ORIGINAL

APPLICATIONS:

APPEAL APPLICATION

This application is to be used for any appeals authorized by the Los Angeles Municipal Code (LAMC) for discretionary actions administered by the Department of City Planning.

1. APPELLANT BODY/CASE INFORMATION

Appellant Body:

☐ Area Planning Commission ☐ City Planning Commission ☑ City Council ☐ Director of Planning

Regarding Case Number: ENV-2013-2332-CE (Related Case DIR-2013-2331-TOC-1A)

Project Address: 2136 – 2140 Westwood Boulevard

Final Date to Appeal: 03/28/2019

Type of Appeal:
☐ Appeal by Applicant/Owner
☑ Appeal by a person, other than the Applicant/Owner, claiming to be aggrieved
☐ Appeal from a determination made by the Department of Building and Safety

2. APPELLANT INFORMATION

Appellant's name (print): Dr. Stewart Fordham

Company: Concerned Neighbors of Glendon Avenue

Mailing Address: 2121 Glendon Avenue

City: Los Angeles State: CA Zip: 90025

Telephone: _____ E-mail: phone/email contact via representative

- Is the appeal being filed on your behalf or on behalf of another party, organization or company?

  ☑ Self ☐ Other: _____

- Is the appeal being filed to support the original applicant's position? ☐ Yes ☑ No

3. REPRESENTATIVE/AGENT INFORMATION

Representative/Agent name (if applicable): Mitchell M. Tsai

Company: MITCHELL M. TSAI, ATTORNEY AT LAW

Mailing Address: 155 South El Molino Avenue, Ste. 104

City: Pasadena State: CA Zip: 91101

Telephone: (626) 381-9248 E-mail: mitch@mitchtsailaw.com

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4. JUSTIFICATION/REASON FOR APPEAL

Is the entire decision, or only parts of it being appealed? ☑ Entire ☐ Part

Are specific conditions of approval being appealed? ☐ Yes ☑ No

If Yes, list the condition number(s) here: _____

Attach a separate sheet providing your reasons for the appeal. Your reason must state:

- The reason for the appeal
- How you are aggrieved by the decision
- Specifically the points at issue
- Why you believe the decision-maker erred or abused their discretion

5. APPLICANT'S AFFIDAVIT

I certify that the statements contained in this application are complete and true:

Appellant Signature: _____ Date: March 28, 2019

6. FILING REQUIREMENTS/ADDITIONAL INFORMATION

- Eight (8) sets of the following documents are required for <u>each</u> appeal filed (1 original and 7 duplicates):
  - Appeal Application (form CP-7769)
  - Justification/Reason for Appeal
  - Copies of Original Determination Letter
- A Filing Fee must be paid at the time of filing the appeal per LAMC Section 19.01 B.
  - Original applicants must provide a copy of the original application receipt(s) (required to calculate their 85% appeal filing fee).
- All appeals require noticing per the applicable LAMC section(s). Original Applicants must provide noticing per the LAMC, pay mailing fees to City Planning's mailing contractor (BTC) and submit a copy of the receipt.
- Appellants filing an appeal from a determination made by the Department of Building and Safety per LAMC 12.26 K are considered Original Applicants and must provide noticing per LAMC 12.26 K.7, pay mailing fees to City Planning's mailing contractor (BTC) and submit a copy of receipt.
- A Certified Neighborhood Council (CNC) or a person identified as a member of a CNC or as representing the CNC may <u>not</u> file an appeal on behalf of the Neighborhood Council; persons affiliated with a CNC may only file as an <u>individual on behalf of self</u>.
- Appeals of Density Bonus cases can only be filed by adjacent owners or tenants (must have documentation).
- Appeals to the City Council from a determination on a Tentative Tract (TT or VTT) by the Area or City Planning Commission must be filed within 10 days of the <u>date of the written determination</u> of said Commission.
- A CEQA document can only be appealed if a non-elected decision-making body (ZA, APC, CPC, etc.) makes a determination for a project that is not further appealable. [CA Public Resources Code ' 21151 (c)].

This Section for City Planning Staff Use Only		
Base Fee: $ 89.00	Reviewed & Accepted by (DSC Planner):	Date: 3/29/2019
Receipt No: 0163020316	Deemed Complete by (Project Planner):	Date:
☒ Determination authority notified	☐ Original receipt and BTC receipt (if original applicant)	

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VIA HAND DELIVERY & E-MAIL

March 28, 2019

Via Hand Delivery

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RE: 2136 – 2140 Westwood Boulevard (Case Nos. DIR-2013-2331-TOC-1A, ENV-2013-2332-CE)

Dear Council President Wesson, Honorable City Council Members, Ms. Wolcott, Mr. Williams, Mr. Hendricks and Mr. Turner,

