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VIA E-MAIL

May 9, 2023

Historic Landmarks Commission Secretary
City of Santa Barbara
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RE: City of Santa Barbara's 633 East Cabrillo Boulevard Project [PLN2022-00443]

Dear Historic Landmarks Commission Secretary,

On behalf of the **Southwest Mountain States Regional Council of Carpenters** (“**Southwest Mountain States Carpenters**” or “**SWMSRCC**”), my Office is submitting these comments for the City of Santa Barbara’s (“**City**”) May 10, 2023 Historic Landmarks Commission meeting for the 633 East Cabrillo Boulevard Project (“**Project**”).

The Southwest Mountain States Carpenters is a labor union representing 63,000 union carpenters in 10 states, including California, and has a strong interest in well-ordered land use planning and in addressing the environmental impacts of development projects.

Individual members of SWMSRCC live, work, and recreate in the City and surrounding communities and would be directly affected by the Project’s environmental impacts.

The Southwest Mountain States Carpenters expressly reserves the right to supplement these comments at or prior to hearings on the Project, and at any later hearing and proceeding related to this Project. Gov. Code, § 65009, subd. (b); Pub. Res. Code, § 21177, subd. (a); see *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1203; see also *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal.App.4th 1109, 1121.

Moreover, the Southwest Mountain States Carpenters requests that the City provide notice for any and all notices referring or related to the Project issued under the California Environmental Quality Act (**CEQA**) (Pub. Res. Code, § 21000 *et seq.*), and the California Planning and Zoning Law (“**Planning and Zoning Law**”) (Gov. Code, §§ 65000–65010). California Public Resources Code Sections 21092.2, and 21167(f) and California Government Code Section 65092 require agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency’s governing body.

I. THE CITY SHOULD REQUIRE THE USE OF A LOCAL WORKFORCE TO BENEFIT THE COMMUNITY’S ECONOMIC DEVELOPMENT AND ENVIRONMENT

The City should require the Project to be built using local workers who have graduated from a Joint Labor-Management Apprenticeship Program approved by the State of California, have at least as many hours of on-the-job experience in the applicable craft which would be required to graduate from such a state-approved apprenticeship training program, or who are registered apprentices in a state-approved apprenticeship training program.

Community benefits such as local hire can also be helpful to reduce environmental impacts and improve the positive economic impact of the Project. Local hire provisions requiring that a certain percentage of workers reside within 10 miles or less of the Project site can reduce the length of vendor trips, reduce greenhouse gas emissions, and provide localized economic benefits. As environmental consultants Matt Hagemann and Paul E. Rosenfeld note:

[A]ny local hire requirement that results in a decreased worker trip length from the default value has the potential to result in a reduction of construction-related GHG emissions, though the significance of the reduction would vary based on the location and urbanization level of the project site.

March 8, 2021 SWAPE Letter to Mitchell M. Tsai re Local Hire Requirements and Considerations for Greenhouse Gas Modeling.

Workforce requirements promote the development of skilled trades that yield sustainable economic development. As the California Workforce Development Board and the University of California, Berkeley Center for Labor Research and Education concluded:

[L]abor should be considered an investment rather than a cost—and investments in growing, diversifying, and upskilling California’s workforce can positively affect returns on climate mitigation efforts. In other words, well-trained workers are key to delivering emissions reductions and moving California closer to its climate targets.¹

Furthermore, workforce policies have significant environmental benefits given that they improve an area’s jobs-housing balance, decreasing the amount and length of job commutes and the associated greenhouse gas (GHG) emissions. In fact, on May 7, 2021, the South Coast Air Quality Management District found that that the “[u]se of a local state-certified apprenticeship program” can result in air pollutant reductions.²

Locating jobs closer to residential areas can have significant environmental benefits. As the California Planning Roundtable noted in 2008:

People who live and work in the same jurisdiction would be more likely to take transit, walk, or bicycle to work than residents of less balanced

¹ California Workforce Development Board (2020) Putting California on the High Road: A Jobs and Climate Action Plan for 2030 at p. ii, *available at* <https://laborcenter.berkeley.edu/wp-content/uploads/2020/09/Putting-California-on-the-High-Road.pdf>.

² South Coast Air Quality Management District (May 7, 2021) Certify Final Environmental Assessment and Adopt Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions Program, and Proposed Rule 316 – Fees for Rule 2305, Submit Rule 2305 for Inclusion Into the SIP, and Approve Supporting Budget Actions, *available at* <http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2021/2021-May7-027.pdf?sfvrsn=10>.

communities and their vehicle trips would be shorter. Benefits would include potential reductions in both vehicle miles traveled and vehicle hours traveled.³

Moreover, local hire mandates and skill-training are critical facets of a strategy to reduce vehicle miles traveled (VMT). As planning experts Robert Cervero and Michael Duncan have noted, simply placing jobs near housing stock is insufficient to achieve VMT reductions given that the skill requirements of available local jobs must match those held by local residents.⁴ Some municipalities have even tied local hire and other workforce policies to local development permits to address transportation issues. Cervero and Duncan note that:

In nearly built-out Berkeley, CA, the approach to balancing jobs and housing is to create local jobs rather than to develop new housing. The city's First Source program encourages businesses to hire local residents, especially for entry- and intermediate-level jobs, and sponsors vocational training to ensure residents are employment-ready. While the program is voluntary, some 300 businesses have used it to date, placing more than 3,000 city residents in local jobs since it was launched in 1986. When needed, these carrots are matched by sticks, since the city is not shy about negotiating corporate participation in First Source as a condition of approval for development permits.

