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**Letter 3**

**VIA EMAIL**

November 29, 2023

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**Re: Comment on Mitigated Negative Declaration  
Pacific Resort Plaza Development Project (DEV 2019-00161)**

Dear City of Anaheim Planning Commission:

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This comment is submitted on behalf of **Supporters Alliance for Environmental Responsibility (“SAFER”)** regarding the mitigated negative declaration (“MND”) prepared for the Pacific Resort Plaza Development Project (DEV 2019-00161) (“Project”). The Project is tentatively scheduled to be heard at the Planning Commission’s December 4, 2023 meeting. 3.1

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SAFER’s review of the MND was assisted by air quality experts Matt Hagemann, P.G., C.Hg., and Paul E. Rosenfeld, Ph.D., of the Soil/Water/Air Protection Enterprise (“SWAPE”). SWAPE’s written comment and CVs are attached hereto as Exhibit A. 3.2

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As discussed below, there is a fair argument that the Project may result in significant impacts, including significant cancer risks to nearby residents due to emissions of diesel particulate matter. Furthermore, several of the MND’s conclusions are not supported by substantial evidence. SAFER respectfully requests that the City prepare an environmental impact report (“EIR”) in order to comply with the California Environmental Quality Act (“CEQA”) prior to approval of the Project. 3.3

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**PROJECT DESCRIPTION**

The 1.57-acre Project site is located at 125 East Ball Road (APN 234-161-04 and 234- 3.4

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161-26) and is currently occupied by a vacant 10,530 sf two-story commercial building, auxiliary storage sheds, and surface parking/vehicle storage space.

The Project proposes the demolition of the existing structures and the development of a hotel, fast food restaurant, and associated parking. The proposed hotel is a 120-room La Quinta Inn and Suites, with five stories (55 feet) and approximately 67,715 square feet. The stand-alone fast-food restaurant would consist of a single story (sixteen feet tall) and would include drive-thru service. Hotel parking will be provided in two four-story puzzle-lift enclosed parking structures (three stories above ground and one story below ground) totaling 3,310 square feet with 72 spaces, seven standard spaces, eight EV spaces, four ADA accessible spaces. Restaurant parking will include seven standard spaces and one ADA accessible space.

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Project construction would be divided into two phases with the fast-food restaurant building and site area being constructed during Phase One, and the hotel building and site area to be constructed during Phase Two. Phase One will also include the demolition of the existing commercial building.

#### LEGAL STANDARD FOR NEGATIVE DECLARATIONS

As the California Supreme Court 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.)

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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, supra*, 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 v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.)

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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*, *supra*, 124 Cal.App.4th at 927.) An MND instead of an EIR is proper only if project revisions would avoid or mitigate the potentially significant effects identified in the initial study “to a point where clearly no significant effect on the environment would occur, and . . . there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.” (*Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331 [quoting PRC §§ 21064.5, 21080(c)(2)].) In that context, “may” means a reasonable possibility of a significant effect on the environment. (PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors*, *supra*, 124 Cal.App.4th at 927; *League for Protection of Oakland's etc. Historic Res. v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-05.)

An EIR must be prepared rather than an MND “whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.” (*No Oil, Inc. v City of Los Angeles* (1974) 13 Cal.3d 68, 75.) Under this “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*, *supra*, 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*, *supra*, 124 Cal.App.4th at 928.)

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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 making administrative determinations. Ordinarily, public agencies weigh the evidence in the record before them and reach a decision based on a preponderance of the evidence. [Citations]. 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. The lead agency’s decision is thus largely legal rather than factual; it does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.

(*Kostka & Zisheke, Practice Under CEQA*, §6.29, pp. 273-74.) 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

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favor of environmental review.” (*Pocket Protectors, supra*, 124 Cal.App.4th at 928.)

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## DISCUSSION

### **I. An EIR is Required Due to a Fair Argument that the Project May Result in Significant Health Impacts from Emissions of Diesel Particulate Matter.**

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Matt Hagemann, P.G., C.Hg., and Dr. Paul E. Rosenfeld, Ph.D., from SWAPE reviewed the Project’s impacts to human health due to emissions of diesel particulate matter (“DPM”). SWAPE concluded that the MND failed to identify a significant impact from emissions of DPM. Due to this fair argument that the Project may result in significant health impacts, CEQA requires the preparation of an EIR, rather than an MND, prior to approval of the Project.

