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VIA EMAIL

June 13, 2023

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Re: Comment on Moonlight Apartments Project (Case Nos. MULTI-004979-2021, DR-004980-2021, BADJ-004981-2021, CDP-004982-2021) PLANNING COMMISSION ITEM 8B (June 15, 2023)

Dear Honorable Planning Commissioners and Ms. Bustamante:

This comment is submitted on behalf of Supporters Alliance for Environmental Responsibility ("SAFER") regarding the Moonlight Apartments Project ("Project") to be heard as Agenda Item 8B at the Planning Commission's June 15, 2023 meeting. The Project consists of a multi-family residential development requiring approval of a density bonus, design review permit, boundary adjustment permit, and coastal development permit (MULTI-004979-2021, DR-004980-2021, BADJ-004981-2021, CDP-004982-202).

The Commission's Staff Report and proposed Resolution claim that the Project is exempt from the California Environmental Quality Act ("CEQA") under Government Code Section 65583.2. Although Section 65583.2 exempts certain housing projects from CEQA where design review is the City's sole discretionary authority over the project, this Project requires additional discretionary approvals beyond design review, including a Coastal Development Permit. Section 65583.2 does not provide an exemption from CEQA for these discretionary actions. For that reason, SAFER respectfully requests that the Commission continue consideration of the Project and require the Project to undergo environmental review under CEQA.

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I. THE PROJECT IS A "DISCRETIONARY PROJECT" SUBJECT TO CEQA.

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies." (Pub. Res. Code § 21080(a).) The CEQA Guidelines define "discretionary projects" as:

> [A] project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.

(14 CCR §15357.)

The CEQA Guidelines further explain that "[w]hether an agency has discretionary or ministerial controls over a project depends on the authority granted by the law providing the controls over the activity. Similar projects may be subject to discretionary controls in one city or county and only ministerial controls in another." (14 CCR § 15002(i)(2).) If a project's approval involves both discretionary and ministerial acts, the project is subject to CEQA review. (14 CCR § 15258(d).)

The Courts apply a "functional" test for distinguishing ministerial from discretionary decisions. (*Protecting Our Water & Env't Res. v. Cty. of Stanislaus* (2020) 10 Cal.5th 479, 493; *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 272.) That test examines whether the agency has the power to shape the project in ways that are responsive to environmental concerns. (*Friends of Westwood*, 191 Cal.App.3d at 267; *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 117.) Under this functional test, a project qualifies as ministerial "when a private party can legally compel approval without any changes in the design of its project which might alleviate adverse environmental consequences." (*Friends of Westwood*, 191 Cal.App.3d at 267) "Conversely, where the agency possesses enough authority (that is, discretion) to deny or modify the proposed project on the basis of environment consequences the EIR might conceivably uncover, the permit process is 'discretionary' within the meaning of CEQA." (*Id.* at 272.) "[I]f the agency is empowered to disapprove or condition approval of a project based on environmental concerns that might be uncovered by CEQA review, the project is discretionary." (*Protecting Our Water*, *supra*, 10 Cal.5th at 494.) In short, discretion exists where the approving agency can impose "reasonable conditions" based on "professional judgment." (*Natural Res. Def. Council v. Arcata* (1976) 59 Cal.App.3d 959, 971.)

Here, the Project requires four discretionary approvals from the City: (1) Density Bonus, (2) Design Review Permit, (3) Boundary Adjustment Permit, and (4) Coastal Development Permit. (Staff Report, p. 1.) Because the Coastal Development Permit ("CDP") grants the City the power to shape the Project in ways that are responsive to environmental concerns, the Project qualifies as a discretionary project subject to CEQA.

Per the City's Municipal Code, approval of the CDP requires three discretionary findings:

(1) The proposed project is consistent with the certified Local Coastal Program of the City of Encinitas;
(2) The proposed development conforms with Public Resources Code Section 21000 and following (CEQA) and that there are no feasible mitigation measures or feasible alternatives available which would substantially lessen any significant adverse impact that the activity may have on the environment.
(3) For projects involving development between the sea or other body of water and the nearest public road, approval shall include a specific finding that such development is in conformity with the public access and public recreation policies of Section 30200 et seq. of the Coastal Act.

(EMC § 30.80.090(A).) When applying for a CDP, the municipal code requires an applicant to submit "***all information necessary to complete environmental review of the proposed project in accordance with state and local guidelines for the implementation of the California Environmental Quality Act*** as well as information sufficient to determine whether the project complies with all policies and standards contained in the certified Local Coastal Program." (EMC § 30.80.030(C) [emph. added].) Furthermore, in approving a CDP, the Municipal Code grants the City "the authority to impose such conditions and safeguards as it deems necessary to protect and enhance the health, safety, and welfare of the surrounding area, and to insure that the proposed project for which coastal development permit approval is sought, fully meets the criteria set forth in the General Plan, Local Coastal Program, and Zoning Code." (EMC § 30.80.100(A).)

