



Friday, June 7, 2020

Subject: 2110 Bay Street EIR deficiencies

Honorable City Council
200 N. Spring Street, Room 272
Los Angeles, CA 90012

Dear Council Members,

Blue Arch Investments Inc. Los Angeles, California opposes certification of the Final Environmental Impact Report (EIR) for the Bay Street Mixed Use Development (Bay Street), CEQA: ENV-2016-3480 EIR SCH. 2017031007 and seeks to challenge the findings (See Figure 1 Development on the Block Bounded by S. Santa Fe Ave. E. Bay Street, Sacramento Street, in the Alameda East Redevelopment Study Area and Central City North Community Plan of Los Angeles California. at the end of this document)

In summary we are presenting a “substantial evidence” challenge of the sufficiency of findings of the Bay Street EIR which improperly omitted adequate biological analysis in both the Initial Study, supporting documents and resulting EIR. We include with this comment substantial evidence that potential bat habitat is present on site.

The attached habitat assessment by Stephanie Remington M.S. conducted on October 6, 2019 concludes that suitable habitat is present on site. To prevent possible unauthorized take of bats on or off-premises, we have refrained from making the bat habitat assessment public until now.

Justification for Challenge

The City’s rebuttal to our appeal and to the comments by the Endangered Habitats League claims that the “site assessment” was adequate because “at the CAJA site inspection no birds or bats were observed” and CAJA consulted the online maps for the National Wetlands Inventory (NWI) and Navigate LA for Significant Ecological Areas (SEA). In response, we counter that:

- 1) Because we presume the site inspection was conducted during daylight hours, it is inadequate to say that “no birds or bats were observed”. Even if the habitat is not presently occupied but there is evidence of previous occupation, the loss of that habitat is significant because of the high fidelity that bats have to their roosts. Since the findings of our habitat assessment show that the site has suitable habitat for bats, acoustic presence or absence surveys are needed to demonstrate:
 - a) That bats are or are not present now and,
 - b) A detailed habitat assessment is required to demonstrate that previously occupied habitat is or is not present.
- 2) The Initial Study (IS) and EIR incorrectly omitted the “mandatory findings of significance” required for biology under CEQA under the mistaken premise that the checklist questions and underlying documentation do not need to consider species that are not sensitive, threatened or endangered.

- 3) Because the site has been disturbed by unauthorized parking by SOHO warehouse for their members, evidence of previous occupation by birds and or bats may have been obliterated. If bats have already been eradicated, then the project has already incurred significant impacts. Guidance posted at the Los Angeles County Department of health states “It is illegal to keep, injure, or kill bats”. The developer bears the burden of proof to provide substantial evidence as to whether bats have already been impacted or unoccupied roosts or colonies have been eradicated.
- 4) If impacts have already occurred, then these findings must be disclosed, along with studies that support them and the mitigation and monitoring plan in the recirculated EIR.
- 5) The documented loss of two bat maternal roosts and/or hibernacula have occurred in the last three years within the warehouse district of Los Angeles. This is evidence of a systemic oversight by City Planning causing cumulative effects that are already individually significant. Any additional impacts of this kind contribute to the growing cumulative impact which, in the absence of a cumulative effects analysis, may already be significant.
- 6) These documented losses to two bat colonies within the last three years represent individually significant impacts as well as new and previously undisclosed cumulative effects. The potential contribution to these cumulative effects from previous bat habitat or bat colony losses or potential future impacts to bat habitats or colonies resulting from the Bay Street Mixed Use Project must be disclosed as “substantial new information” in the recirculated EIR.

Request for Remedy

In the event that the City disagrees with our assessment of potential habitat, significant effects or recommendations for conducting assessments, surveys or properly completing an Initial Study, we seek a peer review of the Initial Study and Site Assessment conducted by CAJA Environmental Services that the EIR relies upon.

Discussion Basis for Peer Review and Substantial New Information Finding

- 1) Conduct technical studies and determine if there is “new information” that requires the EIR to be recirculated. Specific Requirements for an “on-site” Habitat Assessment and Acoustic Bat Survey Biological Technical Study are based on the substantial evidence from our habitat assessment as follows:
 - a) Studies shall be conducted by a qualified biologist specializing in bat acoustic studies
 - b) Conduct acoustic studies including the project site and 500-foot survey buffer for all the potentially occurring species identified in the habitat assessment.
 - c) Conduct multiple acoustic field studies to capture seasonality, weather, and species-specific requirements as guided by the lead bat biologist for your investigations.
 - d) Conduct nesting bird studies to determine impact to nesting birds in both structures and vegetated habitat on site and within the 500-foot survey buffer.
- 2) The City must demonstrate with substantial evidence, the extent and significance of potential biological impacts and whether or not they constitute “new information” that requires the EIR to be recirculated under the California Environmental Quality Act (CEQA) through the following actions:

