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RECEIVED FROM HAZARD ODERMAN
AS PUBLIC RECORD FOR COUNCIL MEETING
OF 11-1-2022
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November 1, 2022

VIA E-MAIL

Mayor Barbara Delgleize and Members of the
City Council
City of Huntington Beach
200 Main Street
Huntington Beach, CA 92648

Re: City Council's November 1, 2022, Meeting; Agenda Items 20 and 21;
Bella Terra Mixed-Use Project

Dear Mayor Delgleize and Members of the City Council:

I am submitting this letter on behalf of Bella Terra Associates LLC ("BTA"). This letter responds to the (last minute) October 31st letter submitted to you by the Lozeau Drury law firm on behalf of the Supporters Alliance for Environmental Responsibility ("SAFER"). I respectfully request that a copy of this letter be entered into the public hearing record at tonight's hearing.

Much of SAFER's October 31 letter covers the same ground as its September 27 letter to the Planning Commission. I previously addressed those points – and others – in my October 26 letter to the Council and will not repeat those points here.

1. **General Legal Standards; The City Properly Exercised its Discretion to Determine that the Project's Environmental Impacts Were Adequately Addressed in the Prior CEQA Documents, Subject to the Few Minor Mitigation Measures Imposed as Noted in the Addendum.**

SAFER's argument that an entirely new EIR is required because a different mix of land uses is proposed on 3.38 acres of the 63.75 acre property addressed in the 2008 EIR – more residential and less commercial – is simply wrong. As the Supreme Court held in *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937 ("*San Mateo Gardens*"), the case primarily relied upon by SAFER for this assertion, the essential question is whether "the original environmental document retains some informational value" for analysis of the environmental impacts of the modified project. It is only if the previous environmental document "in this case, the 2008 Final EIR" "is wholly irrelevant to the decisionmaking process" that the lead agency must "start from the beginning. . . ." (*Id.* at pp. 951-952.) "If the original environmental document retains some informational value despite the proposed changes, then the agency proceeds to decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental

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document. . . .” (*Id.*) And “whether an initial environmental document remains relevant despite changed plans or circumstances. . . is. . . a question for the agency to answer in the first instance, drawing on its particular expertise.” If the agency’s decision on that point is challenged in court, the only question is “whether the agency’s decision is supported by substantial evidence, . . . not to weigh conflicting evidence and determine who has the better argument.” (*Id.* at 953.)

Applying this correct legal standard to the Project before you, BTA agrees with your City staff and Planning Commission that the 2008 EIR (as updated with the 2010 Addendum) “retains some informational value” for analysis of the current Project’s environmental impacts and that the modest changes – more residential and less commercial on about 5% of the Bella Terra site – do not necessitate major revisions to the EIR.

In addition, and contrary to SAFER’s assertion, the fact that the 2008 Bella Terra EIR was labeled a “Program” EIR rather than a “Project” EIR makes no difference in terms of the deferential standard of review applicable to judging whether the City’s decision to use an Addendum is appropriate. The City’s decision will be upheld in the courts as long as there is any substantial evidence to support it, *even if* there is some disagreement on the point. See, e.g., *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 204, where the Court, citing another case for the same proposition, noted that “[o]nce an agency has prepared an EIR, its decision not to prepare a supplemental or subsequent EIR for a later project is reviewed under the deferential substantial evidence standard. [Citations.] ‘This rule applies to determinations regarding whether a new EIR is required following a program-EIR level of review.’”

Here, your staff and highly qualified consultant team went through each and every environmental impact addressed in the 2008 EIR (as updated by the 2010 Addendum), compared the Project impacts to the impacts previously addressed, and determined that the EIR (as so updated) adequately addressed virtually all impacts of the Project. This is because – as SAFER simply refuses to acknowledge – the impacts of the current Project are in most instances more than offset by the *reduction* in impacts caused by the elimination of a significant amount of existing commercial uses on the Project site.

SAFER’s attorneys also argue (at pp 6-7 of their letter) that since the 2008 EIR identified significant impacts from the overall Bella Terra project, a “second tier” EIR is now required to ensure those unmitigated impacts are mitigated or avoided. The argument is misplaced. If SAFER were correct, after all, the subsequent environmental review provisions under CEQA would be stood on their head – and any time an EIR is prepared that identifies significant impacts the project applicant (and local agency) would be caught in an endless loop of having to prepare EIR after EIR, as subsequent phases of a project or minor revisions to a project are brought forward. This would totally eviscerate the provisions of CEQA that require a new or supplemental EIR only when the proposed changes to a previously approved project are “substantial” and “will require major revisions of the previous EIR.” *San Mateo Gardens, supra*, at 950.

