Comment Letter 2

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Via E-mail

David Sinclair, Senior Planner
City of Pasadena
175 North Garfield Avenue
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Re: Comment on the Initial Study/Mitigated Negative Declaration for the 740-790 East Green Street Mixed-Use Project

Dear Mr. Sinclair:

I am writing on behalf of Supporters Alliance for Environmental Responsibility and its members living in and around the City of Pasadena ("SAFER") regarding the Initial Study/Mitigated Negative Declaration ("IS/MND") for the 740-790 East Green Street Mixed-Use Project proposed for the City of Pasadena (the "Project"). After reviewing the IS/MND, we conclude that it fails to adequately analyze all environmental impacts and to implement all necessary mitigation measures. SAFER respectfully requests that the City of Pasadena (the "City") prepare an EIR in order to incorporate our concerns discussed below. 2-1

This comment has been prepared with the assistance of Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH. Mr. Offerman's comment and curriculum vitae are attached as Exhibit A hereto and is incorporated herein by reference in its entirety.

I. PROJECT DESCRIPTION

The Project involves the demolition of five existing commercial buildings, and the construction and operation of a new mixed-use project within the City of Pasadena Playhouse District. The mixed-use project would include one 4-story mixed-use building and one 5-story residential building. The two buildings would be connected by an outdoor ground-level breezeway and external pedestrian bridges at Levels 2, 3, and 4. The two buildings would be located on top of a two-level subterranean parking garage that encompasses the majority of the 2.33-aere property ,and would include 443 parking spaces. The Project would include 16,481 square feet of commercial use and 263 for-rent residential units, 41 of which would be designated as affordable units. The Project relies on the density bonus provision of the Zoning 2-2

Code to increase the maximum density by 30% over the proposed density of 87 dwelling units per acre. The Project requires a zone change from CD-4 to Planned Development No. 37.

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II. LEGAL STANDARD

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, 319-320 (*CBE v. SCAQMD*) (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 88; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504–505). "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.*, 13 Cal.3d at 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 (*CBE v. CRA*).

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*, 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.

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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*, 124 Cal.App.4th at 927. In very limited circumstances, an agency may avoid preparing an EIR by issuing a negative declaration, a written statement briefly indicating that a project will have no significant impact thus requiring no EIR (14 CCR § 15371), only if there is not even a "fair argument" that the project will have a significant environmental effect. PRC, §§ 21100, 21064. Since "[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 are allowed only in cases where "the proposed project will not affect the environment at all." *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440.

Where an initial study shows that the project may have a significant effect on the environment, a mitigated negative declaration may be appropriate. However, a mitigated

negative declaration is proper *only* if the 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." PRC §§ 21064.5 and 21080(c)(2); *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 331. In that context, "may" means a reasonable possibility of a significant effect on the environment. PRC §§ 21082.2(a), 21100, 21151(a); *Pocket Protectors*, 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.

Under the "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,* 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*, 124 Cal.App.4th at 928.

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 & Zischke, *Practice Under CEQA*, §6.29, pp. 273-274. 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 favor of environmental review*." *Pocket Protectors*, 124 Cal.App.4th at 928 (emphasis in original).

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III. DISCUSSION

A. There is Substantial Evidence of a Fair Argument that the Project Will Have a Significant Health Risk Impact from its Indoor Air Quality Impacts.

One component of an air quality impact analysis under CEQA is evaluating the health risk impacts of toxic air contaminant ("TACs") emissions contributed by a proposed project as well as cumulatively with other nearby TAC sources. Certified Industrial Hygienist, Francis "Bud" Offermann, PE, CIH, has conducted a review of the Project, the CEQA Analysis, and relevant appendices regarding the Project's indoor air emissions. Indoor Environmental Engineering Comments (Jan. 13, 2021) ("Offermann Comment") (attached hereto as Exhibit A). Mr. Offermann is one of the world's leading experts on indoor air quality and has published extensively on the topic. As discussed below and set forth in Mr. Offermann's comments, the Project's emissions of formaldehyde to air will result in very significant cancer risks to future residents. As a result of this significant effect to air quality, the Project requires preparation of an EIR to analyze and mitigate this significant impact.