Recently, the State of California verified its commitment towards workforce development through the Affordable Housing and High Road Jobs Act of 2022, otherwise known as Assembly Bill No. 2011 (“**AB2011**”). AB2011 amended the Planning and Zoning Law to allow ministerial, by-right approval for projects being built alongside commercial corridors that meet affordability and labor requirements.

³ California Planning Roundtable (2008) Deconstructing Jobs-Housing Balance at p. 6, available at <https://cproundtable.org/static/media/uploads/publications/cpr-jobs-housing.pdf>

⁴ Cervero, Robert and Duncan, Michael (2006) Which Reduces Vehicle Travel More: Jobs-Housing Balance or Retail-Housing Mixing? Journal of the American Planning Association 72 (4), 475-490, 482, available at <http://reconnectingamerica.org/assets/Uploads/UTCT-825.pdf>.

The City should consider utilizing local workforce policies and requirements to benefit the local area economically and to mitigate greenhouse gas, improve air quality, and reduce transportation impacts.

II. **THE CITY SHOULD IMPOSE TRAINING REQUIREMENTS FOR THE PROJECT'S CONSTRUCTION ACTIVITIES TO PREVENT COMMUNITY SPREAD OF COVID-19 AND OTHER INFECTIOUS DISEASES**

Construction work has been defined as a Lower to High-risk activity for COVID-19 spread by the Occupational Safety and Health Administration. Recently, several construction sites have been identified as sources of community spread of COVID-19.⁵

Southwest Mountain States Carpenters recommend that the Lead Agency adopt additional requirements to mitigate public health risks from the Project's construction activities. SWMSRCC requests that the Lead Agency require safe on-site construction work practices as well as training and certification for any construction workers on the Project Site.

In particular, based upon Southwest Mountain States Carpenters' experience with safe construction site work practices, SWMSRCC recommends that the Lead Agency require that while construction activities are being conducted at the Project Site:

Construction Site Design:

- The Project Site will be limited to two controlled entry points.
- Entry points will have temperature screening technicians taking temperature readings when the entry point is open.
- The Temperature Screening Site Plan shows details regarding access to the Project Site and Project Site logistics for conducting temperature screening.

⁵ Santa Clara County Public Health (June 12, 2020) COVID-19 CASES AT CONSTRUCTION SITES HIGHLIGHT NEED FOR CONTINUED VIGILANCE IN SECTORS THAT HAVE REOPENED, available at <https://www.sccgov.org/sites/covid19/Pages/press-release-06-12-2020-cases-at-construction-sites.aspx>.

- A 48-hour advance notice will be provided to all trades prior to the first day of temperature screening.
- The perimeter fence directly adjacent to the entry points will be clearly marked indicating the appropriate 6-foot social distancing position for when you approach the screening area. Please reference the Apex temperature screening site map for additional details.
- There will be clear signage posted at the project site directing you through temperature screening.
- Provide hand washing stations throughout the construction site.

Testing Procedures:

- The temperature screening being used are non-contact devices.
- Temperature readings will not be recorded.
- Personnel will be screened upon entering the testing center and should only take 1-2 seconds per individual.
- Hard hats, head coverings, sweat, dirt, sunscreen or any other cosmetics must be removed on the forehead before temperature screening.
- Anyone who refuses to submit to a temperature screening or does not answer the health screening questions will be refused access to the Project Site.
- Screening will be performed at both entrances from 5:30 am to 7:30 am.; main gate [ZONE 1] and personnel gate [ZONE 2]
- After 7:30 am only the main gate entrance [ZONE 1] will continue to be used for temperature testing for anybody gaining entry to the project site such as returning personnel, deliveries, and visitors.

- If the digital thermometer displays a temperature reading above 100.0 degrees Fahrenheit, a second reading will be taken to verify an accurate reading.
- If the second reading confirms an elevated temperature, DHS will instruct the individual that he/she will not be allowed to enter the Project Site. DHS will also instruct the individual to promptly notify his/her supervisor and his/her human resources (HR) representative and provide them with a copy of Annex A.

Planning

- Require the development of an Infectious Disease Preparedness and Response Plan that will include basic infection prevention measures (requiring the use of personal protection equipment), policies and procedures for prompt identification and isolation of sick individuals, social distancing (prohibiting gatherings of no more than 10 people including all-hands meetings and all-hands lunches) communication and training and workplace controls that meet standards that may be promulgated by the Center for Disease Control, Occupational Safety and Health Administration, Cal/OSHA, California Department of Public Health or applicable local public health agencies.⁶

The United Brotherhood of Carpenters and Carpenters International Training Fund has developed COVID-19 Training and Certification to ensure that Carpenter union members and apprentices conduct safe work practices. The Agency should require that all construction workers undergo COVID-19 Training and Certification before being allowed to conduct construction activities at the Project Site.