On behalf of Dr. Stewart Fordham and the Concerned Neighbors of Glendon Avenue ("Appellants"), my Office is administrative appealing the Los Angeles City Planning Commission's January 24, 2019 decision to deny Dr. Stewart Fordham's appeal in part and grant in part to conditionally approve, pursuant to Section 12.22 A.31 of the Los Angeles Municipal Code (LAMC), a 60 percent increase in density consistent with the provisions of the Transient Oriented Communities (TOC) Affordable Housing Incentive Program for a Tier 2 project, totaling 77 dwelling units with 7 units reserved for Extremely Low Income Households along with the following three incentives:

a. Height. A maximum height of 56-feet in lieu of the maximum permitted 45-feet;

b. Setbacks (side). A reduction in required side yards to correspond to those of the RAS3 Zone; and

c. Open Space. A 20 percent reduction in the required open space,

determine that the project is exempt pursuant to State CEQA Guidelines, Section 15300, Article III, Section 1, Class 32 and find that there is no substantial evidence demonstrating that an exception to a categorical exemption pursuant to CEQA Guidelines Section 15300.2 applies for a proposed project to construct construct a new, 56-feet in height, residential building with 77 residential units, 6,300 square feet of open space, 70 automobile parking spaces, 8 short-term bicycle parking spaces, and 78 long-term bicycle parking spaces at 2136 – 2140 Westwood Boulevard in the City of Los Angeles ("Project").

I. APPELLANT

Dr. Stewart Fordham ("Dr. Fordham") is the owner of an R1-zoned single-family home at 2121 Glendon Avenue, and resides there along with his partner, Joyce Sheingold ("Appellants"). Appellants hereby appeal the Director of Planning's determination approving the above-captioned TOC case proposed for 2136-2140 Westwood Boulevard (the "Project"), as well as the determination that the Project is categorically exempt from the California Environmental Quality Act ("CEQA") under CEQA's class 32 infill exemption.

Appellants' residence at 2121 Glendon Avenue directly abuts the Project site. There is no alley or other separation or buffer between Appellants' single-family residence and the proposed Project. Project approval will negatively impact the quiet enjoyment of Appellants' home, in that Appellants will be subjected to additional noise and light from the six-story residential project and will suffer a loss of personal privacy in their residence and rear yard due to the design of the Project, with its rear-facing balconies overlooking their back yard. Appellants worry that the adverse Project impacts are likely to cause a corresponding diminution in Appellants' property value.

In addition, during the period of construction, Dr. Fordham, who suffers from asthma under adverse air quality conditions, anticipates he will be exposed to greatly elevated risk of asthmatic attack due to the additional dust and generally lower air quality associated with grading, hauling, large trucks and equipment, and other ordinary construction activities associated with the Project, as will other nearby residents and sensitive receptors. These include nearby elderly residents within the local community, including an elder care home located at 2228 Westwood Boulevard (Westwood Plaza Retirement & Assisted Living, located approximately 500 feet from the Project site) as well as K-5 elementary school children located at 2050 Selby Avenue (Westwood Charter School, located approximately 900 feet from the Project).

Appellants are long-time residents of 2121 Glendon Avenue, which is owned by Appellant Dr. Fordham. The proposed Project is located directly adjacent to their residence and, if approved, would have a major impact on them, other local community members, and nearby sensitive receptors, including nearby elder care facility Westwood Plaza Retirement & Assisted Living, and local charter elementary school Westwood Charter School, which are located approximately 500 and 900 feet from the Project site, respectively. In addition, Appellants and other community members have an interest in ensuring that the City follows its municipal code, general plan, local community plans, specific plans, and all other applicable regulations, as well as state laws, such as CEQA.

Appellant Concerned Neighbors of Glendon Avenue are an unincorporated association composed of community members and residents of the City of Los Angeles dedicated to protecting quality of life here in the City of Los Angeles.

II. APPROVAL OF THE PROJECT VIOLATES THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, LOS ANGELES CITY CHARTER, MUNICIPAL CODE AND LAND USE ORDINANCES

As explained below, the Project is inconsistent with the TOC Guidelines and violates the City's zoning code as well as the locally applicable Pedestrian Oriented District, the Westwood/Pico Neighborhood Oriented District.[1] In addition, the Project is not categorically exempt from CEQA under the class 32 exemption. Thus, the City must undertake an Initial Study to determine the appropriate level of environmental review. In this case, a fair argument exists that the Project as proposed would have significant environmental impacts on local land use regulations, among other potentially significant environmental effects, requiring that an Environmental Impact Report ("EIR") be prepared.

The Director's approval of the Project, despite these significant shortcomings, constitutes error and abuse of discretion for failing to proceed in a manner required by law. The Project approvals, including the determination of exemption from CEQA, must be set aside.

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[1] The Project's zone suffix, POD, stands for "Pedestrian Oriented District." (Determination, p. 1; *see generally* Los Angeles Municipal Code § 13.07.)

a. Background Concerning the California Environmental Quality Act

CEQA has two basic purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. 14 California Code of Regulations ("**CCR**" or "**CEQA Guidelines**") § 15002(a)(1). "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR 'protects not only the environment but also informed self-government.' [Citation.]" *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564. The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal. App. 4th 1344, 1354 (*"Berkeley Jets"*); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures. CEQA Guidelines § 15002(a)(2) and (3). *See also, Berkeley Jets,* 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553; *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400. The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to "identify ways that environmental damage can be avoided or significantly reduced." CEQA Guidelines § 15002(a)(2). If the project has a significant effect on the environment, the agency may approve the project only upon finding that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns" specified in CEQA section 21081. CEQA Guidelines § 15092(b)(2)(A–B).