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#### **A. The MND failed to adequately analyze the Project’s health impacts from emissions of diesel particulate matter.**

The MND’s analysis of the cancer risk posed by emissions of DPM was inadequate. Although the MND compared the Project’s emissions to the SCAQMD localized significance thresholds (“LSTs”) established by the South Coast Air Quality Management District (“SCAQMD”), the MND does not include a quantified health risk assessment (“HRA”) to measure the increased cancer risk to nearby sensitive receptors from construction and operation of the Project.

3.7

As noted by SWAPE, CEQA requires that that the MND “correlate Project-generated emissions with potential adverse impacts on human health.” (Ex. A, p. 10.) However, such an analysis is not possible without a quantified HRA. Furthermore, the failure of the MND to provide a quantified HRA is inconsistent with the most recent guidance of the Office of Environmental Health Hazard Assessment (“OEHHA”). (Ex. A, p. 10-11.) OEHHA recommends that exposure from projects lasting more than 6 months be evaluated for the duration of the project and recommends that an exposure duration of 30 years be used to estimate individual cancer risk for the maximally exposed individual resident (“MEIR”). (Ex. A, p. 10.) Due to the Project’s 15-month construction schedule and its operation for the foreseeable future, a quantified HRA for construction and operation of the Project is necessary to ensure that the Project’s health risks are disclosed and compared to the applicable SCAQMD significance threshold for increased cancer risk.

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#### **B. The Project will result in significant increased cancer risks from emissions of diesel particulate matter.**

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SWAPE prepared a screening-level HRA to evaluate potential impacts to human health from DPM during construction and operation of the Project using AERSCREEN, the leading screening-level air quality dispersion model. (Ex. A, pp. 11-15.) According to the MND’s air quality modeling data, construction of the Project would result in 115.5 pounds of DPM

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emissions and operation of the Project would result in an additional 40 pounds of DPM emissions per year. (Ex. A, pp. 11-12.) Using those values, SWAPE conducted their HRA to calculate the increased cancer risk resulting from those DPM emissions to the Maximally Exposed Individual Receptor (“MEIR”) located approximately 50 meters downwind of the Project site. (Ex. A, p. 12.) The HRA also utilized age sensitivity factors in order to account for the increased sensitivity to carcinogens during early-in-life exposure and to assess the risk for susceptible subpopulations such as children. (Ex. A, p. 13.)

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SWAPE’s HRA found that increased cancer risk to infants and children during construction and operation of the Project would be 120.0 in one million and 80.4 in one million, respectively. (Ex. A, pp. 14-15.) Additionally, the increased cancer risk for a 30-year residential lifetime would be 217 in one million. (*Id.*) Each of the above increased cancer risks exceed SCAQMD’s CEQA significance threshold of 10 in one million and, thus, establishes a fair argument that the Project may result in significant, unmitigated impacts. (Ex. A, p. 15.) Due to this fair argument, CEQA requires that the City prepare an EIR, rather than an MND, prior to approval of the Project.

## **II. An EIR is Required Due to a Fair Argument that the Project May Result in Significant Greenhouse Gas Emissions.**

According to the MND’s analysis of the Project greenhouse gas (“GHG”) emissions, the Project will generate 1,909 metric tons of carbon dioxide equivalents per year (“MT CO<sub>2</sub>e/year”) (MND, p. 5-51 [Table 13].) The MND then claims that these GHG emissions are less than significant because they do not exceed the 3,000 MT CO<sub>2</sub>e/year significance threshold allegedly adopted by SCAQMD. (*Id.*) As an initial matter, the MND likely underestimates the Project’s GHG emissions (see *ante* Section III) and cannot be relied upon as an accurate estimate of the Project’s GHG emissions. But even more importantly, the 3,000 MT CO<sub>2</sub>e/year significance threshold utilized in the MND is woefully outdated and, using a more up-to-date threshold, the Project is likely to result in significant impacts.