- a) Complete the Initial Study deficiency that omitted discussion of CEQA “mandatory findings of significance” (Section 16065) on the bases of no impacts. We address the specific thresholds for the mandatory findings that we have excerpted here in the appendix section of this document under the heading Guidance:

“The project has the potential to: substantially degrade the quality of the environment; substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered rare or threatened species;”

- b) Submit the studies to California Department of Fish and Wildlife (CDFW) for review and comment that was precluded when the EIR was presented with erroneous the assertion that the site had no habitat and therefore no impacts
 - c) Conduct a cumulative effects analysis for biology in the re-circulated EIR for the Bay Street project acknowledging its integrated planning and strategically planned timing of project submittals with Virgin Hyperloop One to avoid CEQA analysis as well as the foreseeable-future multi-project complex SOHO Warehouse Members Club and Hotel (SOHO) and Family Trust 10-unit condos.
- 3) With a finding of “substantial new information” Recirculate the EIR for Bay Capital Fund’s Bay Street Mixed Use Project (Bay Street) to provide “meaningful public review and comment” that was precluded when the EIR tiered to an Initial Study that dismissed key CEQA Checklist items as “no impact” for biology and cumulative effects.

In review, our request is based on the following facts and assertions:

- a) Since we demonstrate that potential habitat does in-fact exist on site, the “no impact” finding cannot be made since there is no substantial evidence in the form of a presence absence survey to demonstrate that bats are not on site
- b) The “no impact” rational in the IS would be in error if bat roosts or colonies exist on site because impacts to bat colonies meet the significance threshold under the CEQA definition for “mandatory findings of significance”. Mandatory findings of significance were omitted in the IS since the checklist questions erroneously concluded that there was “no impact”.
- c) Demonstrating that bats are not currently present is not adequate to conclude that they have not already been impacted by unauthorized actions
- d) Within the last three years two bat colonies in José Huizar’s district were destroyed when warehouses were demolished, therefore significant individual effects within the vicinity of the project have occurred without CEQA- required cumulative effects analysis.
- e) These known losses of bat colonies demonstrate a systematic failure by the City of Los Angeles in implementing CEQA “mandatory findings of significance” for species with no formal status and in implementing cumulative effects analysis.

Bat colonies are imperiled locally and even more so since the pandemic because of fear and anger that has nothing to do with bats. Bats are actually dead-end hosts to viruses like West Nile and provide protection to the community by consuming disease vectors.

The Project should not be approved with a "Statement of Overriding Considerations" without sufficient analysis of potential biological impacts and mitigation of impacts to a level that is less-than-significant.

Proper environmental review of this project can bring awareness to an often over looked issue in the development community that is gaining broad recognition in the environmental community.

The City's deficiency in environmental review of biological resources can be restored by hiring a biologist to the position of "planner"; a position that was lost to attrition in 2017. The City's environmental review process has languished without a biologist in the more than three years since... the same period of time in which the two bat colonies that were destroyed in warehouse demolitions occurred.

The City of Los Angeles can avoid delay of future developments and save time and money for everyone by implementing these remedies and hiring a biologist on staff who knows how to properly consider environmental effects. Therefore, we object to all of the alternatives in the Bay Street EIR until these remedies are satisfied.

Please see our guidance listed below for specific deficiency remedies for the Initial Study, mandatory findings of significance and cumulative effects analysis and which are included as detail for our formal request for remedy.

Sincerely,

A handwritten signature in cursive script that reads "Debbie Kinsinger".

Debbie Kinsinger
Owner/Principal Scientist
Kinsinger Environmental Consulting

Guidance

The habitat assessment we conducted is inadequate to do more than assess potential since we did not have permission to access the site and conducted that assessment from the site perimeter. Therefore, we present the following remedies to satisfy the IS and EIR deficiencies:

After the presence/absence acoustic survey is conducted by a qualified bat biologist team, if results are negative, the site should be inspected by a qualified bat biologist for signs of **previous occupancy because significant impacts may have already occurred**:

- 1) Require that a qualified biologist have access to a crane lift to safely inspect rafters/laths and beams inside the warehouse roof structure for evidence of past use and white wash
- 2) Inspect all aerial structures for evidence of incidental abandonment
- 3) Inspect all aerial structures for evidence of non-humane removal methods and/or dead bats
- 4) If necessary, subpoena SOHO and Bay Street employees for statements about actions taken to clean up the site for parking use