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position.' A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" *Berkeley Jets*, 91 Cal.App.4th 1344, 1355 (emphasis added) (quoting *Laurel Heights,* 47 Cal.3d at 391, 409 fn. 12). As the court stated in *Berkeley Jets*, 91 Cal. App. 4th at 1355:

To achieve its objectives of environmental protection, CEQA has a three-tiered structure. CEQA Guidelines § 15002(k); *Comm. to Save the Hollywoodland Specific Plan v.*

City of Los Angeles (2008) 161 Cal.App.4th 1168, 1185 – 86. First, if a project falls into an exempt category, or it can be seen with certainty that the activity in question will not have a significant effect on the environment, no further agency evaluation is required. Id. Second, if there is a possibility the project will have a significant effect on the environment, the agency must perform a threshold initial study. Id.; CEQA Guidelines § 15063(a). If the study indicates that there is no substantial evidence that the project may cause a significant effect on the environment the agency may issue a negative declaration. Id., CEQA Guidelines §§ 15063(b)(2), 15070. Finally, if the project will have a significant effect on the environment, an EIR is required. Id. Here, since the City proposes to exempt the Project from CEQA entirely, we are at the first step of the CEQA process.

CEQA exempt activities are either expressly identified by statute (i.e., statutory exemptions, PRC § 21080.01 et seq.; CEQA Guidelines §§ 15261 – 85) or those that fall into one of more than two-dozen classes deemed categorically exempt by the Secretary of Resources (i.e., categorical exemptions). PRC §§ 21080(b)(10); CEQA Guidelines § 15300. Public agencies utilizing CEQA exemptions must support their determination with substantial evidence. PRC § 21168.5. Exemptions to CEQA are narrowly construed and exemption categories are not to be expanded beyond the reasonable scope of their statutory language. *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125. A reviewing court must "scrupulously enforce all legislatively mandated CEQA requirements." *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564. Erroneous reliance by the City on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192.

CEQA identifies certain classes of projects which are exempt from the provisions of CEQA. These are called categorical exemptions. PRC § 21084(a); CEQA Guidelines §§ 15300, 15354. Categorical exemptions are certain classes of activities that generally do not have a significant effect on the environment. *Id.* Public agencies utilizing such exemptions must support their determination with substantial evidence. PRC § 21168.5. "[I]f the court perceives there was substantial evidence that the project might have an adverse impact, but the agency failed to secure preparation of an EIR, the agency's action must be set aside because the agency abused its discretion by failing to follow the law." *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644, 656. A categorical exemption may not be invoked for any project

that may cause a substantial adverse change in the significance of a historical resource. PRC § 21084(e); CEQA Guidelines § 15300.2(f); *Comm. to Save the Hollywoodland Specific Plan v. City of Los Angeles* ("*Hollywoodland*") (2008) 161 Cal. App. 4th 1168, 1186.

CEQA categorical exemptions "are construed narrowly" and will not be unreasonably expanded beyond their terms. *County of Amador v. El Dorado County Water Agency* (1999) 91 Cal.Rptr.2d 66, 89. Exemptions are strictly construed to construction allow for the fullest possible environmental protections within the reasonable scope of statutory language. CEQA Guidelines § 15003(f); *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal. App. 4th 1165, 1192 – 93 ("Azusa"); *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal. App. 3d 155, 171; *Laurel Heights Improvement Assn.* v. *Regents of University of California* (1988) 47 Cal.3d 376, 390 (rejecting "an attempt to use limited exemptions contained in CEQA as a means to subvert rules regulating the protection of the environment").

Finally, CEQA bars an agency from approving a project with significant unavoidable imposed unless it is "otherwise permissible under applicable laws and regulations." (CEQA §21002.1(c).)

A. The Project is Not Eligible for the Class 32 Exemption from CEQA.

The Determination and Notice of Exemption explain that the Project is exempt from CEQA under the class 32 exemption from CEQA. (Determination, p. 1; Notice of Exemption ("NOE"), p. 1.) The class 32 exemption is intended for infill projects, and as the NOE correctly describes, a proposed project must meet *all* the requirements of the class 32 exemption as codified in the CEQA Guidelines or the development project is not exempt as a class 32 project. (*See* CEQA Guidelines § 15332.)[2] The Department of City Planning created a form for projects seeking the class 32 exemption, requiring project applicants to submit a completed Environmental Assessment Form ("EAF") for review.[3] In addition to the EAF, the class 32 exemption application requests that the applicant provide "[a]ny supporting documents and/or technical studies to corroborate your position that the proposed project is eligible for the Class 32 Exemption," and "[w]ritten justification that the proposed Project meets" the CEQA Guidelines criteria for a class 32 exemption. The

[2] CEQA Guidelines section 15332 is available online at: http://resources.ca.gov/ceqa/guidelines/art19.html.
[3] An electronic copy of the form is available at the Department of City Planning's website at: https://planning.lacity.org/Forms_Procedures/7828.pdf.

information is necessary because the Director's determination that a categorical exemption applies must be based on substantial evidence. (*See generally, Dehne v. County of Santa Clara* (1981) 115 Cal. App. 3d 827.)

