



T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 150
Oakland, CA 94612

www.lozeaudrury.com
richard@lozeaudrury.com

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VIA EMAIL

Roxana Bonderson, Chair
John M. Baucke, Vice Chair
Donald DeLuccio, Commissioner
Lucille Boss, Commissioner
Sheila Lodge, Commissioner
Devon Wardlow, Commissioner
Lesley Wiscomb, Commissioner
Planning Commission
City of Santa Barbara
735 Anacapa Street
Santa Barbara, CA 93101
PCSecretary@SantaBarbaraCA.gov

Kathleen Kennedy, Project Planner
City of Santa Barbara
735 Anacapa Street
Santa Barbara, CA 93101
KKennedy@SantaBarbaraCA.gov

**Re: Comment on Class 32 Infill Exemption
101 Garden Street Hotel Project (PLN2019-00052)
August 3, 2023 Planning Commission Agenda Item III**

Dear Honorable Planning Commissioners and Ms. Kennedy:

This comment is submitted on behalf of **Supporters Alliance for Environmental Responsibility (“SAFER”)** regarding the proposed Class 32 In-fill Development Categorical Exemption (“Exemption” or “Class 32 Exemption”) for the construction of a new 178,919-square-foot hotel containing 250 rooms, six affordable housing units, and an 85,298-square-foot subterranean parking garage, located on a 4.53 acre-site at 101 Garden Street in the City of Santa Barbara (“Project”), to be heard by the Planning Commission on August 3, 2023 as Agenda Item III.

As discussed below, exempting the Project from CEQA based on the Class 32 Exemption violates the California Environmental Quality Act (“CEQA”) because (1) the Class 32 exemption does not apply on its face, and (2) the unusual circumstances exception to the exemption applies. Since the Project is not exempt from CEQA, an initial study must be prepared to determine the appropriate level of CEQA review required. SAFER requests that the Planning Commission decline to approve the Project unless and until proper CEQA review is conducted.

DISCUSSION

I. The City Incorrectly Applied CEQA's Class 32 In-Fill Development Categorical Exemption to the Project and Thus a Full CEQA Analysis Is Required.

The proposed Project does not qualify for a Class 32 In-fill Development Categorical Exemption under CEQA because of the Project's potentially significant environmental impacts. The City must prepare an Initial Study to determine the appropriate level of CEQA review.

The Class 32 exemption provides:

Class 32 consists of projects characterized as in-fill development meeting the conditions described in this section.

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) *The project site has no value, as habitat for endangered, rare or threatened species.*
- (d) *Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.*
- (e) The site can be adequately served by all required utilities and public services.

14 CCR § 15332 [emph. added].

Some of the key limitations of the Exemption are that it does not apply if the project will have any significant effects relating to traffic, noise, air quality, or water quality, or if the site has value as habitat for endangered, rare or threatened species. 14 CCR § 15332(c), (d). Here, the Exemption cannot apply because the Project site has value for rare species and will have significant air quality impacts, and because the Project is located on a hazardous waste site.

A. The Project is ineligible for exemption because it is located on a hazardous waste site.

Environmental engineers Patrick Sutton, PE, Cem Abatek, and Yilin Tian, Ph.D., of Baseline Environmental Consulting ("Baseline") reviewed the Staff Report and all technical appendices prepared in support of the exemption. Baseline's comments and CVs are attached as Exhibit A.

i. Hazardous waste site

Section 15300.2(e) of the CEQA Guidelines expressly provides that “A categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code.” Section 65952.5 is also known as the “Cortese List.” As the Court of Appeal has explained, “**We agree that the Legislature intended that projects on these [Cortese List] sites should not be categorically exempt from CEQA because they may be more likely to involve significant effects on the environment.**” *Parker Shattuck Neighbors v. Berkeley City Council*, 222 Cal. App. 4th 768, 781 (2013); *McQueen v. Mid-Peninsula Board*, 202 Cal.App.3d 1136, 1149, (“the known existence of....hazardous wastes on property to be acquired is an unusual circumstance threatening the environment” and the project may not be exempted from CEQA review); *Association for a Cleaner Environment v. Yosemite Comm. College*, 110 Cal.App.4th 629 (2004) (presence of hazardous materials makes CEQA exemption improper).

According to Baseline’s review of the Project documents, the Project site is identified as a Leaking Underground Storage Tank (“LUST”) site on the State Water Resources Control Board’s Geotracker database. The Geotracker database is one of several databases that make up the Cortese list,¹ meaning that the Project is ineligible for exemption. The LUST has a closed case status but remains on the Cortese list as required by the California Environmental Protection Agency. Ex. A., p. 2.

The LUST is associated with the address 211 Yanonali Street which, upon preliminary review, appears to be located immediately outside the Project site. However, Baseline’s investigation found that the 211 Yanonali Street address was previously associated with the former Channel City Lumber site, which was located in the central portion of the 101 Garden Street address listed for the Project site. *Id.* Therefore, the Project site is included on the Cortese list and the Project is ineligible for exemption.

