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VIA E-MAIL AND U.S. MAIL

Honorable Ed P. Reyes, Chair
Honorable José Huizar
Honorable Paul Krekorian
Planning and Land Use Management Committee
City of Los Angeles
Attention: Michael Espinosa, Legislative Assistant
200 N. Spring Street
City Hall, Room 395
Los Angeles, CA 90012

Re: Wilshire Grand Redevelopment
ENV-2009-1577-EIR-GB
CPC 2009-3416-TDR-CUB-CU-CUW-ZV-SW-DA-ZAD-SPR-GB
Council File No. 11-0106

Dear Chairman Reyes and Honorable Members of the Planning and Land Use Management Committee ("PLUM"):

As you are aware, this office represents Wilshire Boulevard Property LLC, the owner ("Owner") of the real property located at 1000 Wilshire Boulevard (the "Adjacent Property"), immediately west of the above-referenced proposed redevelopment project (the "Project"). We reiterate the Owner's overall view of the Project as an exciting and very positive development with the potential to bring significant economic benefits to the immediate area and downtown Los Angeles in general, as well as additional amenities to the tenants of the Adjacent Property. However, the Owner maintains considerable concerns that the above-referenced Environmental Impact Report ("EIR") has failed to fully present and analyze the environmental impacts of the Project in a legally adequate manner.

In addition to the comments in our letter dated August 23, 2010, please note that the recent published decision in *Sunnyvale West Neighborhood Assn v. City of Sunnyvale*, 10 Cal. Daily Op. Serv. 15,635, 2010 Daily Journal D.A.R. 18,843, strongly affirms the inadequacy of the EIR. Specifically, the transportation and traffic analysis, among others, fails to disclose the Project's traffic impacts on the existing environment; that is, conditions that exist at the time of

issuance of the notice of preparation ("NOP") for the Project on July 9, 2009. Instead, the EIR impermissibly evaluates traffic impacts with respect to a wholly speculative future scenario, the existence of which is unsupported by any substantial evidence. Further, the No Project Alternative evaluates what would occur under maintenance of the existing conditions at the Property, as required by CEQA. The use of a 2020 baseline for the Project prevents a direct comparison with the No Project Alternative, and therefore does not properly inform the public of the consequences of denying the Project. *See* 14 CCR § 15126.6. These failures deprive the public and decision makers of the information necessary for informed decision-making regarding the project, and necessitates revision and recirculation of the EIR.

I. The Transportation and Traffic Analysis in the EIR Only Evaluates Traffic Against a Future (2020) Baseline Condition, not Existing Conditions, and Therefore does not Satisfy CEQA.

As described in the Traffic Scenarios section on pages IV.B-28 to IV.B-29 of the EIR, the traffic impact analysis in the EIR describes existing (2009) conditions, but only for the purpose of constructing hypothetical year 2020 scenarios for use as a baseline (the "Future-without-Project Conditions"). The analysis then adds Project-related vehicle trips and transit riders, among other factors, to derive "Future-with-Project Conditions," and compares those conditions against the future baseline conditions to determine the impacts of the Project.¹ Finally, the analysis applies the anticipated effects of mitigation measures to the Future-with-Project Conditions to determine the residual impacts.

This error also infects aspects of the analysis other than Project-related vehicle trip generation. For example, Table IV.B-12 describes capacity in the local and regional transit systems (subway and bus) in terms of comparing future with-project and future without-project transit demand.²

Nowhere in the traffic study or EIR does the analysis compare the various operational characteristics of the Project to the conditions that physically existed during the 2009 publication of the NOP. The analysis proposes no mitigation measures for operational traffic and transportation impacts that would occur with respect to the existing conditions in 2009. However, "[a]n EIR must focus on impacts to the existing environment, not hypothetical

¹ See, e.g., Table IV.B-10 (future baseline [2020] intersection levels of service ["LOS"]); Table IV.B-11 (future baseline [2020] for freeway segment LOS); Table IV.B-12 (baseline capacity remaining in various transit modes and routes estimated in 2020); Table IV.B-15 (future [2020] with-Project conditions prior to mitigation).

