

RESOLUTION NO. 2021-XXX

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SANTA ANA DENYING APPEAL APPLICATION NOS. 2020-03 AND 2020-04 AND UPHOLDING THE DETERMINATION OF THE PLANNING COMMISSION TO APPROVE SITE PLAN REVIEW NO. 2020-04 AS CONDITIONED FOR A NEW MIXED-USE RESIDENTIAL AND COMMERCIAL DEVELOPMENT FOR THE PROPERTY LOCATED AT 1801 EAST FOURTH STREET

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SANTA ANA AS FOLLOWS:

Section 1. The City Council of the City of Santa Ana hereby finds, determines, and declares as follows:

- A. On November 9, 2020, the Planning Commission of the City of Santa Ana, following a duly noticed public hearing, adopted a resolution approving Site Plan Review No. 2020-04, as conditioned, to allow the construction of a new mixed-use development consisting of 644 multi-family residential units and 15,130 square feet of commercial space at 1801 East Fourth Street ("Central Point Project" or "Project").
- B. Pursuant to Santa Ana Municipal Code Section 41-645, an appeal from a decision of the Planning Commission can be made by an interested party, individual or group.
- C. On November 16, 2020, Rebecca Davis with Lozeau Drury LLP, on behalf of the Supporters Alliance for Environmental Responsibility (SAFER), submitted Appeal Application No. 2020-03 pursuant to Section 41-645 of the Santa Ana Municipal Code (SAMC) requesting that the City Council reconsider the Planning Commission's decision based on the following reasons:
 - I. The City failed to comply with the California Environmental Quality Act by failing to prepare a Supplemental Environmental Impact Report or Tiered Environmental Impact Report for the project.
- D. On November 19, 2020, John Hanna, on behalf of the Southwest Regional Council of Carpenters (SWRCC), submitted Appeal Application No. 2020-04 pursuant to Section 41-645 of the Santa Ana Municipal Code requesting that the City Council reconsider the Planning Commission's decision based on the following reasons:
 - I. Failure to adequately address affordable housing.

- II. Failure to include qualified Santa Ana residents, veterans, graduate and/or certificate holders of the Santa Ana Unified School District and Rancho Santiago Community College District in the project's construction workforce.
 - III. Failure to ensure the maximum amount of viable commercial development is provided.
- E. On January 19, 2021, the City Council conducted a duly noticed public hearing on Appeal Application No. 2020-03 and found that:
- I. In approving the Central Pointe Project, the Planning Commission found that it was adequately evaluated in the previously certified 2007 Metro East Mixed-Use (MEMU) Overlay Zone EIR and 2018 Subsequent EIR (collectively "MEMU EIR") prepared for the MEMU Overlay. SAFER contends that this was error, because the MEMU EIR "was a programmatic EIR, not a project-level EIR," asserting that the Project has never been analyzed under CEQA. While the MEMU EIR was a Program EIR, SAFER is nevertheless incorrect.

A Program EIR is a type of EIR allowed under the California Environmental Quality Act that is used to evaluate a plan or program having multiple components or actions that are related either geographically, through application of rules or regulations, or as logical parts of a long-term plan. Subsequent activities called for by the Program EIR are compared against the Program EIR and, when consistent with the Program EIR, may be approved without the need for further environmental review.

Once a project is approved, CEQA does not require that it be analyzed anew every time another discretionary action is required to implement the project. Quite the opposite, where an EIR has previously been prepared for a project, CEQA expressly *prohibits* agencies from requiring a subsequent or supplemental EIR, except in specified circumstances provided in Public Resources Code 21166 and CEQA Guidelines Section 15162. Specifically, an agency may not require a subsequent or supplemental EIR unless:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant

environmental effects or a substantial increase in the severity of previously identified significant effects; or

- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete, shows that the project will have new or more significant impacts or that the project's significant impacts could be reduced by mitigation measures or alternatives that have not been adopted.

As explained by the California Court of Appeal, "Section 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process." (*Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal. App. 4th 788, 796.)

CEQA Guidelines Section 15168 expressly authorizes use of a "program EIR" to evaluate "a series of actions that can be characterized as one large project," and makes clear that program EIRs can be used to approve later activities within the scope of the program:

If the agency finds that pursuant to Section 15162, no subsequent EIR would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and *no new environmental document would be required*. Whether a later activity is within the scope of a program EIR is a factual question that the lead agency determines based on substantial evidence in the record.

