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VIA E-MAIL

Mayor and City Councilmembers of the City of Huntington Beach
2000 Main Street
Huntington Beach, CA 92648
c/o Robin Estanislau, City Clerk
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Re: 11/7/23 City Council Agenda Item No. 26 - Bolsa Chica Senior Living Community
Objection Letter

Dear Hon. Mayor and City Council Members:

This letter is submitted on behalf of appellant Brian Thienes and is a supplement to the prior letters submitted on behalf of Mr. Thienes. As discussed herein, the City should not approve the Bolsa Chica Senior Living Community Project at this time as submitted. The City should not amend its General Plan, amend its Zoning Map and Zoning Text, adopt a Specific Plan to alter the zoning requirements for this property for this project and the City should grant Mr. Thienes' appeal reversing the Planning Commission's approval of the Conditional Use Permit. To be clear, Mr. Thienes is not opposed to the development of a senior living facility; however, he does oppose and object to this giant building, close to the street, that over-intensifies the use and is completely out of character with the surrounding area.

1. This proposed project is a blatant and improper attempt to spot zone.

The proposed Bolsa Chica Senior Living Project requires the City to change its General Plan, its Zoning Map, its Zoning Text, adopt a Specific Plan and adopt a Conditional Use Permit in order to approve this massive building which grossly exceeds height, density and intensity under the current zoning. The requested approvals require the City to bend its standards which apply to other properties near (and far) within the City. This attempt to spot zone is improper and unfair.

Major land use treatises agree on what spot zoning is:

> [Spot zoning is] the oldest recognized form of zoning corruption . . . . Historically, spot zoning concerns centered on municipal

> favoritism . . . Identified instances of spot zoning are always presumptively invalid.

(Ryan, "Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning" *Harvard Negotiation Law Review* (Spring 2002) vol. 7:337, p. 352.)

> Typically, in such a case, the land in question has been "upzoned" at the owner's request to allow a higher density or more intensive use or development.

(Rathkopf's *The Law of Zoning and Planning* (Thomson-West 4th ed. 2011) vol. 3, Ch. 41, § 41.2, p. 41-4.) That is precisely what is being proposed by the City and applicant here. This *preferential* form of spot zoning is its original form and is referred to as "classic" spot zoning:

> An amendment intended only to benefit the owner of the rezoned tract represents the **classic case of spot zoning**. This is most evident when an amendment is tailored to encompass only the owner's parcel.

(Rathkopf's *The Law of Zoning and Planning, supra*, § 4.10 ["Benefit to owner of parcel"], p. 41-39-40 [emphasis added].)

Throughout the United States, spot zoning is viewed as the antithesis of rationally planned zoning:

- Spot zoning "**is the very antithesis of planned zoning**." (*Griswold v. City of Homer* (Alaska, 1996) 925 P.2d 1015, 1020.)

- "Spot zoning is **preferential treatment which defeats a preestablished comprehensive plan. . . . It is piecemeal zoning, the antithesis of planned zoning**." (*Pharr v. Tippett* (Texas, 2001) 616 S.W.2d 173, 177.)

- By definition, spot zoning is "the antithesis of planned zoning." (*Palisades Properties, Inc. v. Brunetti* (New Jersey, 1965) 44 N.J. 117, 207.)

More than 80 years ago, the California Supreme Court disparaged spot zoning as "evil":

> A zoning ordinance places limitations upon the use of land within certain areas in accordance with a general policy which has been adopted. But because compliance with the ordinance may present

> unusual difficulties as to certain property, almost every zoning ordinance includes provisions under which an owner may apply to an administrative board for permission to put his land to a non-conforming use. **This procedure has been devised in order to minimize the acknowledged evils of 'spot zoning' by amendment of the zoning ordinance.**

(*Rubin v. Board of Directors of City of Pasadena* (1940) 16 Cal.2d 119, 124 [emphasis added].)

