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VIA E-MAIL

October 26, 2020

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Re: Comment on Central Pointe Mixed-Use Development Project

Chair McLoughlin and Members of the Planning Commission:

I am writing on behalf of the Supporters' Alliance for Environmental Responsibility ("SAFER"), a California non-profit organization with members living in and around the City of Santa Ana, regarding the Central Pointe Mixed-Use Development Project, proposed to be located at 1801 East Fourth Street in the Metro East Mixed-Use Overlay ("MEMU") Active Urban zoning district ("Project"). The City of Santa Ana ("City") has received an application for the development of and permit for the Project.

SAFER is concerned that the City is proposing to approve the Project without any environmental review under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000, *et seq*., based on the assertion that the Project was analyzed in the Metro East Use Overlay Zone environmental impact report certified in 2007 and subsequent environmental impact report certified in 2018 (collectively, "MEMU EIR"). The City contends that under CEQA Guidelines sections 15162 and 15168, no further environmental review is required.

A Supplemental EIR (SEIR) or tiered EIR (TEIR) is required for several reasons:

1. the MEMU EIR was a programmatic EIR, not a project-level EIR. No project-level EIR has been prepared for this Project but one is required;
2. the proposed Project is an entirely different project than what was analyzed in the MEMU EIR ("MEMU Project");
3. the proposed Project will have new and different environmental impacts that were not analyzed in the MEMU EIR;
4. the MEMU EIR recognized that the MEMU Project would have several significant and unmitigated environmental impacts. As such, a draft EIR is required to analyze and mitigate the impacts of the proposed Project.

By opting not to proceed with the required SEIR or TEIR, the City has deprived the members of the public of the public review and circulation requirement available for EIRs. SAFER urges the Commission not to approve the Project, and instead to direct staff to prepare a Draft SEIR or TEIR for the Project, and to circulate the EIR for public review and comment prior to Project approval.

I. PROJECT DESCRIPTION

The Project involves a residential and commercial development that would consist of two buildings comprised of 644 residential units and 15,130 square feet of commercial space, 1,300 parking spaces and associated amenities and open space. The Project would be located at 1801 East Fourth Street, within the Metro East Mixed-Use Overlay Active Urban zoning district.

II. CEQA REQUIRES THE CITY TO PREPARE A TIERED EIR FOR THE PROJECT.

CEQA permits agencies to 'tier' EIRs, in which general matters and environmental effects are considered in an EIR "prepared for a policy, plan, program or ordinance followed by narrower or site-specific [EIRs] which incorporate by reference the discussion in any prior [EIR] and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior [EIR]." (Cal. Pub. Res. Code ("PRC") § 21068.5.) "[T]iering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous [EIRs]." (PRC § 21093.) The initial general policy-oriented EIR is called a programmatic EIR ("PEIR") and offers the advantage of allowing "the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." (14 CCR ("CEQA Guidelines") §15168.) CEQA regulations strongly promote tiering of EIRs, stating that "[EIRs] shall be tiered whenever feasible, as determined by the lead agency." (PRC § 21093.)

Once a program EIR has been prepared, "[s]ubsequent activities in the program must be examined in light of the program EIR to determine whether an additional environmental document must be prepared." (CEQA Guidelines § 15168(c).) The first

consideration is whether the activity proposed is covered by the PEIR. (*Id.*) If a later project is outside the scope of the program, then it is treated as a separate project and the PEIR may not be relied upon in further review. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307.) The second consideration is whether the "later activity would have effects that were not examined in the program EIR." (CEQA Guidelines § 15168(c)(1).) A PEIR may only serve "to the extent that it contemplates and adequately analyzes the potential environmental impacts of the project." (*Sierra Nevada Conservation v. County of El Dorado* ("*El Dorado*") (2012) 202 Cal.App.4th 1156.) If the PEIR does not evaluate the environmental impacts of the project, a tiered EIR must be completed before the project is approved. (*Id.*) For these inquiries, the "fair argument test" applies. (*Sierra Club*, 6 Cal.App.4th 1307, 1318; *see also Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1164 (**"**when a prior EIR has been prepared and certified for a program or plan, the question for a court reviewing an agency's decision not to use a tiered EIR for a later project 'is one of law, i.e., the sufficiency of the evidence to support a fair argument.'").)

Under the fair argument test, a new EIR must be prepared "whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. (*Id.* at 1316 (quotations omitted).) When applying the fair argument test, "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary." (*Sierra Club*, 6 Cal. App. 4th at 1312.) "[I]f there is substantial evidence in the record that the later project may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, notwithstanding the existence of contrary evidence." (*Id*. at 1319.)