⁶ See also The Center for Construction Research and Training, North America's Building Trades Unions (April 27 2020) NABTU and CPWR COVID-19 Standards for U.S. Construction Sites, available at https://www.cpwr.com/sites/default/files/NABTU_CPWR_Standards_COVID-19.pdf; Los Angeles County Department of Public Works (2020) Guidelines for Construction Sites During COVID-19 Pandemic, available at https://dpw.lacounty.gov/building-and-safety/docs/pw_guidelines-construction-sites.pdf.

Southwest Mountain States Carpenters has also developed a rigorous Infection Control Risk Assessment (“**ICRA**”) training program to ensure it delivers a workforce that understands how to identify and control infection risks by implementing protocols to protect themselves and all others during renovation and construction projects in healthcare environments.⁷

ICRA protocols are intended to contain pathogens, control airflow, and protect patients during the construction, maintenance and renovation of healthcare facilities. ICRA protocols prevent cross contamination, minimizing the risk of secondary infections in patients at hospital facilities.

The City should require the Project to be built using a workforce trained in ICRA protocols.

III. **THE PROJECT WOULD BE APPROVED IN VIOLATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**

A. Background Concerning the California Environmental Quality Act

The California Environmental Quality Act is a California statute designed to inform decision-makers and the public about the potential significant environmental effects of a project. 14 California Code of Regulations (“**CEQA Guidelines**”), § 15002, subd. (a)(1).⁸ At its core, its purpose is to “inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made.” *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

1. *Background Concerning Environmental Impact Reports*

CEQA directs public agencies to avoid or reduce environmental damage, when possible, by requiring alternatives or mitigation measures. CEQA Guidelines, § 15002, subds. (a)(2)-(3); see also *Berkeley Keep Jets Over the Bay Committee v. Board of Port Comes* (2001) 91 Cal.App.4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553; *Laurel Heights Improvement Assn.*, 47 Cal.3d at p. 400. The EIR

⁷ For details concerning Southwest Carpenters’s ICRA training program, see <https://icrahealthcare.com/>.

⁸ The CEQA Guidelines, codified in Title 14 of the California Code of Regulations, section 15000 et seq., are regulatory guidelines promulgated by the state Natural Resources Agency for the implementation of CEQA. Cal. Pub. Res. Code, § 21083. The CEQA Guidelines are given “great weight in interpreting CEQA except when . . . clearly unauthorized or erroneous.” *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 217.

serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.” CEQA Guidelines, § 15002, subd. (a)(2). If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns” specified in Public Resources Code section 21081. See CEQA Guidelines, § 15092, subds. (b)(2)(A)-(B).

While the courts review an EIR using an ‘abuse of discretion’ standard, the reviewing court is not to *uncritically* rely on every study or analysis presented by a project proponent in support of its position. *Berkeley Jets*, 91 Cal.App.4th at p. 1355 (quoting *Laurel Heights Improvement Assn.*, 47 Cal.3d at pp. 391, 409 fn. 12) (internal quotations omitted). A clearly inadequate or unsupported study is entitled to no judicial deference. *Id.* Drawing this line and determining whether the EIR complies with CEQA’s information disclosure requirements presents a question of law subject to independent review by the courts. *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 102, 131. As the court stated in *Berkeley Jets*, prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decision-making and informed public participation, thereby thwarting the statutory goals of the EIR process. 91 Cal.App.4th at p. 1355 (internal quotations omitted).

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. *Communities for a Better Environment v. Richmond* (2010) 184 Cal.App.4th 70, 80 (quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449-450). The EIR’s function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been considered. *Id.* For the EIR to serve these goals it must present information so that the foreseeable impacts of pursuing the project can be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made. *Id.*

A strong presumption in favor of requiring preparation of an EIR is built into CEQA. This presumption is reflected in what is known as the “fair argument” standard under which an EIR must be prepared whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the environment. *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602; *Friends of “B” St. v. City of Hayward* (1980) 106 Cal.3d 988, 1002.

The fair argument test stems from the statutory mandate that an EIR be prepared for any project that “may have a significant effect on the environment.” PRC, § 21151; see *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.App.3d 68, 75; accord *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 884. Under this test, if a proposed project is not exempt and may cause a significant effect on the environment, the lead agency must prepare an EIR. PRC, §§ 21100 (a), 21151; CEQA Guidelines, § 15064 (a)(1), (f)(1). An EIR may be dispensed with only if the lead agency finds no substantial evidence in the initial study or elsewhere in the record that the project may have a significant effect on the environment. *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 785. In such a situation, the agency must adopt a negative declaration. PRC, § 21080, subd. (c)(1); CEQA Guidelines, §§ 15063 (b)(2), 15064(f)(3).

“Significant effect upon the environment” is defined as “a substantial or potentially substantial adverse change in the environment.” PRC, § 21068; CEQA Guidelines, § 15382. A project may have a significant effect on the environment if there is a reasonable probability that it will result in a significant impact. *No Oil, Inc.*, 13 Cal.3d at p. 83 fn. 16; see *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309. If any aspect of the project may result in a significant impact on the environment, an EIR must be prepared even if the overall effect of the project is beneficial. CEQA Guidelines, § 15063(b)(1); see *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580.

