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November 30, 2023

VIA EMAIL AND U.S. MAIL

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**Re: Comments on the FM Greenville Electric Vehicle Charging
Depot located at 151 Greenville Road, Livermore, California (SPDR
23-004)**

Dear Director Spence and Ms. Pontau:

We are writing on behalf of the California State Association of Electrical Workers (“CSAEW”) regarding the FM Greenville EV Charging Depot Project (SPDR 23-004) (“Project”) proposed by FM Greenville, LLC (“Applicant”) and located at 151 Greenville Road, Livermore, California (Assessor Parcel Number (“APN”) 099B-5700-002-07). The Applicant is seeking approval of a Site Plan and Design Review (SPDR 23-004) from the City of Livermore (“City”).¹

The Project proposes to develop electric vehicle (“EV”) charging infrastructure for medium-duty (“MD”) and class-8 heavy-duty (“HD”) trucks.² The planned operational life for the Project is a minimum of twenty (20) years.³ Once online, the Project will be capable of charging approximately ninety-six (96) MD and HD battery EVs at a time.⁴ The charging infrastructure will serve the drayage fleets that operate from the Port of Oakland to the San Joaquin Valley as the site is

¹ Exhibit A, Email from Tricia Pontau, Sustainability Program Manager for the Community Development Department, to Alex Stukan, Adams Broadwell Joseph & Cardozo (“ABJC”) (October 9, 2023).

² Exhibit B, FM Greenville, LLC (“Applicant”), *Planning General Application; FM-Greenville CCD Project Summary* at 1 (May 31, 2023).

³ *Id.*

⁴ *Id.*

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located less than half a mile from the I-580 shipping corridor that connects the Port of Oakland with the San Joaquin Valley.⁵ The depot will host approximately thirty-nine (39) 180 kilowatt (“kW”) and 11 (eleven) 360kW dual-port Direct-Current Fast-Chargers (“DCFC”) and associated infrastructure.⁶ The site consists of a 4.39-acre lot within a 1,400-acre commercial and industrial zoned area along the southeast border of the incorporated City of Livermore.⁷

We prepared these comments with the assistance of air quality, public health, greenhouse gas (“GHG”) emissions, and hazards experts Matt Hagemann P.G., C.Hg. and Paul E. Rosenfeld, Ph.D., of Soil Water Air Protection Enterprises (“SWAPE”). SWAPE’s technical comments and curriculum vitae are attached hereto as Exhibit C.⁸ CSAEW reserves the right to supplement these comments at later hearings and proceedings on the Project.⁹

The City stated in an email dated November 9, 2023, that it “anticipate[s] applying [a] CEQA exemption to the project. There will be no public hearings.”¹⁰ The City lacks substantial evidence to support the finding of an exemption pursuant to the California Environmental Quality Act (“CEQA”). As supported by the expert comments prepared by SWAPE and the comments set forth herein, this Project may result in significant and unmitigated impacts from hazards and to air quality. The City therefore cannot rely on a CEQA exemption. The City must prepare an Initial Study and Environmental Impact Report (“EIR”) for the Project to fully analyze and mitigate the Project’s potentially significant impacts.

An exception to application of a CEQA exemption also applies to the Project because there is a reasonable possibility that the Project will have a significant effect on the environment due to unusual circumstances. Finally, the City lacks substantial evidence to approve the Project’s Site Plan and Design Review because approval of the Project may result in significant effects relating to fire risks and air quality. The City therefore cannot support a finding that the Project “will not be

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Exhibit C, *SWAPE Comments on the Greenville Community Charging Depot Project* (November 20, 2023) and curriculum vitae for Matt Hagemann P.G., C.Hg. and Paul E. Rosenfeld, Ph.D. (hereinafter “SWAPE Comments”).

⁹ Gov’t Code § 65009(b); Pub. Res. Code § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; *See Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

¹⁰ *Id.*

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detrimental to the public health, safety, or general welfare, and not detrimental to adjacent property,” as required by the City’s Development Code.¹¹

The City must therefore prepare an Initial Study and an EIR for this Project to fully analyze and mitigate the Project’s potentially significant impacts.

I. STATEMENT OF INTEREST

CSAEW represents thousands of electrical workers in all International Brotherhood of Electrical Workers (IBEW) Local Unions in California and Nevada, including IBEW Local Union 595 and its members who live, work, recreate and raise their families in the City of Livermore and the surrounding areas in Alameda County. Accordingly, they would be directly affected by the Project’s environmental and health and safety impacts. Individual members may also work on the Project itself. They will be first in line to be exposed to any health and safety hazards that exist on site. In addition, CSAEW has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its local unions and their members.