Fifty-seven years later, a Florida court analogized the "erosive effect" spot zoning has on planned zoning not to an evil, but to a disease—cancer: "The term "spot zoning" does not do it justice. Perhaps 'melanoma zoning' or, for short, 'melazoning' would be more appropriate." (*Bird-Kendall Homeowners Association and Richard Still v. Metropolitan Dade County Board of County Comm'rs* (Fla. 1997) 695 So.2d 902.)

Our local Orange County Court of Appeal—Fourth District, Division Three—has held that the creation of an "island" of greater zoning density surrounded by lower density ***is*** spot zoning:

> We hold **the creation of an island of property with less restrictive zoning in the middle of properties with more restrictive zoning is spot zoning**.

(*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1314 [emphasis added].)

Here, the various approvals requested are a blatant attempt to spot zone this specific 3.1-acre property to allow a more intense and dense use that is a massive five-story above-ground building with subterranean construction that is entirely out of character with the surrounding area and the existing zoning of that area. In *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, the California Supreme Court explained how zoning is supposed to be all about fairness to the community as a whole:

> A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare. [] **If the interest of these parties . . . is not sufficiently protected, the**

> **consequence will be subversion of the critical reciprocity upon which zoning regulation rests.**

(*Id.* at p. 517-518.) In subverting zoning's "critical reciprocity," and benefit to one landowner to the detriment of others, spot zoning is governmental discrimination. (*Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1268 ["The essence of spot zoning is **irrational discrimination**."].)

Even worse, if the City approves this attempt to spot zone, the City is well on its way to eradicating proper planning in the City. If the City approves this project and the panoply of exceptions and amendments to the City's General Plan and zoning, the City will set a dangerous precedent providing later applicants in this area and elsewhere in the City with support to spot zone and intensify uses contrary to the City's planning documents. The City should reject the requested approvals for this project, as presently constituted.

2. The City's attempt to approve a General Plan Amendment for this proposed project, and then pretend that there is General Plan consistency for the other approvals is disingenuous.

In order to process the many amendments needed for this proposed project, the City also has to amend its General Plan. The proposed General Plan amendment No. 21-004 is specific to this property and proposed project and changes the General Plan's Land Use Map. The City's attempt to bend its General Plan in order to permit this proposed project is improper. Indeed, in order to process the other amendments and approvals sought by the applicant, the City must find General Plan consistency. Here, the City is expressly amending its General Plan in order to achieve such consistency which is improper. For example, in order to approve a conditional use permit, Huntington Beach Municipal Code Section 241.10 requires a finding that "the granting of the CUP will not adversely affect the General Plan." Here, the City is amending the General Plan to allow the Mixed Use Specific Plan designation which would permit the massive, much more intense construction and development, exceeding the height and density limitations, among others, that otherwise exist. As another example, for the Zoning Map Amendment No. 22-003 staff proposes a finding that the amendment is "consistent with the goals, objectives, policies, *general land uses* and programs specified in the General Plan." The alleged consistency with the General Plan land uses is only achieved by the General Plan amendment. The City should not amend the General Plan in order to attempt to maintain a fiction of General Plan consistency in order to provide this massive project with the necessary approvals.

3. The City lacks substantial evidence to support the "findings" for the Zoning Map Amendment, Zoning Text Amendment and Conditional Use Permit.

Included on this Agenda Item is Attachment No. 1 which is staff's suggested findings of approval for the Zoning Map Amendment No. 22-003, Zoning Text Amendment No. 22-0045 and Conditional Use Permit No. 21-024. In support of those actions, staff has provided a number of purported "findings" alleging consistency with the General Plan. Specifically, staff has identified various General Plan goals and policies that are provided as purported support for this proposed project. However, there is no analysis provided by staff in the staff report or elsewhere to support such assertions/findings. The public is not aware of any analysis conducted by the City or staff to support the statements and findings. At a minimum, any analysis that was conducted has not been disclosed to the public for review, consideration and comment. The City's failure to analyze these proposed actions appears to be an attempt to obfuscate. It provides at least the appearance that the City is not impartial in its review of this project.