This standard sets a “low threshold” for preparation of an EIR. *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 207; *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928; *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 580; *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754; *Sundstrom*, 202 Cal.App.3d at p. 310. If substantial evidence in the record supports a fair argument that the project may have a significant environmental effect, the lead agency must prepare an EIR

even if other substantial evidence before it indicates the project will have no significant effect. See *Jensen*, 23 Cal.App.5th at p. 886; *Clews Land & Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161, 183; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491; *Friends of “B” St.*, 106 Cal.App.3d 988; CEQA Guidelines, § 15064(f)(1).

IV. AN ENVIRONMENTAL SITE ASSESSMENT PHASE I, PHASE II, AND PHASE III MUST BE PROVIDED TO ENSURE THAT THE SITE HAS NO SOIL CONTAMINATION OR HEALTH HAZARDS

The circulated Phase I environmental site assessment (“**ESA**”) by AEI Consultants is manifestly incomplete; its conclusions are unsupported and inaccurate. A new Phase I ESA is required, and, in view of the limited disclosures in the Phase I ESA, the City must require Phase II and Phase III ESAs to be prepared and discuss those in an EIR.

A. The Phase I ESA Improperly Relies on ASTM 1527-13 While the EPA Recently Adopted and Validated ASTM 1527-21

The Phase I ESA is incomplete and inaccurate for purposes of CEQA because it only uses the obsolete ASTM Standard Practice E1527-13 (“**E1527-13**”), while the nonprofit organization ASTM International, founded as the American Society for Testing and Materials,⁹ has long adopted its more stringent ASTM Standard Practice E1527-21.¹⁰ However, while the ESA acknowledges that *ASTM* issued an updated Standard Practice E1527-21 (“**E1527-21**”), the Project’s ESA I subsequently conflates two organizations – the ASTM and the EPA – and misleadingly asserts that the updated ASTM E1527-21 standard – which is in fact more stringent than its predecessor E1527-13 – was not used since *another* agency, the Environmental Protection Agency (“**EPA**”), has not adopted it and instead simply “attempted to use a direct final rule to adopt E1527-21 as an additional standard to meet [All Appropriate Inquiries (“**AAI**”)]; however, such rule was withdrawn on May 2, 2022, and has not yet proposed a new rule to adopt E1527-21.”¹¹ Thus, the Phase I ESA justifies its reliance and choice and concludes that it used E1527-13 to complete the

⁹ See, https://webstore.ansi.org/sdo/astm?gclid=Cj0KCCQjwu-KiBhCsARIsAPztUF1QqmEleuuGuHo2Fy83ZSBkxv0K8HsLZyfGCzAb3IaboYUDzVM7skaAvXXEALw_wcB

¹⁰ Environmental Site Assessment (“**ESA**”), AEI Consultants (Sept. 19, 2022), p. 5.

¹¹ *Id.*

Phase I ESA.¹² However, the foregoing statement is now incorrect, as the EPA adopted the new rule in March of 2022,¹³ and then again reaffirmed its resolve and mandated other agencies and persons to follow E1527-21 by imposing a clear sunset for the ASTM E1527-13 rule, as of on December 15, 2022, which is after the Project's Phase I ESA date of publication on September 19, 2022. *See*, **Exhibit D**.

Thus, the EPA *validated* ASTM E1527-21, and as such, a new Phase I ESA should be prepared that follows the newly adopted ASTM E1527-21 standards.

B. The ESA Erroenously Concludes No Recognized Environmental Conditions Were Identified

In improperly applying ASTM E1527-13 to define a recognized environmental condition (“**REC**”), the Phase I ESA critically missed and failed to disclose various hazardous conditions on site, which are essential for purposes of CEQA. It concludes that no evidence of RECs were identified during the assessment.¹⁴ However, as noted above, the ASTM has long revised its standards and the EPA adopted ASTM's new and more expansive definition of REC. This was not done to relax the standard, but rather, to make it more stringent. The Phase I ESA fails this standard as it relaxes the requirements and, as a result, curtails the needed disclosures. Thus,

- “Under **ASTM E1527-13**, a REC is defined as the **presence** or **likely presence** of **any hazardous substances** or petroleum products in, on, or at a property: (1) due to **release** to the environment; (2) under **conditions indicative** of a release to the environment; or (3) under conditions that **pose a material threat** of a future release to the environment.
- Under **ASTM E1527-21**, a REC means (1) the **presence** of hazardous substances or petroleum due to a release to the environment; (2) the **likely presence** of hazardous substances or petroleum products due to a **likely release** to the environment; or (3) the presence of hazardous substances or petroleum products under conditions that pose a material threat of a future release to

¹² *Id.*

¹³ See, [2022-05259.pdf \(govinfo.gov\)](#)

¹⁴ ESA, *supra*, at p. 7.

the environment. Further, the new standard provides clarifying discussion notes and examples to assist the environmental professional in applying the definition. Together, the new definition and interpretations direct a consultant to rely on the environmental professional’s experience regarding the *likelihood* of certain conditions resulting in releases, such as the long term operation of a dry cleaner, instead of discounting that professional experience based on the lack of current “indications of a release.”¹⁵ (ital. original, bold emphasis added.)