² Sunnyvale acknowledges the possibility that a baseline other than the date of issuance of the NOP may, in rare cases, be appropriate. *Sunnyvale, supra*, at 30. However, an agency may only use an alternative baseline where it can demonstrate, with substantial evidence, that conditions that exist at the time of issuance of the NOP do not represent "generally existing conditions." *Id.* Even if that were true in this case, the EIR makes no attempt to explain why conditions on July 9, 2009 do not represent "generally existing conditions," or why conditions in 2020 or 2035 do or should represent "generally existing conditions," or why either year would serve as an appropriate baseline for environmental impact analysis.

situations." *City of Carmel-by-the-Sea v. Board of Supervisors*, 183 Cal. App. 3d 229, 246–47 (1986); *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 952 (1999) ("It is only against this baseline that any significant environmental effects can be determined."); 14 Cal. Code Regs. ("CCR") § 15125(a) ("environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant"). Comparisons to hypothetical situations mislead the public and decisionmakers as to the true effects of a project. *Communities for a Better Environment v. South Coast Air Quality Management District*, 48 Cal. 4th 310, 322 (2010). Thus, the EIR fails to satisfy the requirement of CEQA to evaluate the effects of the Project on the environment. See, e.g., Cal. Pub. Res. Code. §§ 21060.5 (defining the "environment" as "the physical conditions which exist within the area . . ."), 21151(d) (significant effects on the environment are "limited to . . . adverse changes in physical conditions which exist within the area as defined in Section 21060.5"); 14 CCR § 15126.2 ("lead agency should normally limit its examination to changes in the existing physical conditions in the affected areas as they exist at the time the [NOP] is published").

II. No Substantial Evidence in the Record Supports the Use of 2020 as an Appropriate Baseline.

Although a lead agency retains some discretion as to how to measure existing conditions most accurately, it may only provide an alternative baseline for analysis under narrow circumstances, such as modification of a previously existing use that requires only minimal review under CEQA. See *Communities for a Better Environment*, *supra*, at 326. Substantial evidence must support the choice of an alternative baseline. *Save Our Peninsula*, *supra*, at 120. However, a lead agency cannot simply use an alternative baseline any time some substantial evidence may support doing so. Rather, a lead agency may only use an alternative baseline when physical conditions that exist at the time of the NOP do not represent "generally existing conditions." *Sunnyvale*, *supra*, at 30. As described below, conflicting statements in the EIR, the Development Agreement (the "DA"), and in various public fora as to the nature of the project and the timing of its implementation severely undercut any claim that substantial evidence supports any particular analytical baseline.

A. The Purported Land Use Equivalency and Design Flexibility Program Allows for Significant Changes to the Project, Which May Alter the Construction Schedule.

The Land Use Equivalency Program and the associated Design Flexibility Program, which allow the applicant to build a substantially different project than the one analyzed in the EIR, results in a shifting, inaccurate, and unstable project description, which CEQA does not permit. *County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 199 (1977) (a "finite project description is indispensable to an informative, legally adequate EIR"); *San Joaquin Raptor/Wildlife Rescue Ctr. v County of Stanislaus*, 27 Cal.App. 4th 713, 730 (1994) ("an accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity"). For example, the project includes up to 100 residential units, but under the Land Use Equivalency Program it could include up to 1,100.

Worse still, the Applicant and the City failed to make the Design Flexibility Program available to the public during the time the EIR was circulated for public review and comment. Consequently, the public and decisionmakers cannot know with any certainty what the project comprises, and therefore cannot offer informed comment. A project description that omits or mischaracterizes integral components of a project cannot disclose all of the impacts of that project. See *Santiago County Water Dist. v County of Orange*, 118 CA3d 818, 829 (1981).

Beyond the obvious substantive and procedural problems this creates for public review and comment, it also evidences complete uncertainty as to what the Applicant will construct and when, significantly complicating the consideration of any future baseline. The lack of a uniform project description in the EIR and the associated technical studies strongly evidences this confusion even on the part of the preparers of the document. This complication only highlights the importance of a straightforward discussion regarding the appropriate baseline for analysis of Project-related environmental impacts, bolstered by substantial evidence to support the ultimate choice. The EIR fails to provide such a discussion, and in doing so leaves the public to guess about the City's choice of baseline and the basis for that choice.