In *Friends of College of San Mateo Gardens* the California Supreme Court explained the differing analyses that apply when a project EIR was originally approved and changes are being made to the project, and when a tiered program EIR was originally prepared and a subsequent project is proposed consistent with the program or plan:

> For project EIRs, of course, a subsequent or supplemental impact report is required in the event there are substantial changes to the project or its circumstances, or in the event of material new and previously unavailable information. (*Friends of Mammoth*, citing § 21166.) In contrast, when a tiered EIR has been prepared, review of a subsequent project proposal is more searching. **If the subsequent project is consistent with the program or plan for which the EIR was certified, then 'CEQA requires a lead agency to prepare an initial study to determine if the later project may cause significant environmental effects not examined in the first tier EIR.'** (*Ibid*. citing Pub. Resources Code, § 21094, subds. (a), (c).) 'If the subsequent project is not consistent with the program or plan, it is treated as a new project and must be fully analyzed in a project—or another tiered EIR if it may have a significant effect on the environment.' (*Friends of Mammoth*, at pp. 528–529, 98 Cal.Rptr.2d 334.)

(*Friends of Coll. of San Mateo Gardens v. San Mateo County Cmty. Coll. Dist.* ("*San*

Mateo Gardens") (2016) 1 Cal.5th 937, 960.)

The MEMU EIR is explicit that it was prepared in accordance with CEQA's Program EIR provisions, and that subsequent projects must undergo the tiered review process just described. The MEMU EIR states "[e]ach development proposal undertaken during the planning horizon of the Overlay Zone must be approved individually by the City in compliance with CEQA. Therefore, **the MEMU Overlay Zone is analyzed at a program level**, which evaluates the effects of the implementation of the entire Overlay Zone." (Metro East Mixed-Use Overlay District Expansion and Elan Development Projects Subsequent EIR, p. 1-4 (emphasis added).) As a result, CEQA requires the City to prepare an initial study to determine if the Project *may* cause significant environmental effects not examined in the MEMU EIR. (Pub. Res. Code § 21094.) There is substantial evidence supporting a fair argument that the Project may result in significant environmental impacts that were not previously analyzed in the MEMU EIR. Accordingly, an EIR must be prepared for the Project.

III. THE CITY CANNOT BYPASS CEQA REVIEW FOR THE PROJECT BECAUSE IT WAS NOT ADDRESSED IN THE PROGRAM EIR.

The Project has never been analyzed under CEQA. The City incorrectly states that the Project has already been analyzed under CEQA in the MEMU EIR. Those documents analyze the City's mixed-use overlay zone, and the expansion of the Metro East mixed-use overlay zone and the Elan Project. (*See* City of Santa Ana Metro East Mixed-Use Overlay Zone EIR, p. 1-1; *see also* Metro East Mixed-Use Overlay District Expansion and Elan Development Projects Subsequent EIR, p. 1-1.) Neither of those documents analyzed this Project, which is also made clear by the City's analysis of the Elan Project in the MEMU EIR and exclusion of such an analysis for the proposed Project. Since the Project has not undergone CEQA review, the City must prepare an EIR for the Project.

As the California Supreme Court explained in *San Mateo Gardens*, subsequent CEQA review provisions "can apply only if the project has been subject to initial review; they can have no application if the agency has proposed a new project that has not previously been subject to review." (*Friends of Coll. of San Mateo Gardens v. San Mateo County Cmty. Coll. Dist.* ("*San Mateo Gardens*") (2016) 1 Cal.5th 937, 950.) If the proposed Project had already been addressed in the MEMU EIR, the standard for determining whether further review is required would be governed by CEQA Guidelines 15162 and Public Resources Code section 21166, and an addendum could potentially be allowed under CEQA Guidelines section 15164. These sections are inapplicable here, however, because the proposed Project has never undergone CEQA review. Neither an EIR nor a negative declaration was prepared for the Project, and the Project was never mentioned or discussed in the MEMU EIR. As a result, the City cannot rely on the subsequent review provisions of CEQA Guidelines sections 15162 or 15164, and must instead prepare a tiered EIR under CEQA Guidelines 15168.

IV. THERE IS SUBSTANTIAL EVIDENCE THAT THE PROJECT WILL HAVE A SIGNIFICANT ENVIRONMENTAL IMPACT.

Formaldehyde is a known human carcinogen. Many composite wood products typically used in residential construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. 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 construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims. Given the prominence of materials with formaldehyde-based resins that will be used in constructing the Project and the residential buildings, there is a significant likelihood that the Project's emissions of formaldehyde to air will result in very significant cancer risks to future residents in the buildings. Even if the materials used within the buildings comply with the Airborne Toxic Control Measures (ATCM) of the California Air Resources Board (CARB), significant emissions of formaldehyde may still occur.

