July 12, 2021

Via Email

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Jingo Lou, Vice Chair
Anagh Mamdapurkar, Commissioner
Jerry Schwartz, Commissioner
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Re: Final Environmental Impact Report for the Pacific Square San Gabriel Mixed-Use Project (State Clearinghouse No. 2018081085)

Dear Chair Klawiter, Vice Chair Lou, and Honorable Commissioners:

I am writing on behalf of Supporters Alliance for Environmental Responsibility, including its members living and working in and around the City of San Gabriel (collectively "SAFER" or "Commenters") regarding the Final Environmental Impact Report ("FEIR") prepared for the Pacific Square San Gabriel Mixed-Use Project, State Clearinghouse No. 2018081085 ("Project"). After reviewing the FEIR, together with our consultant, it is clear that the document fails to comply with CEQA and fails to adequately analyze and mitigate the Project's impacts.

Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH, has conducted a review of the Project, the EIR and relevant appendices regarding the Project's indoor air emissions. Mr. Offerman concludes that it is likely that the Project will expose future residents of the Project to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. Mr. Offermann is one of the world's leading experts on indoor air quality and has published extensively on the topic. Mr. Offerman's expert comments and CV are attached hereto as Exhibit A.

In addition, the FEIR fails to respond to public comment on the inadequacy of mitigation measure MM-NOI-1, and as a result, there is no evidence that the Project's significant noise impact will be reduced to a less-than-significant level.

A revised EIR should be prepared prior to Project approval to analyze all impacts and require implementation of all feasible mitigation measures, as described more fully below.

I. PROJECT DESCRIPTION

The Project is a six-story, 495,544 square foot mixed-use development, divided between two Plazas, that would include retail commercial uses on the ground level, one level of below-ground parking, and residential uses above the retail uses. The 700 Plaza would include 102 residential units, 4 live/work units, and 36,352 square feet of ground floor commercial space including restaurant, retail, commercial live-work space, and a fitness center. The 800 Plaza would include 141 residential units, 4 live/work units, and 39,694 square feet of ground floor commercial space including restaurant, retail, café, commercial live-work space, and a market. In total, there would be 243 residential units (413,238 square feet), 8 live/work units (13,026 square feet), and 76,046 square feet of commercial uses.

In between the two plazas would be a 33,543 square feet central park area (23,218 square feet central park and 10,325 square feet central plaza) with expansive landscaping and outdoor seating areas. A 24,280 square foot secondary plaza with landscaped and hardscape areas would surround the perimeter of the entire Project Site. A total of 983 vehicular parking spaces would be provided by two three-level concrete parking garages. The parking garages would include one subterranean basement level (with a maximum depth of 12 feet below grade), one level at grade (ground floor), and one level at mezzanine (with a maximum height of 21.5 feet above grade). Vehicular and pedestrian access would be provided from all sides of the Project Site. Necessary supporting utility infrastructure would also be developed as part of the Project.

The Project site is located in the east/central part of the City and is bound by E. Grand Avenue on the south, S. Gladys Avenue on the east, E. El Monte Street on the north, and S. San Gabriel Boulevard on the west.

II. LEGAL BACKGROUND

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an EIR (except in certain limited circumstances). (See, e.g., Pub. Resources Code, § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.) "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109 (*"CBE v. CRA"*).)

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 Cal. Code Regs. ("CEQA Guidelines") § 15002(a)(1).) "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" (*Citizens of Goleta*

Valley v. Board of Supervisors (1990) 52 Cal. 3d 553, 564.) The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." (*Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs*. (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.)

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. (CEQA Guidelines, § 15002(a)(2) and (3); *See also Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley,* 52 Cal.3d at 564.) The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." (CEQA Guidelines, §15002(a)(2).) If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns." (Pub. Resources Code, § 21081; CEQA Guidelines, § 15092(b)(2)(A) & (B).)

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to '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.'" (*Berkeley Jets*, 91 Cal.App.4th at 1355 (emphasis added), quoting, *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 391 409, n. 12.) As the court stated in *Berkeley Jets*, 91 Cal.App.4th at 1355:

> A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist*. (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

More recently, the California Supreme Court has emphasized that:

> When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR (1) includes sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises [citation omitted]....

