February 22, 2023

Via E-mail

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Re: Planning Commission, Regular Session of February 23, 2023, Agenda Item No. 6.2; 840 The City Drive Apartments; Conditional Use Permit No. 3138-21; Major Site Plan Review No. 1040-21; Design Review No. 5030-21; Administrative Adjustment No. 0051-21; Mitigated Negative Declaration No. 1875-21 (City File No. 22-0718)

Dear Honorable Members of the Planning Commission:

I am writing on behalf of Supporters Alliance for Environmental Responsibility ("SAFER") regarding the Initial Study and Mitigated Negative Declaration ("IS/MND" or "MND") prepared for the 840 The City Drive Apartments Project ("Project"), for Applicant SLR Orange Development, LLC (hereinafter the "Applicant"), including all actions related or referring to the demolition of an existing retail building and proposed construction of a new 225-unit mixed-use apartment development, open parking structure for the adjacent office complex use, related site improvements, and a reduction of 48 parking spaces and 670 square feet of open space, located at 840 The City Drive South.

SAFER is concerned that the MND prepared for the Project is legally inadequate. SAFER's review of the Project has been assisted by air quality experts Patrick Sutton, PE and Yilin Tian, Ph.D. of Baseline Environmental Consulting ("Baseline"), and certified industrial hygienist Francis "Bud" Offermann, PE, CIH. The expert comments of Baseline and Mr. Offermann are attached as **Exhibit A** and **Exhibit B**, respectively.

After reviewing the MND, it is evident that it is inadequate and fails as an informational document. Also, there is a "fair argument" that the Project may have unmitigated adverse

environmental impacts. Therefore, CEQA requires that the City of Orange ("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. SAFER respectfully requests that you do not adopt the MND and instead undertake the necessary efforts to prepare an EIR, as required under CEQA.

LEGAL STANDARD

As the California Supreme Court has held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-320 (*CBE v. SCAQMD*) (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505).) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." (Pub. Res. Code ("PRC") § 21068; *see also* 14 CCR § 15382.) An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." (*No Oil, Inc.*, 13 Cal.3d at 83.) "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 Env't v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 109 (*CBE v. CRA*).)

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.)

An EIR is required if "there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." (PRC § 21080(d); *see also Pocket Protectors*, 124 Cal.App.4th at 927.) In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 CCR § 15371), only if there is not even a "fair argument" that the project will have a significant environmental effect. (PRC §§ 21100, 21064.) Since "[t]he adoption of a negative declaration . . . has a terminal effect on the environmental review process," by allowing the agency "to dispense with the duty [to prepare an EIR]," negative declarations are allowed only in cases where "the proposed project will not affect the environment at all." (*Citizens of Lake Murray v.*

San Diego (1989) 129 Cal.App.3d 436, 440.)

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 & Zishcke*, 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).)

I. There is Substantial Evidence of a Fair Argument That the Project Will have Significant Air Quality, Greenhouse Gas, Energy, and Hazardous Waste Impacts.

Air quality experts Patrick Sutton, PE and Yilin Tian, Ph.D. of Baseline Environmental Consulting ("Baseline") reviewed the IS/MND and related documents for the Project. Baseline's comments are attached as Exhibit A. Baseline found that there is substantial evidence of a fair argument that the Project will have significant air quality, greenhouse gas, energy, and hazardous waste impacts. Therefore, an EIR must be prepared to further evaluate and mitigate these impacts.

A. Air Quality.

According to the MND, project construction will produce emissions of toxic diesel particulate matter ("DPM") and will last approximately one and a half years. (Ex. A., p. 6.). However, the MND failed to include a quantified health risk assessment for the Project. This is directly contrary to guidance from the Office of Environmental Health Hazard Assessment

("OEHHA"), which provides that a health risk assessment ("HRA") should be prepared for any project lasting substantially longer than two months.

