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October 28, 2024

Via email

Anaheim City Council
200 S. Anaheim Blvd.
First Floor
Anaheim, CA 92805

Re: Comments on the Proposed SALT Development Project - Agenda Item #31

Mayor Aitken and Councilmembers:

On behalf of community members and residents of Anaheim Hills, we provide the below comments on SALT Development LLC's proposed "Hills Preserve" development along Santa Ana Canyon Road (the "Project"), which will be considered at tomorrow's City Council meeting.¹ The Project requests a General Plan Amendment, Zoning Reclassification, Zoning Code Amendment, Tentative Tract Map, Discretionary Tree Removal Permit, and Development Agreement.

After careful review of the Project materials and environmental impact report ("EIR"), we identified several violations of the California Environmental Quality Act, as well as the City of Anaheim's ("City") General Plan and municipal code, as identified below.

Furthermore, it has come to our attention that the applicant sent an ultimatum to the City on September 27, 2024: "It is SALT's intent to file formal development applications for [three] Builder's Remedy projects on or before December 4, 2024, if the Hills Preserve project has not been approved by that date." (**Exhibit A**, SALT Letter to City.)

Before the City Council can approve a General Plan Amendment project, it is required to make specified findings of fact. SALT filed three unrelated separate development applications totaling over 1,000 units with the apparent purpose of forcing the City to approve this Project.

SALT's statement essentially presents a veiled threat and compromises the City's decision-making process by framing the situation as an either/or choice, pressuring the City to approve the Hills Preserve project or face a much larger development under the "Builder's Remedy" law. By

¹ These comments apply to the "Alternative 2" Project that is described in the City's Statement of Overriding Considerations and Project EIR, as well as the Preferred Project. The Alternative 2 Project eliminates six single-family homes from the Preferred Project, and does not alleviate any of the below-identified deficiencies with the EIR and Project.

invoking this law, SALT attempts to effectively strip the City of its authority to make independent planning decisions. The implicit threat that SALT will proceed with the Builder's Remedy projects if its proposal is rejected attempts to coerce a favorable decision, while undermining normal environmental and planning review processes. This tactic limits public input and discourages the City from fully considering community concerns or alternative proposals, ultimately compromising the integrity of the planning process by forcing a decision based on fear rather than on the merits of the project and its alignment with the City's goals.

Since the City's independent decision-making authority on this Project would be compromised, **the City must continue the hearing on the Project until after December 4, 2024, the trigger date of SALT's threat.**

The City owes a duty to its residents to provide unbiased, objective decision-making and consider the environmental impacts of *this Project*; and to protect health, safety, and welfare of residents. The City cannot do so with a threat hanging over its head.

I. The City Council Is Not Obligated to Approve the Project

We first want to address the erroneous claims made by SALT through its counsel in a September 27, 2024 letter to the City. Incredulously, SALT is wielding the threat of *other* projects it proposed purely to bully the City into approving a project that conflicts with the General Plan, requires major deviations from the zoning code, severely impacts the sole evacuation route for the community as determined by the City's own fire chief, significantly increases vehicle miles travelled impacts, destroys designated critical habitat, and contains *zero* affordable housing.

Counsel for SALT wrote to the City:

[W]e have presented the City with two options for this site. The first option, the Hills Preserve project, is the project currently before the Planning Commission... The second option is a trio of developments proposed under the state's "Builder's Remedy" law, Gov. Code § 65589.5(d), collectively comprising 1,280 homes on these parcels ("Builder's Remedy projects"). If the City chooses to approve the Hills Preserve project, SALT will withdraw the pending preliminary applications for the Builder's Remedy projects. However, if the City denies the Hills Preserve project, SALT intends to file formal development applications for the Builder's Remedy projects. As described below, the City is legally prohibited from disapproving the Builder's Remedy projects or approving them in a manner that reduces those projects' feasibility. (Exhibit A.)

Not only is this bad faith, but it is also a threat. SALT filed three preliminary project applications on June 7, 2024, and is using these applications in an attempt to force the City to approve a

completely separate project. SALT issues a clear threat to the City: “It is SALT’s intent to file formal development applications for the Builder’s Remedy projects on or before December 4, 2024, if the Hills Preserve project has not been approved by that date.”

The decision of whether or not to approve the Project is purely discretionary for the City and it *must* be made with full discretion. SALT has undercut the City’s discretion through its plan to force the City’s hand. Notably, SALT sent this letter to the City “in response to the staff report” provided in advance of the Planning Commission hearing on the Project, where staff found that two of the four required findings for a General Plan Amendment cannot be made. (Exhibit A, September 27, 2024 Letter from SALT to City.)