B. The Development Agreement Potentially Delays Implementation of the Project to 2032 or Beyond, Though the Applicant has Stated that it Would Construct Some Portion of the Project Immediately Upon Approval.

According to Section 7.2 of the Development Agreement (the "DA"), the DA vests the Applicant's right to develop for twenty (20) years, exclusive of any delays caused by the City or by appeals of or legal challenges to approval of the Project. Consequently, assuming approval of the Project in 2012 and no delays of any kind, the Applicant could begin construction as late as 2032—twelve (12) years beyond the analytical horizon in the EIR traffic analysis.

Conversely, the Applicant could begin construction almost immediately upon approval. Indeed, the Applicant asserted an intent to do so during the CPC hearing on December 16, 2010, as well as in communications with members of the general public. Consequently, completion of at least a portion of the Project could occur well before 2020, which only increases the importance to decisionmakers and the public of an impacts analysis predicated on existing conditions.

In either case described above, as well as in innumerable permutations, construction could occur at some time other than 2020. However, the City has simply provided no substantial evidence as to why 2020, instead of the date of publication of the NOP or any other date (such as the anticipated date of approval of the Project), represents a proper baseline. As stated in *Save Our Peninsula v. Monterey County Board of Supervisors*:

"If an EIR presents alternative methodologies for determining a baseline condition . . . CEQA requires the each alternative be

supported by reasoned analysis and evidence in the record so that the decision of the agency is an informed one."

87 Cal. App. 4th 99, 120 (2001) (emphasis added).

Whether the timing of implementation of the Project would significantly affect the conclusions of the analysis is immaterial, even if impacts evaluated under existing conditions are less severe than under 2020. *See Sunnyvale, supra*, at 39. Even if the City could provide substantial evidence that 2020 provides a reasonable basis for comparison (though it has not done so), no authority allows a comparison of Project impacts only to a hypothetical (and unsupported) future baseline nearly a decade after project approval. *Sunnyvale, supra*, at 31. Although the 2020 analysis already provided in the EIR can inform decisionmakers and the public of possible future effects of the Project, and a reasonable argument may exist that the EIR should include it, "a straightforward assessment of the impacts produced by the project along on the exiting environment is the foundational information of [the] EIR." *Id.* at 34.

Finally, even if the City can provide the substantial evidence for a 2020 baseline, "[it must] set forth any analysis of alternative methodologies early enough in the environmental review process to allow for public comment and response." *Save Our Peninsula, supra*, at 120 (emphasis added). The City has not done so. No substantial evidence supporting a 2020 baseline exists in the EIR or was otherwise presented at the December 16, 2010 CPC hearing. Consequently, the public has not had an opportunity to comment on any such evidence. Numerous court decisions make clear that the use of an erroneous legal standard—such as the incorrect baseline for a CEQA analysis—represents a "failure to proceed in a manner required by law" with respect to this EIR. *See Laurel Heights Improvement Assn v. Regents of the Univ. of California*, 47 Cal.3d 376, 392 (1988). This failure represents a prejudicial abuse of discretion by the City, rendering the EIR invalid. CEQA § 21168.5; *Communities for a Better Environment*, 48 Cal. 4th at 310; *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 88 (1974);

Thus, the City must revise the EIR to include an analysis of the traffic impacts of the Project with respect to conditions as they existed at the time of issuance of the NOP and to include substantial evidence supporting the relevance of a 2020 analysis. The City must also recirculate the EIR to provide an opportunity for the public to comment on any evidence provided and for the Applicant to provide substantive responses to those comments.

III. Compliance with the Los Angeles Department of Transportation's *Traffic Study Guidelines* are Irrelevant to Compliance with CEQA.