The City's method of presence/absence surveys should be guided by a qualified bat biologist with local experience in the urban setting. Briefly and in general, the biologist should recommend:

- One or more nights of survey or surveys and/or in more than one seasons depending on the specific species biology under consideration, time of year and current and predicted weather.
- A team of biologists to monitor multiple potential access points on the survey nights
- Specific infrared visual tools and species-specific acoustic devices
- Detailed and species-specific if exclusion is unavoidable, detailed methodology for humane exclusion and mitigation recommendations for temporary and permanent habitat replacement
- Mitigation and monitoring plan with success criteria and 5-year monitoring for habitat adoption and success

A biologist that is not able to do this, may not be qualified. We can provide the City with a list of qualified biologists with local experience. To help the City better understand what proper implementation of CEQA with respect to bats is presented by CDFW in this one-hour Youtube video from the CDFW Conservation Lecture Series Archive titled "Conserving California's Bats Through Environmental Review and Permitting":

<https://www.youtube.com/watch?v=QFXLRa5mCII&feature=youtu.be>

The City should have required a biological habitat assessment rather than a "site inspection". Based upon the finding of our habitat assessment, the Initial Study CEQA biology checklist questions should be revised the initial study using some of the original language from the IS and inserting revisions as follows with our insertions in italics:

IV. BIOLOGICAL RESOURCES: Would the project:

- a) Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?

A significant impact would occur if a project would remove or modify habitat for any species identified or designated as a candidate, sensitive, or special status species in local or regional plans, policies, or regulation, or by the State or federal regulatory agencies cited above. The Site contains a vacant industrial shed, surface parking, and vacant manufacturing buildings. There are no City or county significant ecological areas on the Project Site or near the Project Site's vicinity *but there is some potential for the Western mastiff bat to occur on site, which is a CDFW Species of Special Concern (SSC).*

The Los Angeles River is a significant hydrologic feature only 550 feet from the subject property that currently provides well documented foraging habitat for many bat species and insectivorous birds that roost or nest in the adjacent urban habitat. The subject project and adjacent projects act as a wildlife corridor between roosting and foraging habitat for these species when they occur on site and therefore possess significant biological resource value.

The site has natural open spaces under the warehouse shed which has a wood lath and corrugated tin roof and open beam wooden struts with a height of approximately 30 feet, enough drop to support the Western mastiff bat, California's largest bat. It requires such height to gain flight after dropping from a roost.

The crevices and spaces between the rafters, lathes and some enclosed walls with openings provide ample opportunity for many other species of colony roosting bats. This structure's adjacency to the LA River is also important for nesting suitability to insectivorous birds such as barn swallows, cliff swallows, swifts as well as habitat for common seed eaters, house finches and doves.

Due to the presence of biotic resources for bats and nesting birds a CNDDDB query of the urban habitats and review of e-bird listing show that there is (no, low medium or high) potential for XX number of candidate, sensitive, or special status species identified in local plans, policies, regulations, by the California Department of Fish and Game (CDFG), or the U.S. Fish and Wildlife Service (USFWS) would be expected to occur on the Site.

In addition to the shed habitat, there is a brick building on site that provides crevice habitat suitable for bats between that building and the adjacent building owned by Virgin Hyperloop One.

The CNDDDB query and California Native Plant Society (CNPS) for the habitat assessment show that there is XX potential for threatened, endangered, sensitive or rare plants to occur. Therefore, XX mitigation will maintain impacts that are less-than-significant.

To reduce impacts to wildlife to a level less-than-significant, focused acoustic surveys should be conducted by a qualified bat biologist to determine the level of potential impacts and the nature of mitigation required for specific bat species in the EIR evaluation.

Demolition should occur outside of the nesting season from February 1 through August 31 or a qualified biological monitor should be onsite to monitor for nesting birds and maintain mitigation.

Since bats may use the site during any season, a qualified bat biologist should conduct a pre-construction bat survey at any time of year in addition to pre-construction nesting surveys during the bird nesting season. Details for survey specifics and mitigation measures are in the attached appendix XX mitigation and monitoring plan, to be updated at the completion of scheduled focused bat surveys and pre-construction surveys.

b) Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?

A significant impact would occur if riparian habitat or any other sensitive natural community identified locally, regionally, or by the State and federal regulatory agencies cited would be adversely modified by a project.