The residential buildings will have significant impacts on air quality and health risks by emitting cancer-causing levels of formaldehyde into the air that will expose workers and residents to cancer risks well in excess of SCAQMD's threshold of significance. A 2019 study by Chan et al. (available at https://escholarship.org/content/qt44g399sb/qt44g399sb.pdf) measured formaldehyde levels in new structures constructed after the 2009 CARB rules went into effect. Even though new buildings conforming to CARB's ATCM had a 30% lower median indoor formaldehyde concentration and cancer risk than buildings built prior to the enactment of the ATCM, the levels of formaldehyde will still pose cancer risks greater than 100 in a million, well above the 10 in one million significance threshold established by the SCAQMD.

Based on expert comments submitted on other similar projects and assuming all the Project's and the residential building materials are compliant with the California Air Resources Board's formaldehyde airborne toxics control measure, future residents and employees using the Project will be exposed to a cancer risk from formaldehyde greater than the SCAQMD's CEQA significance threshold for airborne cancer risk of 10 per million. Currently, the City does not have any idea what risk will be posed by formaldehyde emissions from the Project or the residences.

The City has a duty to investigate issues relating to a project's potential environmental impacts. *See County Sanitation Dist. No. 2 v. County of Kern*, (2005) 127 Cal.App.4th 1544, 1597–98. ["[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts."]. "If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

The failure to address the project's formaldehyde emissions is contrary to the California Supreme Court's decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("*CBIA*"). 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 adverse environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. (*Id*. at 801 ("CEQA calls upon an agency to evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present").) 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 of the Project are not an existing environmental condition. Those emissions to the air will be from the Project. Residents will be users of the Project. Once the Project is built, emissions will begin at levels that pose significant health risks. Rather than excusing the City from addressing the impacts of carcinogens emitted into the indoor air from the project, the Supreme Court in *CBIA* expressly finds that this type of effect 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., Pub. Res. Code §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d).) It goes without saying that the 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 near the project site.

Given the lack of study conducted by the City on the health risks posed by emissions of formaldehyde, a fair argument exists that such emissions from the Project may pose significant health risks. As a result, the City must prepare a project specific EIR to analyze and mitigate this potentially significant impact. This impact was not analyzed in any CEQA document.

V. THE CITY MUST PREPARE AN EIR BECAUSE THE MEMU EIR ADMITS SIGNIFICANT AND UNAVOIDABLE ENVIRONMENTAL IMPACTS.

An EIR must be prepared for the Project because the MEMU EIR determined that the MEMU Project would cause significant and unavoidable impacts on air quality, noise,

transportation and traffic, and cultural resources.

In the case of *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 122-125 (disapproved on other grounds by *Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal.4th 1086), the court of appeal held that when a "first tier" EIR admits a significant, unavoidable environmental impact, then the agency must prepare second tier EIRs for later projects to ensure that those unmitigated impacts are "mitigated or avoided." (*Id*. citing CEQA Guidelines §15152(f).) The court reasoned that the unmitigated impacts was not "adequately addressed" in the first tier EIR since it was not "mitigated or avoided." (*Id*.) Thus, significant effects disclosed in first tier EIRs will trigger second tier EIRs unless such effects have been "adequately addressed," in a way that ensures the effects will be "mitigated or avoided." (*Id*.) Such a second tier EIR is required, even if the impact still cannot be fully mitigated and a statement of overriding considerations will be required. The court explained, "The requirement of a statement of overriding considerations is central to CEQA's role as a public accountability statute; it requires public officials, in approving environmental detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to substantial evidence in support." (*Id*. at 124-125.) The court specifically rejected a prior version of the CEQA guidelines regarding tiering that would have allowed a statement of overriding considerations for a program-level project to be used for a later specific project within that program. (*Id*. at 124.) Even though "a prior EIR's analysis of environmental effects may be subject to being incorporated in a later EIR for a later, more specific project, the responsible public officials must still go on the record and explain specifically why they are approving the later project despite its significant unavoidable impacts." (*Id*. at 124-25.)

Since the MEMU EIR admitted numerous significant, unmitigated impacts, a second tier EIR is now required to determine if mitigation measures can now be imposed to reduce or eliminate those impacts. If the impacts still remain significant and unavoidable, a statement of overriding considerations will be required.

VI. CONCLUSION

For the above reasons, SAFER respectfully requests the Planning Commission decline to approve the Project, and instead direct Planning Staff to prepare and circulate an EIR for public review. SAFER preserves its right to make additional comments on the Project.

Sincerely,

Paige Fennie
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