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Via Email

June 28, 2024

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Re: Comment on Final Environmental Impact Report, 1360 N. Vine Street Project (SCH 2017061063; ENV-2016-3778-EIR) - July 2, 2024, PLUM Committee Hearing, Agenda Item No. 3

Dear Mr. Fukuda and Planning and Land Use Management Committee:

I am writing on behalf of Supporters Alliance for Environmental Responsibility ("SAFER") regarding the Final Environmental Impact Report ("FEIR") prepared for the 1360 N. Vine Street Project (SCH 2017061063; ENV-2016-3778-EIR) ("Project"). SAFER filed a comment letter on December 13, 2023 ("December 13 Letter") informing the City that it failed to provide a substantive response to SAFER's comments that were filed on October 2, 2023 ("October 2 Letter") and October 3, 2023 ("October 3 Letter").[1] The October 2 Letter was supported by comments from air quality experts Matt Hagemann, P.G., C.Hg. and Paul E. Rosenfeld, Ph.D., of the environmental consulting firm, Soil/Water/Air Protection Enterprise ("SWAPE"). In the October 2 Letter, SAFER informed the City that the FEIR failed to provide an accurate project description. The October 3 Letter was supported by comments from

[1] SAFER's October 2 Letter, October 3 Letter, and December 13 Letter including expert comments are attached as Exhibits A, B, and C, respectively.

acoustical engineering firm Wilson Ihrig, which showed that the Project would result in significant noise impacts. The Deputy Advisory Agency issued a letter of determination on October 11, 2023 approving the VTTM for the Project and SAFER filed its appeal on October 19, 2023.

SAFER filed its December 13 Letter in response to the Department of City Planning's December Appeal Report which failed to substantively respond to SAFER's comments. On June 27, 2024, the Department of City Planning issued its most recent Appeal Report ("June Appeal Report"), which again, fails to substantively respond to SAFER's comments, rendering the EIR inadequate. Additionally, we submit herewith new information regarding impacts to biological resources requires an analysis of these impacts and recirculation of the EIR. (Exhibit D). Therefore, the EIR must be revised and recirculated to adequately respond to SAFER's comments and to address significant impacts to biological resources.

LEGAL STANDARD

I. CEQA and Environmental Impact Report

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. (14 CCR § 15002(a)(1).) "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR 'protects not only the environment but also informed self-government.'" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. (14 CCR § 15002(a)(2) and (3); see also *Berkeley Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1349,1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an Environmental Impact Report (EIR) except in certain limited circumstances. (See, e.g., Pub. Resources Code, § 21100.) The EIR is the very heart of CEQA. (*Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652. 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 for Local Control v. City of Bakersfield* (2004), 124 Cal.App.4th 1184, 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 serves to provide agencies and the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." (14 CCR § 15002(a)(2).) Critical to this purpose, the EIR must contain an "accurate and stable project description." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185 at 192-93 ("An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.") The project description must contain (a) the precise location and boundaries of the proposed project, (b) a statement of the project objectives, and (c) a general description of the project's technical, economic, and environmental characteristics. (Cal. Code Regs., tit. 14, ("CEQA Guidelines") § 15124.)

II. Standard of Review

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. A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" (*Berkeley Jets*, 91 Cal.App.4th at 1355 [quoting, *Laurel Heights Improvement Assn.*, 47 Cal. 3d at 391, 409, n. 12.) As the court stated in *Berkeley Jets*, 91 Cal.App.4th at 1355:

> A prejudicial abuse of discretion occurs "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 722; *Galante Vineyards v. Monterey Peninsula Water Management Dist*. (1997) 60 Cal. App. 4th 1109, 1117; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 946.)

More recently, the California Supreme Court has emphasized that:

> When reviewing whether a discussion is sufficient to satisfy CEQA, a court must be satisfied that the EIR (1) includes sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues the proposed project raises [citation omitted]....

(*Sierra Club v. Cty. of Fresno* (2018) 6 Cal.5th 502, 510 (2018) [citing *Laurel Heights Improvement Assn.*, 47 Cal.3d at 405].) The Court in *Sierra Club v. Cty. of Fresno* also emphasized at another primary consideration of sufficiency is whether the EIR "makes a reasonable effort to substantively connect a project's air quality impacts to likely health consequences." (*Id.* at 510.) "Whether or not the alleged inadequacy is the complete omission of

a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document." (*Id.* at 516.)

