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April 10, 2023

Via E-mail

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Re: Appeal of Resolution No. PC 33-22, Planning Commission Recommendation for Approval of the IS/MND for 840 The City Drive Apartments; Orange City Council, Meeting of April 11, 2023, Agenda Item No. 9.1

Dear Mayor Slater and Honorable Members of the City Council:

I am writing on behalf of **Supporters Alliance for Environmental Responsibility ("SAFER")** regarding the Initial Study and Mitigated Negative Declaration ("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.

This letter supplements and adopts in its entirety SAFER's prior written comments submitted to the Orange Planning Commission on February 22, 2023 (SAFER's prior comments, as well as the comments and CVs of its independent experts, are attached as **Exhibit A**). SAFER's experts have responded to the March 20, 2023 Response to Comments prepared by FirstCarbon Solutions ("Response to Comments"). The rebuttal comments of Baseline Environmental Consulting ("Baseline") and certified industrial hygienist Francis "Bud" Offermann, PE, CIH are attached as **Exhibit B** and **Exhibit C**, respectively.

SAFER respectfully requests that you grant its Appeal and overturn the Planning Commission's approval of the Project and the MND. SAFER has reviewed the MND, with the assistance of Baseline and Mr. Offermann, and concluded that 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 direct staff to undertake the necessary efforts to prepare an EIR prior to issuing any approvals, as required by 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).)

DISCUSSION

I. The Response to Comments Fails to Adequately Address the Project’s Significant Air Quality and Hazardous Materials Impacts.

Environmental engineers Patrick Sutton, PE, Cem Abatek, and Yilin Tian, Ph.D. of Baseline Environmental Consulting (“Baseline”) reviewed the MND and related documents for the Project. Baseline found that there is substantial evidence of a fair argument that the Project will have significant air quality and hazardous materials impacts. Baseline has responded in detail to the Response to Comments and concludes that it fails to adequately address SAFER’s concerns regarding the Project’s significant environmental impacts.

A. Air Quality

The MND did not include a construction health risk assessment (“HRA”) to evaluate the health impact of diesel particulate matter (“DPM”) emissions. The Response to Comments indicates that a construction HRA was not required because the Project would not exceed South Coast Air Quality Management District (“SCAQMD”) Localized Significance Thresholds (“LSTs”) for construction-generated criteria pollutants. However, as Baseline explains, LST only evaluates impacts from criteria air pollutants, which does not include DPM. (Ex. B., p. 1.)

This is improper because 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 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 air quality and residents’ health.

The Response to Comments incorrectly asserts that the health risks associated with DPM emissions are due to long term exposure and are not from acute exposure. This is false—DPM is a known human carcinogen which may cause adverse health effects with even limited amounts of exposure. In fact, the Office of Environmental Health Hazard Assessment (“OEHHA”), the California state agency which provides guidance for health risk assessments, advises that “a higher exposure to a carcinogen, over a short period of time may be a greater risk than the same total exposure spread over a much longer time period.” (Ex. B., p. 2.)

Next, the Response to Comments incorrectly suggests that OEHHA guidance does not apply to short-term construction projects. This statement mischaracterizes the guidance. OEHHA recommends the preparation of an HRA for *all projects* lasting longer than two months. (*Id.*) The MND estimates that Project construction will last approximately one and a half years, which is substantially more than two months. (*Id.*) Furthermore, the MND provides no mitigation measures to limit the use of diesel off-road construction equipment outside of the Project’s initial demolition phase. This is despite the fact that building construction – which will involve the use of diesel-powered equipment – is estimated to last for approximately 261 work days, or approximately nine months. (*Id.*, p. 3.)

In light of these considerations, “a health risk assessment 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) that would be exposed to DPM emissions during project construction in accordance with the OEHHA guidance.” (*Id.*) Because the MND has failed to adequately address the Project’s significant air quality impacts, the MND’s conclusion is not supported by substantial evidence. Baseline’s comments constitute substantial evidence that the Project may have a significant impact on human health that has not been analyzed or mitigated and an EIR is required prior to Project approval.

B. Hazardous Materials

The Response to Comments fails to adequately address SAFER's concerns regarding the Project's significant hazardous materials impacts. According to the MND, a dry-cleaning business, Cecilia's Cleaners, was located at the residential portion of the Project site from at least 1989 until 2012. A release of tetrachloroethene ("PCE") from the dry-cleaning service has affected soil and soil gas at the project site.