Appellants note for the record that on Tuesday, June 26, their representative reviewed the entire project file associated with the Project, which contained no EAF form. It contained only the NOE. Following review of the file, Appellants' representative contacted the assigned planner by email to request any documents that should have been included in the project file, specifically a Master Land Use Permit Application, which is ordinarily part of every land use application filed within the City of Los Angeles. The planner replied and provided a "Transit-Oriented Communities Affordable Housing Form" completed by the applicant but not in the project file as well as the "AB 2556 (TOC) Determination" memorandum from the Los Angeles Housing + Community Investment Department. But none of the documentation required by the Department of City Planning class 32 form and procedure has been provided to Appellants for review, including the EAF, supporting documents or technical studies, or a written justification that the Project meets the class 32 CEQA Guidelines requirements have been provided. This absence of submitted documents supports an inference that the documents were either not submitted as required or simply do not exist, but more important reflects the lack of substantial evidence provided by the applicant to support the exemption.

The first requirement of a class 32 infill exemption is that it be "consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations." (CEQA Guidelines § 15332(a); see NOE, p. 2.) The NOE document provides a narrative (entitled "Justification for Project Exemption") that asserts: "The proposed project is consistent with applicable general plan designation, applicable policies, and applicable zoning designations." The portion of the narrative discussing this first requirement completely fails to discuss the applicable zoning code provisions or TOC regulations and appears simply to assume the project is consistent with them. (NOE, p. 2.) Moreover, while the NOE acknowledges the Project site's C4-1VL-POD zone, it fails to mention what the POD designation of that zone means and does not even mention the existence of the Westwood/Pico Neighborhood Oriented District in which the project is located, or whether the project is consistent with the regulations found therein.

As discussed at length above, the Project is not consistent with the Westwood/Pico NOD. It is also not consistent with all applicable zoning regulations, and it is not consistent with the TOC Guidelines. To summarize the numerous issues described in greater detail in Part II, the Project approval assumes an incorrect base height, resulting in an impermissible over-in-height building of 56 feet, rather than the 51 foot tall structure permitted, violating the Los Angeles Municipal Code and the Westwood/Pico NOD; the Project has been granted a three-story bonus, rather than the one-story permitted, violating the municipal code and TOC guidelines; the Project uses an improper transitional height, violating the municipal code and TOC guidelines; and the Project uses an improper rear yard setback,[4] violating the municipal code and TOC Guidelines.

These oversights and assumptions show the class 32 exemption is inapplicable to the Project, because not only does the record reflect a paucity of substantial evidence to support consistency, the record clearly shows the Project is *not* consistent with the applicable zoning designation and regulations. Thus, the first requirement is not met, and the class 32 exemption is not available to exempt the Project from environmental review.

With respect to other four class 32 requirements, the project appears *likely* to be consistent with them, but there is no substantial evidence in the record to support most of them. For example, based on its location, it is possible, perhaps even likely, that the project site may have no value as habitat for endangered, rare, or threatened species, but there is no substantial evidence to support that likelihood, only a bare conclusion provided in the NOE based on the project's urban location. There is also no evidence beyond the speculation provided in the NOE discussion that the project would not result in any significant effects relating to traffic, noise, air quality, or water quality. There are only vague statements to the effect that, for example, the project is "*not expected to* conflict with or obstruct the implementation of the AQMP and SCAQMD rules." (NOE, p. 2, emphasis added.)

In an additional email exchange requesting any other information that should have been in the Project file, the assigned planner forwarded an email chain between the planner and a City Department of Transportation transportation engineer to Appellants' representative. The email included the City traffic engineer's claim that he

[4] The NOE also describes a rear yard setback of only nine feet, a mistake perhaps repeated from the Determination. (NOE, p. 2; Determination, p. 6.)

"ran the calculations and the net trips [sic] way down, well below the 25 net threshold for AM and PM trips . . . So the bottom line is that no Traffic Study or Technical Study are necessary."[5] The conclusion provided in the email may be true, but Appellants or others who review the file have not been provided access to the underlying data that led to those conclusions as they should have been. The data relied upon by the engineer to make his conclusions were not included in the email or project file. Only the conclusion without supporting data seems to have been provided to the Planning Department. Thus, no substantial evidence supports the conclusion that a traffic study is not needed.

Likewise, Planning staff's vague assurance and conclusory statement that "[t]he proposed project has been reviewed by City staff, and can be adequately served by all required utilities and public services" is not substantial evidence to support that the final class 32 requirement is met. (NOE, pp. 2-3.) CEQA requires much more than hopeful expectations of Planning Department staff. The burden is on the applicant to provide substantial evidence that the class 32 exemption applies, not on members of the public to refute speculation and insubstantial evidence.

In any event, whether there is substantial evidence on the final four requirements, which Appellants assert there is not, it is abundantly clear based on record information that the first requirement, consistency with all applicable general plan policies, zoning designations, and other applicable regulations, is not met. The Project is thus not exempt from CEQA under the class 32 exemption, and the City must undertake an initial study to determine the appropriate level of environmental review.