(*Sierra Club v. Cty. of Fresno* (2018) 6 Cal.5th 502, 510 (2018), citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405.) The Court in *Sierra Club v. Cty. of Fresno* also emphasized at another primary consideration of sufficiency is whether the EIR "makes a reasonable effort to substantively connect a project's air quality impacts to likely health consequences." (6 Cal.5th at 510.) "Whether or not the alleged

inadequacy is the complete omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document." (*Id*. at 516.) Although an agency has discretion to decide the manner of discussing potentially significant effects in an EIR, "a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including 'detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (6 Cal.5th at 516, citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197.) "The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions." (6 Cal.5th at 516.) As the Court emphasized:

> [W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

(*Sierra Club v. Cty. of Fresno*, 6 Cal.5th at 514.)

In general, mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. (CEQA Guidelines § 15370.) Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. (*Id.* at § 15126.4(a)(1)(B).) A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved.

III. ANALYSIS

A. THERE IS SUBSTANTIAL EVIDENCE THAT THE PROJECT WILL HAVE SIGNIFICANT INDOOR AIR QUALITY IMPACTS.

One component of an air quality impact analysis under CEQA is evaluating the health risk impacts of toxic air contaminant ("TACs") emissions contributed by a proposed project as well as cumulatively with other nearby TAC sources. Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH, has conducted a review of the Project, the CEQA Analysis, and relevant appendices regarding the Project's indoor air emissions. Indoor Environmental Engineering Comments (July 9, 2021) ("Offermann Comment") (attached hereto as Exhibit A). Mr. Offermann is one of the world's leading experts on indoor air quality and has published extensively on the topic. As discussed below and set forth in Mr. Offermann's comments, the Project's emissions of formaldehyde to air will result in very significant cancer risks to future residents. As a result of this significant effect to air quality, the Project may not rely upon any of the referenced exemptions to forego the preparation of a supplemental EIR for the Project.

The CEQA Analysis includes a discussion of the Project's anticipated TAC emissions as well as TAC emissions from nearby sources. CEQA Analysis, pp. 3.2-24 to 3.2-33. The CEQA Analysis identifies the significance thresholds established by the South Coast Air Quality Management District ("SCAQMD") for a project's TAC emissions as well as cumulative emissions from a project and other nearby TAC sources. A project will have a significant impact if it "emits carcinogenic materials or TACs that exceed the maximum incremental cancer risk of ten in one million or a cancer burden greater than 0.5 excess cancer cases (in areas greater than or equal to 1 in 1 million), or an acute or chronic hazard index of 1.0." EIR, 3.2-24.

Although the CEQA Analysis identifies TAC emissions associated with the Project's diesel particulate matter emissions associated with construction equipment (EIR 3.2-29 to 32) and from periodic maintenance operations (cleaning, painting, etc.) and periodic delivery and service vehicles (EIR 3.2-32 to 33), the Analysis fails to acknowledge the significant indoor air emissions that also will result from the Project. Specifically, there is no discussion, analysis or identification of mitigations for significant emissions of formaldehyde to air from the Project.

Mr. Offermann explains that many composite wood products typically used in home and apartment building construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He states, "The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in residential building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims." Offermann Comment, pp. 2-3.

Formaldehyde is a known human carcinogen. Mr. Offermann states that there is a fair argument that future residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 120 per million, assuming all materials are compliant with the California Air Resources Board's formaldehyde airborne toxics control measure. *Id*., p. 3. This is 12 times the SCAQMD's CEQA significance threshold for airborne cancer risk of 10 per million. Mr. Offermann concludes that this significant environmental impact should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. *Id*., p 2. Mr. Offermann suggests several feasible mitigation measures, such as requiring the use of no-added-formaldehyde composite wood products, which are readily available. Offermann Comments, pp. 10-11. Mr. Offermann also suggests requiring air ventilation systems which would reduce formaldehyde levels. *Id*. Since the CEQA Analysis does not analyze this impact at all, none of these or other mitigation measures are considered.