SALT’s plan appears to be having its intended effect. The Staff Report released before SALT’s letter recommended denial of the requested General Plan amendment for failure to meet the required findings. (September 30, 2024 Planning Commission Report, p. 23.) However, after SALT issued its threat, the City Council Agenda Report now recommends that the City Council approve the requested General Plan Amendment and certify the EIR. (October 29, 2024 City Council Agenda Report.)

Rather than incorporate changes to the Project or identify alternative locations in good faith to address the City’s concerns, SALT instead undermined the discretionary nature of the City Council’s decision. For this reason alone, the hearing on the Project must be continued until after SALT’s stated “deadline.”²

We also wish to briefly address SALT’s claim that “in the event the General Plan Amendment is denied per staff’s recommendation, the City will be required by state housing law to approve the alternative projects SALT has put forward.” As SALT itself notes, the Housing Accountability Act does not strip local agencies of their ability to deny or condition projects where they find the projects “would have a specific, adverse impact upon the public health or safety.” Furthermore, these findings are only required if a “proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards.” (Government Code Section 65589.5(j)(1).) The Housing Accountability Act further states specifically that nothing relieves a local agency from making the required CEQA findings and otherwise complying with CEQA. (Government Code Section 65589.5 subd.(e).)

² We find it worth noting that nothing prevents SALT from obtaining its approval for the Project from the City, and then filing formal applications for the three “Builder’s Remedy projects” regardless.

The only information that SALT provides about its three “Builders Remedy Projects” is contained in the following list: “1) Deer Canyon apartments: 725 apartments on 13.95 acres; 2) Deer Canyon Townhomes: 90 homes on 32.26 acres; and 3) Valley View Apartments: 465 apts on 29.8 acres.” (Exhibit A.) SALT simply points to general requirements and penalties under the Housing Accountability Act, rather than discuss the actual project specifics. Thus, SALT’s claims that the City would be obligated to approve these three projects lack foundation.

It is ironic that the Project invokes State laws intended to maintain housing affordability when the Project is 100% market rate with no affordable housing, the developer describes the Project as “luxury for-rent apartments,” and offers the “cheapest” rates of \$2,500 a month, with the “most expensive [] likely going to push \$15,000-16,000 a month.” (Appendix D, Applicant’s Workshop Comments.)

We urge the City to seriously consider the precedent this would set. If developers see the City bow to threats like this one from SALT, it will only incentivize similar behavior from other developers in future applications.

II. The Project Does Not Qualify for a General Plan Amendment

To approve a requested General Plan Amendment, the City must make a finding of fact that the evidence presented shows that all of the following conditions exist:

- 1) The proposed amendment maintains the internal consistency of the General Plan;
- 2) The proposed amendment would not be detrimental to the public interest, health, safety, convenience or welfare of the City;
- 3) The proposed amendment would maintain the balance of land uses within the City; and
- 4) If the amendment is to the General Plan Land Use Map, the subject property is physically suitable to accommodate the proposed modification, including but not limited to, access, physical constraints, topography, provision of utilities, and compatibility with surrounding land uses.

As the City’s Staff found in its September 30, 2024 Planning Commission report, the Project conflicts with the required findings that it would not be detrimental to public interest, health, and safety, and that it is physically suitable:

[B]ecause the magnitude of increased density and intensity, inhabitants and vehicular trips will increase evacuation time and result in an exacerbation of risk, the required finding that the proposed amendment ...would not be detrimental to the public interest, health, safety, convenience or welfare of the City (Finding No. 2) **is unsupported according to City staff, in consultation with Anaheim Police Department and Anaheim Fire & Rescue staff.** Furthermore, while City staff

believes a General Plan Amendment to incrementally increase residential density on the project site would be in furtherance of maintaining the balance of land uses in the City, considering the physical constraints of the site largely attributable to topography, The finding that the proposed map amendment – particularly to accommodate 498 multi-family residential units – **is physically suitable for the site** (Finding No. 4) **is not established**.

(September 30, 2024 Planning Commission Report, p. 23.)