II. LEGAL BACKGROUND

“CEQA and the regulations implementing it ‘embody California’s strong public policy of protecting the environment.’”¹² CEQA is designed to inform decision-makers and the public about the potential, significant environmental effects of a project.¹³ “CEQA’s fundamental goal [is] fostering informed decision-making.”¹⁴ “The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.”¹⁵

The implementation of CEQA is a multistep process that begins with whether the proposed activity is subject to CEQA at all.¹⁶ Next, assuming CEQA applies, the agency must determine whether the activity qualifies for a categorical exemption.¹⁷

¹¹ City of Livermore, Development Code, Part 9, Permits and Approvals, Chapter 9.07, Site Plan and Design Review, § 9.07.050(C)(2)(a), available at: <https://www.codepublishing.com/CA/Livermore/> (hereinafter “Development Code”).

¹² *Save the Agoura Cornell Knoll*, 46 Cal. App. 5th at 673.

¹³ 14 C.C.R. § 15002(a)(1).

¹⁴ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 402.

¹⁵ *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283.

¹⁶ See Pub. Res. Code § 21065.

¹⁷ 14 C.C.R. § 15061.

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If the project is exempt, the agency need not proceed with environmental review.¹⁸ CEQA identifies certain classes of projects which are exempt from the provisions of CEQA.¹⁹ These classes of activities generally do not have a significant effect on the environment.²⁰ “Where the specific issue is whether the lead agency correctly determined a project fell within a categorical exemption, [a court] must first determine as a matter of law the scope of the exemption and then determine if substantial evidence supports the agency’s factual finding that the project fell within the exemption.”²¹ CEQA exemptions are to be narrowly construed and “[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language.”²² Erroneous reliance by a lead agency on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA.²³

To qualify for a categorical exemption, a lead agency must provide “substantial evidence to support [its] finding that the Project will not have a significant effect.”²⁴ “Substantial evidence” means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency.²⁵ If a court locates substantial evidence in the record to support the agency’s conclusion, the agency’s decision will be upheld.²⁶ If, however, the record lacks substantial evidence, as here, a reviewing court will not uphold an exemption determination.

If an agency meets its burden to demonstrate that the project is within a categorically exempt class, the burden shifts to the party challenging the categorical exemption to show that the project is not exempt due to an exception pursuant to CEQA Guidelines Section 15300.2.²⁷ One such exception is that a categorical

¹⁸ *Id.*

¹⁹ Pub. Res. Code § 21084(a); 14 C.C.R. §§ 15300, 15354.

²⁰ *Id.*

²¹ *California Farm Bureau Fed’n v. California Wildlife Conservation Bd.* (2006) 143 Cal. App. 4th 173, 185.

²² *Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125.

²³ *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192.

²⁴ *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

²⁵ 14 C.C.R. § 15384.

²⁶ *Bankers Hill Hillcrest*, 139 Cal.App.4th at 269.

²⁷ *California Farm Bureau Fed’n*, 143 Cal. App. 4th at 186.

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exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to “unusual circumstances.”²⁸ A categorical exemption is also inapplicable to an activity if “the cumulative impact of successive projects of the same type in the same place, over time is significant.”²⁹

Alternatively, if no exemptions are applicable, the agency must undertake environmental review of the activity, which begins with an initial study to determine whether the project may have a significant effect on the environment.³⁰ A negative declaration may be prepared “if there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment.”³¹ A mitigated negative declaration is required if the initial study identifies potentially significant environmental effects but (1) those effects can be fully mitigated by changes in the project and (2) the project applicant agrees to incorporate those changes.³² Because “[t]he adoption of a negative declaration...has a terminal effect on the environmental review process” by allowing the agency to dispense with the duty to prepare an EIR, negative declarations, as well as mitigated negative declarations, are allowed only in cases where there is not even a “fair argument” that the project will have a significant environmental effect.³³

An EIR is necessary for any discretionary project that may have a significant adverse effect on the environment.³⁴ “At the heart of CEQA is the requirement that public agencies prepare an EIR for any project that may have a significant effect on the environment.”³⁵ A negative declaration is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.³⁶ A “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”³⁷ Substantial evidence, for purposes of the fair

²⁸ 14 C.C.R. § 15300.2(c).