Where environmental review has been conducted through a program EIR, CEQA requires further review only in limited circumstances which are specified in Public Resources Code Section 21166 and CEQA Guidelines Section 15162. *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal. App. 4th 788, 802. Moreover, contrary to SAFER's assertions, "substantial evidence is the proper standard where . . . an agency determines that a project consistent with a prior program EIR presents no significant, unstudied adverse effect." *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal. App. 5th 160, 174; see also *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal. App. 4th 598, 611

[“[T]he fair argument standard does not apply to review of an agency's determination that a project's potential environmental impacts were adequately analyzed in a prior program EIR.”].)

The MEMU EIR studied the impacts of developing up to 5,551 residential units and 963,000 square feet of commercial development, and 690,000 of office development in the Overlay Zone. The Central Pointe Project, which consists of 644 residential units and 15,130 square feet of commercial space, is entirely consistent with the previously established development standards for the MEMU Overlay Zone, and thus, does nothing more than implement a relatively small portion of the larger project previously analyzed in MEMU EIR. Therefore, the Project is within the scope of the project covered by the MEMU EIR. Moreover, Central Pointe will not have new or more severe environmental impacts than those disclosed in the MEMU EIR and this is supported by substantial evidence. As described in the 2007 EIR Chapter 3, Project Description, the Active Urban zone was described as a highly urbanized environment with residential and commercial opportunities; the site was shown and designated with the Active Urban overlay in Figure 3-4; Table 3-1 listed the development standards for the Active Urban overlay; and Chapter 2 of the SEIR described modification to the MEMU development standards. As described in the Planning Commission staff report and Attachment 10 to the Planning Commission staff report, the Project is consistent with the MEMU overlay zone and the development standard for the Active Urban subzone. Accordingly, SAFER's assertions that Central Pointe “has never been analyzed under CEQA” and that the City was required to prepare a tiered EIR for the Project are incorrect.

- II. Health Risk Impacts - SAFER argues that an EIR is required to study alleged health risks to future residents of the Central Pointe Project. However, as explained by the California Supreme Court, “CEQA does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents.” *California Building Industry Ass’n v. Bay Area Air Quality Management Dist.* (2015) 62 Cal. 4th 369, 392. Thus, impacts to future residents of the Project caused solely by existing environmental conditions are not required to be evaluated in a CEQA document.

The City nonetheless required the preparation of a Health Risk Assessment to identify any impacts from developing a residential community near a major freeway. As noted in the Health Risk Assessment, the Project applicant has agreed to install and maintain MERV (minimum efficiency reporting value) 13 air filtration systems in the proposed multi-family residential dwelling units. Contrary to

SAFER's assertion, the Health Risk Assessment looked at both potential cancer risks and non-cancer risks and concluded that a less than significant impact to Project residents would occur.

III. Greenhouse Gas (GHG) Impacts - SAFER takes issue with the methodology utilized in the MEMU EIR to evaluate GHG impacts, but SAFER failed to raise such issues before the MEMU EIR was certified, and it is too late to do so now. Further, while SAFER suggests that the MEMU EIR's analysis should only be applied to projects that will become operational through 2020, the Subsequent MEMU EIR was not prepared until 2018, and clearly indicated it was analyzing GHG impacts based on a 2040 buildout year. Because GHG impacts from the entire buildout of the entire MEMU Overlay, including the Central Pointe Project site, were already quantified and analyzed in the MEMU EIR, SAFER's assertion that a new CEQA document is required to analyze such impacts is incorrect.

IV. As discussed above, when a project is within the scope of a previously certified EIR (including a program EIR), a lead agency may require a subsequent EIR only in one of the three situations set forth in Public Resources Code Section 21166 and CEQA Guidelines Section 15162. As none of the three situations are met, including no new information that could not have been known when the MEMU EIR was certified, this comment is incorrect.

Air Quality - SAFER alleges that the City was required to prepare a new CEQA document to evaluate alleged "impacts related to indoor air quality, and in particular, emissions of the cancer-causing chemical formaldehyde," and submits a report from Francis J. Offerman PE, CIH discussing such emissions. SAFER claims that because Mr. Offerman relies, in part, on a 2020 indoor air quality study, such alleged impacts constitute new information which "could not have been known with the exercise of reasonable diligence at the time the 2007 MEMU EIR or the 2018 MEMU SEIR were certified." But Mr. Offerman's own CV (which was attached to the comments) shows numerous papers and presentations on the alleged risk of formaldehyde emissions from wood products that date prior to the MEMU SEIR, as early as 2010.