The discretionary findings required for the CDP coupled with the City's authority to impose conditions and mitigation measures on the CDP to protect health, safety, and welfare satisfy the "functional" test for discretionary decisions requiring CEQA review. (See *Friends of Westwood*, *supra*, 191 Cal.App.3d at 272.) The municipal code even assumes that CEQA review will occur by requiring the applicant to submit all relevant CEQA information and requiring the City to make findings regarding CEQA compliance. (EMC §§ 30.80.030(C), 30.80.090(A).) Thus, the Project qualifies as a discretionary project that is subject to CEQA unless otherwise exempt. As discussed below, the City is incorrect that the Project is exempt under Government Code section 65583.2 and, as a result, the City must conduct CEQA review and prepare an Initial Study followed by an EIR or MND for the Project.

Furthermore, the fact that the Project's use is zoned "by right" in the City's municipal code does not necessarily mean that the Project is not subject to any discretionary decisions that would trigger CEQA. The Project site is located in the R-30 Overlay Zone, which is zoned to allow certain multi-family residential projects "by right." (EMC § 30.09.010, Note 35.) However, the municipal code also explicitly states that "use by right does not exempt projects from design review or the requirements of the California Coastal Act." (EMC § 30.09.010, Note 35.) The CDP is a requirement of the Coastal Act that is administered at the local level by the

City. When the Coastal Commission considers a CDP or LCP, it applies its own certified regulatory program in lieu of the regular CEQA process. (14 CCR §§15251(c) and (f).) However, when a local agency considers a CDP, it acts as the lead agency responsible for completing CEQA review for the project. (Practice Under the California Environmental Quality Act (2d ed. Cal. CEB 2022) §20.18; see Pub. Res. Code § 30519(a) [after certification of LCP, review authority for LCP area is delegated to local government].) Here, the City's decision on the CDP is final and not appealable to the Coastal Commission. (Staff Report, p. 28.)

II. GOVERNMENT CODE SECTION 65583.2 DOES NOT EXEMPT THE PROJECT FROM CEQA.

The Staff Report incorrectly claims that Government Code section 65583.2 exempts the Project from CEQA. According to the Staff Report, a project is exempt from CEQA under Section 65583.2(h) and (i) where the following conditions are met: (1) the project site is designated for "by right" approval, (2) twenty percent of units are affordable, and (3) the project does not require a subdivision. (Staff Report, pp. 2, 28-29.) The Staff Report also falsely claims that if the above conditions are met, the City is barred from requiring any discretionary decisions for the Project other than design review.[1] (Staff Report, pp. 2, 28.) Using that false standard, the Staff Report concludes,

> The Moonlight Apartments project is statutorily exempt from CEQA in that it is located in the R-30 Overlay Zone, which is designated for 'by right' approval by Encinitas Municipal Code Chapter 30.09 (Zoning Use Matrix, Note 35) and proposes that 30 of 202 units (20 percent of 149 base density units) exclusive of additional units provided by a density bonus, will be affordable to lower income households and does not require a subdivision.

(Staff Report, pp. 2, 28-29.) However, there is no basis under Section 65583.2 for the Staff Report's fabricated three-factor exemption test. Simply put, Section 65583.2 provides no such exemption from CEQA and the Planning Commission must reject Staff's interpretation.

Government Code Section 65583 governs the contents of local housing elements and establishes procedures for local governments to meet their regional housing needs allocation ("RHNA"). Section 655583 requires that local governments "quantify the locality's existing and projected housing needs for all income levels, which includes the locality's proportionate share of regional housing needs for each income level." (*Martinez v. City of Clovis* (2023) 307 Cal.Rptr.3d 64, 78 [citing Govt. Code § 65583(a)(1)].) Then, a valid housing element must

[1] The Staff Report's claim that Section 65583.2 limits the City's review of the Project to design review is inconsistent with the three additional discretionary approvals required by the City for this Project (Density Bonus, Boundary Adjustment Permit, and Coastal Development Permit). If the Staff Report's interpretation of Section 65583.2 were correct (which it is not), then the City would be barred from considering these additional discretionary approvals. Obviously, the City can and must make these additional discretionary decisions and is in the process of doing so, further underscoring the Staff Report's faulty interpretation of Section 65583.2.

contain "[a]n inventory of land suitable and available for residential development, including vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level." (Govt. Code § 65583(a)(3).)

If the inventory of sites "do[es] not accommodate the local government's RHNA for each income level," the local government must develop a program that "shall identify the actions that will accommodate those needs, which include rezoning actions to close the gap." (*Martinez, supra*, 307 Cal.Rptr.3d at 80.) Section 65583(c)(1)(A) requires that the program rezone an adequate amount of sites to meet the RHNA requirements. (Govt. Code § 65583(c)(1)(A).[2]) That rezoning program is required to "accommodate 100 percent of the need for housing for very low and low-income households" and the sites "shall be zoned to permit owner-occupied and rental multifamily residential use by right for developments in which at least 20 percent of the units are affordable to lower income households." (Govt. Code §65583.2(h).[3])

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[2] Government Code section 65583(c)(1)(A) in full:

> Where the inventory of sites, pursuant to paragraph (3) of subdivision (a), does not identify adequate sites to accommodate the need for groups of all household income levels pursuant to Section 65584, rezoning of those sites, including adoption of minimum density and development standards, for jurisdictions with an eight-year housing element planning period pursuant to Section 65588, shall be completed no later than three years after either the date the housing element is adopted pursuant to subdivision (f) of Section 65585 or the date that is 90 days after receipt of comments from the department pursuant to subdivision (b) of Section 65585, whichever is earlier, unless the deadline is extended pursuant to subdivision (f). Notwithstanding the foregoing, for a local government that fails to adopt a housing element that the department has found to be in substantial compliance with this article within 120 days of the statutory deadline in Section 65588 for adoption of the housing element, rezoning of those sites, including adoption of minimum density and development standards, shall be completed no later than one year from the statutory deadline in Section 65588 for adoption of the housing element.