For example, the suggested findings of approval (Attachment No. 1) assert consistency with the General Plan, claiming that the amendments and the project itself will be "compatible in proportion, scale, and character of the surrounding land uses . . . and will be similar in massing to other multi-story senior living facilities in the City." (Attachment No. 1.1; see also Attachment No. 1.2, 1.3, 1.5, 1.6.) There is no support for such an assertion. Rather, the suggested findings of approval simply rely on conclusory statements claiming compatibility with surrounding land uses. As is evident from a review of the surrounding area, there are no massive, five-story above-ground structures with subterranean levels together with minimal street setbacks. (A simple review of Google Maps Street View on Bolsa Chica Street and Warner Avenue in the vicinity of the proposed project site establishes as much; for the City to call this intersection and area a "commercial corridor" demanding and justifying a five-story dense development is entirely contrary to reality).

Here, the project-specific Specific Plan, itself, establishes that there is no compatibility or consistency in proportion, scale or massing to the neighborhood. The Specific Plan confirms that the surrounding land uses are one and two-story buildings. (Draft Bolsa Chica Senior Living Community Specific Plan (SP-19), p. 7.) The Specific Plan acknowledges that the "scale and massing" of the proposed project "will differ from a standard residential apartment building of the same count." (*Ibid.*) That assertion is a tremendous understatement. The density of this proposed project is outlandish. The Specific Plan confirms that the project requires General Plan and Zoning amendments in order to accommodate the increased density over the current standards: "higher intensity than currently permitted under Huntington Beach's commercial zoning". (*Id.* at p. 9.)

Likewise, the EIR establishes the lack of compatibility or consistency. Specifically, the EIR confirms that the change to the General Plan, Zoning and adoption of the Specific Plan is needed in order to increase the intensity of the use, increase the floor area ratio, and increase the maximum building height. (See Draft EIR 1-6 to 1-7.)

Finally, the City's Staff Report claims that the "administrative record" is massive and effectively tries to claim that there is probably some evidence somewhere in the "administrative record" to support its findings. The fact that the City is obfuscating its support for its findings is improper and is the opposite of being transparent with the public. To the extent that City staff claims that the assertions by the applicant's attorney, applicant's hired consultant claiming that other projects elsewhere in the City provide support for these findings, such assertions are incorrect. The City cannot rely on massing, height and density of other projects under different zoning classifications[1], in other neighborhoods (most of which are five or more miles away and are on or near State Route 39), with different characteristics to justify this project[2]. Thus, those other projects in other areas of the City of Huntington Beach do not establish compatibility "in proportion, scale, and character *of the surrounding land uses*." Further, those other projects are not as dense, do not provide as large a massing, nor are they as tall. The four properties/projects discussed in the Final EIR are all less dense than the proposed project:

- Merrill Gardens has 121 units on 2.71 acres, or 44 units per acre. It is 2.3 miles from the proposed project site and is a three-story building.

- The Beach and Ocean complex has 173 units on 3.18 acres, or 54 units per acre. It is 6 miles from the proposed project site.

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[1] Based on information obtained from the City's website, the Beach and Ocean complex, Plaza Almeria and Jamboree Senior Housing Project are all in Specific Plan zoning designation. All of those properties, however, are within a larger Specific Plan that provides the zoning and development standards for a larger area—not just a single property. The Beach and Ocean complex and the Jamboree Senior Housing Project are both within the Beach Edinger Corridor Specific Plan, whereas the Plaza Almeria property is within the Downtown Specific Plan.

[2] To state the obvious, the City cannot rely on those other projects in other areas of the City to support purported findings concerning compatibility with the *surrounding area*. The "surrounding area" is not the City of Huntington Beach, in general. It is geographically limited. And there is no evidence of massive five-story structures of this intensity and density in the surrounding area.

- Plaza Almeria has 42 units on 1.88 acres, or 22 units per acre. It is 7 miles from the proposed project site.

- Jamboree Senior Housing project is 43 units on .78 acres, or 55 units per acre. It is 4.5 miles from the proposed project site.