Furthermore, any future HRA "should be conducted to calculate the incremental increase in cancer risk for sensitive receptors (e.g., single-family homes south of the southern project site boundary) exposed to diesel particulate matter emissions during project construction in accordance with the OEHHA guidance for sources with variable emission rates," including by accounting for age and pregnancy status (*Id.*)

Additionally, the MND suggests that "health risks from exposure to diesel particulate matter would not be significant because the project would not exceed the SCAQMD's Localized Significance Thresholds (LSTs) for construction-generated criteria pollutants." (*Id.*, p. 7.) However, as Baseline explains, "LSTs only apply to criteria air pollutants and were not designed to evaluate localized health risks from exposure to diesel particulate matter." (*Id.*)

CEQA requires an analysis to determine whether a Project's toxic air contaminant ("TAC") emissions—including DPM emissions—will have potentially adverse impacts on human health. *Sierra Club v. Cty. of Fresno* (2018) 6 Cal. 5th 502, 518 (an EIR must make "a reasonable effort to substantively connect a project's air quality impacts to likely health consequences.") The failure to address potential health-related impacts resulting from the Project's likely air emissions is problematic because operation of construction equipment during construction, as well as truck trips during future operations, will release DPM emissions into the air, affecting local and regional air quality.

DPM is a known human carcinogen which poses unique health risks to nearby sensitive receptors.. DPM contains 40 toxic chemicals, including benzene, arsenic and lead. (www.p65warnings.ca.gov/fact-sheets/diesel-engine-exhaust.) DPM is also listed by the State of California as a toxic air contaminant known to cause cancer in humans. (https://oehha.ca.gov/media/downloads/proposition-65//p65chemicalslistsinglelisttable2021p.pdf.) According to the U.S. Environmental Protection Agency, "Exposure to diesel exhaust can lead to serious health conditions like asthma and respiratory illnesses and can worsen existing heart and lung disease, especially in children and the elderly. These conditions can result in increased numbers of emergency room visits, hospital admissions, absences from work and school, and premature deaths." (https://www.epa.gov/dera/learn-about-impacts-diesel-exhaust-and-diesel-emissions-reduction-act-dera).

Without an HRA, the MND's conclusion that the Project will not have a significant impact on human health from the Project's construction-related and operational DPM emissions is not supported by substantial evidence. An EIR must be prepared to further address and mitigate these impacts.

B. Greenhouse Gas Emissions.

The MND states that the Project's greenhouse gas ("GHG") emissions impact would be less than significant because the Project's estimated emissions rate is below the draft interim GHG threshold set by the South Coast Air Quality Management ("SCAQMD"). However, this finding is improper because SCAQMD has never formally adopted the interim threshold (Ex. A., p. 2.). Furthermore, the 3,000 MTCO2e annual GHG threshold fails to comply with the State's long term climate goals, as detailed by the 2022 California Air Resources Board ("CARB") Scoping Plan (*Id.*)

In fact, neither the SCAQMD Governing Board, nor the California Air Resources Board or the California Air Pollution Control Officers' Association – nor *any* state or regional agency – has adopted the 3000 MTCO2e annual GHG threshold. (*Id.*) The City issued guidance recommending use of the threshold in 2020; but this, too, is improper because the threshold is not supported by substantial evidence. (*Id*). In contrast, local and regional agencies throughout California have adopted significantly lower GHG thresholds, ranging from 900 to 2,500 MTCO2e (*Id.*, p. 3.)

In accordance with the Supreme Court's decision in *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, a project's GHG emissions should be evaluated based on its effect on California's efforts to meet the State's long-term climate goals. Pursuant to Executive Order B-55-18, California is committed to achieving carbon neutrality by 2045. However, the City has failed to evaluate to what extent, if any, the Project will contribute its "fair share" in GHG reductions that will be necessary to meet this ambitious goal. (*Id.*, p. 4.)