Accordingly, as shown above in the E1527-21 definition of a REC, the use of the phrases, “likely presence,” or “likely release,” are more stringent than the REC definition in E1527-13, which leaves out the potential impact for purposes of CEQA. The newer E1527-21, on the other hand, encompasses those concerns.

The Project would clearly have not passed the test under E1527-21, since its ESA would have to disclose numerous RECs on site and would, as a result require further testing and studies in the form of an ESA II and III. Such RECs would include the oil house, lumberyard, presence of underground storage tanks, and railroad, as discussed in further detail below.

Of further note, AAI compliance, which is the focus of the ESA or EPA, is different from CEQA compliance. According to the Environmental Protection Agency, the AAI standard’s objective “is to conduct inquiries into past uses and ownerships of a property and visually inspect the property to identify conditions indicative of releases and threatened releases of hazardous substances on, at, in, or to the subject property.”¹⁶ Accordingly, AAI can be performed in compliance with either ASTM E1527-21 or E2247-16 in order to protect innocent landowners, contiguous property owners, or bona fide prospective purchasers from potential liability under the Comprehensive Environmental Response, Compensation, and Liability Act (“**CERCLA**”).¹⁷

¹⁵ <https://www.quarles.com/publications/epa-approves-astm-e1527-21-phase-i-esa-standard-for-all-appropriate-inquiry/>

¹⁶ EPA, *Brownfields All Appropriate Inquiries* (last updated Jan. 17, 2023), available at <https://www.epa.gov/brownfields/brownfields-all-appropriate-inquiries#:~:text=The%20final%20AAI%20rule%20is,or%20to%20the%20subject%20property> (accessed on May 5, 2023).

¹⁷ *Id.*

CEQA, on the other hand, is intended “to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259. Accordingly, if substantial evidence in the record supports a fair argument that the project may have a significant environmental effect, the lead agency must prepare an EIR even if other substantial evidence before it indicates the project will have no significant effect. See *Jensen*, 23 Cal.App.5th at p. 886; *Clews Land & Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161, 183; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491; *Friends of “B” St.*, 106 Cal.App.3d 988; CEQA Guidelines, § 15064(f)(1).

For this reason, too, the fact that the EPA provides for sunset of February 2024 for the use of the older ASTM standard and allows its use at the time for purposes of CERCLA liability does not yet mean that the Project, with the manifestly potential RECs under the more updated standard, may not have impacts for purposes of CEQA that require good faith disclosures, remedial activity, and mitigation.

C. The ESA Site Contains Potential Recognized Environmental Conditions

The Phase I ESA expressly states that the Project Site itself has been used for oil use, a lumberyard, and is next to a railroad roundhouse.¹⁸ Taken with the fact that the ESA’s reconnaissance identified a small aboveground storage tank (“AST”) for fuel on the east portion of the main Property,¹⁹ the fact that an existing railroad roundhouse on the Project Site was destroyed by an earthquake in 1925²⁰ that potentially could have destroyed and dispersed hazardous materials on the Site, and the fact that the Project Site was never studied for soil contamination for the Scope of the Project *now* proposed,²¹ altogether this suggests that the Project Site may have soil contamination on-site.

Similarly, the fact that the Project is adjacent to *other* industrial uses, such as a railroad, further suggests that it may be subject to the REC in the form of vapor intrusion, and the Project may exacerbate those conditions.

¹⁸ ESA, *supra*, at p. 6.

¹⁹ *Id.* at pp. 34-35.

²⁰ *Id.* at p. 6.

²¹ *Id.* at pp. 8, 16-17.

Furthermore, in light of the 1925 earthquake that occurred at the Project Site, there is a *likely release* and therefore a *likely presence* of hazardous substances at the Project Site.

Also, given that the Project Site is adjoined with railroad lines on the north end,²² there could be potential petroleum, fuel, or oil spills that could have taken place next to the Project Site. Specifically, “[r]ailway transport is a source of pollution to soils and living organisms by e.g. PAHs, PCBs, oil-derived products, pesticides and heavy metals.”²³ Moreover, toxic substances that pollute the soil near railways may be transferred from the soils to the plants that are near the railway tracks and, as a result, to living organisms.²⁴ Accordingly, a soil evaluation should have been conducted in the Phase I ESA to check for any potential contamination from the nearby railway. As such, a new Phase I ESA should be prepared that includes a soil evaluation.²⁵

Next, the ESA indicates that part of a lumberyard is located on the northeast area of the Project Site.²⁶ The use of a lumberyard on the Project Site may have significant environmental impacts, as wood processing uses various chemicals. According to the United States EPA, “[w]ood preservative products are those that control wood degradation problems” and that “the treatment process and the use of treated [sic] products can result in risks to human health and the environment.”²⁷ Included among these chemicals are chromated arsenicals, creosote, pentachlorophenol, alkaline copper quaternary, which contains quaternary ammonium compounds, among

²² *Id.*

²³ National Library of Medicine, *Multidimensional Evaluation of Soil Pollution from Railway Tracks* (Mar. 12, 2015), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4387276/> (accessed on May 8, 2023) (study finding that where soils along railway tracks from various stations in Poland were tested, the study detected PAHs, PCBs, heavy metals, oil-derived hydrocarbons and pesticide residues and determined that these substances “had a toxic effect on numerous test organisms from different trophic levels.”)