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2. The Two New Experts Cited By SAFER Do Not Provide Any Information that Necessitates Preparation of a New or Supplemental EIR.

In an obvious attempt to sandbag the City and BTA, SAFER waited until the very last minute to submit to the City – just this morning! – assertions by 2 engineers that SAFER says support its call for preparation of an EIR. As of the moment I am drafting this letter, I believe that ICF, BTA’s highly qualified CEQA consulting firm who has assisted the City in preparing the Addendum, is preparing a rebuttal of these 2 late submittals. I defer to ICF as to matters within its area of expertise, but I offer the following thoughts as well:

A. The Indoor Environmental Engineering (“IEE”) memo, if taken at face value and if followed to its logical conclusion, would require that a full Environmental Impact Report be prepared for every single project any local agency ever considered anywhere in the State of California. Surely this cannot be the case!

B. The IEE report is built on mountains of speculation—including: (1) how to extrapolate from older studies prepared for unidentified types of housing (single-family homes? apartments?) with unidentified assumptions regarding the quantities and types of formaldehyde-containing products; (2) unreasonable assumptions regarding the levels of exposure to formaldehyde residents of the Project’s apartments and employees in the completed commercial component of the Project would supposedly receive (e.g., the assumption residents would stay in their units 24 hours per day and employees would remain in their same jobs 40 hours per week, 50 weeks per year, for 45 years of their lives!); (3) unstated assumptions regarding the types of formaldehyde-emitting products used in the Project; (4) an apparent absence of studies of commercial projects (none are mentioned); (5) a failure to account for ventilation and air conditioning systems and open windows, all of which IEE acknowledges would help to reduce formaldehyde exposure for residents/occupants, but which IEE appears to discount because Project residents allegedly would keep their exterior windows shut to prevent noise intrusion (notwithstanding that the units are upper-story residential units and, as the noise consultant who prepared the Technical Report underlying the Addendum noted, ambient noise levels in the vicinity are relatively low); and (6) a failure to provide recent data based upon the 2019 updates to Title 24 (dealing with newer ventilation standards) and the updated CARB Phase 2 standards and how those regulatory changes have mitigated indoor air quality issues/concerns.

The IEE report does not amount to “substantial evidence.” As stated in my October 26th letter, under CEQA “substantial evidence” does not include “argument, speculation, [or] unsubstantiated opinion. . . .” (State CEQA Guidelines, 14 Cal. Code of Regs., Section 15384(a).) The IEE report lacks foundation valid for the Project and amounts to sheer speculation.

C. Even if one strings together the long list of speculative worst-case assumptions upon which IEE’s conclusions are based (and assuming each Project resident occupies his/her unit

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for 12 hours per day, 7 days per week, 52 weeks per year), IEE's conclusion is that there would be a cancer risk affecting one out of every 16,666 residents. Assuming 2 residents per unit for each of the 300 units in the Project (which I submit is a reasonable assumption), this means that 8,333 additional residential units—or approximately 28 similarly sized 300-unit apartment projects—would have to be constructed before a single additional case of cancer would (according to IEE) occur (not to mention that IEE does not identify the severity of the cancer risk). While any increase in cancer risk is, of course, undesirable, CEQA only addresses environmental changes that affect the public at large, not impacts that impact only a handful of persons. See, e.g., *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 782 (held: alleged health risks to project residents and construction workers from contaminated soils did not constitute a fair argument of an impact to the environment under CEQA since, among other reasons, the question under CEQA “is whether a project [would] affect the environment of persons in general, not whether a project [would] affect particular persons.” The tiny cancer risk identified by IEE does not trigger the need for preparation of a full-blown EIR.

D. Contrary to IEE's assertion (at pp. 11-12), the Technical Reports supporting the Addendum *did* address the impact of the project related air pollutant emissions from all sources. What IEE fails to mention is that the air quality consultant's conclusion was that such emissions would be substantially *reduced* due to the large net reduction in motor vehicle traffic (and because the Project itself will generate virtually no stationary source emissions). IEE asserts, without foundation, that “it is my experience” that emissions levels will increase, but the author of the IEE report does not even acknowledge whether he read the traffic reports and analysis prepared for the Project and discounted Project impacts based on the reduction of emissions from baseline existing conditions. Again, sheer speculation.