Even more, as discussed above, the above developments are not in the surrounding area to the proposed project site. A review of the development that are actually in the area surrounding the proposed project site proves that the proposed project is not in conformity with the surrounding area:

- The Cambridge Apartment complex directly to the south of the proposed project has approximately 136 units on 3.93 acres, or 35 units per acre.

- The Monticello apartment complex directly to the west of the proposed project has approximately 112 units on 3.11 acres. That is also 35 units per acre.

- The Cabo Del Mar condominium complex to the south east of the proposed project has 288 units on 11.96 acres of land, or 24 units per acre.

The proposed project, in contrast, is more dense and larger than all of the above—those outside the surrounding area and those in the surrounding area. **The proposed project is double the density of those projects in the surrounding area at 69 units per acre**.

The City's failure to support its proposed findings, or at minimum, its refusal to inform the public of the purported support for the proposed findings, is entirely improper and requires denial of the requested approvals and denial of this project.

4. The EIR's analysis of cumulative impacts is deficient. The analysis must consider development that would occur as a result of the project, which in this case, must include consideration of the spot zoning via amendment to the General Plan, Zoning Map and Text, Specific Plan and Conditional Use Permit.

Here, the proposed project includes amendment to the General Plan, Zoning Map and Text, adoption of a Specific Plan and Conditional Use Permit in order to allow the construction and use of the property for the senior living facility. As discussed above, the only purported support for such actions appears to be other development elsewhere in the City—not in the surrounding area to the proposed project site. Thus, if the City were to approve this project (which it should not), it is likely and foreseeable that this project would be used by City staff and

project applicants/proponents to justify other intensification of uses and height exceptions throughout the City of Huntington Beach. Thus, the EIR must consider such foreseeable development in considering the cumulative impacts resulting from the project.

In responding to this point raised by Mr. Thienes and others, the City appears to claim on an assertion that it only need consider projects that are approved or in the approval process. That position, however, is legally incorrect and demonstrates the invalidity of the environmental analysis. Where, as here, a project provides a "catalyst for further development," such future development cannot be ignored or deferred based on assertions that future development proposals will be subject to further environmental review at the time of development. (*City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1333, 1338.) The analysis of such impacts is required even if it may be impossible to specify or predict the precise development that will eventually occur. (*Id.* at p. 1335-1336.) The EIR's failure to consider such cumulative impacts is improper.

5. The EIR's analysis of alternatives is deficient—the EIR improperly refused to consider a reduced density/intensity alternative.

The environmental document has not sufficiently considered alternatives and has improperly dismissed project alternatives without any consideration or analysis, including a reduced density alternative. CEQA requires EIRs to identify and analyze a reasonable range of alternatives in order to "foster informed decisionmaking and public participation." (Pub. Res. Code, §§ 21100, subd. (b)(4); Guidelines, § 15126.6; see *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059 [EIR for new city general plan found legally inadequate because it did not consider a reduced development alternative even though it would have reduced significant impacts and met most of city's stated objectives].) Alternatives must be able to implement most project objectives, <u>but they need not be able to implement all of them</u>. (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477.) The Guidelines explain that the analysis should focus on alternatives that can eliminate <u>or reduce</u> significant environmental impacts even if it would impede attainment of project objectives to some degree or be more costly. (Guidelines, § 15126.6, subd. (a).) Analysis of such alternatives is important and required for CEQA, but is equally important in light of the many General Plan and Zoning amendments sought by the applicant to intensify the use of the property.

Contrary to the CEQA Guidelines and such established law, the EIR here did not consider a reduced density alternative to the proposed project. There is no evidence that a reduced density alternative was ever considered in the preparation of the draft EIR. This proposed project is based upon a false "all or nothing" approach. Rather, the draft EIR discusses the consideration of a No Project Alternative, and states that a "Maximum CG Buildout

Alternative . . . was initially considered, but ultimately rejected." (See Draft EIR, p. 1-4.) In response to public comments and objections to the draft EIR suggesting that the project height should be reduced the three-stories, the Final EIR responded claiming that it would not meet the objectives of providing senior housing "with a goal of producing as many housing units as possible." (Final EIR, p. 2-16.) Such an assertion is ridiculous as that justification would support a 15-story project as much as a 5-story project. It would also justify five to ten story buildings a few feet away from every arterial in Huntington Beach.

