



T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 150
Oakland, CA 94612

www.lozeaudrury.com
richard@lozeaudrury.com

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Via Email

Planning and Land Use Management
Committee (PLUM)
City of Los Angeles
Councilmember Marqueece Harris-Dawson
Councilmember Monica Rodriguez
Councilmember Katy Yaroslavsky
Councilmember John S. Lee
Councilmember Heather Hutt
John Ferraro Council Chamber
200 N. Spring Street, Room 340
Los Angeles, CA 90012
c/o Candy Rosales, Legislative Assistant
clerk.plumcommittee@lacity.org

Renata Ooms, City Planner
200 North Spring Street, Rm 763
Los Angeles, CA 90012
renata.ooms@lacity.org

Re: Supplemental Comment on Proposed CEQA Infill Exemption for Mission and Lincoln Apartments (CPC-2022-6189-CU-DB-ZAA-SPR-HCA)

Dear Honorable Members of PLUM and the Los Angeles City Council:

I am writing on behalf of **Supporters Alliance for Environmental Responsibility (“SAFER”)**, whose members live or work in the City of Los Angeles (“City”), regarding the proposed Class 32 Categorical Exemption from review pursuant to the California Environmental Quality Act (“CEQA”) for CPC-2022-6189-CU-DB-ZAA-SPR-HCA, including all actions related or referring to the proposed construction of a new 7-story apartment building with 184 residential units above 2 levels of automobile parking, to be located at 3601-3615 Mission Road/2010-2036 Lincoln Park Avenue, in the City of Los Angeles (the “Project”).

On September 5, 2023 SAFER submitted comments providing that the Class 32 Exemption to CEQA does not apply to the Project because (1) the Project will have significant adverse impacts on air quality and health risk impacts, and (2) the City has failed to present sufficient evidence showing the Project will not have significant noise impacts. This supplemental comment incorporates all prior SAFER comments.

The purpose of this comment is to raise additional issues that preclude the City from relying on the Class 32 Exemption. Specifically, (1) The City’s finding that the project site has no value as habitat for endangered, rare or threatened species is not based on substantial evidence; (2)

There is substantial evidence that the Project site indeed does have value as habitat for threatened species; and (3) The Unusual Circumstances Exception precludes the Class 32 Exemption here because the Project will have significant biological impacts and is uniquely located. For these reasons, the Class 32 Exemption may not apply. A CEQA document is therefore required to analyze these impacts and propose mitigation measures.

SAFER's comments are supported by wildlife biologist Dr. Shawn Smallwood Ph.D. (CV and comments attached as Exhibit A).

LEGAL BACKGROUND

The EIR is the very heart of CEQA. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 927.) The EIR is an "environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological points of no return." (*Bakersfield Citizens*, 124 Cal.App.4th at 1220.) The EIR also functions as a "document of accountability," intended to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*Laurel Heights Improvements Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392.) The EIR process "protects not only the environment but also informed self-government." (*Pocket Protectors*, 124 Cal.App.4th at 927.)

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

As the California Supreme Court has held, "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319-20.) "Significant environmental effect" is defined very broadly as "a substantial or potentially substantial adverse change in the environment." (Pub. Res. Code ("PRC") § 21068; see also, 14 CCR § 15382.) An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83.) "The 'foremost principle' in interpreting CEQA is that the Legislature

intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” (*Communities for a Better Env’t v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 109.)

The Class 32 exemption provides:

Class 32 consists of projects characterized as in-fill development meeting the conditions described in this section.

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) *The project site has no value, as habitat for endangered, rare or threatened species.*
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.

(14 CCR § 15332 [emph. added].)

In order to approve the Project based on the Class 32 Exemption, the City must make the above finding, and support those findings with substantial evidence. (*See, Protect Tustin Ranch v. City of Tustin* (2021) 70 Cal. App. 5th 951, 960.)