E. The IEE report outdoes itself in stringing together multiple layers of speculation and conjecture regarding supposed benzene emission impacts on Project residents by asserting that (1) the nearby Costco gas station may at some time in the future unlawfully discharge contaminants into the soil, (2) Costco may then unlawfully fail to contain, mitigate, or clean up the spill(s), (3) the resulting contamination may then migrate underneath the buildings on the Project site, and (4) the contaminated soil may then cause vapors that will rise up into the Project and cause Project residents to get cancer. My, what an imagination! Again, none of these ruminations or fears are supported by the slightest bit of evidence and accordingly must be ignored. In addition, since the Costco gas station is now part of the “existing environment,” IEE's baseless speculation is irrelevant to the sort of analysis required under CEQA, which (subject to a few exceptions) requires only the analysis of the impacts of the project on the environment, *not* the impacts of the environment on the project. See, e.g., *California Building Industry Association v. Bay Area AQMD* (2015) 62 Cal.4th 369, 385-388.

F. SAFER's so-called noise expert (Wilson IHRIG) bases her opinions on a similar lack of factual foundation. For example, she asserts the Addendum should include a more

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complete analysis of the impacts of construction noise on “nearby schools,” without bothering to identify those schools or where they are situated in relation to the Project. The reality is that the nearest educational institution (the Fusion Academy – located within a commercial building without operable windows) is far distant from the Project site and some 550 feet from the Project’s proposed construction haul route, and the nearest buildings at the next closest educational institution (Golden West College) are more than 2,000 feet away from the haul route! No educational facilities will be adversely impacted by Project noise.

G. Wilson IHRIG also complains that the mitigation measure requiring the Project to use augur cast piles (instead of impact driven piles) has not been “codified.” BTA respectfully disagrees and is prepared to comply with this mitigation measure. BTA’s position is the same with respect to the other mitigation measures listed at p. 3 of the IHRIG report.

H. Wilson IHRIG’s disagreement with whether noise impacts are “substantial” or not (IHRIG letter at pp. 3-4) does not prove the City has failed to mitigate the Project’s noise and vibration impacts. The City gets to establish its own noise standards.

* * *

For the foregoing reasons, I request you uphold your City staff/consulting team and Planning Commission’s recommendations and actions and accept the Addendum as an adequate document under CEQA for consideration of the environmental impacts of the Project.

Respectfully submitted,

RUTAN & TUCKER, LLP


Jeffrey M. Oderman

JMO:mrs

cc: Hayden Beckman, City of Huntington Beach
Kris Golder, Bella Terra Associates LLC



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CONSULTANT
TO APPLICANT

Memorandum

Prepared for: Hayden Beckman, Senior Planner, City of Huntington Beach

Prepared by: Keith Lay, ICF

Date: November 1, 2022

Re: **Bella Terra Residential Project —Response to October 31, 2022, Letter from Lozeau Drury to City Council**

This memorandum provides responses to the air quality, health risk, and noise comments included in the letter submitted by Lozeau Drury, LLP on behalf of the Supporters Alliance for Environmental Responsibility ("SAFER") (hereafter, "Lozeau Drury letter") dated October 31, 2022, regarding the City of Huntington Beach City Council's Public Hearing Item Nos. 20-21 for the Bella Terra Residential Project (project).

Comment A. Future Residents Will Face Elevated Cancer Risks from Indoor Formaldehyde Emissions

The commenter maintains that the project would have a significant impact on indoor air quality due to formaldehyde and refers to a research paper, *Indoor Air Quality in California Homes with Code-required Mechanical Ventilation* (Chan, W., Kim, Y., Offerman, F., and Walker, I., 2020). The research paper collected data from 70 homes about ventilation practices and conducted pollutant measurements of fine particulate matter (PM_{2.5}) indoors and outdoors and formaldehyde and carbon dioxide (CO₂) indoors.