At the Planning Commission hearing, Anaheim’s Fire Chief Russel voiced his opposition to the Project due to its impact on evacuation operations in the event of a wildfire.³ Only one evacuation route exists in the community, which results in all vehicles utilizing Santa Ana Canyon Road during an evacuation. Residents submitted extensive comments and photographs to the City detailing the massive gridlock and hours-long delay on Santa Ana Canyon Road during prior evacuations. After Fire Chief Russell spoke, the Police Department Captain addressed the Commission and agreed with Fire Chief Russell, also recommending that the Commission deny the proposed Project.⁴

Furthermore, Fire Chief Russel explicitly noted that the EIR’s evacuation study presumed flawless execution of the evacuation plan, which in practicality is far removed from reality on the ground.⁵ As described further in Section III, the EIR’s “Evacuation Study” suffers from significant flaws, omissions, and assumptions lacking substantial evidence.

The Project also is not physically suitable for the site. Chapter 17.06 of the City’s Code, which addresses “Grading, Excavations and Fills In Hillside Areas,” explains that “[i]n the use of crib walls and retaining walls, it is essential to require certain standards in order to preserve the natural beauty of the Hillside Area. These standards ... are imposed in addition to any applicable permit and other requirements for crib walls and retaining walls.”

The City’s Code establishes that the “maximum height **shall be ten feet**” for retaining walls. (AMC Section 17.06.048.) The EIR admits, “the Project would include some relatively tall retaining walls when compared to the walls that are allowed by AMC”: two **60-foot-tall retaining walls** and a 30-foot-tall retaining wall. (EIR, p. 4.1-23, emphasis added.) Thus, the Project proposes several retaining walls three to six times the height allowed by the City.

³ Anaheim Planning Commission Meeting (Sept. 30, 2024), available at <https://www.youtube.com/watch?v=1eaRrOKge0U> (cited language beginning at the 1:37:00 mark).

⁴ *Id.* beginning at 1:39:20 mark.

⁵ *Id.* beginning at 1:41:00 mark.

The EIR further admits “[t]he Project Site has **existing topographic constraints** and existing development to the west that limit what the Project Site can improve on.” (EIR, p. 4.10-64, emphasis added.) The Project is plainly not suitable for the site, resulting the need for several deviations from the Anaheim Municipal Code.⁶

Therefore, Staff correctly found that the subject property is not physically suitable to accommodate the proposed modification, and the requested amendment should be denied.

III. The Project Fails to Adequately Analyze and Mitigate Its Significant Impacts to Evacuation and Wildfire Risks

1. The Project Will Significantly Impact Evacuation on a Constrained Roadway with a History of Delayed Evacuations, and Fails to Provide Adequate Mitigation

In response to the increase in severity and frequency of fires in California, the Attorney General’s Office released new guidance on siting and design of development in very high fire severity zones in 2023, titled “Best Practices for Analyzing and Mitigating Wildfire Impacts of Development Projects Under the California Environmental Quality Act.”⁷

The Attorney General’s Office explains, “Development in fire-prone areas increases the likelihood that more destructive fires will ignite, fire-fighting resources will be taxed, more habitat and people will be put in harm’s way or displaced, and more structures will burn. It is therefore imperative that local jurisdictions making decisions to approve new developments carefully consider wildfire impacts as part of the environmental review process, plan where best to place new development, and mitigate wildfire impacts to the extent feasible.”

In particular, the Attorney General explains that “siting residential structures in rugged terrain or on the top of steep hills may increase the wildfire risk.... Some EIRs have concluded that the conversion of some wildland vegetation into paved development reduces or does not increase wildfire risk. This conclusion is contrary to existing evidence and the well-accepted understanding that the fundamental driver of increased wildfire risk is the introduction of people into a flammable landscape.”

The Project site is located in a very high fire severity zone. The EIR concluded that “the Project would expose additional people and structures to wildfire hazards and secondary effects when

⁶ Including: 18.46.120 Crib Retaining Walls, 17.06.048. Crib Walls and Retaining Walls, 18.46.120.1201 Crib and retaining walls visible from public rights-of-way, 17.060.110 Excavation –Terracing 17.06.120 Fills –Terracing

⁷ Available at: <https://oag.ca.gov/system/files/attachments/press-docs/2022.10.10%20-%20Wildfire%20Guidance.pdf>.

compared to existing conditions” and “would increase evacuation time that is already in excess of three hours without implementation of the Project.” (EIR, p. 4.18-3.) The EIR ultimately relied on the following mitigation measures MM HAZ-4, MM HAZ-5, and MM HAZ-9 in its determination that impacts could be mitigated to below a level of significance.