As demonstrated above, compliance with CEQA requires an analysis of Project impacts on conditions as they exist at time of publication of the NOP, though the City may deviate from this where substantial evidence supports a compelling reason to do so, and an EIR may also evaluate impacts with respect to a future baseline. The Los Angeles Department of Transportation ("LADOT") *Traffic Study Guidelines* may allow the use of a future baseline. However, just as in *Sunnyvale*, compliance with local traffic analysis formulae "are irrelevant to

whether a proposed project complies with CEQA." *Sunnyvale, supra*, at 2. Further, even if the Traffic Study Guidelines represent the independent judgment of the City in allowing the use of future baselines as a general matter, those guidelines represent broad policy and do not and could not provide substantial evidence to support the use of any particular future baseline in evaluating the traffic impacts of any particular project.

Therefore, the Memorandum of Understanding ("MOU") from LADOT for a particular traffic study, as a project-specific document, would be expected to provide substantial evidence supporting the choice of baseline. However, the MOU for the Project merely states a buildout year of 2020 and provides trip generation estimates for 2020 for use in the traffic study. See MOU, p.1 and Table 2, included in Appendix IV.B to the EIR. The MOU provides no information whatsoever as to why and how 2020 was selected. Because the MOU contains no substantial evidence as to the selection of the baseline, it fails to satisfy CEQA and requires the EIR itself to provide that information. As stated above, the EIR fails to do so.

IV. The Air Quality and Noise Impact Analyses in the EIR Rely on the Traffic Analysis, and Therefore Also do not Evaluate the Impacts of the Project with Respect to Existing Conditions.

The Noise section (IV.C) of the EIR relies on the future baseline traffic analysis for its analysis of operational traffic noise. As discussed on page IV.C-28 of the EIR, roadway noise was calculated under and compared with the future (2020) with- and without-Project scenarios, and Tables IV.C-19 and -22 provide the off-site roadway noise impact comparisons for the project-specific and cumulative impact analyses, respectively. Because the noise analysis provides no justification for the use of a 2020 baseline other than a basis on and consistency with the 2020 traffic analysis, it suffers from the same fatal flaw as the traffic analysis; that is, the unsubstantiated use of a baseline other than the physical conditions that existed at the time of publication of the NOP.

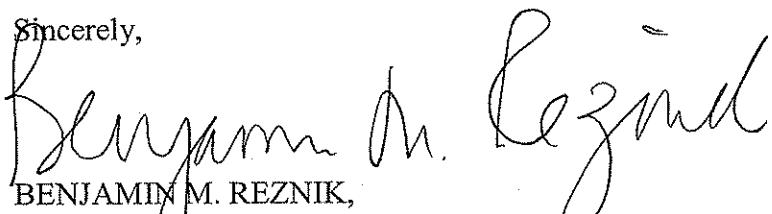
The Air Quality section (IV.G) of the EIR suffers from the same defect. Tables IV.G-15 and -16 provide estimated carbon monoxide concentrations for alternative scenarios in 2020, and Table IV.G-18 provides estimated operational emissions of criteria pollutants in 2020. The analysis thus hinges on a year 2020 comparison. Therefore, as with the noise analysis, the air quality analysis provides no justification for the use of a 2020 baseline other than a basis on and consistency with the 2020 traffic analysis, it suffers from the same fatal flaw as the traffic analysis; that is, the unsubstantiated use of a baseline other than the physical conditions that existed at the time of publication of the NOP.

Therefore, the City must also revise the noise and air quality analyses to evaluate impacts relative existing conditions and recirculate the EIR to allow the public an opportunity to consider the impacts of the project as properly characterized.

VIII. CONCLUSION

As noted above, the Owner believes the proposed Project could benefit for the Adjacent Property as well as the overall economy of Downtown Los Angeles. However, the Project will have material impacts on the Adjacent Property (and surrounding area) that require further analysis. Further, the EIR contains significant inconsistencies and deficiencies that render it invalid. The Owner urges the City to carefully analyze and address the comments provided in this letter, arrive at a clear understanding of the Project design and scope (including phased construction alternatives), correctly identify and substantiate a baseline for impact analysis, and appropriately identify impacts and specific mitigation obligations.

Sincerely,



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