When a Project exceeds a duly adopted CEQA significance threshold, as here, this alone establishes a fair argument that the project will have a significant adverse environmental impact and an EIR is required. Indeed, in many instances, such air quality thresholds are the only criteria reviewed and treated as dispositive in evaluating the significance of a project's air quality impacts. See, e.g. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative

significance"). See also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 ("A 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant"). The California Supreme Court made clear the substantial importance that an air district significance threshold plays in providing substantial evidence of a significant adverse impact. *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327 ("As the [South Coast Air Quality Management] District's established significance threshold for NOx is 55 pounds per day, these estimates [of NOx emissions of 201 to 456 pounds per day] constitute substantial evidence supporting a fair argument for a significant adverse impact"). Since expert evidence demonstrates that the Project will exceed the SCAQMD's CEQA significance threshold, there is a fair argument that the Project will have significant adverse impacts and an EIR is required.

Mr. Offermann also notes that the high cancer risk that may be posed by the Project's indoor air emissions likely will be exacerbated by the additional cancer risk that exists from vehicle emissions from the adjacent and nearby roadways, airport, and railway. Offermann at 10-11. He observes that "[a]n air quality analyses should to be conducted to determine the concentrations of $PM_{2.5}$ in the outdoor and indoor air that people inhale each day." *Id*. at 11. Because the City's analysis of the cumulative health risk impacts of the Project fails to include these sources as well as the TAC emissions to air from the Project itself, the cumulative impact analysis and conclusion is not supported by substantial evidence. Mr. Offermann concludes that:

> It is my experience that based on the projected high traffic noise levels, the concentration of $PM_{2.5}$ will exceed the National $PM_{2.5}$ 24-hour standards and warrant installation of high efficiency air filters (i.e. MERV 13 or higher) in all mechanically supplied outdoor air ventilation systems

Id. at 11-12.

The failure of the CEQA Analysis to address the Project's formaldehyde emissions is contrary to California Supreme Court decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("*CBIA"*). In that case, the Supreme Court expressly holds that potential adverse impacts to future users and residents from pollution generated by a proposed project ***must be addressed*** under CEQA. At issue in *CBIA* was whether the Air District could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of adjacent environmental conditions on a project. The Supreme Court held that CEQA does not generally require lead agencies to consider the environment's effects on a project. *CBIA*, 62 Cal.4th at 800-801. However, to the extent a project may exacerbate existing environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id*. at 801. In so holding, the Court expressly held that CEQA's statutory language required lead agencies to disclose and analyze "impacts on ***a project's users or residents*** that arise ***from the project's effects*** on the environment." (*Id*. at 800 (emphasis added).)

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. People will be residing in and using the Project once it is built and begins emitting formaldehyde. Once built, the Project will begin to emit formaldehyde at levels that pose significant health risks. The Supreme Court in *CBIA* expressly finds that this type of air emission and health impact by the project on the environment and a "project's users and residents" must be addressed in the CEQA process.

The Supreme Court's reasoning is well-grounded in CEQA's statutory language. CEQA expressly includes a project's effects on human beings as an effect on the environment that must be addressed in an environmental review. "Section 21083(b)(3)'s express language, for example, requires a finding of a 'significant effect on the environment' (§ 21083(b)) whenever the 'environmental effects of a project will cause substantial adverse effects *on human beings,* either directly or indirectly.'" (*CBIA*, 62 Cal.4th at 800 (emphasis in original.) Likewise, "the Legislature has made clear—in declarations accompanying CEQA's enactment—that public health and safety are of great importance in the statutory scheme." (*Id*., citing e.g., §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d).) It goes without saying that the hundreds of future residents at the Project are human beings and the health and safety of those residents is as important to CEQA's safeguards as nearby residents currently living adjacent to the Project site.

A revised EIR is necessary to analyze, disclose, and mitigate this significant impact.

B. THE PROJECT WILL HAVE A SIGNIFICANT NOISE IMPACT THAT HAS NOT BEEN ADEQUATELY MITIGATED.

1. Mitigation Measure MM-NOI-1 Constitutes Deferred Mitigation

The City's General Plan has a residential exterior noise standard of 50 dBA during the daytime, and 45 dBA during the nighttime. (San Gabriel General Plan Noise Element, N-8.) These levels are adjusted based on the duration of the noise. (*Id.*) The General Plan also includes interior noise standards for residential uses of 40 dBA during the daytime, and 45 dBA during the nighttime. (*Id*. at N-9.)