These mitigation measures are plainly inadequate. MM HAZ-4 merely requires the preparation of a Construction Management Plan, which would only serve to mitigate wildfire hazard during the construction phase of the development. (EIR, p. 4.8-46–4.8-47.) This mitigation measure would provide **no** benefit for the residents of the proposed development once construction is completed. MM HAZ-5 calls for the installation of closed-circuit television (“CCTV”) cameras at various locations in proximity of the Project. (*Id.* at 4.8-48.) This too provides no tangible benefit once an evacuation has begun; rather, it would only serve as an alert system. Moreover, nothing in the language of MM HAZ-5 purports to provide for monitoring of these CCTV cameras. Without active monitoring, the installation of the CCTV cameras fails to serve even as a means of early fire detection. Similarly, MM HAZ-9 requires the Developer to pay its “fair share” to Anaheim Fire and Rescue to support education and outreach programs. (*Id.* at p. 4.8-49.) While this measure may serve to educate the public, education alone will not reduce evacuation times by more than a non-negligible degree.

The Attorney General’s Office Memorandum recommends “[c]onstruction of additional points of ingress and egress and modification of evacuation routes to minimize or avoid increasing evacuation times or emergency access response times.” Yet, each of the Project’s mitigation measures fails to curtail evacuation times. In fact, not a single fire hazard measure calls for substantive improvements to the Project’s planned evacuation routes, despite the site’s identification as a “constrained roadway” in the City’s General Plan.

Senate Bil 99 also emphasizes the need for ample routes for ingress and egress, requiring identification of residential developments in hazard areas that fail to provide at least two emergency evacuation routes. (Cal. Gov. Code § 65302, subd. (g)(5).) In response to Senate Bill 99, the City identified the Project’s entrance as a “constrained roadway” in its General Plan safety element. (General Plan, Safety Element, Figure S-7.) The General Plan further explains that “Cal Fire is concerned with subdivisions within the state that have 30 or more dwellings accessing a single roadway.” (*Id.* at p. 27.)

This Project would evacuate along a single road that leads to and from the Project, Santa Ana Canyon Road.

It is evident that Project poses a severe risk of fire hazard to its residents, fails to adequately mitigate that risk, and is thus inconsistent with the Attorney General’s Office guidance. The City’s Fire Chief came to this conclusion. For this reason, the Project further conflicts with the

General Plan’s mandate to “[e]nsure all new development and redevelopment projects provide adequate ingress/egress for emergency access and evacuation.” (*Id.* at p. 31.)

Therefore, the Project must be denied unless the above deficiencies are corrected.

2. The Project Fire Evacuation Study Relies on Inaccurate Assumptions and Fails to Analyze Cumulative Projects in the Evacuation Modeling

The EIR’s “Evacuation Analysis” concluded the Project would increase evacuation times in the community by 24 minutes, resulting in an evacuation time of 3.5 hours for a fire origin located immediately east of the project site. (EIR, Appendix S (“Evacuation Report”), p. 7.)

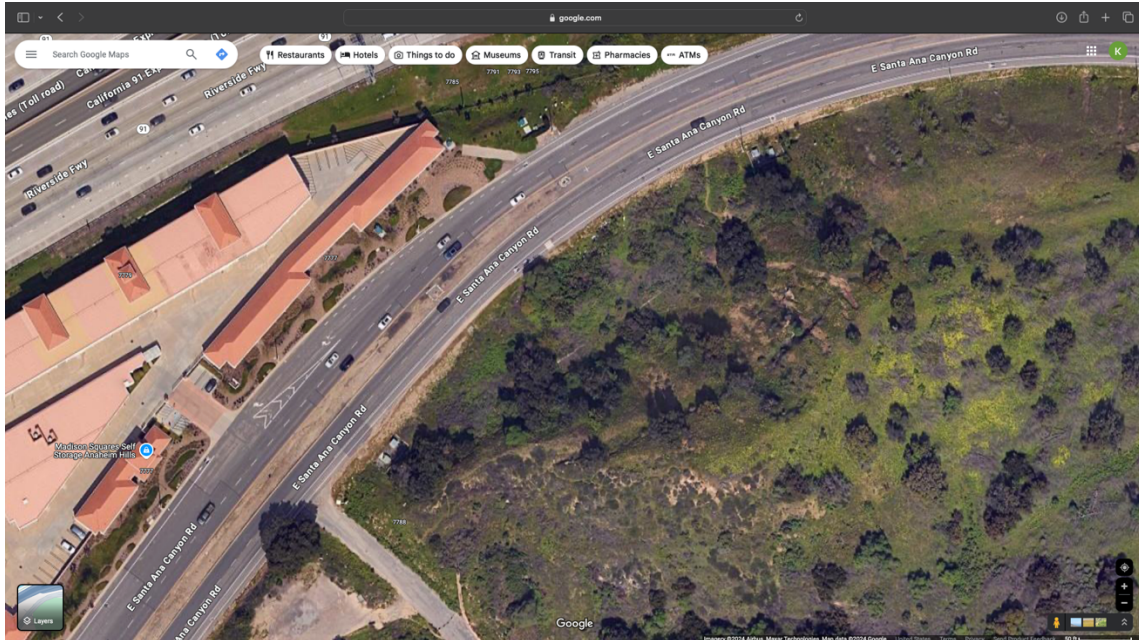
Despite the EIR’s admission that the Project would increase evacuation times in the event of a fire originating east of the site, the Evacuation Report assumed that “the proposed Project would shelter in place for the other fire origins evaluated in the Firesafe Planning Solutions fire modeling scenarios, which would therefore result in no increase in evacuation travel times along Santa Ana Canyon Road.” (*Ibid.*) This further conflicts with the Attorney General’s Guidance to “[a]void overreliance on community evacuation plans identifying shelter-in-place locations. Sheltering in place... should not be relied upon **in lieu of analyzing and mitigating** a project’s evacuation impacts.”⁸