Furthermore, the site is also identified on the GeoTracker database as a Cleanup Program case and a Department of Toxic Substances Control (“DTSC”) Cleanup site. DTSC’s EnviroStor database indicates that the Cleanup Site may contain unexploded ordinances (“UXOs”) from past military bomb storage. *Id.* Additionally, the Cleanup Program case for the Project specifically lists an address of 101 Garden Street and has an “open – site assessment” status as of March 29, 2019.

The most recent document available on GeoTracker for this Cleanup Program case is a letter from Santa Barbara County Environmental Health Services (“SBCEHS”) providing conditional approval of a work plan addendum for additional environmental site assessment for the project site and is dated January 20, 2023. The SBCEHS letter indicates that

¹ See, California Environmental Protection Agency, Cortese List Data Resources (2023), available at: <https://calepa.ca.gov/sitecleanup/corteselist/>.

additional assessment is proposed in order to delineate previously identified impacts from total petroleum hydrocarbons as gasoline (“TPHg”) and volatile organic compounds (“VOCs”), including tetrachloroethene (PCE), benzene, and chloroform in soil vapor; and VOCs including trichloroethene (TCE) and benzene in groundwater. The SBCEHS letter also indicates that borings will continue to be screened for potential UXOs and acknowledges that the source of TPHg contamination at the project site appears to be the above-mentioned LUST which is located on the Project site. *Id.*, pp. 3-4.

The Staff Report states that the project “would remediate all contaminated soils and [that] there would be no impacts to groundwater.” However, based on the publicly available documents on Geotracker, no remediation plans have been developed for the Project site. Therefore, Baseline explains, “[a]ny remediation plans for the project must be reviewed under CEQA as part of the project to ensure that the remediation activities would not result in significant impacts to the environment.” *Id.*, p. 5.

The Project does not qualify for an exemption because the Project site is extensively contaminated with hazardous waste and appears on the Cortese list. Therefore, additional environmental review is required and the City must prepare either a mitigated negative declaration (“MND”) or environmental impact report (“EIR”) for the Project. Any future CEQA document prepared for the Project must “disclose the nature and extent of hazardous materials contamination that has been identified at the project site, and [...] describe the remedial actions and regulatory oversight that would be required to ensure protection of human health and the environment during remediation of the project site and construction and operation of the project.” *Id.*, pp. 5-6.

B. The Project will have significant air quality impacts, precluding reliance on the Class 32 Exemption.

Baseline found that the Staff Report and the Air Quality and Greenhouse Gas Emissions Technical Memorandum (“AQ memorandum”) failed to adequately evaluate the Project’s potential air quality impacts. Specifically, the Staff Report indicates that a Remediation Action Plan and Soil Management Plan would be prepared for the Project and subject to approval by SBCEHS. However, those plans have not yet been disclosed or analyzed. This is problematic because remediation activities which will take place at the site have the potential to result in the release of toxic air contaminants (“TACs”), including benzene, PCE, TCE, and lead. *Id.*, p. 6. Furthermore, development of the site could create preferential pathways for subsurface toxic vapors to intrude into the future hotel building. *Id.*

Despite these conditions, the AQ memorandum failed to evaluate the potential health risks associated with exposure to TACs during remediation activities. The AQ memorandum also failed to evaluate criteria air pollutant emissions that will result from the operation of off-road diesel construction equipment and associated truck trips that will occur during planned remediation activities. In failing to adequately assess these impacts, the City has failed to provide substantial evidence to support a finding that the Project will result in less-

than-significant air quality impacts, and it therefore cannot claim a Class 32 Exemption for the Project.

C. The Project serves as habitat for rare species, precluding reliance on the Class 32 Exemption.

One of the key limitations of the Class 32 exemption is that it does not apply if the project has value as habitat for endangered, rare, or threatened species. Here, the exemption cannot apply because evidence from expert wildlife biologist Dr. Shawn Smallwood demonstrates that the Project has value as habitat for rare species and may have significant impacts on biological resources. Dr. Smallwood's comments and CV are attached Exhibit B. The City is therefore precluded from using a Class 32 Exemption for this Project and must prepare either an MND or an EIR for the Project.

Dr. Smallwood's comments are supported by a site visit by wildlife biologist Noriko Smallwood ("Ms. Smallwood"). Ex. B, p. 1. Ms. Smallwood visited the site for 2.9 hours on April 18, 2023, starting at 6:21 am. *Id.* She walked the site's perimeter, using binoculars to scan for wildlife. *Id.*

Ms. Smallwood observed 33 species of vertebrate wildlife at the Project site, four of which were special-status species. *Id.*, see Ex. B, p. 3, Table 1. These include Allen's hummingbird (*Selasphorus sasin*), Western gull (*Larus occidentalis*), Bullock's oriole (*Icterus bullockii*), and yellow warbler (*Setophaga petechia*), all of which are identified by the US Fish & Wildlife Service as "Birds of Conservation Concern."² Birds of Conservation Concern include "migratory nongame birds that without additional conservation action are likely to become candidates for listing under the Endangered Species Act (ESA) of 1973."³ Ms. Smallwood observed and photographed the yellow warbler and the Bullock's oriole perched at the Project site and observed many Western gull flying over the site; she observed the Allen's hummingbird drinking nectar from flowers immediately off-site.