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The 3,000 MT CO<sub>2</sub>e/year significance threshold was adopted *in 2008* as an interim threshold in response to the Global Warming Solutions Act of 2006 (commonly known as “AB 32”), which required requires California to reduce GHG emissions to 1990 levels by 2020. (Ex. A, p. 17.) Now that 2020 has come and gone, the 3,000 MT CO<sub>2</sub>e/year significance threshold “is outdated and inapplicable to the proposed Project.” (*Id.*) Instead, the SCAQMD threshold to reduce GHG emissions by a target date of 2035 should be employed, which is an efficiency threshold based on service population of 3.0 MT CO<sub>2</sub>e/year, where “service population” is the sum of the number of residents and the number of jobs supported by the Project. (*Id.*) In other words, the Project’s annual GHG emissions must be divided by the service population and then compared to the 3.0 MT CO<sub>2</sub>e/year threshold.

Here, the service population of the Project is the 26 jobs that the Project will provide (as a hotel, the Project does not have any residents). (MND, p. 5-70.) Dividing the Project’s 1,909 MT

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CO2e/year of GHG emissions by the service population of 26 results in 73.4 MT CO2e/year, well in excess of the 3.0 MT CO2e/year threshold. This exceedance of SCAQMD's threshold establishes a fair argument that the Project may result in significant GHG emission and, as a result, an EIR is required. 3.9 cont.

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### III. The MND's Air Quality Analysis Is Not Supported by Substantial Evidence.

SWAPE found that the MND underestimated the Project's emissions and therefore cannot be relied upon to determine the significance of the Project's air quality impacts. (Ex. A, pp. 4-9.) To estimate the Project's emissions, the MND utilized the California Emissions Estimator Model version 2022.1 ("CalEEMod"). (Ex. A, p. 3.) CalEEMod relies on recommended default values based on site specific information related to a number of factors (Ex. A, p. 2.) CEQA requires that any changes to the default values must be justified by substantial evidence. (*Id.*)

Typically, CalEEMod provides output files that provide the quantitative changes that were made to model's default values. (Ex. A, p. 3.) However, the CalEEMod version utilized in the MND is a "soft release" and does not provide complete output files indicating the quantitative changes that were made to the default values. (*Id.*) Instead, the MND only provides a qualitative description of the changed default values, thereby hindering public review and comment. At the very least, an updated analysis should be prepared that provides all relevant output files. (Ex. A, pp. 3-4.) 3.10

Notwithstanding the above, SWAPE reviewed the Project's CalEEMod output files and found that the values input into the model were inconsistent with information provided in the MND, resulting in an underestimation of the Project's emissions. (Ex. A, p. 4.) As a result, the MND lacks substantial evidence to conclude that impacts will be less than significant. (*Id.*)

Specifically, SWAPE found that the following values used in the MND's air quality analysis were either inconsistent with information provided in the MND or otherwise unjustified:

1. Unsubstantiated changes to construction phase lengths (Ex. A, pp. 4-6.)
2. Unsubstantiated changes to off-road equipment input parameters (Ex. A, pp. 6-7.)
3. Unsubstantiated changes to architectural coating emission factors (Ex. A, pp. 7-8.)
4. Unsubstantiated changes to construction trips and VMT (Ex. A, pp. 8-9.)
5. Unsubstantiated changes to operational off-road fuel type (Ex. B, pp. 7-9.)

As a result of these errors, the MND underestimates the Project's construction and operational emissions and cannot be relied upon to determine the significance of the Project's air quality impacts.

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**IV. The MND’s Hazards Analysis Is Not Supported by Substantial Evidence.**

The MND claims that the Project’s impacts related to hazards and hazardous materials would be less than significant based solely upon review of regulatory databases and an online review of the Cortese list. (MND, p. 5-52.) The MND never mentions the fact that the previous use of the Project site was a motorsports dealership (Hahm Motorsports), which sold motorcycles, jet skis, ATVs, and generators.<sup>1</sup> This past use of the Project site “may have resulted in the release of hazardous materials, including fuel and lubricants.” (Ex. A, p. 1.)