The EIR fails to provide any evidence for this assumption. The City’s Fire Chief concluded that the Evacuation Report was unrealistic, further undermining the Evacuation Report’s assumption.

The Evacuation Plan contained within the Evacuation Report relies on “road closures and the intersection locations that would require traffic control by the City of Anaheim Police Department...City of Anaheim Police Department personnel would be placed at these identified intersections to direct vehicular traffic ...” Yet, the City’s own Police Department Chief also opposed the Project as described earlier.

The EIR also claims that “[g]iven that Santa Ana Canyon Road has three westbound through lanes as it approaches Imperial Highway, the evaluation assumes three westbound through lanes.” (Evacuation Report, p. 6.) This is not accurate. Santa Ana Canyon Road has only two lanes in each direction within the Project vicinity, as demonstrated by Satellite Imagery:

⁸ See *supra*, fn. 6.



(Satellite Imagery of Santa Ana Canyon Road at Project Entrance)

The Evacuation Report’s inaccurate assumption that Santa Ana Canyon Road would have three lanes in both directions is particularly concerning given that the Project’s Transportation Analysis admitted several segments of Santa Ana Canyon Road “are forecast to operate at an unacceptable LOS D or LOS E when compared to the LOS standards defined in this report.” (EIR, Appendix L, p. 74.)

Finally, the EIR is required to consider a Project’s cumulative impacts, including its potential to result in cumulatively significant impacts to evacuation. The City is currently processing another major project – 450 units and commercial uses – on Santa Ana Canyon Road, off Festival Center Drive.



(Location of Festival Center Drive Project, As Shown in City Project Documents)

While the SALT Project's EIR lists the Festive Center Drive Project in its general list of cumulative projects. (EIR, p. 4-5), the Project's Evacuation Report does not indicate it included cumulative projects in its analysis. In fact, in describing the "Potential Evacuation Area," the Evacuation Report states, "It should be noted that **the number of homes in each area were counted using Google aerial maps.**" (EIR, Appendix S, p. 3, emphasis added.) It does not appear that the Festival Center Drive Project was included in the Project's Evacuation Report or Supplemental Evacuation Modeling Report.

In fact, the EIR admits that the Festival Hills Project "could result in up to approximately 1,125 additional cars needing to evacuate the area during an emergency." (EIR, p. 4.8-18.) However, the EIR declined to include the Festival Hills Project in the Project's evacuation modeling, because it "is assumed to evacuate eastbound in the event of a wildfire event, while the Proposed Project would evacuate westbound." (Ibid.)

Yet, the analysis in the Evacuation Report is based on "the Potential Evacuation Area Plan for a fire origin located **immediately east of the Project site.**" (EIR, Appendix S, p. 3, emphasis added.) To assume that residents would evacuate towards the location of the fire defies logic. The City's Fire Chief underscored this reality.

Our firm successfully challenged the City of San Diego's similar omission of a neighboring cumulative project in an EIR analysis (**Exhibit B** [excerpt of Opinion].) The City must re-circulate the EIR to correct these unreasonable assumptions and to adequately incorporate the omitted cumulative projects in evacuation modeling.