In addition, Mr. Offerman's assertions regarding the alleged impacts of formaldehyde emissions from building materials do not rise to the level of substantial evidence, given that such emissions are already the subject of extensive regulation at both the state and federal level, including stringent emission limits that the U.S. EPA and California Air Resources Board have determined are protective of human health. Furthermore, Mr. Offerman's analysis appears to assume the same level of emissions will be present, year after year,

notwithstanding the fact that formaldehyde is readily biodegradable and complete degradation of formaldehyde can be accomplished in less than 30 days.

Bird Collisions - SAFER argues that the potential for birds to be harmed by flying into windows constitutes “significant new information” requiring the preparation of a subsequent EIR, merely because new studies related to that issue and the extent of bird decline in general have come out in recent years. SAFER submits comments from ecologist Shawn Smallwood, Ph. D. The information submitted by SAFER contradicts its assertion that this is a new issue that could not have been raised prior to the certification of the MEMU EIR. Dr. Smallwood’s own letter indicates that window collisions have been known to be one of the largest sources of human-caused bird mortality for years, and cites numerous studies attempting to quantify such fatalities going back to 1976. Thus, this alleged impact could have been raised prior to the certification of the MEMU EIR, and clearly does not trigger the need for further analysis under Section 15162.

- V. SAFER notes that the MEMU EIR Mitigation and Monitoring Reporting Program (MMRP) requires that the Project site be investigated for evidence of hazardous materials contamination “prior to issuance of grading permits,” and argues that such measure improperly defers mitigation. But again, it is too late to challenge the adequacy of the analysis done in the MEMU EIR or the sufficiency of the mitigation measures adopted when the Overlay was approved.

Moreover, SAFER has not identified any evidence that hazardous materials are present on the site, and even when contamination is known to exist, there is nothing improper about a mitigation measure that requires such contamination be investigated and remediated after project approval.

- VI. Senate Bill 743 enacted in 2013 and codified in Public Resources Code 21099, directed the Governor’s Office of Planning and Research (OPR) to develop new guidelines governing the evaluation of transportation impacts, and provides that upon certification of such guidelines, automobile delay, as measured by “level of service” and other similar metrics, shall generally not be considered a significant impact on the environment for purposes of CEQA. In 2018, OPR proposed, and the California Natural Resources Agency certified and adopted, new CEQA Guidelines Section 15064.3 that identifies vehicle miles traveled (“VMT”) – meaning the amount and distance of automobile travel attributable to a project – as the most appropriate metric to evaluate a project’s transportation impacts. Though CEQA Guidelines Section 15064.3 took effect statewide on

July 1, 2020, Santa Ana, through Resolution No. 2019-049, elected to be governed by this section on the earlier date of June 18, 2019, and by the same resolution, adopted VMT thresholds of significance for transportation impact analysis under CEQA

Irrespectively, however, CEQA Guidelines Section 15007 states that “amendments to the guidelines apply prospectively only,” and that “if a document meets the content requirements in effect when the document is set out for public review, the document does not need to be revised to conform to any new content requirements in Guideline amendments taking effect before the document is finally approved.” Thus, under the plain language of the Guidelines, any EIR that was publicly circulated prior to the City’s earlier adoption of VMT analysis in 2019 – like the MEMU EIR -- is not required to include the VMT analysis now mandated by Section 15064.3.

Moreover, the this determination is consistent with longstanding case law where the court explained that a responsible agency was not required to prepare a supplemental EIR to comply with a new statute requiring additional traffic analysis, noting “fairness and the need for finality” require that the adequacy of an EIR “be measured against those regulations in effect” when the EIR was presented for public review. *Long Beach Savings & Loan Ass’n v. Long Beach Redevelopment Agency* (1986) 188 Cal. App. 3d 249, 261 n.12.

As discussed above, the MEMU EIR was not only publicly circulated, but certified long before the VMT requirements took effect. Accordingly, the requirements set forth therein are inapplicable to such EIRs, and any future project within the scope of those EIRs is not required to do a VMT analysis.

As explained above, where a project is within the scope of a previously certified program EIR, “no new environmental document is required” unless the project will have “new significant environmental effects or a substantial increase in the severity of previously identified significant effects” than were disclosed in the program EIR. CEQA Guidelines Sections 15162, 15168(c)(2). SAFER nonetheless argues that a subsequent EIR must be prepared because the MEMU EIR disclosed certain unavoidable impacts. SAFER is incorrect.