The MND's analysis includes a discussion of the Project's anticipated TAC emissions. *Id.* at 39. The MND concludes that while TACs will be generated during Project construction, "the duration of the proposed construction activities would only constitute a small percentage of the total 30-year exposures period," and therefore TACs from construction "would not result in concentrations causing significant health risks." *Id.* The MND also concludes that "the proposed Project would not involve operational activities that would generate TAC emissions." *Id.*

The MND identifies the significance thresholds established by the South Coast Air Quality Management District ("SCAQMD") for a project's TAC emissions as "an incremental cancer risk threshold of 10 in 1 million. 'Incremental cancer risk' is the net increased likelihood that a person continuously exposed to concentrations of TACs resulting from a Project over a 9-, 30-, and 70-year exposure period will contract cancer based on the use of standard Office of Environmental Health Hazard Assessment (OEHHA) risk-assessment methodology (OEHHA 2015)." *Id.* at 39.

Although the MND identifies TAC emissions associated with the Project's construction equipment, the Analysis fails to acknowledge the significant indoor air emissions that also will result from the Project. Specifically, there is no discussion, analysis or identification of mitigations for significant emissions of formaldehyde to air from the Project.

Mr. Offermann explains that many composite wood products typically used in home and apartment building construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. He states, "The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in residential building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims." Offermann Comment, pp. 2-3.

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Formaldehyde is a known human carcinogen. Mr. Offermann states that there is a fair argument that future residents of the Project will be exposed to a cancer risk from formaldehyde of approximately 120 per million, assuming all materials are compliant with the California Air Resources Board's formaldehyde airborne toxics control measure. *Id.*, p. 3. This is 12 times the SCAQMD's CEQA significance threshold for airborne cancer risk of 10 per million. Mr. Offermann concludes that this significant environmental impact should be analyzed in an EIR and mitigation measures should be imposed to reduce the risk of formaldehyde exposure. *Id.*, p. 2. Mr. Offermann suggests several feasible mitigation measures, such as requiring the use of no-added-formaldehyde composite wood products, which are readily available. Offermann Comments, pp. 12-13. Mr. Offermann also suggests requiring air ventilation systems which would reduce formaldehyde levels. *Id.* Since the CEQA Analysis does not analyze this impact at all, none of these or other mitigation measures are considered.

When a Project exceeds a duly adopted CEQA significance threshold, as here, this alone establishes a fair argument that the project will have a significant adverse environmental impact and an EIR is required. Indeed, in many instances, such air quality thresholds are the only criteria reviewed and treated as dispositive in evaluating the significance of a project's air quality impacts. See, e.g. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"). See also *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 ("A 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant"). The California Supreme Court made clear the substantial importance that an air district significance threshold plays in providing substantial evidence of a significant adverse impact. *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327 ("As the [South Coast Air Quality Management] District's established significance threshold for NOx is 55 pounds per day, these estimates [of NOx emissions of 201 to 456 pounds per day] constitute substantial evidence supporting a fair argument for a significant adverse impact"). Since expert evidence demonstrates that the Project will exceed the SCAQMD's CEQA significance threshold, there is a fair argument that the Project will have significant adverse impacts and an EIR is required.

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Mr. Offermann also notes that the high cancer risk that may be posed by the Project's indoor air emissions likely will be exacerbated by the additional cancer risk that exists from vehicle emissions from the adjacent and nearby roadways such as I-210, E Green Street, Hudson Street, Colorado Boulevard, S. Lake Avenue, and Oak Knoll Avenue. *Id.* at 10.

He observes that the Project is located in south Coast Air Basin, which is a State and Federal non-attainment are for PM2.5, and that "[a]n air quality analyses should be conducted to determine the concentrations of $PM_{2.5}$ in the outdoor and indoor air that people inhale each day. *Id.* at 11. Because the City's analysis of the cumulative health risk impacts of the Project fails to include these sources as well as the TAC emissions to air from the Project itself, the cumulative impact analysis and conclusion is not supported by substantial evidence. Mr. Offermann concludes that:

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> It is my experience that based on the projected high traffic noise levels, the concentration of $PM_{2.5}$ will exceed the California and National $PM_{2.5}$ annual and 24-hour standards and warrant installation of high efficiency air filters (i.e. MERV 13 or higher) in all mechanically supplied outdoor air ventilation systems

Id.