²⁴ *Id.*

²⁵ This evaluation of hazards and hazard impacts is further warranted and required in view of the potential of train crashes that are not uncommon. See articles about such train crash hazards at <https://www.independent.com/2023/03/03/amtrak-v-wood-chipper-incident-stalls-train-travel-through-santa-barbara/> ; <https://www.nordstrandlaw.com/blog/train-accident/is-surfliner-a-danger-to-residents/> ; <https://www.kclu.org/tags/fatal-train-accident> ; <https://www.noozhawk.com/amtrak-train-hits-overturned-vehicle-on-tracks-gaviota-coast-santa-barbara/>

²⁶ ESA, *supra*, at p. 6.

²⁷ Environmental Protection Agency, *Overview of Wood Preservative Chemicals* (last updated Apr. 17, 2023), available at <https://www.epa.gov/ingredients-used-pesticide-products/overview-wood-preservative-chemicals> (accessed on May 5, 2023).

others.²⁸ These chemicals pose further hazards to the environment, including to humans. For example, “the U.S. Environmental Protection Agency (EPA) lists arsenic under authorization of the Clean Air Act as a hazardous air pollutant, defined as a substance that may cause an increased mortality or serious illness in humans after significant exposure [EPA 2007].”²⁹

Although the Phase I ESA indicates that aerial photographs were taken that revealed the presence of the lumberyard on the Project Site,³⁰ the ESA does not indicate that any subsequent study was conducted on the environmental impact of this lumberyard. As such, the ESA leaves out critical information that could potentially show that the Project Site is contaminated with chemicals from the lumberyard. Therefore, a new Phase I ESA, along with a Phase II and III ESA, should be conducted that properly study, test, and analyze these potential hazards and their environmental impacts.

Lastly, the Phase I ESA’s analysis on vapor migration merely states that “AEI reviewed reasonably ascertainable information for the subject and nearby properties, including a regulatory database, files for nearby release sites, and/or historical documentation, to determine if potential vapor-phase migration concerns may be present which could impact the subject property” and concludes that no vapor-phase concern currently exists at the Project Site.³¹ Here again, since the Phase I ESA relied on the older ASTM standards and also older environmental documents or reports, its review of the database and conclusions are unsupported and inconclusive as to the potential of vapor intrusion.

Vapor Encroachment or Intrusion study (and its identification as a **VEC** similar to REC) is specifically mandated by ASTM and EPA since 2013 under the EPA Final Rule.^{32,33} Thus, in its Final Rule in 2013, EPA states:

EPA believes that ASTM E1527–13 improves upon the previous standard and reflects the evolving best practices and level of rigor that will afford prospective property owners necessary and essential information when

²⁸ *Id.*

²⁹ See, <https://www.atsdr.cdc.gov/csem/arsenic/standards.html>

³⁰ ESA, *supra*, at pp. 16-17.

³¹ *Id.* at p. 29.

³² See, <https://www.epa.gov/ust/petroleum-vapor-intrusion>

³³ See, <https://www.govinfo.gov/content/pkg/FR-2013-12-30/pdf/2013-31112.pdf>

making property transaction decisions and meeting continuing obligations under the CERCLA liability protections.

In particular, the new ASTM E1527–13 standard enhances the previous standard with regard to the delineation of historical releases or recognized environmental conditions at a property and makes important revisions to the standard practice to clarify that all appropriate inquires and **phase I environmental site assessments must include**, within the scope of the investigation, an **assessment of the real or potential occurrence of vapor migration and vapor releases on, at, in or to** the subject property.

Federal Register, Volume 78, No. 250, December 30, 2013, p. 3, (emph. added.)

Here, the Project’s Phase I ESA mentions that it relied on older studies and reports that predated the ASTM 2013 rule change and requirement to study vapor migration: a 1979 a Final Environmental Impact Report, A Preliminary Assessment Report (PAR) prepared by the California Department of Health Services, Toxic Substances Control Division (currently the DTSC) in 1989, and an additional Site Screening in 1993. Phase I ESA, p. 6. Thus, to the extent the ESA relied on these older documents that did not study vapor intrusion at all, its conclusions that no VECs are at the Project site are inaccurate and unsupported. This is further so since the Project site does contain RECs and therefore VECs are also reasonably foreseeable.

Altogether, given the Project Site’s oil use, lumberyard, proximity to a railroad roundhouse, the earthquake that destroyed the roundhouse, and the lack of a soil contamination study, there is a *likely presence* of hazardous substances or petroleum products due to a *likely release* to the environment, per the ASTM E1527-21 standard. For the same reasons, there is also the potential that the site contains VECs. Therefore, potential RECs and VECs may indeed be present at the Project Site and require a new Phase I ESA, along with a Phase II and even Phase III ESA, to conduct the required testing at the Project Site and to provide adequate good faith disclosures about the hazards impacts and their mitigation, including for purposes of CEQA.