As explained by the Court of Appeal:

To hold that a project-specific EIR must be prepared for all activities proposed after the certification of the program EIR, even where the subsequent activity is ‘within the scope of the project described in the

program EIR' . . . would be directly contrary to one of the essential purposes of program EIR's, i.e., to streamline environmental review of projects within the scope of a previously completed program EIR.

Center for Biological Diversity v. Department of Fish & Wildlife (2015) 234 Cal.App.4th 214, 239 [explaining, in a case involving a program EIR that disclosed significant and unavoidable impacts, "CEQA does not require the Department to engage in a public process when it determines whether the impacts from a site-specific project were addressed and adequately mitigated in the program EIR. And if the Department finds the impacts were addressed, it need not prepare a new environmental document at all"]].

Since, the Central Pointe Project is within the scope of the MEMU EIR and will not have any new or more severe impacts than those disclosed therein, the City is not required to prepare a new CEQA document.

- F. On January 19, 2021, the City Council conducted a duly noticed public hearing on Appeal Application No. 2020-04 and found that:
- I. The Housing Opportunity Ordinance (HOO) Chapter 41, Article XVIII.I was amended on September 1, 2020. While previously, Section 41-1902(b)(4) applied the HOO to any new project in an overlay zone site plan permitting residential land uses, the recent amendments remove this reference. As amended, the HOO now only applies when a residential project which proposes a residential density above the General Plan permitted density (Sections 1902(a) and (b)). The Central Pointe Mixed-Use project is consistent with the General Plan District Center land use designation. No General Plan Amendment is required for the Project. Therefore, the HOO does not apply.
 - II. Santa Ana Municipal Code Section 41-1607, entitled "Deviations from density bonus and affordable housing provisions," applies to projects seeking a density bonus or waivers and modifications from development standards. The project does not seek a density bonus and complies with the development standards of the Metro East Mixed-Use overlay zone.
 - III. CEQA Guidelines Section 15162 states that when an EIR has been certified for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following: (1) Substantial changes are proposed in the project which would require major revisions of the previous EIR or SEIR due to the involvement of new significant environmental effects or a

substantial increase in the severity of previously identified significant effects; (2) Substantial changes will occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or SEIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR and SEIR was certified as complete, shows the project will have one or more significant effects not discussed in the previous EIR or SEIR, significant effects previously examined will be substantially more severe than shown in the previous EIR or SEIR, or mitigation measure measures are applicable to the project. As stated in the Planning Commission staff report, presentation, and Planning Commission Resolution No. 2020-38, none of these findings are applicable, and therefore the Project does not require subsequent environmental review.

- IV. The Planning Commission's responsibilities include decisions regarding land use and zoning as prescribed by ordinance. There is no City ordinance regarding community workforce agreements for private development projects.
- V. The Metro East Mixed-Use Overlay, Active Urban subzone permits mixed-use development. The project proposes 644 residential units and 15,130 square feet of commercial space. The Metro East Mixed-Use Overlay does not require a minimum amount of commercial square footage for a mixed-use development. A Traffic Impact Analysis was prepared for the proposed project and reviewed by the City's Public Works Agency. The recommendations of the study will be implemented with the construction of the project.

Section 2. The City Council, after hearing, considering and weighing all evidence in the record presented on behalf of all parties and being fully informed of the Planning Commission's decision on the Project, and Appeal Application Nos. 2020-03 and 2020-04, hereby finds and determines that the Planning Commission's decision was not made in error, that the Planning Commission's decision was not an abuse of discretion by the Planning Commission, and that the Planning Commission's decision was supported by substantial evidence in the record.

Section 3. The City Council hereby further finds, determines, and declares as follows:

Based on the substantial evidence set forth in the record, including but not limited to the Environmental Impact Report No. 2006-01 (SCH No. 2006031041) and Subsequent EIR No. 2018-15, the City Council finds that, in accordance with the California Environmental Quality Act, the Project has been determined to be adequately

evaluated in the previously certified Environmental Impact Report No. 2006-01 (SCH No. 2006031041) and Subsequent EIR No. 2018-15, as per Sections 15162 and 15168 of the CEQA Guidelines. All mitigation measures in EIR No. 2006-01 and SEIR No. 2018-15 and associated Mitigation Monitoring and Reporting Program (MMRP) will be enforced and apply to the proposed project. In addition, a traffic impact analysis dated July 30, 2020 was prepared by Linscott, Law and Greenspan which analyzed the Project's impacts on 25 intersections. The off-site improvements listed the Traffic Impact Analysis shall be implemented. A health risk assessment (HRA) dated June 2, 2020 was prepared by Urban Crossroads to identify any impacts from developing a residential community near a major freeway. The HRA finds that a less than significant impact to project residents would occur due to the Project's proximity to a major freeway.