The failure of the CEQA Analysis to address the Project's formaldehyde emissions is contrary to California Supreme Court decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("*CBIA*"). In that case, the Supreme Court expressly holds that potential adverse impacts to future users and residents from pollution generated by a proposed project ***must be addressed*** under CEQA. At issue in *CBIA* was whether the Air District could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of adjacent environmental conditions on a project. The Supreme Court held that CEQA does not generally require lead agencies to consider the environment's effects on a project. *CBIA*, 62 Cal.4th at 800-801. However, to the extent a project may exacerbate existing environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id.* at 801. In so holding, the Court expressly held that CEQA's statutory language required lead agencies to disclose and analyze "impacts on ***a project's users or residents*** that arise ***from the project's effects*** on the environment." (*Id.* at 800 (emphasis added).)

The carcinogenic formaldehyde emissions identified by Mr. Offermann are not an existing environmental condition. Those emissions to the air will be from the Project. People will be residing in and using the Project once it is built and begins emitting formaldehyde. Once built, the Project will begin to emit formaldehyde at levels that pose significant health risks. The Supreme Court in *CBIA* expressly finds that this type of air emission and health impact by the project on the environment and a "project's users and residents" must be addressed in the CEQA process.

The Supreme Court's reasoning is well-grounded in CEQA's statutory language. CEQA expressly includes a project's effects on human beings as an effect on the environment that must be addressed in an environmental review. "Section 21083(b)(3)'s express language, for example, requires a finding of a 'significant effect on the environment' (§ 21083(b)) whenever the 'environmental effects of a project will cause substantial adverse effects *on human beings,* either directly or indirectly.'" (*CBIA*, 62 Cal.4th at 800 (emphasis in original.) Likewise, "the Legislature has made clear—in declarations accompanying CEQA's enactment—that public health and safety are of great importance in the statutory scheme." (*Id.*, citing e.g., §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d).) It goes without saying that the hundreds of future residents at the Project are human beings and the health and safety of those residents is as important to CEQA's safeguards as nearby residents currently living adjacent to the Project site.

Because Mr. Offermann's expert review is substantial evidence of a fair argument of a significant environmental impact to future users of the project, an EIR must be prepared to disclose and mitigate those impacts.

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B. The IS/MND fails to establish a baseline for hazardous substances and its conclusion that the Project will not have significant impact on human health from hazardous substances is not supported by substantial evidence.

It is well-established that CEQA requires analysis of toxic soil contamination that may be disturbed by a Project, and that the effects of this disturbance on human health and the environment must be analyzed. CEQA requires a finding that a project has a "significant effect on the environment" if "the environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." PRC §21083(b)(3). As the Court of Appeal recently stated, "[a] new project located in an area that will expose its occupants to preexisting dangerous pollutants can be said to have substantial adverse effect on human beings." *Cal. Building Industry Assn. v. Bay Area Air Quality Mgm't Dist.* ("*CBIA v. BAAQMD*"), 2013 Cal. App. LEXIS 644, *46 (Cal. Ct. App. 2013). The existence of toxic soil contamination at a project site is a significant impact requiring review and mitigation in an EIR. (*McQueen v. Bd. of Dirs.* (1988) 202 Cal.App.3d 1136, 1149; *Assoc. For A Cleaner Env't v. Yosemite Comm. College Dist.* ("*ACE v. Yosemite*") (2004) 116 Cal.App.4th 629.) This mitigation may not be deferred until a future time after Project approval. (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 306; *Citizens for Responsible Equitable Envt'l Dev. v. City of Chula Vista* ("*CREED*") (2011) 197 Cal.App.4th 327, 330-31.)

The Project site has the potential to be significantly impacted with hazardous substances as a result of past land uses. A Phase I Environmental Site Assessment ("ESA") was conducted and found numerous recognized environmental conditions ("RECs") including:

- The east portion of the Project site was formerly used as a gas station. Car and battery repair and greasing also took place on site. There is no regulatory agency documentation that tanks were removed or soil sampled.
- The adjacent properties to the north of the Project site were used historically for auto repair since 1932. Based on the close proximity (within 100-feet) and the long-term utilization of the property for auto repair purposes, the north adjacent property poses a potential vapor encroachment concern

MND, p. 70.