The Response to Comments fails to acknowledge that additional environmental investigation activities were performed at the Project site in 2022 and fails to respond to SAFER's prior comments stating that these investigations were not disclosed in the MND. (*Id.*, pp. 4-5.) In fact, the Department of Toxic Substances Control ("DTSC") Envirostor Database¹ shows that a supplemental groundwater investigation was performed at the project site in August 2022 and that additional soil gas sampling was performed at the project site in September 2022. (*Id.*, p. 5.) The results of these recent investigations must be disclosed to inform the public of the Project's potential hazardous materials impact.

Next, the Response to Comments asserts, without evidence, that the groundwater testing indicated that the site's groundwater is clean for residential construction. However, groundwater testing results were not disclosed in the MND. (*Id.*) Furthermore, the 2019 Phase I Environmental Assessment ("ESA") prepared for the mixed-use portion of the project site indicates that groundwater beneath the project site is relatively shallow and had not yet been assessed. The Phase I ESA also recommends additional soil gas and groundwater testing at the project site. (*Id.*) However, the MND does not disclose the findings or recommendations of the Phase I ESA. (*Id.*) An EIR is required to properly analyze and mitigate these significant impacts.

The Response to Comments suggests that the Project's current "remediation plan" is adequate to ensure the health of the Project's future occupants. However, the MND does not describe any remediation plans for the project site. (*Id.*) As such, Baseline observes: "Although the Draft IS/MND indicates that PCE contamination poses no significant risk of vapor intrusion, it is relying on the findings of an indoor air quality assessment for the existing building on the project site, and a new building on the project site could have very different vapor intrusion potential depending on the building design and operation. For example, a new building could have utility trenches and utility penetrations that can create preferential pathways for vapor intrusion, and a new building would have different ventilation systems that would have different air exchange rates." (*Id.*)

The Response to Comments suggests that implementation of mitigation measure HAZ-1 would address potential impacts related to subsurface contamination revealed during project construction. However, this mitigation measure merely requires biweekly visits to the project site by a hazardous materials specialist. This is clearly inadequate. As Baseline explains, "Disturbance of PCE contaminated soil releases vapors that can affect construction workers and

¹ https://www.envirostor.dtsc.ca.gov/public/profile_report.asp?global_id=60002574

the surrounding public and PCE contaminated soil could be spread to new areas if not managed appropriately. At a minimum, a Soil Management Plan should be required for the project to ensure that contractors abide by proper protocols for management of contaminated soil at all times, and not just when a specialist visits the project site once every two weeks.” (*Id.*, p. 6.)

Finally, the Response to Comments improperly suggests that further mitigation is not required because the Applicant has been working voluntarily with DTSC for several years to remediate the site. However, the Voluntary Agreement is *voluntary* – it can be terminated by the Applicant at any time. Instead, to ensure that future residents, workers, and patrons are not exposed to substantial concentrations of hazardous chemicals from vapor intrusion, an enforceable mitigation measure must be adopted to require that the Applicant obtain a final No Further Action determination from DTSC prior to the issuance of building permits. (*Id.*) An EIR must be prepared to properly analyze this significant impact and to provide appropriate mitigation.

II. The Response to Comments Fails to Adequately Address the Project’s Significant Adverse Indoor Air Quality and Health Impacts.

Certified Industrial Hygienist, Francis “Bud” Offermann, PE, CIH, reviewed the MND and all relevant documents regarding the Project’s indoor air emissions. Based on this review, Mr. Offermann concluded 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 has responded in detail to the Response to Comments and concludes that it fails to adequately address SAFER’s concerns regarding the Project’s significant indoor air quality impacts.

The Response to Comments incorrectly asserts that the health risks associated with indoor formaldehyde emissions need not be addressed during the CEQA review process. This assertion is directly contrary to the California Supreme Court’s 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 held that potentially adverse impacts to future users and residents resulting from a Project’s environmental impacts must be addressed by the CEQA review process. The issue before the Court in *CBIA* was whether an air district could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of existing environmental conditions that occurred near a project site.

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 385-88). However, it ruled that agencies must still consider the extent to which a project may *exacerbate existing environmental conditions* at or near a project site, insofar as those conditions may adversely affect the project’s future users or residents. (*Id.* at 388.) Specifically, the Supreme Court wrote, CEQA’s statutory language requires 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 387

[emph. added].)

The Supreme Court's reasoning in *CBIA* is well-grounded in CEQA's statutory language. CEQA expressly identifies a project's effects on human beings as an effect that must be addressed as part of 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 386.) 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, subs. (b), (c), (d), (g), 21001, subs. (b), (d)].) It goes without saying that future employees of the Project are human beings. It is therefore axiomatic that any threat to the health and safety of those workers resulting from the Project's impact on the environment is subject to protection under CEQA.