D. The ESA Improperly Relies on Outdated Documents to Show that the ESA Site Has No Potential for Contamination

In the ESA’s Historical Review of Site and Vicinity section, the ESA notes that in 1979, a Final Environmental Impact Report (“**FEIR**”) was prepared relating to the

proposed development of the resort, which includes the subject property and adjacent property on the east and west sides.³⁴ As a preliminary matter, the ESA is improperly relying on an obsolete EIR that was prepared more than forty (40) years ago.

Furthermore, the ESA notes that the FEIR “was prepared to evaluate potential impacts of the development to the environment, not to necessarily to [sic] evaluate existing environmental impacts.”³⁵ Notably, the proposed development in 1979 was significantly different from the one proposed now, in both its mass and scale and the needed demolition, grading, construction, and operation activities. Therefore, the FEIR relied upon by the ESA is not only outdated, but it pertains to a completely different and smaller-scale project and cannot be relied upon in the present Phase I.

In addition, the ESA relies upon a 1989 Preliminary Assessment Report (“**PAR**”) to conclude that the PAR “did not identify apparent contamination in soil or groundwater and that “the former railroad roundhouse site (to the east of the subject property) and former use of the subject property did not appear to pose a potential hazard to the environment or public health. Therefore, the PAR concluded that No Further Action was necessary.”³⁶

However, as with the FEIR, the PAR prepared in 1989 is completely outdated and obsolete, including for purposes of CEQA, to conclusively show that the site has no potential for contamination.

Even further, the ESA failed to attach either the FEIR or the PAR. Therefore, the statements made in this ESA and this ESA’s summary of the findings in the FEIR or PAR cannot be ascertained for their accuracy or completeness.

In addition, the fact that the 1979 FEIR and 1989 PAR did not find RECs is not indicative or conclusive for *this Project*, because the Project Description for the prior project analyzed in those documents is completely different from this one. For example, the subject Project proposes to construct a 48,400-square-foot building addition, removal of an existing 4,700-square-foot building to make way for additional improvements, including a swimming pool, spa, outdoor fire pit lounge area, and a bar. *See, Exhibit E.* Arguably, the project studied before in 1979 and 1989 was of

³⁴ *Id.* at p. 16.

³⁵ *Id.*

³⁶ *Id.* at pp. 16-17.

smaller scale. As such, the Project calls for considerably more work than the prior project and requires an entirely new Environmental Impact Report and ESAs.

Finally, and in any event, the 1979 FEIR and 1989 PAR cannot be conclusive because these outdated documents did not consider the site's *current conditions*. Given that these documents are more than thirty (30) years old, site conditions may have changed over the past few decades, and the 1979 FEIR and 1989 PAR cannot be conclusive as to the presence of hazards on site or their potential impacts for the 2023 proposed Project now.

E. The ESA Improperly Relies on Interviews with Individuals Who Likely Lack Sufficient Knowledge of the Site's Potentially Hazardous Conditions

According to the ESA, the following individuals were interviewed to obtain information indicating RECs in connection with the Project Site:

1. Owner/Owner Representative Brenda Hilgers of Fess Parker – Red Lion Hotel c/o Park Hotels & Resorts; and
2. Key Site Manager Mr. Chris Inman, General Manager at Hilton Santa Barbara Beachfront Resort.³⁷

The ESA further indicates these interviews were conducted pursuant to ASTM E1527-13.³⁸ However, the interviews conducted are deficient for a number of reasons.

First, the ESA Phase I improperly relies on the E1527-13 standard which, as further discussed above, is a much more relaxed standard for purposes of CEQA. Therefore, another Phase I ESA must be conducted in accordance with the more recently adopted E1527-21 standards to provide accurate good faith disclosures, prior to making any environmental determinations for the Project.

Second, the interview information provided in the ESA leaves blank the year that Ms. Hilgers was first associated with the property.³⁹ Therefore, it is unclear how much knowledge this individual may actually have about the Project Site and its potential RECs. Even further, the ESA fails to indicate what date Ms. Hilgers was interviewed. Therefore, without providing the date for when she was interviewed, it is unclear how

³⁷ *Id.* at p. 30.

³⁸ *Id.*

³⁹ *Id.*

long ago this interview took place and whether any changes could have occurred at the Project Site since the time of the interview.

Third, according to the Interview Summary provided in the ESA, in response to the question, “Do you have any knowledge of previous environmental investigations conducted on site?”, Ms. Hilgers responded “Yes (See Section 6.3),” which merely relies on a Phase I Environmental Site Assessment that was prepared for the entire hotel Resort Property in 2016.⁴⁰ However, not only is the referenced Phase 1 ESA outdated, since it was prepared seven (7) years ago, but per the ESA at hand, the “report describes the subject property *generally* consistent with current conditions,” and notes that the previous report included a review of the FEIR from 1979, the PAS from 1989, along with a Toxic Substance Control Division from 1989 and Asbestos Operation and Maintenance Program from 2007.⁴¹

Therefore, the interview respondent’s mere reliance on a number of now outdated documents is insufficient and cannot properly provide information about the Project Site’s *current* conditions and any potential RECs present at the Project Site. In addition, it is unclear how knowledgeable the interviewee actually is about the Project Site’s previous and current conditions and potential RECs or whether the interviewee has the expertise to accurately decipher prior ESAs and their findings.