²⁹ *Id.* at § 15300.2(b).

³⁰ *Id.* at § 15063.

³¹ *Id.* at § 15063(b)(2).

³² *Id.* at § 15070(b)(1)-(2).

³³ *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440; Pub. Res. Code §§ 21064, 21100.

³⁴ Pub. Res. Code § 21151(a).

³⁵ *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944 (internal citations and quotations omitted).

³⁶ *Id.* at 957.

³⁷ Pub. Res. Code § 21068; 14 C.C.R. § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.

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argument standard, includes “fact, a reasonable assumption predicated upon fact, or *expert opinion* supported by fact.”³⁸

III. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT A CEQA EXEMPTION

CEQA requires analysis of the environmental effects of a project at the earliest possible stage in the planning process.³⁹ This Project may result in significant and unmitigated impacts from hazards and to air quality that, at minimum, must be assessed in an EIR.

First, as supported by expert comments prepared by SWAPE, the City lacks substantial evidence that the Project qualifies for an exemption from environmental review under CEQA due to potentially significant risks of fires. SWAPE “concludes that the Project may have significant impacts from hazards and hazardous materials,” and “[a] CEQA document should be prepared to disclose potentially significant fire risks associated with charging lithium-ion batteries at a charging facility of this scale and include mitigation measures to prevent and effectively fight fires.”⁴⁰

According to SWAPE, fires resulting from lithium-ion batteries overheating are well-documented and include, but are not limited to, “a 2021 fire involving a 2013 Tesla Model S and five fires involving Chevrolet Bolts.”⁴¹ With regards to EV charging stations, like the present Project, SWAPE comments that a fire at these charging depots “presents additional concerns because electric vehicles are often parked close to one another and drivers may remain in the trucks during ‘Dwell Charging’ and/or ‘Opportunity Charging.’”⁴² Forum Mobility’s own “Safety Guidelines” recognize the dangers when using its charging services, explaining that the “[f]ailure to take proper precautions can result in serious injury, property damage or even death.”⁴³

³⁸ Pub. Res. Code § 21080(e)(1) (emphasis added); *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 331.

³⁹ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 396; *City of Redlands v. San Bernardino County* (2002) 96 Cal.App.4th 398, 410.

⁴⁰ SWAPE Comments at 1-2.

⁴¹ *Id.* at 1.

⁴² *Id.* at 2.

⁴³ Forum Mobility, *Safety Guidelines*, available at: <https://forummobility.com/safety/>.

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SWAPE's comments also provide substantial evidence demonstrating that “[w]hen the Project is operational, a battery fire involving one truck may soon spread to involve many trucks, presenting a specific, adverse impact to public health and safety particularly if drivers remain in the trucks during charging.”⁴⁴ For example, SWAPE's comments discuss an incident in 2023 where “a fire initiated at one truck spread rapidly throughout a facility used for storage of Ford F-150 pickup trucks.”⁴⁵ SWAPE explains that “[b]attery fires spread quickly and become too large to extinguish by portable fire extinguishers. If the spread of a battery fire is to be avoided, some believe fire suppression is necessary prior to the fire department's arrival. Automated systems are being developed for the purposes of early fire suppression.”⁴⁶

SWAPE states in the attached comment letter that environmental review is necessary to disclose, analyze, and mitigate to the extent feasible the potentially significant risks of fire during Project operations.⁴⁷ The following analysis must be set forth in an EIR for the Project:

1. An estimate of the amount of water, the source of the water, and the water supply network (including hydrants) that would be necessary to fight a reasonable worst-case fire scenario;
2. A list of all chemical components in the batteries and a list of chemicals that would be released during a fire;
3. Plans to show that secondary containment would be adequate to handle the volume of chemicals and any water required to fight a worst-case scenario fire; and
4. Emergency notification and evacuation measures for neighboring residents and businesses.⁴⁸

Additionally, SWAPE explains that the EIR needs to provide mitigation measures to prevent the start and spread of fires, including, but not limited to,

⁴⁴ SWAPE Comments at 2.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

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automated early fire suppression systems.⁴⁹ As supported by SWAPE’s comments, an EIR must be required to fully analyze and mitigate the potentially significant impacts from the Project’s risks of hazards.