Although an agency has discretion to decide the manner of discussing potentially significant effects in an EIR, "a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including 'detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (*Sierra Club,* 6 Cal.5th at 516, [citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197].) "The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions." (*Id.* at 516.) As the Court emphasized:

> [W]hether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence.

(*Id.* at 514.)

III. Mitigation Measures

In general, mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. (14 CCR § 15370.) Where several mitigation measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. (14 CCR § 15126.4(a)(1)(B).) A lead agency may not make the required CEQA findings unless the administrative record clearly shows that all uncertainties regarding the mitigation of significant environmental impacts have been resolved.

If the project will have a significant effect on the environment, the agency may approve the project only if it finds 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." (Pub. Res. Code, § 21081; 14 CCR § 15092(b)(2)(A) and (B).)

IV. Response to Comments

When a significant environmental issue is raised in comments that object to the draft EIR's analysis, the response must be detailed and must provide a reasoned, good faith analysis. (14 CCR §15088(c); *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 940; *Covington v. Great Basin Unified Air Pollution Control Dist*. (2019) 43 Cal.App.5th 867, 878 [rejecting adequacy of response that did not explain why suggested mitigation was infeasible].) The failure of a lead agency to respond to comments raising significant environmental issues before approving a project frustrates CEQA's informational purpose and may render the EIR legally inadequate. (See *Flanders Found. v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615; *Rural Landowners Ass'n v. City Council* (1983) 143 Cal.App.3d 1013, 1020.)

V. Recirculation Required for Significant New Information

CEQA Guidelines Section 15088.5 sets the standard for requiring recirculation prior to certification of an EIR. Recirculation of an EIR is required when "significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification [of the Final EIR]." New information added to an EIR is significant when "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement."

DISCUSSION

VI. The City Failed to Adequately Respond to Comments.

A. The City Disregarded Feasible Mitigation Measures to Address Significant Noise Impacts.

The June Appeal report maintains that all feasible noise mitigation measures were included in the FEIR. However, SAFER's October 3 Letter, which contains expert comments from the acoustical engineering firm, Wilson Ihrig demonstrates that the FEIR failed to consider feasible mitigation measures.

While the FEIR states that Project construction would result in significant noise impacts, it fails to include feasible mitigation measures. To address significant noise impacts, the FEIR puts forth NOI-MM-1, which would include erecting noise barriers around the site, however, this mitigation measure would "not provide any noise relief to residents on the upper floors of neighboring buildings." (Ex. B, pp. 3.) Instead of providing additional mitigation measures, the

FEIR states that it would be infeasible to block construction noise at higher elevations. This is not true. According to Wilson Ihrig, there are three feasible mitigation measures for this impact which include: (1) erecting scaffolding to support construction noise control blankets at the facades of impacted receptors; (2) installing of heavy plexiglass or other clear panels to act as sound barriers; and (3) offering to upgrade windows and exterior doors of those upper floor residential units or hospital rooms which would not be shielded by the sound barriers defined in NOI-MM-1. (*Id.* at pp. 3-4.) None of these mitigation measures were considered in the FEIR.

By disregarding these feasible mitigation measures, the City has failed provide a reasoned good faith analysis, rendering the City's response to SAFER's comments inadequate.

1. <u>The City Cannot Adopt a Statement of Overriding Consideration Until Feasible Mitigation Measures are Implemented.</u>

The City cannot adopt a statement of overriding consideration until it has implemented all feasible mitigation measures. (Pub. Res. Code, § 21081; 14 CCR § 15092(b)(2)(A) and (B).) As SAFER's October 3 Letter explained: the City may not adopt a statement of overriding consideration until it first considers all feasible mitigation measures to address significant noise impacts, such as the measures identified by Wilson Ihrig. (*Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867; *see also NRDC v. City of Los Angeles* (2023) 98 Cal.App.5th 1176.)

If the City adopts a statement of overriding consideration, it must be supported by substantial evidence in the record. (14 Cal. Code Regs. §15093(b); *Sierra Club v. Contra Costa Co*. (1992) 10 Cal.App.4th 1212, 1223.) The agency must make "a fully informed and publicly disclosed" decision that "specifically identified expected benefits from the project outweigh the policy of reducing or avoiding significant environmental impacts of the project." (15 Cal. Code Regs. §15043(b)). As with all findings, the agency must present an explanation to supply the logical steps between the ultimate finding and the facts in the record. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515).