The EIR discloses that residences across the street from the Project site – the closest of which is only 65 feet away - would be exposed to increased noise levels during daytime from project construction. The EIR indicates that noise levels at nearby sensitive receptors could reach up to 83 dBA, far in excess of the 50 dBA daytime noise standard required by the General Plan. (EIR, 3.10-23.) As a result of this significant impact, the EIR includes mitigation measure MM-NOI-1. (EIR, 3.10-24.)

The Daft EIR included the following measures as MM-NOI-1 to reduce the Project's significant construction-related noise impacts:

Mitigation Measure MM-NOI-1: For all construction-related activities, noise attenuation techniques shall be employed as needed to ensure that noise remains as low as possible during construction, specifically at each nearby sensitive receptor listed above. The following noise-attenuation techniques shall be incorporated into contract specifications to reduce the impact of construction noise:

a) Ensure that construction equipment is properly muffled according to industry standards and in good working condition.

b) Place noise-generating construction equipment and locate construction-staging areas away from sensitive uses, **where feasible**.

c) Implement noise attenuation measures **to the extent feasible**, which may include but are not limited to installing temporary noise barriers or noise blankets around stationary construction noise sources for the duration of project construction.

d) Use electric air compressors and similar power tools rather than diesel equipment, **where feasible**.

e) All stationary construction equipment (e.g., air compressors, generators, impact wrenches, etc.) shall be operated **as far away from residential uses as possible** and shall be shielded with temporary sound barriers, sound aprons, or sound skins during operation.

f) Construction-related equipment, including heavy-duty equipment, motor vehicles, and portable equipment, shall be turned off when not in use for more than 30 minutes.

g) Clearly post construction hours, allowable workdays, and the phone number of the job superintendent at all construction entrances to allow surrounding owners to contact the job superintendent. If the City or the job superintendent receives a complaint, the superintendent shall investigate, take appropriate corrective action, and report the action taken to the reporting party.

(EIR, 3.10-24 (emph. added).) Mitigation Measure MM-NOI-1 violates CEQA because it constitutes deferred mitigation, includes vague and unenforceable standards, and its effectiveness is unsupported by substantial evidence.

As the above-underlined portions of the mitigation measure indicate, the majority of the proposed noise-attenuation measures are essentially optional, as long as the Project applicant deems them "infeasible," based on any standard it chooses, since no standard is included in the mitigation measure. In addition, the EIR provides no evidence regarding the effectiveness of the measures included in MM-NOI-1 at reducing the Project's construction noise to nearby sensitive receptors from 83 dBA down to 50 dBA, which is what is required for a less-than-significant finding.

Further, formulation of the specifics of MM-NOI-1 are deferred until after the Project is approved. Lead agencies may defer formulating mitigation until after project approval only "when it is impractical or infeasible to include those details during the project's environmental review." (CEQA Guidelines § 15126.4(a)(1)(B); *see also POET, LLC v. State Air Res. Bd.*

(2013) 218 Cal.App.4th 681, 736.) An EIR must also explain an agency's decision to defer finalizing the specifics of mitigation. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.) In the limited circumstances where deferring mitigation is justified, the EIR must (1) commit itself to the mitigation, (2) adopt specific performance standards the mitigation will achieve, and (3) identify the types of potential actions that can feasibly achieve that performance standard. (Guidelines § 15126.4, subd. (a)(1)(B).) Mitigation Measure MM-NOI-1 does not meet these requirements because it includes no performance standards, and does not commit itself to mitigating the impact to a less-than-significant level.

These shortcomings of MM-NOI-1 were raised in comments on the DEIR. While the FEIR did respond to the comments, the response was not adequate.

2. The FEIR fails to Adequately Respond to Comments on the Inadequacy of Mitigation Measure MM-NOI-1.

Public participation is an essential part of the CEQA process. Public review of environmental documents serves the following purposes: (a) sharing expertise; (b) disclosing agency analyses; (c) checking for accuracy; (d) detecting omissions; (e) discovering public concerns; and (f) soliciting counter proposals. (CEQA Guidelines, § 15200). "[T]he 'privileged position' that members of the public hold in the CEQA process . . . is based on a belief that citizens can make important contributions to environmental protection and on notions of democratic decision making. . . ." (*Concerned Citizens of Costa Mesa, supra*, 42 Cal.3d at 936).

An FEIR's responses to comments must be detailed and must provide a reasoned, good faith analysis. 14 CCR §15088(c). Failure to provide a substantive response to a comment render the EIR legally inadequate. *Rural Land Owners Assoc. v. City Council* (1983) 143 Cal.App.3d 1013, 1020.