The carcinogenic formaldehyde emissions which Mr. Offermann identified are not an existing environmental condition. To the contrary, those emissions will be caused *by the Project* and will result in adverse effects on the environment. Furthermore, as Mr. Offermann notes, the Project site has an **existing outdoor cancer risk of 446 per million**, "and thus the cancer risk from exposure to formaldehyde emitted indoors from composite wood products would **further exacerbate the pre-existing cancer risk of the building occupants**, which result from exposure to carcinogens in both indoor and outdoor air." (Ex. C., p. 2, emph. added.)

Next, the Response to Comments states that Mr. Offermann "presupposes that formaldehyde-containing composite wood products will be used in building materials as part of the project, particularly for all interior finish systems," and that "The project proponent has not commissioned (and does not intent [sic] to commission) the use of formaldehyde-containing composite wood products in project building materials." (*Id.*) The Response to Comments also states that Mr. Offermann's comments are inapplicable because the Project will comply with California regulations regarding the manufacture and sale of composite wood products. These assertions are incorrect and do not invalidate Mr. Offermann's findings.

First, Mr. Offermann's calculations regarding indoor formaldehyde emissions **assumed compliance** with the California Air Resources Board ("CARB") formaldehyde airborne toxics control measure ("ATCM"). Even accounting for this assumption, Mr. Offermann found that future residents of the proposed Project would be exposed to a cancer risk of 120 per million. This risk level is **12 times greater** than the South Coast Air Quality Management District ("SCAQMD") CEQA significance threshold for airborne cancer risk of 10 per million. This is a significant impact which must be addressed and mitigated by an EIR.

Next, Mr. Offermann explains that, for the Project to avoid exposing future residents to indoor emissions of formaldehyde, the Project would need to "either only use [no-added-formaldehyde] composite wood products, or select composite wood products with formaldehyde emission rates that result in indoor cancer risks no greater than 10 per million." (*Id.*) Importantly, Mr. Offermann observes, "Even composite wood products manufactured with CARB certified ultra-low emitting formaldehyde (ULEF) resins do not insure that the indoor air will have

concentrations of formaldehyde the meet the [CEQA] cancer risks that substantially exceed 10 per million.” (*Id.*, p. 6.) Instead, “Only use of composite wood products made with no-added formaldehyde resins (NAF), such as resins made from soy, polyvinyl acetate, or methylene diisocyanate can insure that the [CEQA] cancer risk of 10 per million is met.” (*Id.*)

The Applicant’s statement that it does not “intend” to use formaldehyde-containing composite woods products in Project building materials does not provide adequate assurance that this significant impact will be avoided. CEQA requires mitigation measures to be legally enforceable through permit conditions, agreements, or other legally binding instruments. 14 CCR § 15126.4(a)(2). *See, Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal. App. 4th 683, 730 (project proponent’s agreement to a mitigation by itself is insufficient; mitigation measure must be an enforceable requirement). The City could require enforceable mitigation measures that would restrict its ability to use composite wood products containing formaldehyde in Project construction. However, because it has failed to do so, this remains a significant unmitigated impact which must be analyzed and mitigated by an EIR.

CONCLUSION

Based on the foregoing, the MND for the Project must be withdrawn, and an EIR must be prepared and circulated for public review and comment.

Sincerely,



Adam Frankel
Lozeau Drury LLP



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PLANNING DIVISION
 RECEIVED

MAR 02 2023

CITY OF ORANGE

APPEAL APPLICATION

APPEAL APPLICATION NO.

0562-23

23APP0562

This application must be filled out completely. Any appeal shall be filed with the Community Development Department Planning Division *within fifteen (15) calendar days after the hearing or action from which the appeal is made* (OMC Section 17.08.050 C). The \$1000.00 filing fee (initial deposit – actual cost required) must accompany the appeal.

Name of Appellant(s) Adam Frankel

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PROJECT INFORMATION:

Appeal of action on case number: PC 33-22

Project address: 840 S. The City Drive, Orange, CA

REASON FOR REQUEST: Please specify and explain WHY you are appealing the decision or determination and indicate specifically the error or abuse of discretion (OMC Section 17.08.050 C).

There is a "fair argument" that the Project may have significant 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. See Attached letter.

Adam Frankel

2/24/23

Signature of Appellant (or representative) Date

PLANNING DIVISION USE ONLY: Date of hearing or decision and hearing body _____

Application checked by RE

Date & Time Received 03/02/2023 2:40pm