Key among the findings that the lead agency *must* make is that:

> "Specific economic, legal, social, technological, or other considerations, including ***the provision of employment opportunities for highly trained workers*****,** make infeasible the mitigation measures or alternatives identified in the environmental impact report…[and that those] benefits of the project outweigh the significant effects on the environment."

(Pub. Res. Code §21081(a)(3), (b) [*emphasis added*].)

Thus, should the City proceed with a statement of overriding consideration after implementing all feasible mitigation, it must be supported by substantial evidence with respect to both the environmental impacts of the Project, and the economic benefits including "the provision of employment opportunities for highly trained workers" created.

B. The FEIR's Project Description Remains Inadequate.

As SAFER has explained in its October 2 Letter, the FEIR fails to provide an accurate, stable and finite project description. In order to provide an accurate project description that allows for meaningful public participation, the City must select a preferred project rather than a range of distinct proposed projects. (*Washoe Meadows Community v. Dept. of Parks and Recreation* (2017) 17 Cal.App.5th 238, 290 [DEIR analyzing a range of significantly different alternatives for a golf course reconfiguration project "without the designation of a stable project was an obstacle to informed public participation" rendering the document legally inadequate.].)

By not selecting a stable project option, the City has provided "conflicting signals to decision makers and the public about the nature and scope of the project" rendering the FEIR fundamentally inadequate and misleading. (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1045, ("*Treasure Island*"). While there may be instances where the basic characteristics of a project are provided and certain specifics are left for further review, it does not relieve the lead agency's responsibility to identify the project being proposed. (*See Washoe Meadows*, 17 Cal.App.5th at 289 [discussing *Treasure Island,* 227 Cal.App.4th 1036.].) Indeed, the Court of Appeal found in *Washoe Meadows,* that it did not matter that the alternative ultimately selected had been thoroughly analyzed in the final EIR. "[T]he problem with an agency's failure to propose a stable project is not confined to 'the informative quality of the EIR's environmental forecasts.'" (*Washoe Meadows*, 17 Cal.App.5th at 288.) Rather, a failure to identify or select a project at all "impairs the public's right and ability to participate in the environmental review process." (*Id.*) The failure of the City to identify a preferred alternative has precluded informed decision-making and informed public participation.

The June Appeal Report states that the project description issue was addressed in the December Appeal Report. However, the December Appeal Report failed to adequately respond to this issue. The December Appeal Report stated that dual project options are allowed under *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, where the court upheld the DEIR's project description, despite offering an office and residential building option. While this Project also proposes an office and residential building option, the differences between these options are stark, unlike the project options proposed in *South of Market Community Action Network*. In *South of Market Community Action*

Network, the EIR "described one project—a mixed-use development involving the retention of two historic buildings, the demolition of all other buildings on the site, and the construction of four new buildings and active ground floor space—with two options for different allocations of residential and office units." (33 Cal.App.5th at 333-334.)

Here, the two building options do not merely offer varying allocations of residential and office units. As an example, the residential option proposes a 33-story building at 361 feet high and the office option proposes a 17-story building at 303 feet high, which will result in differing biological impacts, specifically impacts to birds which were not analyzed in the FEIR and are discussed below. Given that the FEIR's project description remains inadequate, and the City failed to adequately respond to SAFER's comments, the FEIR must be revised.

VII. The City Must Recirculate the FEIR Because New Information Shows Significant Impacts to Biological Resources which the FEIR Failed to Analyze and Mitigate.

Expert wildlife biologist, Dr. Shawn Smallwood, Ph.D., found that both project options would result in significant impacts to biological resources. Dr. Smallwood's comment and CV are attached as Exhibit D. Dr. Smallwood's findings constitute new information of significant impacts requiring revision and recirculation of the FEIR.

The Guidelines require recirculation when:

> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
>
> (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
>
> (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the project, but the project's proponents decline to adopt it.
>
> (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (*Mountain Lion Coalition v. Fish and Game Com*. (1989) 214 Cal.App.3d 1043)

The California Supreme Court has stated that:

> the addition of new information to an EIR after the close of the public comment period is not "significant" unless the EIR is changed in a way that (i) deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement.