The nearby LA River is classified as Wetland (Riverine habitat) and is 550 feet East from the Site. It provides well documented foraging habitat for bats and insectivorous birds. The warehouses, bridges and rooves, both flat and pitched, provide unique ecological niches for a variety of wildlife that forage on the river within the warehouse district. Although this river is contained within a trapezoidal cement channel and will not be physically modified by the proposed project, loss of a significant colony of bats and or nesting birds could create an adverse imbalance in the insect population. The insect species that are associated with the LA River are part of its habitat and natural community. An adverse imbalance within their populations would be a significant impact which can be avoided by maintaining the balance of insectivorous species that forage there.

c) Have a substantial adverse effect on state or federally protected wetlands (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

A significant impact would occur if federally protected wetlands, as defined by Section 404 of the Clean Water Act, would be modified or removed by a project. The nearby LA River is classified as Wetland (Riverine) but is 550 feet from the Site and there are intervening buildings and railroad uses.³⁰ This habitat area is not near the Project Site and will not be affected by Project construction or operations. Therefore, the Project will not result in the direct removal, filling, or hydrological interruption of a federally protected wetland as defined by Section 404 of the Clean Water Act. Therefore, no impact would occur. Further evaluation of this issue in an EIR is not required.

d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?

A significant impact would occur if a project would interfere or remove access to a migratory wildlife corridor or impede the use of native wildlife nursery sites.

The Site contains a vacant industrial shed, surface parking, and vacant manufacturing buildings and has no vegetation. It does possess suitable crevice and roof habitat for nesting birds and bats (see IV-a). Loss of bat hibernacula and/or maternal roosts would substantially interfere with the movement of native bats and could result in exceeding the significance threshold of any of several factors of "mandatory significance".

For example loss of an individual colony of bats would "eliminate an animal community" and/or cause a fish or wildlife population to drop below self-sustaining levels" Loss of a Western

mastiff bat, an SSC, could substantially reduce the number or restrict the range of and endangered, rare or threatened species”

Bats have a high site fidelity and a single hibernacula and/or maternal roost, even if unoccupied is significant. A signal colony may represent 8 to 10 generations of reproduction therefore the loss of even one can be catastrophic causing genetic isolation of intermingling colonies of the same species and/or stochastic extirpation, i.e. “loss of self-sustaining levels”.

Because of bat’s high site fidelity, mitigation in the form of replacement habitat does not guarantee reduction of impacts to less-than-significant. For this reason, mitigation as it is often done in Caltrans projects, is conducted over a multiple year period to guarantee success in humane exclusion and successful adoption of substitute habitat. For example, since the Bay Street’s planned pedestrian walkway between the Bay Street project and the Hyperloop One project is already in the design phase, mitigation in the form of crevice habitat can be designed into the underside of the walkway, if focused surveys determine that type of habitat is appropriate.

The Site is located within an urban area that is highly disturbed with a combination of new and old structures. As old structures are gradually replaced with new ones the habitat for nesting birds and bats changes in unpredictable ways. Therefore, it’s prudent in the habitat assessment to know what types of habitats the birds and bats in the area use. For instance, flat gravel rooftops are used for nesting by the common nighthawk. The biologist for our habitat assessment determined that the types of habitats used by birds in this area include xx for xx species. And that the flat roof-top and eaves of the brick building on site (do or do not) provide nesting habitat for XX species. Likewise, the pitched open beam rooftop of the shed (does or does not) provide habitat for XX species.

Since the Project would involve changes in the existing environment that could interfere with the movement of migratory birds or other wildlife species including bats and these species rely on the adjacent bodies of water, the LA River that provides habitat for insects, without further investigation, the project may interfere with the movement of native resident or wildlife species and established native resident or migratory wildlife corridors and may impede the use of native wildlife nursery sites such as bat hibernacula and/or maternal roosts. Therefore, focused presence absence surveys are required before a significance threshold determination can be made and what mitigations would be necessary to reduce those impacts to a level that is less-than-significant.

e) Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?

(This section unchanged)

f) Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?

A significant impact would occur if a project would be inconsistent with policies in any draft or adopted conservation plan. The Project Site is located in an urbanized area of Los Angeles and is currently developed with buildings, paving, and minimal landscaping. The Site is not located in or adjacent to an existing or proposed Significant Ecological Area. *However, it is 550 feet from the Los Angeles River which provides foraging habitat for insectivorous birds and bats that use the adjacent buildings and structures for roosting and nesting.*

While there is no adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan that applies to the Project Site, non-sensitive wildlife within the area is still subject to CEQA “mandatory findings of significance” and the significance thresholds discussed in d) above.

Otherwise, the Project is within the River Improvement Overlay District (RIO), which requires compliance with the RIO District and development regulations in LAMC Section 13.17. The Project would comply with these regulations. The Project would not conflict with any habitat conservation plans.