Specifically, none of the conditions identified in Public Resources Code section 21166 and State CEQA Guidelines Section 15162 requiring subsequent environmental review have occurred, because:

- A. The Project does not constitute a substantial change that would require major revisions of the MEMU EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.
- B. There is not a substantial change with respect to the circumstances under which the Project will be developed that would require major revisions of the MEMU EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of the previously identified significant effects.
- C. New information of substantial importance has not been presented that was not known and could not have been known with the exercise of reasonable diligence at the time the MEMU EIR was certified or adopted, showing any of the following: (i) that the modifications would have one or more significant effects not discussed in the earlier environmental documentation; (ii) that significant effects previously examined would be substantially more severe than shown in the earlier environmental documentation; (iii) that mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects, but the Applicant declined to adopt such measures; or (iv) that mitigation measures or alternatives considerably different from those analyzed previously would substantially reduce one or more significant effects on the environment, but which the Applicant declined to adopt.

Further, the City Council finds that, pursuant to State CEQA Guidelines Section 15168, that the Central Pointe Mixed-Use Development is consistent with Environmental Impact Report No. 2006-01 (SCH No. 2006031041) and Subsequent EIR No. 2018-15 including allowable land use, planned density and building intensity, and geographic location analyzed in the program EIR. All mitigation measures in EIR No. 2006-01 and

SEIR No. 2018-15 and associated Mitigation Monitoring and Reporting Program will be enforced and apply to the proposed project.

Section 4. The Applicant shall indemnify, protect, defend and hold the City and/or any of its officials, officers, employees, agents, departments, agencies, authorized volunteers, and instrumentalities thereof, harmless from any and all claims, demands, lawsuits, writs of mandamus, and other and proceedings (whether legal, equitable, declaratory, administrative or adjudicatory in nature), and alternative dispute resolution procedures (including, but not limited to arbitrations, mediations, and such other procedures), judgments, orders, and decisions (collectively "Actions"), brought against the City and/or any of its officials, officers, employees, agents, departments, agencies, and instrumentalities thereof, that challenge, attack, or seek to modify, set aside, void, or annul, any action of, or any permit or approval issued by the City and/or any of its officials, officers, employees, agents, departments, agencies, and instrumentalities thereof (including actions approved by the voters of the City) for or concerning the Project, whether such Actions are brought under the Ralph M. Brown Act, California Environmental Quality Act, the Planning and Zoning Law, the Subdivision Map Act, Code of Civil Procedure Sections 1085 or 1094.5, or any other federal, state or local constitution, statute, law, ordinance, charter, rule, regulation, or any decision of a court of competent jurisdiction. It is expressly agreed that the City shall have the right to approve the legal counsel providing the City's defense, and that Applicant shall reimburse the City for any costs and expenses directly and necessarily incurred by the City in the course of the defense. City shall promptly notify the Applicant of any Action brought and City shall cooperate with Applicant in the defense of the Action.

Section 5. The City Council of the City of Santa Ana hereby denies Appeal Application No. 2020-03 and Appeal Application No. 2020-04, thereby upholding the Planning Commission's approval of Site Plan Review No. 2020-04 as conditioned. This decision is based upon the evidence submitted at the above-said hearing, which includes, but is not limited to: the Request for City Council Action dated January 19, 2021, and exhibits attached thereto, and the public testimony, written and oral, all of which are incorporated herein by this reference.

ADOPTED this ____ day of _____, 2021.

Vicente Sarmiento
Mayor

APPROVED AS TO FORM:
Sonia R. Carvalho
City Attorney

By: John M. Funk
John M. Funk
Sr. Assistant City Attorney

AYES: Councilmembers _____

NOES: Councilmembers _____

ABSTAIN: Councilmembers _____

NOT PRESENT: Councilmembers _____

CERTIFICATE OF ATTESTATION AND ORIGINALITY

I, DAISY GOMEZ, Clerk of the Council, do hereby attest to and certify the attached Resolution No. 2021-XXX to be the original resolution adopted by the City Council of the City of Santa Ana on _____, 2021.

Date: _____

Clerk of the Council