[3] Government Code section 65583.2(h) in full:

> The program required by subparagraph (A) of paragraph (1) of subdivision (c) of Section 65583 shall accommodate 100 percent of the need for housing for very low and low-income households allocated pursuant to Section 65584 for which site capacity has not been identified in the inventory of sites pursuant to paragraph (3) of subdivision (a) on sites that shall be zoned to permit owner-occupied and rental multifamily residential use by right for developments in which at least 20 percent of the units are affordable to lower income households during the planning period. These sites shall be zoned with minimum density and development standards that permit at least 16 units per site at a density of at least 16 units per acre in jurisdictions described in clause (i) of subparagraph (B) of paragraph (3) of subdivision (c), shall be at least 20 units per acre in jurisdictions described in clauses (iii) and (iv) of subparagraph (B) of paragraph (3) of subdivision (c) and shall meet the standards set forth in subparagraph (B) of paragraph (5) of subdivision (b). At least 50 percent of the very low and low-income housing need shall be accommodated on sites designated for residential use and for which nonresidential uses or mixed uses are not permitted, except that a city or county may accommodate all of the very low and low-

Government Code section 65583.2(i) explains that, in order to qualify as "by right," the local government "may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval that would constitute a 'project' for the purposes of [CEQA]." (Govt. Code § 65583.2(i); see *Martinez*, *supra*, 307 Cal.Rptr.3d at 80.) The sole exception is that a local government can still require discretionary design review and that design review does not constitute a "project" under CEQA. (Govt. Code § 65583.2(i).) Section 65583.2(i) also provides that "[a]ny subdivision of the sites shall be subject to all laws, including, but not limited to, the local government ordinance implementing the Subdivision Map Act." (Govt. Code § 65583.2(i).)

The above requirements establish the following rule: In order to have a valid housing element where a city's inventory of sites does not meet its RHNA allocation, the city is required to meet its RHNA allocation for low-income households by zoning an adequate amount of sites to require no discretionary approvals other than design review if 20 percent of the proposed units are affordable to lower income households.

The Staff Report's interpretation of Section 65583.2 seems to confuse the requirements for the City's Housing Element with the City's obligations under CEQA. Contrary to the Staff Report's interpretation, Section 65583.2 does not provide a blanket exemption from CEQA for projects zoned as "by right" with no subdivision and 20 percent affordable units. Rather, Section 65583.2 directs the City to ensure that an adequate amount of affordable sites do not require any discretionary decisions, other than design review, that trigger CEQA. As an initial matter, it is not clear from the Staff Report that the Project site was rezoned in order to comply with Government Code sections 65583 and 65583.2 such that those sections even apply to the project. However, even if it were, the site does not meet the definition of "by right" under Section 65583.2(i) because its location in the coastal zone requires a discretionary coastal development permit, which constitutes a project under CEQA.

Because CEQA only applies to discretionary actions (Pub. Res. Code § 21080(a)), if a project did meet Section 65583.2(i)'s definition of "by right" (i.e. the project does not require any approval except design review that would constitute a "project" for the purposes of CEQA), CEQA would not apply. In such a case, it is *not* Section 65583.2 that would exempt the project from CEQA but rather the absence of any discretionary authority by the City would render CEQA inapplicable. Here, except for design review, Section 65583.2 provides no basis for exempting the Project from CEQA. Even though the Project site is zoned as "by right" in the municipal code, the Project requires discretionary approvals in addition to design review, including the CDP. As such, the Project is subject to CEQA and an environmental impact report or negative declaration is required prior to approval of the Project.

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income housing need on sites designated for mixed use if those sites allow 100 percent residential use and require that residential use occupy 50 percent of the total floor area of a mixed-use project.

III. CONCLUSION

Contrary to the Staff Report's claims, Government Code Section 65583.2 does not provide a statutory exemption from CEQA for the Project. A project is subject to CEQA if it requires a discretionary decision by the City and the City has the power to shape the project in ways that are responsive to environmental concerns. Except for design review, there is nothing in Section 65583.2 that exempts the City's discretionary decisions over the Project, including the Coastal development Permit, from CEQA. As such, the Project is not exempt from CEQA under Section 65583.2 and CEQA review is required. SAFER respectfully requests that the Planning Commission continue further consideration of the Project to allow time for Staff to conduct CEQA review of the Project through an environmental impact report or negative declaration.

Sincerely,

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