For instance, the MND states that the project would be served with natural gas provided by Southern California Gas. However, the project "could replace natural gas with electric power which will support California's transition away from fossil fuel–based energy sources and will bring the project's GHG emissions associated with building energy use down to zero as the electric supply becomes 100 percent carbon free." (*Id.*) Similarly, the "project could be designed to provide sufficient electric vehicle (EV) charging infrastructure beyond the CalGreen mandatory level to support the shift to zero-emission vehicles (e.g., implement the voluntary CalGreen Tier 2 EV charging standards). The ISMND does not evaluate and incorporate the use of all-electric buildings or EV charging infrastructure into the project design." (*Id.*)

Lastly, the MND fails to evaluate consistency with CARB's 2022 Carbon Neutrality Scoping Plan, and instead only evaluates compliance with the 2017 Scoping Plan. (*Id.*, p. 5.) This is improper because the 2022 Scoping Plan is the agency's most current guidance. Moreover, the 2022 Scoping Plan specifically identifies building decarbonization as a "key strategy for achieving California's climate change mitigation and air quality goals." (*Id.*) According to the 2022 Scoping Plan, "several studies estimate that the costs of constructing all-electric homes are lower than constructing mixed-fuel new homes, primarily due to the avoided costs of fossil gas infrastructure at the building site, with cost savings in the range of $2,000 to $10,000 per unit." (*Id.*)

Accordingly, by "failing to evaluate building decarbonization methods such as an all-electric building design, the ISMND has not demonstrated consistency with the key GHG reduction strategies under the 2022 Scoping Plan." (*Id.)* Therefore, there is a fair argument that the Project may have a significant GHG emissions impact. As such, an EIR must be prepared to more accurately account for and mitigate this impact.

C. Energy Use.

CEQA provides that all Projects must include mitigation measures "to reduce the wasteful, inefficient, and unnecessary consumption of energy." (Pub. Res. Code § 21100(b)(3).) Energy conservation under CEQA is defined as the "wise and efficient use of energy." (CEQA Guidelines, app. F, § I.) The "wise and efficient use of energy" is achieved by "(1) decreasing overall per capita energy consumption, (2) decreasing reliance on fossil fuels such as coal, natural gas and oil, and (3) increasing reliance on renewable energy resources." (*Id.*)

Mere compliance with the California Building Energy Efficiency Standards (Cal. Code Regs., tit. 24, part 6 ("Title 24") does not constitute an adequate analysis of energy. *League to Save Lake Tahoe*, 75 Cal. App. 5th at 165; *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal. App. 4th 256, 264-65. Notably, in *California Clean Energy v. City of Woodland*, the court held unlawful an EIR's energy analysis which relied solely upon compliance with Title 24 to conclude that energy impacts would be less than significant. *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal. App. 4th 173, 209-13 (*City of Woodland*).

The courts have recently affirmed *City of Woodland*, explaining that even where "[an] EIR [has] determined the project's impacts on energy resources would be less than significant," a lead agency must still analyze implementation of all "renewable energy options that might have been available or appropriate for [a] project," including to achieve 100 percent on-site renewable power generation. (*League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer* (2022) 75 Cal.App.5th 63, 166-67.) Furthermore, the court explained, a lead agency's failure to consider implementation of all feasible renewable energy proposals raised during the environmental review process constitutes a "prejudicial error." (*Id*. at 168.)

Here, the MND "evaluates the local utility provider's energy mix, including the percentages of eligible renewable, but fails to adequately consider feasible design features or mitigation measures to reduce the project's fossil fuel consumption, such as eliminating natural gas heating and appliances, installing rooftop solar panels, or installing EV charging infrastructure that exceeds the minimum Title 24 requirements." (Ex. A., p. 6.) Therefore, the MND's energy impacts analysis is inadequate and its conclusion that the Project's energy impacts will be less than significant is unsupported. Stated otherwise, there is substantial evidence of a fair argument that the Project will have a significant energy impact and an EIR is required.

D. Hazardous Materials.

According to the MND, a dry-cleaning business was located at the residential portion of the Project site from at least 1989 until 2012. Accordingly, a "release of tetrachloroethene (PCE) from the dry cleaning service has affected soil and soil gas at the project site." (Ex. A., p. 7). Therefore, in 2017, "the current property owner entered into a Voluntary Cleanup Agreement with the Department of Toxic Substances Control (DTSC) for assessing and remediating the PCE at the project site." (*Id.*) However, "according to the DTSC EnviroStor database, it does not appear that the Indoor Air Quality Assessment has been reviewed and approved by DTSC." (*Id.*) Finally, "It also appears that additional environmental investigation activities were performed at the project site in October and September 2022 to further evaluate the chemical quality of soil gas and groundwater, but the results of those investigation activities were not disclosed in the ISMND." (*Id.*)