As one county explains, "Special Status Species" is a universal term used in the scientific community for species that are considered sufficiently rare that they require special consideration and/or protection and should be, or have been, listed as rare, threatened or endangered by the Federal and/or State governments."⁴

The site therefore has value for these rare, special status bird species. As a result, the City cannot rely on the Exemption as it has not met one of the mandatory conditions.

i. The City inadequately characterized the existing environmental setting as it

² USF&WS, Birds of Conservation Concern 2021, p. 18, 19, <https://www.fws.gov/sites/default/files/documents/birds-of-conservation-concern-2021.pdf>.

³ *Id.*, p. 4.

⁴ Sacramento County, Planning and Environmental Review, "Special Status Species," https://planning.saccounty.net/InterestedCitizens/Pages/ER_SpecialStatusSpecies.aspx.

relates to wildlife.

The City inadequately characterized the existing environmental setting and the site's ability to provide habitat to rare, special-status species. Every CEQA document must start from a "baseline" assumption. The CEQA "baseline" is the set of environmental conditions against which to compare a project's anticipated impacts. *Communities for a Better Env't. v. So. Coast Air Qual. Mgmt. Dist.* (2010) 48 Cal. 4th 310, 321.

According to Dr. Smallwood's review, the City has not completed a survey of the site for biological resources in at least 20 years. Ex. B., p. 12. Instead, two surveys were performed for wetland vegetation at the site, only one of which *may* have considered wildlife, but which was not made available among the many technical studies that were released together with the 2023 Staff Report (*See*, Rindlaub 2002 study, cited by SAIC 2007 report). Regardless, Rindlaub's determination was merely that the site had "low" value for wildlife, not that it lacked any such value whatsoever. "A site with low value is a site with value, especially in the current crisis of rapidly declining wildlife abundance." *Id.*

Furthermore, no desktop review appears to have been completed to assess the likelihood of occurrence of rare species on the site. *Id.*, p. 13. In contrast, Dr. Smallwood concludes based on his in-site visit and review of occurrence databases that 120 special-status species of wildlife are known to occur near enough to the site to be analyzed for occurrence potential.

Ms. Smallwood's in-person identification of species onsite and Dr. Smallwood's identification of potential species that may occur onsite present substantial evidence that the Project serves as habitat for rare, special-status species. These potential impacts must be discussed and analyzed in an EIR, or at least an MND, to ensure that species are accurately detected and that any impacts are mitigated to a less than significant level.

ii. The City's plan for wetland restoration would destroy existing on-site wildlife habitat.

The Staff Report discusses plans to restore the wetland/drainage area and create a 15-foot buffer along the Garden Street frontage. However, this plan fails to take into account that doing so would destroy existing on-site habitat which supports at least 33 species of vertebrate wildlife, including at least four special-status species. *Id.*, p. 14. Habitat restoration may still occur but must account for on-site wildlife activity, including breeding activity, and take special consideration into habitat for rare and special-status species living at the site. Plans for habitat restoration should not be developed further unless and until the City prepares an appropriate biological resources assessment to properly characterize the existing wildlife baseline at the site.

II. The Unusual Circumstances Exception Precludes Reliance on the Class 32 Exemption.

A categorical exemption is inapplicable “where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” 14 CCR 15300.2(c). Here, the Project does not present the same general risk of environmental impacts as other projects falling under Class 32 exemptions and therefore the exemption cannot apply.

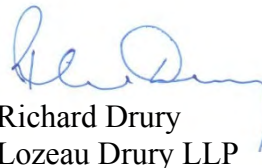
In *Berkeley Hillside Preservation v. City of Berkeley*, the California Supreme Court explained that there are two ways a party may invoke the unusual circumstances exception. First, “a party may establish an unusual circumstance with evidence that the project *will* have a significant environmental effect. That evidence, if convincing, necessarily also establishes ‘a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.’” *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105 [emph. added]. Alternatively, “[a] party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance.” *Id.*

As discussed above, SAFER has presented substantial evidence that the Project will have significant air quality and biological impacts. The fact that these significant impacts will occur constitutes an unusual circumstance. The site’s extensive contamination with hazardous materials is also in and of itself an unusual circumstance. Together, these conditions preclude the City’s reliance on an exemption.

CONCLUSION

The City cannot rely on a Class 32 exemption because the Project does not meet the terms of the exemption. Accordingly, the City must prepare an initial study to determine the appropriate level of environmental review to undertake pursuant to CEQA. Thank you for considering these comments.

Sincerely,



Richard Drury
Lozeau Drury LLP