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Via Email

December 14, 2022

Los Angeles City Planning Commission
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Caroline Choe, Vice President
Helen Campbell, Commissioner
Helen Leung, Commissioner
Yvette Lopez-Ledesma, Commissioner
Karen Mack, Commissioner
Dana Perlman, Commissioner
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Re: Comment on Proposed CEQA Infill Exemption for Mixed-Use Project at 3800 North Pasadena Avenue (full version)
December 15, 2022 City Planning Commission Hearing, Agenda Item 11

Dear President Millman, Vice President Choe, Honorable Members of the Planning Commission, and Ms. Carter:

I am writing on behalf of Supporters Alliance for Environmental Responsibility ("SAFER") regarding the proposed Class 32 In-fill Development Categorical Exemption ("Exemption" or "Class 32 Exemption") for a seven-story mixed use building with 100 dwelling units and 14,734 square feet of ground floor commercial space with 13 commercial condominium units, proposed in the City of Los Angeles ("Project").

SAFER objects to the City of Los Angeles' ("City") decision to exempt the Project from review under the California Environmental Quality Act ("CEQA") pursuant to Section 15332 of the CEQA Guidelines. CEQA review is required for the Project. As demonstrated below, the Exemption is inapplicable because the Project will have significant traffic impacts, precluding use of the Class 32 Exemption. Since the Project is not exempt from CEQA, an initial study must be prepared to determine the appropriate level of CEQA review required.

I. PROJECT DESCRIPTION

The Project includes the construction, use, and maintenance of a seven-story mixed-use building with 100 dwelling units, including 10 dwelling units set aside for Extremely Low Income Households and 14,734 square feet of ground floor commercial space with 13 commercial condominium units. The Project will provide 114 automobile parking spaces, 16 short-term and 210 long-term bicycle parking spaces. The property is within the Northeast Los Angeles Community Plan with a Community Commercial land use designation. The Project site currently has one duplex and a recycling center, which would be demolished in order to construct the Project.

The Project is claiming the following Tier 3 Base and Additional Incentives pursuant to the Transit Oriented Communities Affordable Housing Incentive Program: (1) a 70 percent density increase; (2) a Floor Area Ratio increase; (3) a reduction in required parking spaces; and (4) a height increase.

II. LEGAL STANDARD

a. CEQA Exemptions Generally

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, 319-20.) "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. v. City of Los Angeles* (1974) 13 Cal.3d 68, 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.)

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *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.)

To achieve its objectives of environmental protection, CEQA has a three-tiered structure. (14 CCR § 15002(k); *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1185-86.) First, if a project falls into an exempt category, or it can be seen with certainty that the activity in question will not have a significant effect on the environment, no further agency evaluation is required. (*Id.*) Second, if there is a possibility the project will have a significant effect on the environment, the agency must perform an initial threshold study. (*Id.*; 14 CCR § 15063(a).) If the study indicates that there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment the agency may issue a negative declaration. (*Id.*; 14 CCR §§ 15063(b)(2), 15070.) Finally, if the project will have a significant effect on the environment, an EIR is required. (*Id.*)

The classes of projects which are exempt from the provisions of CEQA are called categorical exemptions. (14 CCR §§ 15300, 15354.) "Exemptions to CEQA are narrowly construed and '[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language.' [Citations]." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125.) The determination as to the appropriate scope of a categorical exemption is a question of law subject to independent, or de novo, review. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.*, (2006) 139 Cal. App. 4th 1356, 1375 ["[Q]uestions of interpretation or application of the requirements of CEQA are matters of law. [Citations.] Thus, for example, interpreting the scope of a CEQA exemption presents 'a question of law, subject to de novo review by this court.' [Citations]."].) In addition, there are several exceptions to CEQA's categorical exemptions. (See, 14 CCR § 15300.2.)

b. Prohibition of Mitigated Exemptions

An agency may not rely on a categorical exemption if to do so would require the imposition of mitigation measures to reduce potentially significant effects. (*Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108 ("*SPAWN*"); *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1198-1201 ("*Azusa*").) If mitigation measures are necessary, then at a minimum, the agency must prepare a mitigated negative declaration to analyze the impacts, and to determine whether the mitigation measures are adequate to reduce the impacts to below significance. (*Id.*)

The court of appeal has thoroughly explained why projects that require mitigation are not eligible for an exemption from CEQA. (*SPAWN*, 125 Cal.App.4th at 1106-08.) In *SPAWN*, the court of appeal considered a CEQA exemption for a single-family home abutting a creek within a designated stream conservation area. (*Id.* at 1103.) The planning commission exempted the project from CEQA, noting that the project "***as conditioned incorporates numerous provisions*** reducing to insignificance the possibility that the project would harm coho salmon or steelhead trout." (*Id.* [emphasis added].) The board of supervisors similarly found that the project could result in "potential 'adverse impacts on the habitat of threatened or

endangered species,'" but nevertheless exempted the project from CEQA because such impacts were addressed in a "riparian protection plan and ***other conditions of approval***." (*Id.* at 1104 [emphasis added].)

