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Via LACouncilComment

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

Dear Honorable Members of the PLUM Committee:

I am writing on behalf of Supporters Alliance for Environmental Responsibility ("SAFER"), whose members live and work in the City of Los Angeles ("City"), regarding the appeal of the proposed Class 32 Categorical Exemption for the Mission & Lincoln Apartments Project (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 and December 4, 2023, SAFER submitted comments providing that the Class 32 Exemption, which exempts the Project from further review pursuant to the California Environmental Quality Act ("CEQA"), does not apply to the Project because (1) the Project will have significant adverse impacts on air quality and health risk impacts; (2) the City failed to present substantial evidence showing the Project will not have significant noise impacts; (3) the City has failed to present substantial evidence in concluding that the Project site will not have habitat value for rare, endangered, or threatened species while SAFER has provided substantial evidence to the contrary; and (4) the unusual circumstances exception to the Categorical Exemption applies. This supplemental comment incorporates all prior SAFER comments and includes additional expert comments from expert wildlife ecologist Dr. Shawn Smallwood, PhD.

After careful review, SAFER maintains its appeal that a Class 32 Categorical Exemption is improper and that further CEQA review, either through a Mitigated Negative Declaration ("MND") or an Environmental Impact Report ("EIR") is required to analyze these impacts and propose mitigation measures.

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 findings, 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.

The City does not rely on substantial evidence to conclude that the Project site does not have habitat value for rare, endangered, or threatened species. 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. In asserting that the site does not have substantive value as a habitat for endangered, rare or threatened species (Categorical Exemption, p.4), the City relies on a December 23, 2023 report prepared by South Environmental (South Report"). However, South Report's scope of analysis of the Project site was not for rare, endangered, or threatened species pursuant to the CEQA Categorical Exemption. Instead, the South Report that the City relies on narrowly focuses on the Project site's habitat value for special status species. (South Report, p. 3.) As the court in *Nassiri v. Lafayette* (2024) 103 Cal.App.5th 910, 323 Cal.Rptr.3d 168, 178 ("*Nassiri*") emphasized, the two terms are not interchangeable and each have their own meaning. In *Nassiri*, the applicant's expert testified before the City Council that, due in part to the species' geographic ranges, the identified species on the project site were not "rare." (*Id*.) Here, there is nothing in the South Report or expert

testimonies that the City can reference to make that conclusion. Therefore, the South Report does not provide or constitute substantial evidence regarding habitat value for rare, endangered, or threatened species. As such, there is no substantial evidence in the record that the City can rely on to reach its conclusion regarding the Project site's habitat value for rare, endangered, or threatened species.

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 City Cannot Rely on a Categorical Exemption Because the Project Site has Habitat Value for Endangered, Rare or Threatened Species.

The City cannot invoke the Categorical Exemption where there is substantial evidence that the Project site has habitat value for rare, endangered, or threatened species. (14 CCR § 15332.) Ms. Smallwood's surveys of the Project site identified species that preclude reliance on the Categorical Exemption. Ms. Smallwood first surveyed the Project site on October 27, 2023, where she identified rare, endangered, or threatened species on and near the Project site at Lincoln Park, which is located just south of the Site. (Ex. B, p. 9.) Then, on the evening of November 7, 2024, on behalf of Dr. Shawn Smallwood, Noriko Smallwood conducted a bat survey of the Project site (Id., p. 3.) Ms. Smallwood detected 2 distinct bat species, the Hoary bat (*Lasiurus cinereus*) and Mexican free-tailed bat (*Tadarida brasiliensis*). (Ex. A, p.1.) Notably, these species are listed on the Western Bat Working Group list, with the Hoary Bat as a medium priority. (Ex. B, p. 8.) These species were previously detected by residents of the Lincoln Park neighborhood and included in their previously submitted comments in the record. Altogether, substantial evidence in the record demonstrates the Project's habitat value for rare, endangered, or threatened species, thereby prohibiting the use of the Categorical Exemption.

In response, the South Report disputes the characterization of these species as special status, and that the Project site cannot have habitat value because it is not "native habitat." (South Report, pp. 3-4.) However, as Dr. Smallwood notes, the wildlife identified on the Project site are in fact properly characterized as rare, endangered, or threatened species. For instance, the BCC list is comprised of rare wildlife because the list was "intended to prevent species from having to be listed as Threatened or Endangered…" (Ex. A, p. 11):

> The BCC list includes those species with 1. Documented or apparent population declines; 2. Small or restricted populations, or 3. Dependence on restricted or vulnerable habitats. Note that these three qualifications for inclusion on the BCC list are consistent with the CEQA Guidelines definitions A and B of Rare species. Under definition B, a species "likely to become endangered within the foreseeable future" implies population decline, which is consistent with qualification 1 for inclusion on the BCC list. Under definition A, "existing in such small numbers throughout all or a significant portion of its range that it may become endangered if its environment worsens" implies small or restricted populations or dependence on restricted or vulnerable habitats, which are conditions that are consistent with qualifications 2 and 3 for inclusion on the BCC list.

(Ex. A, p. 11.) Furthermore, with regard to Birds of Prey, including those identified by Ms. Smallwood and the South Report, Dr. Smallwood explains that "[t]heir positions in the food chain naturally require large home ranges and relative rarity compared to most other species of birds." (*Id*., p. 10.) As such, Dr. Smallwood's identification and explanation of the identified species as rare, endangered, or threatened demonstrates the proper classification of wildlife on or around the Project site to bar the City from relying on a Categorical Exemption for the Project.

The City further disputes that the Project site has habitat value for rare, endangered, or threatened species because they are not "native habitat." (South Report, p. 3.) However, such assertion is incorrect and conflicts with existing case law. Not only is the term "native habitat" undefined in the South Report, but it is inconsistent with the CEQA Guidelines' plain language. Dr. Smallwood notes "it is unclear what South Environmental means by "native habitat." The term native habitat might apply to a species that has expanded its range, in which case native habitat might refer to the habitat of the species' original geographic range. Otherwise, habitat is defined as that part of the environment that is used for survival and reproduction by members of a species (Hall et al. 1997)." (Ex. A, p. 2.)

Here, the South Reports' response to Dr. Smallwood's findings and conclusions are limited to whether a species' ideal habitat features are included on the Project site. (South Report, pp. 4-5.) However, the absence of typical habitat features alone does not foreclose the possibility of the area possessing some habitat value for rare, endangered, or threatened species. Uncontested observations of wildlife foraging and socializing lend support to the idea that there is at least some habitat value. (*Nassiri*, 323 Cal.Rptr.3d at 178 [presence of species on a project site means that the parcel is assumed to have some value as habitat for those species]; see also, AR5791-5793.) In fact, even though South Environmental contends that there is no habitat value on the Project site for the Cooper's hawk because its "typical habitat" are riparian woodlands and forests (South Report, p. 5), South Environmental's survey also identified the Cooper's hawk, thereby substantiating Ms. Smallwood's first site visit and reinforcing Dr. Smallwood's conclusion of the Project site's habitat value for rare, endangered, or threatened species.

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.

CONCLUSION

The City cannot rely on a Class 32 exemption because the Project does not meet the terms of the exemption. Accordingly, the City must prepare an initial study to determine the appropriate level of environmental review to undertake pursuant to CEQA.

Sincerely,

Richard Drury
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