Laurel Heights Improvement Assn. v. Regents of University of California (1993) 6 Cal.4th 1112, 1129. Among the codified exceptions to this rule is where the draft EIR is so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded:

> (a) A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term "information" can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not "significant" unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement. "Significant new information" requiring recirculation include, for example, a disclosure showing that:
>
> …
>
> (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (*Mountain Lion Coalition v. Fish and Game Com*. (1989) 214 Cal.App.3d 1043.)

(CEQA Guidelines § 15088.5(a), (a)(4).)

In this case, the DEIR and FEIR were "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." The public could not meaningfully comment on impacts to biological resources because the DEIR merely concluded that there would be no biological impacts, and therefore the subsequent FEIR contained no analysis of these impacts. However, Dr. Smallwood found that the Project would result in potentially significant adverse biological impacts that require additional review and mitigation. (Ex. D, pp. 20.) Even if the Project had already received final approval, which it has

not, a supplemental EIR would be required pursuant to CEQA section 21166 and CEQA Guidelines section 15162.[2]

Finally, since the EIR fails entirely to analyze biological impacts, these impacts are subject to the fair argument, rather than the substantial evidence standard. Fair argument standard applies even to EIRs if the EIR fails entirely to analyze a particular impact. (*Bakersfield Citizens for Loc. Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1208.) Under the fair argument standard, an impact must be analyzed in an EIR whenever substantial evidence in the record supports a "fair argument" that significant impacts may occur.[3]

1. Bird-Window Collisions

Notably, Dr. Smallwood predicted that the office building option of the Project would result in approximately 1,523 annual bird deaths and the residential building option would result in approximately 1, 807 annual bird deaths due to bird-window collisions. (*Id*.) Additionally, Dr. Smallwood determined "that a large number of birds might routinely fly through the aerosphere that would be displaced by the [Project]" due to the Project site likely being near a movement corridor. (*Id.* at pp. 16-17.) Dr. Smallwood's associate, Noriko Smallwood, also observed Allen's hummingbird flying through the Project site during a site visit on June 25, 2024. (*Id*. at pp. 3.) Allen's hummingbird is listed as a Bird of Conservation Concern by the U.S. Fish & Wildlife Service, making it a special status species. (*Id*.) This finding contradicts the DEIR's conclusion that the Project would not have a substantial adverse effect on special status species. Noriko Smallwood's sighting of a special status species, and Dr. Smallwood's finding that the Project would result in a substantial number of bird deaths, constitutes new information that must be considered and analyzed in a recirculated EIR.

2. Traffic Impacts

Based on the Project's annual estimated VMTs, Dr. Smallwood predicted 5,078 vertebrate wildlife fatalities per year due to project-generated traffic from the office building option, or 6,818 vertebrate wildlife fatalities per year due to project-generated traffic from the residential building option. (*Id.* at pp. 22.) Dr. Smallwood's findings and analysis demonstrate that the "project-generated traffic would cause substantial, significant impacts to wildlife," which

[2] Here, Dr. Smallwood's analysis and findings constitute "new information of substantial importance which was not known and could not have been know with the exercise of reasonable diligence at the time the previous EIR was certified as complete," showing that "[t]he project will have one or more significant effects not discussed in the previous EIR . . ." (14 Cal. Code Regs. § 15162(a)(3)(A).)

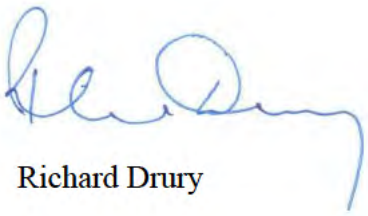
[3] CEQA's unique "fair argument" standard also applies to a reviewing court's examination of an agency's decision concerning preparation of an EIR. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375-76*; Quail Botanical*, 29 Cal.App.4th at 1602.)

the FEIR failed to analyze or mitigate. (*Id.* at pp. 23.) Therefore, traffic-related impacts must be considered and analyzed in a recirculated EIR.

CONCLUSION

SAFER respectfully requests that the Planning and Land Use Management Committee recommend that the City Council deny the tract map until a revised EIR has been circulated to address the issues and deficiencies raised in this comment to ensure compliance with CEQA.

Sincerely,



Richard Drury