The court rejected the county's exemption of the project from CEQA, focusing on the fact that there were admitted possible impacts and that mitigation had been applied to address those impacts. (*SPAWN*, 125 Cal.App.4th at 1107-09.) The court explained,

> [***T]he County erred in relying upon mitigation measures to grant a categorical exemption from CEQA***. Only those projects having no significant effect on the environment are categorically exempt from CEQA review. (Pub. Resources Code, §§ 21080, subd. (b)(9), 21084, subd. (a).) . . . ***If a project may have a significant effect on the environment, CEQA review must occur***, and only then are mitigation measures relevant.

(*Id.* at 1107 [citing *Azusa*, 52 Cal.App.4th at 1199-2000] [emphasis added].) Indeed, "[a]n activity that may have a significant effect on the environment cannot be categorically exempt." (*Id.* [quoting *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 124].)

The question of whether an agency impermissibly relied on mitigation measures in exempting a project from CEQA review is reviewed *de novo* with no deference given to the agency. (*Azusa*, 52 Cal.App.4th at 1192, 1201.)

III. DISCUSSION

A. The City Improperly Relied on Mitigation Measures as a Basis for Exempting the Project.

The City has improperly used a mitigation measure to render the Project's traffic impacts less than significant, therefore it cannot claim the Class 32 Exemption for the Project. The Categorical Exemption document ("CE") prepared for the Project contains an e-mail describing the Vehicle Miles Traveled (VMT) analysis prepared for the Project. The e-mail states:

> implementation of the Project would have a significant Household Impact and no work VMT impact. To mitigate the significant VMT impact the project will incorporate unbundled parking as a TDM [transportation demand management] strategy. Parking will be provided at a cost of $150 a month for a portion of the project. With the mitigation measure applied, the project's expected Household VMT will be reduced to 6. This will fully mitigate the project's significant impact.

(CE; E-mail from Wes Pringle to Oliver Netburn re: "VTT74933 FIGUEROA AND PASADENA"; August 22, 2022; pdf p.112.) Additionally, the memorandum provided to the

City by transportation planning and engineering firm "Transpogroup" contains a section entitled "Mitigation Measures" and states that "[a]dditional TDM measures are needed to mitigate the Project VMT impact . . . [a]ttachment A shows the Project VMT impact would be less than significant with the proposed TDM mitigation strategy." (CE; Memorandum from Transpogroup to City re: "Belvedere (3832-3836 N Figueroa Street) TIS Addendum (VTT 74933)"; August 18, 2022; pdf p.116.)

The CE admits a significant traffic impact above the Department of Transportation significance threshold. Therefore, it imposes a requirement for unbundled residential parking with a monthly fee of at least $150 for all residential parking. As such, the City's decision to exempt the Project from CEQA was improper because the City evaluated the Project "as mitigated" rather than evaluating whether the Project could result in a significant impact *without* the mitigation proposed for VMT impacts. (*See SPAWN*, 125 Cal.App.4th at 1103-04, 1107-09.) Indeed, as determined by City staff, the failure to include additional TDM measures would result in a significant VMT impact.

Since the City had determined that the Project, if left unmitigated, could result in a significant impact, the Project cannot be subject to a categorical exemption from CEQA review. An MND or an EIR is required, which would allow the public to assess the adequacy of the proposed mitigation measures, would require a public and transparent environmental review process and would involve formal public notice to the public and other agencies.

B. The Class 32 Exemption Does Not Apply on its Face.

The proposed Project does not qualify for a Class 32 Exemption under CEQA because of the Project's significant traffic impact. The City must prepare an Initial Study to determine the appropriate level of CEQA review, be it a mitigated negative declaration or an environmental impact report.

The Class 32 exemption provides:

> Class 32 consists of projects characterized as in-fill development meeting the conditions described in this section.
>
> (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
> (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
> (c) The project site has no value, as habitat for endangered, rare or threatened species.

(d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
(e) The site can be adequately served by all required utilities and public services.

(14 CCR § 15332 [emph. added].)

One of the key limitations of the Exemption is that it does not apply if the project will have any significant effects relating to traffic. (14 CCR § 15332(d).) Here, the Exemption cannot apply because the City stated in the CE that there will be a significant traffic impact from the Project.

B. The Unusual Circumstances Exception Precludes Reliance on the Class 32 Exemption.

A categorical exemption is inapplicable "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (14 CCR 15300.2(c).) In *Berkeley Hillside Preservation v. City of Berkeley*, the California Supreme Court explained that there are two ways a party may invoke the unusual circumstances exception. First, "a party may establish an unusual circumstance with evidence that the project *will* have a significant environmental effect. That evidence, if convincing, necessarily also establishes 'a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.'" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105 [emph. added].) Alternatively, "[a] party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance." (*Id.*)

As discussed above, the City has admitted that the Project will have a significant traffic impact. The fact that this significant impact will occur constitutes an unusual circumstance, precluding the City's reliance on an exemption.

IV. CONCLUSION

The City cannot rely on a Class 32 exemption because the Project does not meet the terms of the exemption and because the unusual circumstances exception to exemption applies. Accordingly, the City must prepare an initial study to determine the appropriate level of environmental review to undertake pursuant to CEQA. Thank you for considering these comments.

Sincerely,

Amalia Bowley Fuentes
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