Second, the City lacks substantial evidence that the Project qualifies for an exemption from environmental review under CEQA due to potentially significant impacts on air quality. The Pacific Gas and Electric Company (“PG&E”) submitted a letter dated June 26, 2023 to the City regarding the Project’s proposal to vacate “an existing ten foot (10’) wide PG&E easement for the operation and maintenance of an overhead line of poles.”⁵⁰ PG&E explained in its letter that the Applicant may apply for the relocation of the overhead lines and the vacation of the easement.⁵¹ The construction activities associated with the removal and relocation of these overhead lines may result in significant air quality impacts, as well as potentially significant impacts on public utilities depending on where the overhead lines will be relocated, which is undisclosed. As a result of these potentially significant impacts, the Project does not qualify for a CEQA exemption.

For the foregoing reasons, the City cannot support a CEQA exemption with substantial evidence. The City must prepare an Initial Study and EIR for the Project to fully analyze and mitigate the Project’s potentially significant impacts due to hazards and hazardous materials.

IV. THE PROJECT FALLS WITHIN AN EXCEPTION TO THE APPLICATION OF CATEGORICAL EXEMPTIONS

Categorical exemptions are inapplicable “where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”⁵² The Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* clarified the meaning of the unusual circumstances exception and the applicable standards of review, and set forth two tests to determine whether the unusual circumstances exception applies.⁵³ “One may identify ‘evidence that the project will have a significant effect on the environment.’ Alternatively, one may show evidence (1) the project is unusual because it ‘has some feature that

⁴⁹ *Id.*

⁵⁰ Exhibit D, Letter from Justin Newell, Pacific Gas and Electric Company (“PG&E”), to Tricia Pontau, City of Livermore (June 26, 2023).

⁵¹ *Id.*

⁵² 14 C.F.R. § 15003.2(c).

⁵³ *Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105.

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distinguishes it from others in the exempt class, such as its size or location;’ and (2) there is ‘a reasonable possibility of a significant effect due to that unusual circumstance.’”⁵⁴

To demonstrate circumstances that are unusual for projects in the exempt classes, the Supreme Court in *Berkeley Hillside Pres.* established that “[a] party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location.”⁵⁵ Here, substantial evidence supports the finding that the Project presents unusual circumstances. The Project is described by the Applicant as the “first of their kind [Community Charging Depots]....”⁵⁶ Additionally, the Applicant recognizes that these types of charging depots have not yet been “widely deployed.”⁵⁷ The Project is therefore unusual.

The Project’s components will also present new and unique environmental impacts and hazards, particularly from fires, that are unlike the other developments in the area. As supported by SWAPE’s comments, there is ample evidence of fires at charging depots and these hazards may be significant at the Project’s charging depot for MD and HD trucks.⁵⁸ Trucks at the Project’s charging depot will be parked close together and, as a result, “a fire initiated at one truck may spread rapidly throughout a facility and may be too large to suppress by portable fire extinguishers,” according to SWAPE.⁵⁹ SWAPE also comments that “a battery fire involving one truck may soon spread to involve many trucks, presenting a specific, adverse impact to public health and safety particularly if drivers remain in the trucks during charging.”⁶⁰ For the foregoing reasons, the Project is unusual for the purpose of CEQA Guidelines Section 15300.2.

Given an adequate demonstration of unusual circumstances, the next question identified in *Berkeley Hillside Pres.* is whether there is a fair argument of a reasonable possibility of a significant environmental effect.⁶¹ As demonstrated

⁵⁴ *Protect Tustin Ranch v. City of Tustin* (2021) 2021 WL 4962754, at *5.

⁵⁵ *Berkeley Hillside Pres.*, 60 Cal. 4th at 1105.

⁵⁶ Exhibit B, FM Greenville, LLC (“Applicant”), *Planning General Application; FM-Greenville CCD Project Summary* at 1 (May 31, 2023).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Berkeley Hillside Pres.*, 60 Cal. 4th at 1105.

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herein and in SWAPE's attached comments, there is substantial evidence supporting a fair argument that the Project may result in significant and unmitigated impacts from hazards.⁶² For the foregoing reasons, there is a reasonable possibility that the Project will have a significant effect on the environment due to unusual circumstances such that an exception to the CEQA exemption applies. An EIR must be prepared to thoroughly disclose and analyze these risks to the public, especially nearby and on-site receptors, and impose mitigation measures.