The EIR and the Staff Report completely dismiss the reduced density alternative. What possible basis is there to dismiss this alternative? According to the EIR and Staff Report, it is based on the extremely inadequate and result-driven analysis of whether they meet project objectives. Such result-driven analysis is not permitted by CEQA. Project objectives cannot be drafted in such a way that the *only* alternative to meet the objectives is the proposed project. Yet, that is precisely what has occurred here. The EIR and Staff's failure to consider and analyze a reduced density/intensity alternative is baseless.

6. The EIR's Mitigation Monitoring and Reporting Program is deficient. The EIR defers analysis until a later date improperly.

As discussed herein and in Mr. Thienes' other letters to the City, the environmental document's analysis of impacts to the environment is deficient. As such, appropriate mitigation measures have not been proposed. Further, even the mitigation measures that *are* being proposed are largely ineffective and without any real oversight. It further fails to analyze impacts, instead, putting off analysis until the future. (See Attachment A to proposed Resolution No. 2023-52, MMRP, 7-14 [deferring analysis of impacts to sewer until future studies].) Analysis deferred is analysis denied and deferral of consideration and application of mitigation measures does not comply with CEQA. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.4th 918, 939, 941.) CEQA does not permit governmental agencies to play fast and loose with the Mitigation Monitoring and Reporting Program obligations. Mitigation measures are not aspirational statements--they are supposed to be enforceable and actually enforced. The City's failure to adopt a comprehensive MMRP to potentially take a "we may require mitigation later, maybe" approach is improper. (See *Banning Ranch Conservancy v. City of Newport Beach, supra*, 2 Cal.4th at p. 939; *Lotus v. Dept. of Transp.* (2014) 223 Cal.App.4th 645 [improper to rely on "construction techniques" rather than enforceable mitigation measures to reduce impacts]; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 81 [analysis of impacts after environmental review improperly deferred analysis]; *Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70 [city improperly deferred mitigation measures until after project approval].) Here, the Mitigation Monitoring and Reporting Program falls far short. The "if it's convenient we might do something" approach is

not permissible. The time to analyze and provide the public with information is now—not some later "maybe" date.

7. Mr. Thienes' comments are timely submitted.

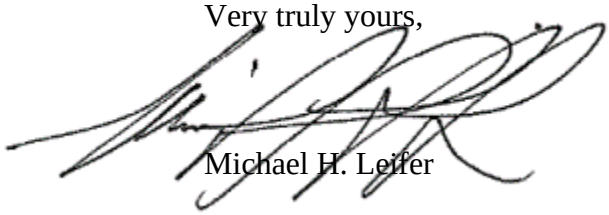
The applicant's attorney appears to make an assertion that Mr. Thienes' comments are somehow untimely. The following quote from *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1201, amply rebuts this claim:

> City appears to have thought that the public's role in the environmental review process ends when the public comment period expires. Apparently, it did not realize that if a public hearing is conducted on project approval, then new environmental objections could be made until close of this hearing. (*§ 21177, subd. (b)*; *Guidelines, § 15202, subd. (b)*; *Hillside, supra, 83 Cal.App.4th at p. 1263*.) If the decisionmaking body elects to certify the EIR without considering comments made at this public hearing, it does so at its own risk. If a CEQA action is subsequently brought, the EIR may be found to be deficient on grounds that were raised at any point prior to close of the hearing on project approval.

8. Conclusion.

Based on the foregoing and incorporating any and all objections and comments to this proposed project made by others during the processing of these various requests, Mr. Thienes requests that the City Council deny certification of the Final EIR, deny General Plan Amendment 21-004, deny Zoning Map Amendment No. 21-003, deny Zoning Text Amendment, and approve the appeals of and reverse the Planning Commission's approval of Conditional Use Permit No. 21-024.

Very truly yours,



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