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September 27, 2022

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Re: Comment on Proposed Addendum to Environmental Impact Report No. 21-002, Bella Terra Residential Project, September 27, 2022 Planning Commission Meeting Public Hearing Item No. 1 (File No. 22-747, General Plan Amendment No. 21-001, Zoning Text Amendment No. 21-003, Site Plan Review No. 21-002)

Dear Honorable Planning Commissioners, Mr. Beckman, and Ms. Estanislau:

I am writing on behalf of Supporters Alliance for Environmental Responsibility ("SAFER") regarding the proposed Addendum to the 2008 Final Program Environmental Impact Report ("FPEIR") and the 2010 EIR Addendum (hereinafter, the "2022 Addendum"), prepared for the Bella Terra Residential Project (File No. 22-747, General Plan Amendment No. 21-001, Zoning Text Amendment No. 21-003, Site Plan Review No. 21-002).

The 2022 Addendum for the proposed Project includes all actions related or referring to the proposed demolition of an existing 149,000 square foot Burlington department store and of 30,000 square feet of adjacent retail space, and the proposed construction of a seven-story mixed-use infill project consisting of 300 apartment units, 40,000 square feet of retail and restaurant space, an above-ground three-level podium parking garage with 404 spaces, and associated hardscape and landscape improvements, at 7777 Edinger Avenue in the City of Huntington Beach (the "Project").

After reviewing the 2022 Addendum, we conclude that it fails as an informational document, and that there is a fair argument that the Project may have adverse environmental impacts. Therefore, we request that the City of Huntington Beach ("City") prepare an environmental impact report ("EIR") for the Project pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, et seq.

LEGAL STANDARD

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield (*2004) 124 Cal.App.4th 1184, 1214 (*Bakersfield Citizens*); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.) The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." (*Bakersfield Citizens*, 124 Cal.App.4th at 1220.) The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*Laurel Heights Improvements Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392.) The EIR process "protects not only the environment but also informed self-government." (*Pocket Protectors*, 124 Cal.App.4th at 927.)

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, which requires the lead agency to 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 II*") 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.)

Under the "fair argument" standard, an EIR is required if any substantial evidence in the record indicates that a project may have an adverse environmental effect—even if contrary evidence exists to support the agency's decision. (14 CCR § 15064(f)(1); *Pocket Protectors,* 124 Cal.App.4th at 931; *Stanislaus Audubon Society v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-51; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602.) The "fair argument" standard creates a "low threshold" favoring environmental review through an EIR rather than through issuance of negative declarations or notices of exemption from CEQA. (*Pocket Protectors*, 124 Cal.App.4th at 928.)

The "fair argument" standard is virtually the opposite of the typical deferential standard accorded to agencies. As a leading CEQA treatise explains:

> This 'fair argument' standard is very different from the standard normally followed by public agencies in their decision making. Ordinarily, public agencies weigh the evidence in the record and reach a decision based on a preponderance of the evidence. [Citation]. The fair argument standard, by contrast, prevents the lead agency from weighing competing evidence to determine who has a better argument concerning the likelihood or extent of a potential environmental impact.

(Kostka & Zischke*, Practice Under the California Environmental Quality Act*, §6.37 (2d ed. Cal. CEB 2021).) The Courts have explained that "it is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, with *a preference for resolving doubts in favor of environmental review*." (*Pocket Protectors*, 124 Cal.App.4th at 928 (emphasis in original).)

LEGAL REVIEW OF CEQA ADDENDUM

The City has prepared an Addendum to a previously certified EIR. In order to be compliant with CEQA, an Addendum must comply with the CEQA Guidelines and with the courts' prior decisions outlining the circumstances under which an Addendum may be adopted. The Addendum presented today fails to comply with either of these requirements and, if adopted, would directly violate CEQA.

a. The Addendum Involves New Significant Environmental Effects and Violates CEQA

Pursuant to the CEQA Guidelines, an addendum to a previously certified EIR may be prepared only if "none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred." (CEQA Guidelines § 15164(b).) Notably, CEQA Guidelines § 15162(a) provides that **an addendum to an EIR is not appropriate where:**

(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.

The significant proposed changes presented cannot plausibly be described as "minor technical changes" to the 2008 FPEIR and 2010 Addendum. To the contrary, the 2022 Addendum proposes the addition of 40,449 square feet of commercial space and 300 residential units to the area designated as "Area B." None of the significant environmental impacts that will result from these newly proposed developments were previously considered. In fact, the proposed construction of 300 units—in addition to the existing 468 units that were constructed as part of development of the Revised Village at Bella Terra/Costco (the "2010 Project")—would ***exceed by 55 units the FPEIR's approved maximum*** of 713 residential units.

These proposed changes make clear that the Project involves **new significant environmental effects** and **new information of substantial importance** that make the use of Addendum here entirely inappropriate.

THE CITY'S INADEQUATE PUBLIC DISCLOSURES FRUSTRATE THE PURPOSE OF CEQA

The courts have made clear that a core tenet of the EIR process is that it "protects not only the environment but also informed self-government." (*Pocket Protectors*, 124 Cal.App.4th at 927.) Adoption of the 2022 Addendum would violate key principles of informed self-government and legally required disclosures of public records.

As of this writing, the City has not publicly released or made available for public inspection the 2008 FPEIR or the 2010 Addendum. Notably, the City's Planning Division maintains a dedicated web page including a list of all environmental documents and related approvals prepared for the various stages of the Project.[1] However, none of the published hyperlinks are currently functional, thus impeding the public's ability to view these important records. At a minimum, the City should republish all prior environmental review documents related to the Project prior to undertaking any further consideration of additional approvals.

CONCLUSION

In conclusion, SAFER believes that the 2022 Addendum fails as an informational document, and that there is a fair argument that the Project may have adverse environmental impacts. Therefore, we request that the City of Huntington Beach ("City") prepare an environmental impact report ("EIR") for the Project pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, et seq.

We reserve the right to supplement these comments, including but not limited to at public hearings concerning the Project. *Galante Vineyards v. Monterey Peninsula Water Management Dist*., 60 Cal. App. 4th 1109, 1121 (1997).

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[1] https://www.huntingtonbeachca.gov/government/departments/planning/major/BTVillage.cfm (visited on Sept. 27, 2022).

Sincerely,

Adam Frankel
LOZEAU DRURY LLP