of a project's effects on the environment and human health. CEQA also provides that the EIR should evaluate any potentially significant direct, indirect, or cumulative environmental impacts of locating development in areas susceptible to hazardous conditions, including both short-term and long-term conditions.²⁹

The Project poses a potentially significant risk of exacerbating hazardous contamination in soil and groundwater. According to the Office of Environmental Health Hazard Assessment (OEHHA), on behalf of the California Environmental Protection Agency (CalEPA), the Project site is within the 91st percentile in terms of groundwater threats.³⁰ The Project is also within the 41st percentile for toxic releases from facilities.³¹ The Project site is adjoined on its northeastern corner by a site listed as an open Spills, Leaks, Investigations, and Cleanup (SLIC) release case in the regulatory database.³² The site is contaminated with halogenated

²⁶ Clark Comments, p. 3.

²⁷ *Id.*

²⁸ 14 CCR 15126.2(a); *Cal. Building Industry Ass’n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 388.

²⁹ 14 CCR 15126.2(a).

³⁰ CalEnviroScreen 3.0 Results (June 2018 Update) Available at: <https://oehha.ca.gov/calenviroscreen/report/calenviroscreen-30>.

³¹ *Id.*

³² Addendum p. 124.

volatile organic compounds (HVOCs), including PCE, in soil, soil-gas, indoor air, and shallow groundwater at concentrations above their respective regulatory screening criteria at this site.³³ In addition, elevated HVOC levels have been detected in soil, soil-gas, groundwater, and indoor air samples collected from the properties located north/northeast of the Project site.³⁴

The Addendum fails to analyze the Project's risk of exacerbating existing environmental conditions and bringing people to the area affected, in violation of CEQA. The Addendum must be withdrawn, and a Subsequent EIR pursuant to CEQA Guidelines Section 15162 must be prepared and circulated for public review.

B. The Addendum Fails to Mitigate the Impacts of Hazardous Contamination

The Staff Report does not remedy the impermissible deferral of mitigation for hazardous contamination in the Addendum. Mitigation Measure HAZ-1 is inadequate because it constitutes impermissibly deferred analysis. CEQA Guidelines § 15126.4(a)(1)(B) provide that formulation of mitigation measures shall not be deferred until some future time.³⁵ “Impermissible deferral of mitigation measures occur when an EIR puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described in the EIR.”³⁶ Here, the Addendum states that a Phase II Environmental Site Assessment will be conducted after Project approval, at which time additional groundwater sampling and mitigation may be proposed.³⁷

“An EIR is inadequate if ‘[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.’”³⁸ Here, MM HAZ-1 would require additional analysis and formulation of mitigation measures that should have been included in an EIR, rather than an Addendum which is not required to be circulated for public review. The Addendum fails as an informational document for impermissibly deferred analysis and mitigation.

³³ Addendum p. 124.

³⁴ *Id.*

³⁵ 14 CCR 15126.4(a)(1)(B).

³⁶ *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 915-916.

³⁷ Addendum p. 126-127.

³⁸ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, quoting *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, quoting *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 670.

The CEQA Guidelines provide that “[t]he specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project’s environmental review...”³⁹ The Addendum does not state why specifying the Phase II site assessment and additional mitigation measures were impractical or infeasible at the time the Addendum was drafted. In *Preserve Wild Santee v. City of Santee*, the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures “was impractical or infeasible at the time the EIR was certified.”⁴⁰ The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the EIR.⁴¹ Further, the court in *Endangered Habitats League, Inc. v. County of Orange*, held that mitigation that does no more than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.⁴² Here, the fact that the Site and Groundwater Management Plan will be approved later by the Director of Planning, Building and Code Enforcement or the Director’s designee does not cure the informational defects in this Addendum.⁴³

V. THE CITY CANNOT MAKE THE NECESSARY FINDINGS TO APPROVE THE SITE DEVELOPMENT PERMIT

As described in Silicon Valley Residents prior comments, the City does not have the legal basis to make the necessary findings for a Site Development Permit. In order to approve a Site Development Permit, the City must make all the following findings⁴⁴:

1. The site development permit, as approved, is consistent with and will further the policies of the general plan and applicable specific plans and area development policies.
2. The site development permit, as approved, conforms with the zoning code and all other provisions of the San José Municipal Code applicable to the project.

³⁹ 14 CCR § 15126.4(a)(1)(B).

⁴⁰ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.

⁴¹ *Id.*

⁴² *Endangered Habitats League, Inc. v. County of Orange*, (2005) 131 Cal.App.4th 777, 794.

⁴³ *See Cal. Clean Energy Comm. v. City of Woodland* (2014) 225 Cal.App.4th 173, 194.

⁴⁴ San Jose Zoning Code § 20.100.630.

3. The site development permit, as approved, is consistent with applicable city council policies, or counterbalancing considerations justify the inconsistency.
4. The interrelationship between the orientation, location, and elevations of proposed buildings and structures and other uses on-site are mutually compatible and aesthetically harmonious.
5. The orientation, location and elevation of the proposed buildings and structures and other uses on the site are compatible with and are aesthetically harmonious with adjacent development or the character of the neighborhood.
6. The environmental impacts of the project, including but not limited to noise, vibration, dust, drainage, erosion, storm water runoff, and odor which, even if insignificant for purposes of the California Environmental Quality Act (CEQA), will not have an unacceptable negative affect on adjacent property or properties.
7. Landscaping, irrigation systems, walls and fences, features to conceal outdoor activities, exterior heating, ventilating, plumbing, utility and trash facilities are sufficient to maintain or upgrade the appearance of the neighborhood.
8. Traffic access, pedestrian access and parking are adequate.

The director, the planning commission, or the city council shall deny the application where the information submitted by the applicant or presented at the public hearing fails to satisfactorily substantiate such findings.

The Addendum fails to analyze the Project's nonconformance with the Site Development Permit requirements with respect to the air quality impacts associated with construction and operation of the Project. As Dr. Clark noted in his comments, the impacts from construction emissions and the backup generator may result in significant unacceptable negative effects on the adjacent property and properties. These impacts will adversely impact sensitive receptors at adjacent properties. These include the future 19 North Second Street Affordable Senior Housing project to the northeast of the project site.⁴⁵ The maximum excess residential cancer risks at these locations would be 17.19 per million for infant risk, which is greater than the BAAQMD significance threshold of 10 in one million for cancer risk.⁴⁶ The dust from construction may negatively affect the sensitive receptors within adjacent properties, but the Addendum fails to adequately analyze

⁴⁵ Addendum p. 54.

⁴⁶ *Id.*

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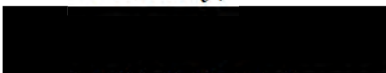
and mitigate such impacts. As such, the City cannot make the necessary findings to approve the Site Development Permit, absent the circulation of a Subsequent EIR which adequately analyzes and mitigates the Project's significant air, dust, and health risk impacts.

VI. CONCLUSION

For the reasons discussed above and in Silicon Valley Residents' prior comments and expert consultant reports, the Addendum remains wholly inadequate under CEQA. The City should grant this Appeal, and prepare a Subsequent EIR pursuant to CEQA Guidelines Section 15162 to provide legally adequate analysis of, and mitigation for, all of the Project's potentially significant impacts. Until a subsequent EIR is circulated for public review, the City may not lawfully approve the Project, nor the Site Development Permit.

Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,


Kelilah D. Federman

Attachment
KDF:acp