In order to accurately assess the Project’s hazards, the MND should have contained a Phase I Environmental Site Assessment (“ESA”). (Ex. A, pp.1-2.) As SWAPE explains,

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The preparation of a Phase I ESA is often undertaken in CEQA matters to identify and disclose hazardous materials issues that may present impacts to the public, workers, or the environment, and which may require further investigation, including environmental sampling and cleanup. Standards for performing a Phase I ESA have been established by the US EPA and the American Society for Testing and Materials Standards.

(*Id.*) A Phase I ESA would assist the City in identifying any “recognized environmental conditions” (“RECs”), which are “the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater, or surface water of the property.” (Ex. A, p. 2.) If any RECs are identified, a Phase II ESA would follow, which “includes the collection of soil, soil vapor and groundwater samples, as necessary, to identify the extent of contamination and the need for cleanup to reduce exposure potential to the public.” (*Id.*)

Without preparing a Phase I ESA, the City lacks substantial evidence to conclude that the Project’s impacts would be less than significant. At the very least, the MND should be revised to include a Phase I ESA prior to approval of the Project.

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**V. The MND inadequately analyzes the Project’s energy impacts.**

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

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<sup>1</sup> Google Maps Street View of Project site, [https://www.google.com/maps/@33.8181752,-117.9070051,3a,75y,2.37h,90t/data=!3m6!1e1!3m4!1sxeKJKqS\\_NTqWrKDTg7uSRw!2e0!7i16384!8i8192?entry=ttu](https://www.google.com/maps/@33.8181752,-117.9070051,3a,75y,2.37h,90t/data=!3m6!1e1!3m4!1sxeKJKqS_NTqWrKDTg7uSRw!2e0!7i16384!8i8192?entry=ttu)

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natural gas and oil, and (3) increasing reliance on renewable energy resources.” (*Id.*)

Mere compliance with the California Building Energy Efficiency Standards (Cal. Code Regs., tit. 24, part 6) (“Title 24”) does not constitute an adequate analysis of energy. (*League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer* (2022) 75 Cal.App.5th 63, 165 (*League to Save Lake Tahoe*); *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal. App. 4th 256, 264-65; *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 209-13.) Even where an agency has concluded that a project’s impacts on energy resources would be less than significant, a lead agency must still analyze implementation of all “renewable energy options that might have been available or appropriate for [a] project.” (*League to Save Lake Tahoe, supra*, 75 Cal.App.5th at 166-67.) A lead agency’s failure to consider implementation of all feasible renewable energy proposals raised during the environmental review process constitutes a “prejudicial error.” (*Id.* at 168.)

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Despite CEQA’s requirement to consider all renewable energy options, the MND’s analysis of alternative energy merely relies on compliance with Title 24. (MND, pp. 5-32 to 5-33.) Because mere compliance with Title 24 is insufficient to determine that energy impacts are less than significant, the MND’s energy analysis is inadequate and its conclusion that the Project’s energy impacts will be less than significant is unsupported.

The MND also claims that the Project will “develop alternative energy (solar PV) [and] provide EV parking and charging infrastructure.” (MND, p. 5-34.) However, there is no indication of how much solar PV or EV parking will be provided by the Project or whether it is feasible to provide more of either. Furthermore, there is no indication that solar PV or EV parking will actually be *required* for the Project. Without more information about the solar PV or EV parking (and without an express requirement for both in the Project’s conditions of approval, the City lacks substantial evidence to conclude that the Project’s energy impacts will be less than significant. The Project’s energy analysis should be updated to consider the implementation of all feasible renewable energy features in accordance with CEQA.

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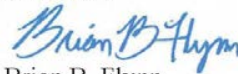
### CONCLUSION

SAFER’s experts have established a fair argument that the Project may have significant impacts related to emissions of DPM and GHGs. Furthermore, the MND fails to provide substantial evidence to support its conclusions regarding the Project’s impacts to air quality, hazards, and energy. For those reasons, SAFER respectfully requests that the City not rely on the MND but instead prepare and circulate an EIR prior to further consideration of the Project.

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Sincerely,



Brian B. Flynn  
 Lozeau Drury LLP