The responses to comments on a draft EIR must state reasons for rejecting suggested mitigation measures and comments on significant environmental issues. "Conclusory statements unsupported by factual information" are not an adequate response. 14 CCR §15088(b, c); *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3rd 348. The need for substantive, detailed response is particularly appropriate when comments have been raised by experts or other agencies. *Berkeley Keep Jets v. Bd. of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1367; *People v. Kern* (1976) 72 Cal.app.3d 761. A reasoned analysis of the issue and references to supporting evidence are required for substantive comments raised. *Calif. Oak Found. v. Santa Clarita* (2005) 133 Cal.App.4th 1219.

Here, Mitch Tsai raised comments on the inadequacy of MM-NOI-1 in comments dated January 21, 2021, including that the measure is vague, unenforceable, and constitutes deferred mitigation. The City's response to Mr. Tsai's comments is not sufficient under CEQA.

First, the FEIR's response does not address the mitigation measure's failure to include performance standards. Second, the FEIR's response exclusively mention **average** noise levels

of nearby residential properties, which is distinct from what the General Plan's standard requires. (See San Gabriel General Plan, N-8, which provides standards based on maximum levels over a particular period of time.) The FEIR also does not address the vagueness and unenforceability of many aspects of NOI-1, as discussed above.

In response to Mr. Tsai's comments, the City revised MM NOI-1, but the revision did not resolve the problems, as the mitigation remains vague, uncertain, and unenforceable in violation of CEQA. The revisions attempt to quantify the potential noise reduction each measure could have, but does nothing to address the permissible language of the measures, allowing most to occur only where the Applicant deems it "feasible." For example, MM-NOI-1(d) as revised now states:

> Use electric air compressors and similar power tools rather than diesel equipment, where feasible. Electric equipment generates up to 5 dBA lower noise levels as compared to gasoline- or diesel-driven equipment. When the use of electricity is available this measure would reduce equipment noise by 3 to 5 dBA.

(FEIR, 3-2 to 3-3.)

Disclosure of the potential noise reduction provided by the use of non-diesel air compressors and tools does nothing to fix the permissive nature of the measure, which is only required "where feasible." As the EIR acknowledges, these reductions would only be applicable when such equipment and electricity are available. No evidence is provided as to whether or not either will be available. This new language does not make it any more likely that electric air compressors and other power tools will actually be used, nor does it make the measure any more enforceable. The City must have substantial evidence to support its findings that a mitigation measure will reduce an impact to less-than-significant.

Similarly, MM-NOI-1(b) as revised now states:

> Place noise-generating construction equipment and locate construction-staging areas away from sensitive uses, where feasible. As noise attenuates with distance, placing equipment at 100 feet from the adjacent receiver would reduce the noise by 3 dBA compared to placing the equipment at a distance of 50 feet from the receiver. This measure would reduce the construction noise by up to 3 dBA.

(FEIR, 3-2.)

None of the added language includes a performance standard or makes the provision enforceable. Moreover, each time MM-NOI-1 requires an action "where feasible," it is improperly delegating the City's legal responsibility of determining what constitutes adequate mitigation to the Project applicant, in violation of CEQA. *See Sundstrom v County of Mendocino* (1988) 202 Cal.App.3d 296, 306-308 (an agency's legislative body must ultimately review and

vouch for all environmental analysis mandated by CEQA). The other revisions to MM-NOI-1 are equally ineffective at rendering the measure compliant with CEQA.

Finally, the FEIR still lacks any evidence that, even if some elements are infeasible and therefore not implemented, MM-NOI-1 will effectively reduce noise at offsite sensitive land use R3 and R4 by 33 and 32 dBA, respectively, which is what is required for a finding that the Project's construction noise will be less than significant. (See EIR, 3.10-23.)

Because it lacks specific, concrete performance standards and evidence that these standards can actually be achieved, the EIR's mitigation for the Project's construction-related noise impacts violates CEQA.

III. CONCLUSION

For the foregoing reasons, SAFER respectfully requests the Planning Commission decline to certify the EIR or approve the Project, and instead require preparation of a revised EIR that conforms with CEQA, as described above.

Sincerely,

Rebecca L. Davis