The building conditions in the research paper are dissimilar to the project because the research paper was seeking to study single family detached homes built in 2011 through 2017 to comply with the 2010 through 2016 versions of the California Title 24 standards, whereas the project would be built to the most current and applicable California Title 24 standards (the 2019 version of the California Title 24 standard is the current version as of the date of this response) and is comprised of apartment with a mix of floor plans. The Title 24 2019 standards include new ventilation requirements that improve indoor air quality protecting residents from air pollution originating from outdoor and indoor sources.¹ The adopted fan sizing method in the 2019 Title 24 includes requirements that ensures there is no structural bias towards higher pollutant exposure in homes using unbalanced ventilation systems, unlike the previous Title 24 standards, which could worsen indoor air quality by 20 percent on average.² Further, the 2019 Title 24 requirements referenced above ensure that ventilation systems consistently demonstrate lower indoor air quality exposures across various home types (e.g., homes with more air leakage, homes with more airtightness) than

¹ California Department of General Services Building Standards Commission. 2020. *2019 California Green Building Standards Code, Title 24, Part 11 with July 2021 Supplement*. Available: <https://codes.iccsafe.org/content/CGBC2019P4>. Accessed: November 2022.

² Chan, W., Kim, Y., Singer, B., and Walker I. 2019. *Ventilation and Indoor Air Quality in New California Homes with Gas Appliances and Mechanical Ventilation*. Lawrence Berkeley National Laboratory, Energy Technologies Area, LBNL-2001200, DOI: 10.20357/B7QC7X.

prior standards.³ Therefore, it is misleading to directly apply results from the referenced research paper to the project.

The State of California's own regulatory agency with authority over this issue, the California Air Resources Board (CARB), has stated that the control measures it has approved for reducing emissions, including formaldehyde, from composite wood products provide a level of control that protects health and safety. CARB makes this point by stating directly in its Frequently Asked Questions for Consumers on Reducing Emissions from Composite Wood Products (CWP) that, from a public health standpoint, the CWP Regulation's emission standards are set at low levels intended to protect public health.⁴ The first emission standards (Phase 1) went into effect in 2009. The more stringent Phase 2 standards are now in effect for all composite wood panels and finished goods sold in California. Prior to the CWP Regulation, formaldehyde emissions were often ten to twenty-fold higher than the current allowable levels. The regulation also includes provisions for no-added formaldehyde and ultra-low emitting formaldehyde-based resins, to encourage the use of these lower-emitting resins in composite wood products. Thus, the project's residential uses, which would be built to the newer ventilation requirements found in the Title 24 standards and include the stringent CARB Phase 2 standards, would not have significant indoor air quality impacts. Furthermore, CARB's Airborne Toxic Control Measures (ATCM) program functions as a certified state regulatory program.⁵ Therefore, the commenters assertion that the project would be far above the South Coast Air Quality Management District's (SCAQMD) CEQA significance threshold for airborne cancer risk of 10 per million is invalid. In addition, the commenters comparison to the SCAQMD thresholds is not appropriate, as the SCAQMD thresholds apply to stationary and mobile sources of emissions, not consumer materials. Formaldehyde in building materials, as noted above, is regulated by CARB not SCAQMD. Furthermore, the commenter is speculating in the assertion that composite wood materials would be used in the interior of the buildings. Indoor building materials will not be known until the building permit stage, and, as stated above, these materials will be required to comply with Title 24 standards and CARB Phase 2 requirements.

Moreover, the commentator speculates that the project could have an effect on the project residents, which is not considered to be an impact under CEQA and need not be analyzed in the project's EIR. See, e.g., *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 782 (Court concluded that alleged health risks to project residents and construction workers from contaminated soils did not constitute a fair argument of an impact to the environment under CEQA. "In general, CEQA does not regulate environmental changes that do not affect the public at large: "the question is whether a project [would] affect the environment of persons in general, not whether a project [would] affect particular persons." [Citations omitted]). The project would not exacerbate an existing environmental condition, as all products that would be newly installed in the project's

³ Ibid.

⁴ California Air Resources Board, *Frequently Asked Questions for Consumers, Reducing Formaldehyde Emissions from Composite Wood Products*, Available: https://ww3.arb.ca.gov/toxics/compwood/consumer_faq.pdf?_ga=2.32900281.682464648.1573169874-1026610208.1565143819. Accessed: November 2022.