The findings from the most recent environmental investigations at the project site should be disclosed in the ISMND for public review. In addition, DTSC should review and approve the findings of all investigative reports and issue a letter of No Further Action prior to the issuance of buildings permits. Accordingly, "To ensure that future residents, workers, and patrons are not exposed to substantial concentrations of hazardous chemicals from vapor intrusion, a mitigation measure should be prepared that requires the applicant to submit a copy of the DTSC letter of No Further Action to the City prior to the issuance of buildings permits." (*Id.*)

Unless and until these corrective actions are taken, there is substantial evidence of a fair argument that the Project will have significant hazardous waste impacts which may continue to affect the environment and the health of future residents. Therefore, an EIR must be prepared to further evaluate and more appropriately mitigate these impacts.

II. There is Substantial Evidence of a Fair Argument That the Project Will Have Significant Adverse Indoor Air Quality and Health Impacts.

Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH, has reviewed the MND and all relevant documents regarding the Project's indoor air emissions. Based on this review, Mr. Offermann concludes that the Project will likely expose future residents living at the Project to significant impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde. Mr. Offermann is a leading expert on indoor air quality and has published extensively on the topic. Mr. Offermann's CV and expert comments are attached as Exhibit B.

Formaldehyde is a known human carcinogen and is listed by the State of California as a Toxic Air Contaminant ("TAC"). The South Coast Air Quality Management District ("SCAQMD"), the agency responsible for regulating air quality within the South Coast Air Basin—which includes the City of Orange—has established a cancer risk significance threshold from human exposure to carcinogenic TACs of 10 per million. (Ex. B., p. 2.)

Mr. Offermann explains that many composite wood products routinely used in indoor building materials and furnishings commonly found in offices, residences, and hotels contain

formaldehyde-based glues which off-gas formaldehyde over long periods of time. He states that "[t]he primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particleboard. These materials are commonly used in building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims." (*Id*., pp. 2-3.)

Mr. Offermann concludes that future residents of the proposed Project will be exposed to a cancer risk from formaldehyde of approximately 120 per million, ***even assuming compliance*** with the California Air Resources Board's formaldehyde airborne toxics control measure. (*Id*., p. 4.) This risk level is **12 times greater** than the SCAQMD's CEQA significance threshold for airborne cancer risk of 10 per million.

The California Supreme Court has emphasized the importance of air district significance thresholds in providing substantial evidence of a significant adverse environmental impact under CEQA. (*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 substantial evidence that an "unstudied, potentially significant environmental effect[]" exists. (See, *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 958.)

Mr. Offermann concludes that these significant impacts should be further mitigated to reduce the significant health risks that will result from indoor formaldehyde emissions. (*Id*., pp. 12-14.) Mr. Offermann proposes various feasible mitigation measures to reduce these impacts, including by imposing a requirement that the Project applicant install high-capacity air filters throughout the building and commit to using only composite wood materials that are made with CARB approved no-added formaldehyde (NAF) resins, or ultra-low emitting formaldehyde (ULEF) resins, for all of the buildings' interior spaces.

Mr. Offermann's observations constitute substantial evidence of a fair argument that the Project will likely produce potentially significant air quality and health impacts which the MND has failed to address. Therefore, the City must prepare an EIR to further evaluate and mitigate these impacts to the Project's future residents.

III. CONCLUSION

For the foregoing reasons, the MND for the proposed Project fails to comply with CEQA. Namely, there is substantial evidence of a fair argument that the Project may have significant impacts on air quality, greenhouse gas emissions, energy use, and hazardous materials. Moreover, the MND failed to adequately mitigate the Project's likely impacts. SAFER therefore respectfully requests that you decline to adopt the MND and instead direct staff to undertake the

necessary efforts to prepare an EIR for the proposed Project. Thank you for considering these comments.

Sincerely,

Adam Frankel
LOZEAU | DRURY LLP