For the foregoing reasons, the Phase I ESA’s interviews pursuant to E1527-13 are insufficient and a new Phase I ESA, along with a Phase II and Phase III ESA, should be prepared pursuant to the E1527-21 standards and the site must be tested.

F. Phase II and Phase III Environmental Site Assessments Should be Conducted

The ESA is manifestly erroneous in its ultimate conclusion that Phase II sampling for contamination based on the various investigations at the Project Site is not warranted.⁴² As a general matter, Phase I is improper in this case with Phase I ESA’s likely hazards, detailed above, and both Phase II and Phase III ESAs are required in this case. As explained by experts in the field of ESA:

The primary difference between Phase I and Phase II site assessment lies in the scopes of work of the assessment. A Phase I primarily assesses the

⁴⁰ *Id.* at pp. 30-31.

⁴¹ *Id.* [Emph. added.]

⁴² *Id.* at p. 8.

likelihood that a site is contaminated through visual observations, historical use reviews and regulatory records, while a Phase II assesses whether contamination is in fact present. Here are the components of each.

Phase I Environmental Site Assessment

Review of records, to discover whether the site has been used for potentially hazardous purposes in the past.

Visual inspection of the property's current condition, with comparison to site plans.

Visual inspection of adjoining properties.

Interviews with current property owners, operators, occupants, and local government officials.

Goal: Assess likelihood that property has been contaminated.

Phase II Environmental Site Assessment

Soil and water sampling for signs of contamination.

Comparison of lab results with local, state, and federal regulatory guidelines.

May include inspection of interior spaces for mold, radon, or lead paint.

May include identification of wetlands, ecological resources, or endangered species that may prevent certain land uses.

Goal: Assess actual presence of environmental contaminants.

Phase III Site Assessment

A Phase III Site Assessment is called for only when contamination has been identified. A Phase III Assessment determines the extent of the contamination, both horizontally and vertically, and forms the basis for preparing a remediation plan, and estimation of the cost for remediation. Buyers and lenders use the Phase III Assessment as a negotiating tool with

the sellers to ensure the property they purchase yields the benefit they expect.⁴³

For all of the reasons set forth above, the Phase I ESA is grossly inadequate. Therefore, a new Phase I ESA should be prepared, along with both Phase II and Phase III ESAs, before any environmental determination can be made about the Project and before the Project may be approved.

V. AN EIR IS REQUIRED IN LIGHT OF THE REASONABLY FORESEEABLE INDIVIDUAL AND CUMULATIVE IMPACTS OF THE PROJECT.

Apparently relying on the flawed Phase I ESA, the Project seeks to evade its CEQA review. As noted below, the Phase I ESA is inaccurate and inconclusive as to the Project's potential CEQA impacts, specifically for hazards and hazardous materials.

In addition and for the similar reasons and well as based on the Project's mass and scale, it is reasonably foreseeable that the Project may have significant individual and cumulative impacts, during both its construction and operation phase, including in the following areas: traffic, air quality, greenhouse gas emissions, land use, open space, biological resources, public services, water and hydrology. Simply put, there is no factual evidence to support any environmental determination to the contrary since the only thing in support for the City is the flawed ESA, which, in addition, admits to the presence of numerous RECs and VECs for purposes of CEQA.

Notably, to the extent the new ESAs confirm the likely presence of soil contamination and therefore the Project's likely exacerbation of the environmental conditions and impacts, including on human beings and groundwater, the Project applicant must conduct additional *remedial activities*, the impact of which must be also studied in the EIR.

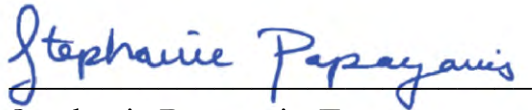
Such impacts further mandate an EIR, to provide good faith accurate disclosures, as mandated by CEQA.

⁴³ <https://www.gleassociates.com/phase-i-versus-phase-ii-environmental-site-assessments/>

VI. CONCLUSION

In sum, an Environmental Impact Report should be prepared that accurately discloses all the problems that the Phase I ESA has not properly studied or reported. The City must order a *new* Phase I ESA based on the updated ASTM and EPA standards, and must also include Phase II and Phase III ESAs, in view of the identified problems at the Project Site and/or the Project Site's proximity to various problem sites. New Phase I and Phase II ESAs should be conducted to perform the required testing and to conclusively identify any potential contamination on site. The EIR must also address the need for remedial actions, their feasibility, and their impacts.

Sincerely,



Stephanie Papayanis, Esq.

Attorneys for Southwest Mountain
States Regional Council of Carpenters

Attached:

March 8, 2021 SWAPE Letter to Mitchell M. Tsai re Local Hire Requirements and Considerations for Greenhouse Gas Modeling (Exhibit A);

Air Quality and GHG Expert Paul Rosenfeld CV (Exhibit B);

Air Quality and GHG Expert Matt Hagemann CV (Exhibit C);

Federal Register Volume 87, No. 240 Rules and Regulations (Exhibit D);

City of Santa Barbara Planning (PLN) Application Submittal Packet (Exhibit E).