DISCUSSION

A. The City’s Exemption Determination is Not Supported by Substantial Evidence.

Substantial evidence is defined in the CEQA guidelines as “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.” (14 CCR § 15384(a).) Substantial evidence does not include speculation or unsubstantiated opinion. (*Id.*) Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (14 CCR § 15384(b).)

The City’s Categorical Exemption is not supported by substantial evidence. The City asserts the Site “does not have substantive value as a habitat for endangered, rare or threatened species,” without any support whatsoever. Exemption, ENV-2022-6190-CE, at p.4. No surveys for wildlife were completed in support of the Categorical Exemption. As wildlife biologist Dr. Shawn Smallwood points out in his comments, “Without having completed any surveys for

wildlife on the project site, the City cannot possibly know whether or to what degree the project site serves as wildlife habitat.” Ex. A at p. 13.

In response to Lincoln Heights Preservation Coalition’s Appeal, the City points to the lack of reported occurrences of special-status species in the California Natural Diversity Database (CNDDDB) maintained by the California Department of Fish and Wildlife (CDFW). As Dr. Smallwood explains, the CNDDDB is not designed to support absence determinations or to screen out species from characterization of a site’s wildlife community. *Id.* at p.14 As noted by CNDDDB, “The CNDDDB is a positive sighting database. It does not predict where something may be found There are many areas of the state where . . . there is nothing on the map. That does not mean that there are no special status species present.” *Id.* The City improperly relies on the CNDDDB and fails to adequately review the potential for special status species to occur on the project site. The lack of CNDDDB does not constitute substantial evidence to support the City’s findings.

For the foregoing reasons, the City’s finding the Site has “no value for endangered, rare or threatened species” is not based on substantial evidence, and thus violates CEQA.

B. The Project Site has “Value as Habitat for Endangered, Rare or Threatened Species,” Therefore the City May Not Exempt the Project from CEQA Review.

On October 27, 2023, on behalf of Dr. Shawn Smallwood, Noriko Smallwood conducted a site inspection of the Project site (“Site”) and Lincoln Park, which is located just south of the Site. Ex. A, at p.1. Ms. Smallwood detected 25 distinct species of vertebrate wildlife at or adjacent to the Site, including five species with special status. *Id.* at 3. Taking into account site visit data and reports from database reviews, Dr. Smallwood has located nine special status species that have been recorded on-site. *Id.*

Importantly, the species detected is only a fraction of those that would be detected over a longer inspection period. *Id.* at 10. Dr. Smallwood calculated that with repeated surveys, Ms. Smallwood would detect 109 species of vertebrate wildlife at the Site, including 22 special status species. *Id.* at 11. While the reconnaissance survey conducted is only a starting point for characterization of a site’s wildlife community, Dr. Smallwood found these findings to indicate a species-rich wildlife community that warrants a serious survey effort. *Id.* at 11-12.

Based on Ms. Smallwood’s observations, Dr. Smallwood reports that the Site supports a relatively high concentration of vertebrate wildlife species, including special-status species. *Id.* at 10. Dr. Smallwood found that the rate of new species detections at the adjacent Lincoln Park far exceeds the rates measured at other project sites he has surveyed in the region. *Id.*

Furthermore, 117 special-status species are known to occur near enough to the site to warrant analysis of occurrence potential, 32% of which have been documented within 1.5 miles of the site (‘Very close’). Thus, the site supports multiple special-status species of wildlife and carries the potential for supporting many more special-status species of wildlife based on proximity of recorded occurrences.” *Id.* Based on these observations and findings, Dr. Smallwood

concluded, “the site provides considerable habitat value to wildlife, and that the City has failed to complete the surveys that would be needed to characterize this value.” *Id.* at 12

Since the Site has “value as habitat for endangered, rare or threatened species,” the City may not exempt the Project from CEQA review pursuant to the CEQA infill exemption.

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

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

Both aspects of the Unusual Circumstances exception apply here—the Project will have significant biological impacts and the distinct location of the Site distinguishes it from others in the exempt class.

a. The Project Will Result in Significant Biological Impacts Establishing Unusual Circumstances.