However, significant impacts may occur with or without mitigation and further evaluation of these issues will include a detailed habitat assessment for both birds and bats. For bats that habitat assessment will consider the past or present use of the site by bats for day roosts, maternal roost and hibernacula. If there is indication that the site was used by bats in the past then mitigation will be proposed for replacement habitat with species-specific maintenance and monitoring 5-year success criteria in the mitigation and monitoring plan.

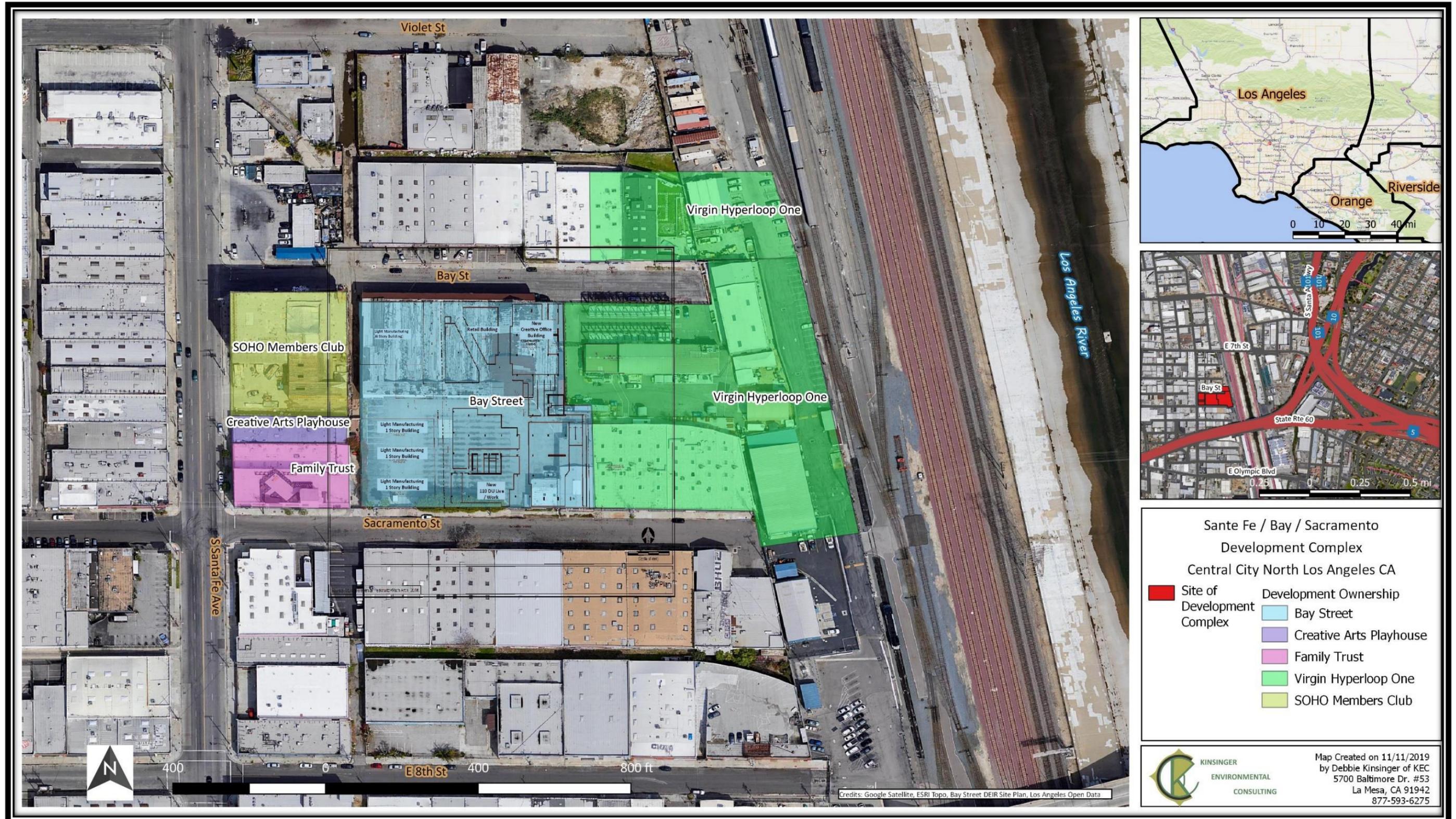


Figure 1 Development on the Block Bounded by S. Santa Fe Ave, E. Bay Street, Sacramento Street, in the Alameda East Redevelopment Study Area and Central City North Community Plan of Los Angeles California.