Limited steps were taken to investigate these potentially harmful RECs. A Vapor Intrusion Risk Assessment was performed, but it was far from sufficient. First, it only included seven vapor probes for the entire 2.33-acre property. While six of the probes were taken to the rear of existing commercial structures to assess the former onsite auto repair and gas station, only one probe was taken in the northeastern corner of the Project site to assess the potential for vapor encroachment from the former gas station and auto repair operations just north of the Project site. EFI Global , Vapor Intrusion Assessment (Dec. 22, 2016), p. 2. Moreover, these probes were only taken to a depth of 5 feet below ground, while the two story subterranean parking garage proposed for the majority of the site will require excavation far below this level. In addition, the vapor sampling was conducted more than four years ago, and is therefore out of date now. It

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does not tell the public or decision makers how contamination plume may have migrated since the sampling.

Based on this incomplete sampling protocol, the MND concludes that "a threat to human health was not identified as a result of the former gasoline and auto repair operations at the Project site and at the north adjacent property. Therefore, potential risks associated with the vapor encroachment REC are less than significant." MND, p. 70. But then in the next sentence, the MND admits that "[t]here are still potential impacts associated with the presence of the former gasoline service station, including potential underground storage tanks and impacts to subsurface soils. Potential contaminants of concern associated with former automotive and gasoline service station activities include, but are not limited to, petroleum hydrocarbons (gasoline, diesel, heavy oil), and volatile organic compounds (VOCs)." MND, p. 70. Rather than investigate these potentially dangerous conditions, the MND simply defers that analysis. *Id.* at 71.

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The Project may have significant impacts due to the presence of toxic and cancer-causing chemicals in the soil at the Project site, but the MND failed to conduct the analysis to make such a determination. The MND admits that, "[s]hould construction occur in an area where a UST was/is located or contaminated soils are found, this could result in an upset or accident resulting in a release of hazardous materials." *Id.* at 71. While some steps were taken to assess hazardous vapors, the City has done nothing to assess the potential for construction workers and others to be exposed to hazardous materials as a result of soil contamination. No soil samples were taken or tested, and no effort has yet been made to determine if USTs are or are not still on the property.

Construction workers, such as the members of SAFER, will be at the highest risk from such chemicals, as will be future residents of the Project and neighboring residents, who may be exposed during construction and operation. Construction workers will be directly disturbing and excavating potentially contaminated soil during Project construction.

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To avoid these risks, and to establish an environmental baseline, the City should halt the MND process until an investigation of the USTs and soil contamination are assessed and cleanup completed. Additional vapor sampling is also needed at appropriate depths. Without this information, the MND does not include substantial evidence to support its conclusion that the Project will not have a significant impact on human health from hazards and hazardous substances.

C. The IS/MND's greenhouse gas analysis is based on unsupported assumptions.

In support of its greenhouse gas analysis, the IS/MND states:

> CalEEMod default values for energy consumption assume compliance with the 2016 Title 24 Building Energy Efficiency Standards. However, since the Project would be required to comply with the more stringent 2019 Title 24 Building Energy Efficiency Standards that became effective January 1, 2020, a 30% reduction was applied in

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> CalEEMod based on the California Energy Commission's estimate that compared to the 2016 standards, "nonresidential buildings [built to 2019 standards] will use about 30% less energy due mainly to lighting upgrades" (CEC 2018).

IS/MND, p. 61. The assumption that compliance with 2019 Title 24 Building Standards will result in a 30% reduction in GHG emissions compared to 2016 Building Standards is not supported by substantial evidence. The IS/MND states that the 30% reduction is based on the California Energy Commission's estimate that compared to the 2016 standards, "nonresidential buildings [built to 2019 standards] will use about 30% less energy due mainly to lighting upgrades." *Id.* The problem with the assumption is that the CEC's determination was based on ***non-residential*** buildings, while the Project here consists mainly of residential uses. The MND provides no evidence that a 30% reduction is warranted in such a case. As a result, the City lacks evidence to support its finding that the Project's GHG impacts will be less than significant.

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D. There is no evidence that mitigation measures MM-TRA-1 will reduce the Project's transportation impact to a less-than-significant level.

In general, mitigation measures must be designed to minimize, reduce or avoid an identified environmental impact or to rectify or compensate for that impact. (CEQA Guidelines § 15370.) A CEQA analysis "must contain facts and analysis, not just the agency's bare conclusions or opinions … to support the inference that the mitigation measures will have a quantifiable 'substantial' impact on reducing the adverse effects." *Sierra Club*, 6 Cal. 5th at 522; *Friends of Oroville v. City of Oroville* (2013) 219 Cal. App. 4th 832, 842-843 (EIR must quantify effectiveness of mitigation measures).