V. THE CITY LACKS SUBSTANTIAL EVIDENCE TO APPROVE THE PROJECT'S REQUESTED SITE PLAN AND DESIGN REVIEW

The City lacks substantial evidence to approve the Project's Site Plan and Design Review (SPDR 23-004) because the requisite finding to approve this requested entitlement is not supported by substantial evidence. Site Plan and Design Review is governed by Chapter 9.07 in the City's Development Code.⁶³ The purpose of Site Plan and Design Review, in relevant part, is to "[p]romote[] the orderly development of the City in compliance with the goals, objectives, and policies of the General Plan, any applicable Specific Plan, and the standards specified in this Development Code;" and "[r]espect[] the physical and environmental characteristics of the site;..."⁶⁴ "Each application for a Site Plan and Design Review shall be reviewed to ensure that the application is consistent with the purpose of this Chapter; applicable development standards and regulations of this Development Code; and the City's Design Standards and Guidelines."⁶⁵

Pursuant to section 9.07.050 in the City's Development Code, "[t]he review authority may approve a Site Plan and Design Review application, only after first making all of the following findings. The proposed development will:

1. Be allowed within the subject zone;
2. Be designed such that:: [sic]

⁶² See SWAPE Comments.

⁶³ Development Code, Chapter 9.07.

⁶⁴ *Id.* at § 9.07.010(B)(1)-(2); see also City of Livermore, Municipal Code, Title 15, Buildings and Construction, § 15.38.020(A), available at: <https://www.codepublishing.com/CA/Livermore/>.

⁶⁵ *Id.* at § 9.07.040(C).

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a. The project will not be detrimental to the public health, safety, or general welfare, and not detrimental to adjacent property;

b. Architectural design and functional plan of the structure(s) and related improvements are of reasonable aesthetic quality and compatible with adjacent developments;

c. Structure(s) and related improvements are suitable for the proposed use of the property and provide adequate consideration of the existing and contemplated uses of land and orderly development in the general area of the subject site; and

d. The project's site plan and design is consistent with the City's Design Standards and Guidelines.

3. Be designed to include [*sic*] the following criteria, as applicable:

a. Compliant with this Chapter, this Development Code, Municipal Code Title 15 (Buildings and Construction), and all other applicable City regulations and policies;

b. Efficient site layout and design;

c. Compatible and appropriate scale to neighboring properties and developments;

d. Efficient and safe public access (both pedestrian and vehicular) and parking;

e. Appropriate and harmonious arrangement and relationship of proposed structures and signs to one another and to other development in the vicinity, based on good standards of design;

f. Appropriate relationship to land use and development of adjacent properties, including topographic and other physical characteristics of the land;

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- g. Proper site utilization and the establishment of a physical and architectural relationship to existing and proposed structures on the site;
- h. Compatible architectural style with the character of the surrounding area, both to avoid repetition of identical design where not desired, and to ensure compatibility in design where desired;
- i. Harmonious relationship with existing and proposed developments and the avoidance of both excessive variety and monotonous repetition;
- j. Compatible in color, material, and composition of the exterior elevations to neighboring visible structures;
- k. Appropriate exterior lighting which provides for public safety and is not of a nature that will constitute a hazard or nuisance to adjacent properties;
- l. Compatible in scale and aesthetic treatment of proposed structures with public areas;
- m. Appropriate open space and use of water efficient landscaping; and
- n. Consistent with the General Plan and any applicable Specific Plan.”⁶⁶

For the reasons set forth herein and in the attached expert comments, approval of the Project may result in significant effects relating to fire risks and air quality. The City therefore cannot support a finding that the Project “will not be detrimental to the public health, safety, or general welfare, and not detrimental to adjacent property;...”⁶⁷ Thus, approval of the Site Plan and Design Review for the Project would be an abuse of discretion by the City because it cannot make the required findings. The City therefore cannot approve the Project’s Site Plan and Design Review (SPDR 23-004).

⁶⁶ *Id.* at § 9.07.050(C)(1)-(3)(emphasis added).

⁶⁷ *Id.* at § 9.07.050(C)(2)(a).

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VI. CONCLUSION

For the reasons set forth above, the City must prepare an Initial Study and an EIR to fully analyze and mitigate this Project's potentially significant impacts. The City must also evaluate that analysis and mitigation in determining whether the Site Plan and Design Review are consistent with the City's Code. Thank you for your attention to these comments.

Sincerely,
Tara C. Rengifo
Tara C. Rengifo

Attachments
TCR:acp