⁵ The California Secretary for Resources has determined that CARB meets the criteria for a Certified State Regulatory Program (Title 14, California Code of Regulations (CCR) §15251(d)). This certification allows CARB to adopt rules, regulations, standards and plans, and exempts CARB from the requirement to prepare Initial Studies, Notices of Preparation, Negative Declarations or Environmental Impact Reports (EIRs).

uses would meet the stringent CARB Phase 2 standards, as applicable, for formaldehyde as discussed above, and the project's residential uses would incorporate improved ventilation standards in compliance with 2019 Title 24 Standards as discussed above. As a residential development, the project does not represent a unique or special development that needs addressing in CEQA, which is primarily concerned with a project's impact on the environment; therefore, no special analysis or mitigation is required under CEQA. The project will comply with the codes and regulations in California applicable to the project's uses, which adequately address potential emissions and risks from building materials to ensure safe practices and healthy indoor air.

Comment B. Hazardous Soil Vapors from the Costco Gas Station Will Negatively Impact Indoor Air Quality and Impact the Health of Future Residents

The commentator speculates that the project could have an effect on the project residents, which is not considered to be an impact under CEQA and need not be analyzed in the project's EIR. See, e.g., *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 782 (Court concluded that alleged health risks to project residents and construction workers from contaminated soils did not constitute a fair argument of an impact to the environment under CEQA. "In general, CEQA does not regulate environmental changes that do not affect the public at large: "the question is whether a project [would] affect the environment of persons in general, not whether a project [would] affect particular persons." [Citations omitted]). In addition, the court case referenced in the comment's footnote refers to the dispersal of settled MTBE from an abandoned gas station that affect the surrounding environment. Those conditions do not apply to the proposed project. Therefore, the potential health risks associated with contaminated soils were not considered.

Comment C. An EIR Must Be Prepared to Disclose and Mitigate the Project's Significant Indoor Air Quality and Adverse Health Impacts

Please refer to the responses to Comments A and B above. No additional mitigation measures are required.

Comment D. The Addendum Obscures the Project's Likely Impacts Upon Sensitive Noise Receptors, Including School Children and Vulnerable Residents

As discussed in Section 7.1.1 of the Noise and Vibration Technical Report (ICF, April 2022), the construction staging, loading, and haul truck area would be in the existing loading dock area at the center of Bella Terra Mall, which is surrounded by existing commercial buildings. Trucks would enter and exit this area via the driveway to the north, then Central Avenue to and from I-405. This haul route would be 550 feet from the Fusion Academy and more than 2,000 feet from the buildings located on the campus of Golden West College. Based on a noise level of 77 dBA at a distance of 50 feet, the truck noise would be reduced to 45 dBA at Golden West College and to 56 dBA at Fusion Academy. These noise levels are far below the 75 dBA Lmax permitted by the City of Huntington Beach in Section 8.40.050 of the municipal code. In addition, these noise levels do not include any

noise attenuation provided by the existing structures located between the haul routes and the schools, such as the Hotel Huntington Beach located between the haul route and the Fusion Academy. These noise levels are the maximum noise levels associated with intermittent activities. Furthermore, the Fusion Academy is located within a commercial building that does not have operable windows. Therefore, the average noise levels would not exceed the 55 dBA exterior noise level or 40 dBA interior noise level referenced in the comment.

Section 7.1.1 of the Noise and Vibration Technical Report (ICF, April 2022) does disclose that the construction activities could result in an increase in noise of up to 23 dB when compared to the existing conditions. Although these short-term increases would be very noticeable and may cause nuisance or annoyance to nearby residents, average construction noise levels are less than the 80 dBA Leq threshold established by the City in Section 8.40.090 of its Municipal Code. Therefore, although some large noise increases are predicted, the resulting noise levels would not exceed the applicable City noise limits for temporary construction activities.

Comment D. The Addendum Fails to Adopt Legally Enforceable Mitigation Measures and Improperly Defers Mitigation

As discussed in Chapter 8 of the Noise and Vibration Technical Report (ICF, April 2022), after implementing PDF-NOI-1 through PDF-NOI-4, the project's noise and vibration impacts have been reduced to below a level of significance. Therefore, there are no additional mitigation measures to enforce.

Project design feature PDF-NOI-3 does require the evaluation of the final plans by an acoustical consultant to ensure that the onsite mechanical and electrical equipment is in compliance with the City's nighttime stationary source noise thresholds. At this time, the size, design, and manufacturer of the HVAC equipment is unknown. To ensure that a conservative assessment was included in the noise analysis, the noise levels were calculated assuming that the compressors would be distributed across the project rooftops and could potentially all run simultaneously. Including the noise attenuation provided by the roof edge, and fewer compressors operating simultaneously, would reduce the noise levels to below the City's standards.