Moreover, CEQA disallows deferring the formulation of mitigation measures to post-approval studies. 14 CCR § 15126.4(a)(1)(B); *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309. An agency may only defer the formulation of mitigation measures when it possesses "'meaningful information' reasonably justifying an expectation of compliance." *Sundstrom* at 308; *see also Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-29 (mitigation measures may be deferred only "for kinds of impacts for which mitigation is known to be feasible"). A lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727 (finding groundwater purchase agreement inadequate mitigation because there was no evidence that replacement water was available). This approach helps "insure the integrity of the process of decisionmaking by precluding stubborn problems or serious criticism from being swept under the rug." *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

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The IS/MND admits that the Project will have a significant transportation impact because the Project's vehicle trips ("VT") per capita will exceed the City's threshold of significance. IS/MND, p. 109. In order to reduce this impact to a less-than-significant level, a 27% reduction in vehicle trips is required. As a result, the IS/MND required mitigation measure MM-TRA-1,

which requires the Project Applicant/Developer to develop and implement a Transportation Demand Management Plan ("TDM") "that includes strategies to reduce the Project's vehicle trips by a minimum of 27%." *Id.* The mitigaiton measures goes on to state that "strategies to reduce VT per capita shall complement City's Trip Reduction Ordinance minimum requirements and shall include, but not necessarily be limited to, the following:"

- Unbundled parking for residential uses
- The Project Applicant/Developer shall purchase 121 Metro passes and offer them to interested residents at 50% discount for five consecutive years form the issuance of Certificate of Occupancy.
- The Project Applicant/Developer shall provide an Annual TDM Survey beginning one year after issuance of Certificate of Occupancy to demonstrate the minimum 27% reduction of Project vehicular trips per capita is maintained.

The MND concludes that, with implementation of MM-TRA-1, the Project's transportation impact will be less-than-significant. This conclusion is not supported by substantial evidence, and MM-TRA-1 does not constitute adequate mitigation under CEQA.

First, despite knowing the amount of VT reduction that is needed, MM-TRA-1 defers identification of measures to mitigate impacts until some unspecified time, after CEQA review is complete. An agency must have, and must articulate, a good reason for deferring the formulation of mitigation. *San Joaquin Raptor*, 149 Cal.App.4th at 670, 684. Absent such a reason, deferral is simply not acceptable. "[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment." *Comtys. for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 92. The City has given no reason why it could not devise and commit to mitigation measures now. Deferral of mitigation without justification violates CEQA.

Deferral of mitigation is also impermissible if it removes the CEQA decision-making body from its decision-making role. The City may not delegate the formulation and approval of mitigation measures to address environmental impacts because an agency's legislative body must ultimately review and vouch for all environmental analysis mandated by CEQA. *Sundstrom v County of Mendocino* (1988) 202 Cal.App.3d 296, 306-308. Thus, the IS/MND may not rely on programs to be developed and implemented later without approval by the City.

Here, the City as the lead agency has improperly delegated its legal responsibility of determining what constitutes adequate mitigation to the Project applicant and developer. MM-TRA-1 calls for the development of a TDM plan, but there is no requirement that such plan be reviewed or approved by the City. Thus it is the Project applicant itself that will determine whether or not its TDM is sufficient to mitigate the Project's impacts. The IS/MND may not rely on a TDM plan to be developed, approved, and implemented later without any approval by the City, at some future time after the Project has been approved.

Second, there is no evidence that MM-TRA-1 will be effective at reducing vehicle trips

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by 27%. One of the three elements of the TDM plan is nothing more than a survey to determine if trips have been reduced, and does nothing to actual reduce vehicle trips. The second proposed element of the TDM plan would provide some discounted bus passes, but only for five years. After the five years are over, no mitigation is required, but the impact will continue for the life of the building. The only other measure required as part of the TDM is the unbundling of parking for residential uses, and there is no evidence that this alone with reduce vehicle trips by 27% or more. Without additional evidence or mandated mitigation requirements, there is no evidence tha that the Project's transportation impacts will be mitigated to a less-than-significant level.

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Without valid mitigation, the Project's significant impact on transportation remains significant, and an EIR is required.

IV. CONCLUSION

In light of the above comments, the City must prepare an EIR for the Project and the draft EIR should be circnlated for public review and comment in accordance with CEQA. Thank you for considering these comments.

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Sincerely,

Rebecca L. Davis
Lozeau | Drury LLP