Dr. Smallwood found that the Project will result in significant biological impacts. First, the Project will result in significant impacts from habitat loss. Dr. Smallwood’s projected that the Project would lead to the loss of 16.7 nest sites, resulting in the prevention of 55 birds per year. Ex. A at 20. According to Dr. Smallwood, the loss of nest sites would qualify as a significant project impact. *Id.* This finding is particularly noteworthy given that the site visit reveals protected bird species on the Site.

Second, the Project will result in significant impacts from interference with wildlife movement. Dr. Smallwood found that the Project’s elimination of 1.163 acres of vegetation cover and insertion of a 7-story building into aerospace used by birds and other flying species, “would cut wildlife off from one of the last remaining stopover and staging opportunities in the project area, forcing volant wildlife to travel even farther between remaining stopover sites.” Dr. Small found this impact would be significant. *Id.* at 23.

Third, the ample glass on the facades of the proposed 7-story project will cause significant impacts from bird-window collisions. *Id.* at 21. Many special-status species of birds have been

recorded at or near the aerosphere of the project site. Dr. Smallwood's review indicates 87 special-status species of birds with potential to use the site's aerosphere that would be put at risk of collision with the Project's largely glass facade. *Id.* In addition hundreds more species that migrate through the project area and are protected by the federal Migratory Bird Treaty Act and California's Migratory Bird Protection Act would be put at risk. *Id.* at 22. Dr. Smallwood estimated 145 bird deaths annually. *Id.* at 24. The vast majority of these deaths would be of birds protected under the Migratory Bird Treaty Act and under the recently revised California Fish and Game Code 3513, thus causing significant unmitigated impacts.

The fact that the Project will have significant biological impacts constitutes an unusual circumstance, precluding the City's reliance on the Class 32 Exemption.

b. The Project's Location Constitutes an Unusual Feature Creating a Reasonable Possibility of Significant Biological Impacts.

While the Project is located in an area that has undergone severe habitat fragmentation, the Site and the adjacent Lincoln Park provide the only open space with woodland nest substrate in the area. *Id.* at 20. During Noriko Smallwood's site visit, she detected five special status species on the Site, and an additional three special status species in Lincoln Park. *Id.* at 3. Between the project site and the adjacent Lincoln Park, Noriko saw 38 species of vertebrate wildlife and Monarch, which is a candidate for listing under the federal Endangered Species Act. Because of the unique location adjacent to Lincoln Park, the Project would not just impact wildlife on the Project Site but also to the wildlife at park. *Id.* at 1. According to Dr. Smallwood,

Considering the number of special-status species Noriko detected on both the project site and Lincoln Park (Table 1) and the number documented in the project area (Table 2), and considering that nearly all of the remaining areas have been developed while the project site is covered by many mature trees, the adjacency of the project site to Lincoln Park makes the project site unique. With respect to the wildlife at Lincoln Park, the project would complete the process of habitat fragmentation, which in my experience is an unusual circumstance.

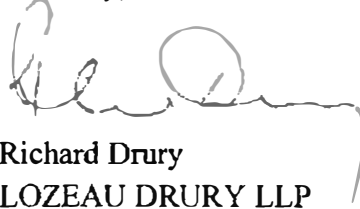
Ex. A at p. 13. The fact the Project Site is adjacent to Lincoln Park and these two sites serve the only woodland nest substrate in the area, the significant impacts detailed above are multiplied. As Dr. Smallwood explains, the windows of the project serve as "lethal traps for any birds attempting to remain or to continue to stop over at Lincoln Park. *Id.* at 14.

The fragmentation of the area, the presence of known special status species, and the existence of only open space with woodland nest substrate in the area constitute unusual circumstances precluding application of the Class 32 Exemption.

CONCLUSION

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

Sincerely,



Richard Drury
LOZEAU DRURY LLP