CEQA "requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75, supplemented (1975) 13 Cal.3d 486; CEQA Guidelines § 15064; see Pub. Resources Code, § 21002.1.) The "fair argument" standard sets "a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review." (*Sierra Club v. County of Sonoma* (1992) 6 Cal. App. 4th 1307, 1316–17.) Based on the evident significant land use impacts alone, to approve the Project as currently proposed the City must prepare an Environmental Impact Report to justify such significant departures from local land use regulations, if such departures

[5] Email chain between City Planner Jordann Turner and Transportation Engineer Associate Clive Grawe, May 24, 2018.

can be justified at all. It is also evident that typical construction activities not yet considered due to the improper claim of exemption, such as grading, hauling, moving of equipment, and heavy truck use needed to move materials and import concrete, among other things, may cause significant environmental impacts.

The decisionmaker erred and abused his discretion by finding the Project to be exempt from CEQA under the class 32 exemption.

B. The Project's Previous Notice of Exemption was Issued Prematurely

The NOE and its restrictive 35-day limitations period are only valid if the agency (1) approves the project in a manner that "commits to a definite course of action" and (2) the agency is "legally bound to take that course of action." (*Cty. of Amador v. El Dorado Cty. Water Agency*, 76 Cal. App. 4th 931, 965 (1999) ("*County of Amador*"), citing CEQA Guidelines § 15352(a).) In *County of Amador*, the lead agency filed a notice of exemption *before* it approved the project. The Court analyzed the CEQA Guidelines and concluded that a "notice of exemption cannot be filed until after the project is approved." (*Id.* at 963). The agency in that case had not committed to a definite course of action and the project was still subject negotiation and change. "The notice of exemption filed in April 1995 preceded this project approval and is therefore invalid. Under these circumstances, a challenge to the exemption determination must be brought within 180 days of the date of project approval. [Citations]." (*Id.* at 965).

Likewise, the court in *Coalition of Clean Air* emphasizes that when plaintiffs "intend to pursue the argument that the project was not approved until after the notice," then the shorter limitations period does not apply. (*Coalition for Clean Air v. City of Visalia* (2012) 209 Cal. App. 4th 408, 423 ("*Coalition for Clean Air*").) In that case, the lead agency argued its notice of exemption was "facially valid" since it was filed in the format set forth in appendix E of the CEQA Guidelines. (*Id.* at 418, 421.) The court, however, held that this was not enough because evidence existed on demurrer that the notice exemption may have been filed *prior* to project approval, which fails to comply with CEQA's guidelines on filing NOEs, resulting in 180-day limitations period, not 35-days. (*Id.* at 423-425.) (*See also Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 532 (NOD failed to comply with CEQA because it failed to specify the date on which a project was approved, resulting in a 180-day, not 30-day limitations period); *City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1719 – 20 (NOE

that failed to adequately describe the project resulted in a 180-day, not 35-day, limitations period); *Lewis v. Seventeenth Dist. Agricultural Assn.* (1985) 165 Cal.App.3d 823, 831-32 (NOE not posted in a manner required by CEQA resulted in 180-day, not 35-day, limitations period); *Latinos Unidos de Napa v. City of Napa* (2011) 196 Cal.App.4th 1154, 1160 (NOE not posted for full 30 days required by CEQA results in 180-day, not 35-day, limitations period).)

Here, the City has also unlawfully issued a NOE prior to final Project approval, and therefore the NOE is presumptively invalid.

C. The Project Has Incorrectly Been Granted Three Additional TOC Incentives

Section IV subd. (5) of the City's Transit Oriented Communities Affordable Housing Incentive Program Guidelines ("TOC Guidelines") state that "[t]hree [a]dditional [i]ncentives may be granted for projects that include "**at least 11% of the base units for Extremely Low Income Households.**" (*See also* Los Angeles Municipal Code § 12.22(A)(31) [emphasis added].)

The Project fails to set aside an adequate amount of affordable housing to quality for three additional incentives to be granted under the Program, as the Project only sets aside 7 units (9%), rather than the required 9 units (11%), for Extremely Low Income Households. While the TOC Guidelines state that the number of "base units" is determined based upon the maximum allowable density allowed by the zoning, prior to any density increase . . ." the TOC regulation violates Section 12.22(A)(31) of the LAMC which requires that the "the required Restricted Affordable Units . . . shall be based on the total final project unit count." Moreover, Section 12.22(A)(31) of the LAMC mandated that the City set its minimums for additional Transit Oriented Communities Affordable Housing Incentives based upon the requirements set forth in California Government Code section 65915(d)(2) which requires even "at least 30 percent of the total units for lower income households, at least 15 percent for very low income households, or at least 30 percent for persons and families of moderate income in a common interest development."

For the aforementioned reasons, the Project fails to meet the requirements necessary to obtain three incentives. Moreover, the TOC Guidelines, as applied, would in all likelihood be declared facially invalid in violation of both the Los Angeles Municipal Code and California Government Code.

D. The Project Incorrectly Assumes a Base Height of 45 feet, Resulting in Violations of the TOC Guidelines, Municipal Code, and Westwood/Pico Neighborhood Oriented District

The Project parcels are located entirely within the Westwood/Pico Neighborhood Oriented District. (Determination, pp. 1, 6.) The parcels are all zoned C4-1VL-POD. (Determination, p. 1.) Ordinarily this would result in a base height of 45 feet, and a limitation of three stories. (Los Angeles Municipal Code [hereinafter "LAMC"] § 12.21.1.A.1.) But as explained below, even though the parcel is zoned C4-1VL, because of the parcels' POD designation the base height is only 40 feet, not 45.

The Westwood/Pico NOD does not independently regulate the height of buildings. It states: "Whenever this ordinance is silent, the provisions of the LAMC shall apply. (Westwood/Pico NOD section 2.C.) The Westwood/Pico NOD identifies LAMC Section 13.07 as the applicable zoning regulation except as otherwise modified. *(Id.,* p. 1, sections 2.B, 3.A, and 3.B.)6Los Angeles Municipal Code section 13.07.E.5 states in relevant part: "The height of a building shall not exceed 40 feet." Thus, the Project approval makes a fatal error in assuming that the correct base height to which a TOC height incentive may be added is 45 feet, as if the parcels comprising the Project site were ordinarily zoned C4-1VL parcels.7

The proposed Project uses as one of its additional incentives a height bonus pursuant to TOC Guidelines section VII.1.g.i.2, which permits "[o]ne additional story up to 11

6 Los Angeles Municipal Code Chapter 1, Article 2 is the "Comprehensive Zoning Plan" of the City, but regulation of supplemental use districts such as pedestrian oriented districts is regulated in Chapter I, Article 3. "Lots zoned . . . C4-1VL-POD . . . shall conform with the requirements and restrictions found in Section 13.07 of the LAMC except as modified by this Ordinance, and the Development Regulations established by Section 4 of this Ordinance." (Westwood/Pico NOD, section 3.B.)

7 It must be noted that the project applicant previously applied for and received an approval for a density bonus project. (Los Angeles Planning Case No. DIR-2013-2331-DB.) Two appeals of the approval were timely filed, including one by Appellant Dr. Fordham. Dr. Fordham's previous appeal of the DB case relied in large part on the same errant 45' base height to which the density bonus was added: an 11-foot increase to allow a total project height of 56 feet, in lieu of the allegedly otherwise applicable 45 feet. Without holding a hearing on the obviously meritorious appeal, the Director issued a letter rescinding the improperly granted density bonus. It would not be an unreasonable inference from the same mistake having occurred a second time on the same property, with the same project number except for the suffix (TOC rather than DB), and where the project file includes all of the previous project paperwork including the appeals and rescission notice, that the applicant was aware of the base height issue but chose to present another project with the same error in hopes that community members might fail to respond to the approval notice, or perhaps not notice the same "mistake" made the second time around. Knowing the recent project history, Planning staff should have identified and flagged the issue.

additional feet" for Tier 2 project sites.[8] Calculated from the proper base height of 40 feet, the total project height can be no greater than 51 feet. Review of the Determination and its Exhibit A site plans make clear that the project is 56 feet in height. (Determination, pp. 2, 6; Exh. A, pp. A4.00-A4.01.) The Director erred and abused his discretion in approving a project with a height of 56 feet based on the incorrect assumption that the base height is 45 feet.

E. The Project Violates the TOC Guidelines by Taking a Three-Story Bonus, rather than the One-Story Bonus Permitted.

The project is zoned C4-1VL-POD, which ordinarily permits a building of no greater than 45 feet and three stories. LAMC § 12.21.1.A.1. As discussed above, the POD designation results in a lower base height (maximum 40 feet). Without a density bonus or TOC height incentive or zoning code variance, 40 feet and three stories represents the maximum height and number of stories permissible in the zone.

The TOC Guidelines allows "[o]ne additional story up to 11 additional feet" for a Tier 2 site, such as the Project site. TOC Guidelines § VII.1.g.i.2. Thus, the ordinarily permitted three-story, 40-foot tall building could be increased to a maximum of four stories and 51 feet. The Determination, however, approves a TOC incentive bonus of *three* additional stories and 11 feet. (Determination, p. 2; *see also* Exh. A, pp. A1.02, A2.06-A2.07, A3.00-A3.01, A4.00-A4.01.) The Determination provides no analysis suggesting that any other bonus or provision of the municipal code applies to provide for a greater number of floors. Allowing a six-story structure, where only a four-story structure is permitted based on the TOC Guidelines' one-story bonus, with no reference to a permissible justification is an abuse of discretion.

F. The Project Appears to Use an Additional TOC Incentive Bonus to Use an Alternative Transitional Height Requirement rather than LAMC Section 12.21.1.A.10.

As discussed above, the Determination finds the Project qualifies for three additional incentive bonuses, and has requested and obtained three: one for additional height, one for reduced side yard setbacks, and one for reduced open space. (Determination p.2.) The Determination says nothing about another incentive available in the TOC menu of additional incentives, or under any other bonus or municipal code provision, to allow a different transitional height than otherwise required. LAMC section

[8] As discussed in Part II.B, the proposed Project clearly violates this TOC Guideline by allowing *three* additional stories, rather than the *one* additional story permitted.

12.21.1.A.10 requires that "[n]otwithstanding any other provisions of this section, portions of buildings on a C or M zoned lot governed by the provisions of this section shall not exceed the height limits set forth below when located within the distances specified from a lot classified in the RW1 Zone or a more restrictive zone." The lots abutting the rear of the Project site are zoned R1, requiring the standard transitional height standard be applied. The table included in LAMC section 12.21.1.A.10 provides for the following transitional height limitations:

Distance	Height
0 to 49 feet	25 feet
50 to 99 feet	33 feet
100 to 199 feet	61 feet

(LAMC § 12.21.1.A.10.) Based on review of the site plans, it is evident that these standards are not met. (*See, e.g.*, Exh. A p. A.4.00, diagram entitled "Section A-A.") Clearly the standard transitional height requirements are violated with a taller than 25-foot structure within the first 49 feet of an R1 zone, and a taller than 33-foot structure within 99 feet of the same R1 zone.

Instead of adhering to the standard transitional height guidelines, the Project appears to use the transitional height requirements found in TOC Guidelines section VII.1.g.ii.1, which permits Tier 2 buildings to be "stepped-back at a 45 degree angle as measured from a horizontal plane originating 15 feet above grade at the property line of the adjoining lot," in lieu of the otherwise applicable municipal code requirements. Evidence of this approach is the first page of the site plan, which recites the TOC Guidelines language quoted above (also impermissibly bundling the transitional height as part of the height incentive), and a notation made on the Section A-A diagram of the approved Exhibit A site plans, which shows where the 45 degree angle measurement falls above the rear property line. Exh. A, pp. A0.00 and A4.00.

But the Determination does *not* grant the Project applicant this additional transitional height incentive. Nor has the applicant sought or received relief under LAMC section 12.24.X.22, as described in the final paragraph of LAMC section 12.21.1.A.10. Approval of the Project as proposed with the additional unapproved incentive thus violates the TOC Guidelines, which provide for a maximum of three additional incentives. (TOC Guidelines § IV.5.) The approval of the Exhibit A site plan using an additional fourth incentive not granted by the Director violates the TOC Guidelines

and LAMC section 12.21.1.A.10 and constitutes an error of law and abuse of discretion.

G. The Project Violates the TOC Guidelines by Using a RAS3 Rear Yard Setback.

The Project Exhibit A site plan shows a RAS3 rear yard setback of 15' plus 1' for each floor above the third story. (*See generally*, Exh. A, especially p. A4.0, and text on p. 1.) Use of the RAS3 rear setback is impermissible for several reasons.

First, use of a RAS3 rear yard setback is an impermissible additional incentive. As discussed above, the TOC Guidelines allows for a maximum of three additional incentives, and the Project has been granted three incentives (one for height, one for side yard setbacks, and one for unbundled parking). (Determination pp. 2-3, *see also* TOC Guidelines § IV.5.) While commercially-zoned Eligible Housing Developments "may utilize any or all of the yard requirements of the RAS3 zone per LAMC 12.10.5" (TOC Guidelines § VII.1.a.i), the RAS3 zone does not permit reduced rear yard setbacks adjacent to properties with a zone of RD or more restrictive, such as an R1 zone. (LAMC § 12.10.5.C.3.[9]) Thus the incentive is not available to the Project.

Second, the TOC Guidelines justification provided by the applicant for reduced yards is for "up to 30% decrease in width or depth of one setback." (Exh. A, p. A0.00.) This is consistent with TOC Guidelines VII.1.a.ii.2.b, but since the project is not located on a residentially zoned parcel, this provision is not applicable. Moreover, the cited provision allows for only one setback change, not three (two side yard setback reductions, and one rear yard setback reduction).

Finally, and most important, no decrease in required rear yards is permissible under TOC Guidelines VII.1.a.iii, which states: "Yard reductions may not be applied along any property line that abuts an R1 or more restrictive residential zoned property." As the Determination acknowledges, the abutting properties to the east of the Project along Glendon Avenue are all zoned R1.

The proper rear yard setback is thus defined by the underlying zoning, and not by any incentive available under the TOC Guidelines. The subject parcel is zoned C4-1VL-POD. The C4 base zone utilizes R4 setbacks for side and rear yards for each

[9] As LAMC section 12.10.5 provides, "There shall be a rear yard of not less than 15 feet in depth when the subject property is located adjacent to property zoned RD or more restrictive, otherwise there shall be a rear yard of not less than five feet in depth."

residential story. (LAMC § 12.16.C.2.) The R4 rear yard setback is 15' plus 1' additional for each story above the *second* story. LAMC § 12.11.C.3. Because the Project improperly utilizes the RAS3 setback, the approval violates the TOC Guidelines and zoning code, and constitutes an error of law and abuse of discretion.

H. The Director's Determination is Inconsistent with the Project Site Plans.

The Director's Determination contains numerous errors and internal inconsistencies, which makes it unclear precisely what has been approved, and which incentive bonuses have been granted by the approval.

For example, the Transit Oriented Communities ("TOC") portion of the Determination approves, in part, "[a] reduction in required side yards to correspond with those of the RAS3 Zone." (Determination, p. 2.) This portion of the approval says nothing about reduced rear-yard setbacks. Later in the Determination, however, the proposed Project is described as having "a nine-foot rear yard setback." (*Id.*, p. 6; *but see* Determination Exhibit A, p. A0.00 (hereinafter "Exh. A") [describing a rear setback of 15' + 1' per story above the third story.[10]])

In addition, the required TOC Findings state: "The requested yard incentives . . . include utilization of *all* of the yard requirements for the RAS3 Zone . . ." (Determination, p. 11, emphasis added.) This is apparently consistent with the site plans, which appear to show a 15' rear yard setback with 1' additional setback for each story above the third floor. (Site Plans, pp. A0.00, A2.00-2.06.)[11] The inconsistency is confusing at best as to what has been granted by the approval, and at worst describes an impermissible additional incentive or project feature requiring a zoning administrator's determination or variance.

Approving a Project with its Exhibit A site plan describing a physical project inconsistent with and in excess of the grant of approval is an abuse of discretion.

I. The City Council Should Hold the Project Approvals Until It Has Heard and Ruled on This Appeal

CEQA requires that an appeal of any CEQA determination, including categorical exemptions be appealable to an elected decision-making body. CEQA requires public

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[10] As discussed earlier in Part II.D, this describes a rear setback for RAS3 properties, which is not permitted at this project site due to the adjacent R1 zoned parcels.

[11] *See* footnote 6, and Part II.D, supra.

agencies to allow the public to appeal a CEQA determination to a public "agency's elected decision-making body." Pub. Res. § 21151(c). A CEQA determination and project approval is not "final" until the "final adjudicatory administrative decision." *Hensler v. City of Glendale* (1994) 8 Cal. 4th 1, 22. CEQA defines "project" broadly to mean "the whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately ... [¶] [t]he term . . . refers to the activity which is being approved . . . ." Guidelines[12], § 15378, subds. (a) and (c). The scheme proposed by the City, that CEQA only requires a perfunctory appeal regarding the sufficiency of an EIR to an elected decision-making body, defeats the entire point of an EIR, which requires an agency, and if available an agency's elected decision-makers, to "have a real confrontation with the EIR," to "face "the political heat of certifying an EIR," leaving them with "no alternative to taking arms against the troubles identified in the EIR," and to have a "real confrontation . . . with the economic and social values in the project." *Vedanta Soc'y of So. Cal. v. Cal. Quartet* (2000) 84 Cal. App. 4th 517, 527 – 529.

It is a well-established principle that "CEQA is violated when the authority to approve or disapprove the project is separated from the responsibility to complete the environmental review." *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal. App. 4th 681, 734, and that an elected decision-making body "act[] as the final, independent decision-making body for both the Project and the environmental review documents." *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 359 (emphasis added); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1202 ("It is the City's bifurcated process, which resulted in segregation of environmental review from project approval, that supports an imputation of bad faith"). The City's practice does exactly what *POET* and *L Street* disapprove of -- separating project approval from responsibility to complete the environmental review and allowing elected decision-making bodies to ignore the merits of the project ultimately being analyzed and considered for approval.

As *POET* noted, an EIR cannot be certified after a project had already been approved, as the City has done previously done in declaring the Tree Removals final prior the completion of the administrative appeals of the permit approvals. (*POET*, *supra*, 218 Cal. App. 4th at 730 ["The Executive Officer's adoption of the final regulation was

[12] Known as the CEQA Guidelines, codified in Title 14 of the Cal. Code of Regulations.

improper because it violated the timing requirement of CEQA that "approval" occur after consideration of the environmental review documents."].) Similarly, *L Street* independently found that an appeal that included only the sufficiency of an EIR failed to satisfy CEQA's mandates under PRC § 21177. (*L Street*, *supra*, 229 Cal. App. 4th at 362 ["the administrative appeal, standing as a separate and independent procedure, did not comply with the CEQA requirement for findings by the decision-making body."].) As such, the City's CEQA procedure in declaring Tree Removal Permits final before the administrative appeal to the elected decision-making body, (the Council) has been completed, is a violation of CEQA because it separates components of the project from the environmental review. See *POET*, *supra*, 218 Cal. App. 4th at 734.

The City Council should hold the issuance of any demolition, construction permits or other permits related to the Project until the CEQA appeals process has been completed in this matter.

J. The City Failed to State Which Part of Appellant's Appeal it Previously Granted in Part

While the City Planning Commission granted and denied in part Appellant's appeal, it is entirely unclear what part of Appellants' appeal to the City Planning Commission was granted. Appellants request that the City Council remand this item back to the City Planning Commission for clarification prior to considering this item.

IV. Conclusion

For all the reasons discussed above, Appellants urge the City Planning Commission to overturn and set aside the Director's Determination finding the Project categorically exempt from CEQA under the class 32 exemption and deny the Project entirely.

Sincerely,

Mitchell M. Tsai