IV. The Project EIR Fails to Adequately Analyze Impacts to Biological Resources and Impermissibly Defers Mitigation

The Project site features significant biological resources. The City's General Plan Environmental Impact Report explains that "the City of Anaheim is largely urbanized" and "there are few remaining areas of natural habitat." (General Plan EIR, p. 5-35.)⁹ In fact, "the Hill and Canyon Area" that the Project is proposed within "contains the majority of the City's remaining significant biological resources." (Ibid.)

The majority of the Project site lies within land designated by the United States Fish and Wildlife Service as Coastal California Gnatcatcher Critical Habitat. (Project Biological Technical Report, p. 51, Exhibit 9.) Nesting California Gnatcatchers have been observed on site. (Ibid.) The coastal California gnatcatcher is a federally-listed Threatened species and a California Species of Special

⁹ Available at: <https://www.anaheim.net/DocumentCenter/View/2185/53-Biological-Resources-?bidId=>.

Concern. (*Ibid.*) The City’s Habitat Conservation Plan, which provides the City an incidental take permit to comply with the federal Endangered Species Act, did not “evaluate” or provide “coverage” on the project site.

The EIR admits the Project’s will significantly impact biological resources on site. However, the EIR relies on an impermissibly delayed mitigation measure (MM-BIO-1):

The Property Owner/Developer shall mitigate for impacts to coastal sage scrub and coastal California gnatcatcher prior to the issuance of a grading permit through one or a combination of the following options, as elected by the Project Owner/Developer and approved by the USFWS and CDFW: (1) payment of the NCCP/HCP mitigation fee¹⁰ ... (2) long-term preservation of existing coastal sage scrub habitat occupied by coastal California gnatcatchers *at an on-site or off-site location*; and/or (3) restoration of coastal sage scrub habitat *at an on-site or off-site location*. Coastal sage scrub shall be replaced at a minimum 1:1 ratio, or as otherwise determined by the USFWS and CDFW.

In their scoping comments, the wildlife agencies highlighted the need for the City to conduct a detailed analysis of the Project’s impacts, including an assessment of its consistency with the NCCP, and to fully mitigate the Project’s impacts.

MM-BIO-1 fails to incorporate adequate performance standards in violation of CEQA. The United States Fish and Wildlife Service commented on the insufficiency of MM-BIO-1, stating that while it “appreciate[s] the DEIR appropriately referencing the need for the Property Owner/Developer to seek authorization from the USFWS for incidental take...we generally recommend early coordination between the Property Owner/Developer and the Service (e.g., prior to finalization of a DEIR) so that the Property Owner/Developer has the opportunity to appropriately consider alternative actions to the taking, and can work with us to identify appropriate mitigation measures.” (Final EIR, p. 2-36.)

Fish and Wildlife Service warned that “finalization of the EIR in advance of such coordination could inaccurately portray the project configuration and/or list mitigation measures that will not be implemented.” (Id. at p. 2-37.)

¹⁰ In responding to comments on the impermissible nature of MM-BIO-1, the EIR stated, “The comment is noted...the City does not believe that the mitigation fee option would be applicable to the Project, unless permitted by USFWS and CDFW. Given that the comment does not raise significant environmental issues beyond that discussed in the Draft EIR, no further response is necessary.”

Rather than fully assess the Project's potential impacts, including an analysis of feasible on-site mitigation and Project alternatives, the EIR delays this analysis to a later date. Instead, the EIR provides a suite of vague, varying options, and delays formation of performance criteria until after Project approval. The EIR must revise its analysis and proposed mitigation measure to incorporate clear performance criteria.

V. Project Will Result in Impacts to Vehicle Miles Travelled

The Project is located on “the eastern edge of the City of Anaheim limits,” outside of any area close to transit. (EIR, p. 4.15-13, Appendix T, p. 2.) In fact, the Project is within a “higher VMT than the Orange County average zone.” (Id. at p. 4.) The State of California has increasingly prioritized the direction of new growth into “infill” areas, close to existing jobs and transit, to move away from car-centric development. Senate Bill 743 requires the evaluation of a project's impact to “Vehicle Miles Travelled” (“VMT”).

The EIR admits the Project would result in significant impacts to VMT. (EIR, p. 4.15-13.) Yet, the EIR fails to incorporate all feasible mitigation measures to address VMT. Furthermore, the five professed “mitigation measures” in the EIR fail to provide any meaningful VMT mitigation, as they rely on “soft” unenforceable actions like “marketing” and “providing information.” This is unacceptable, especially given the State's climate emergency and the Project's location in a high VMT area, contrary to the State's goals.

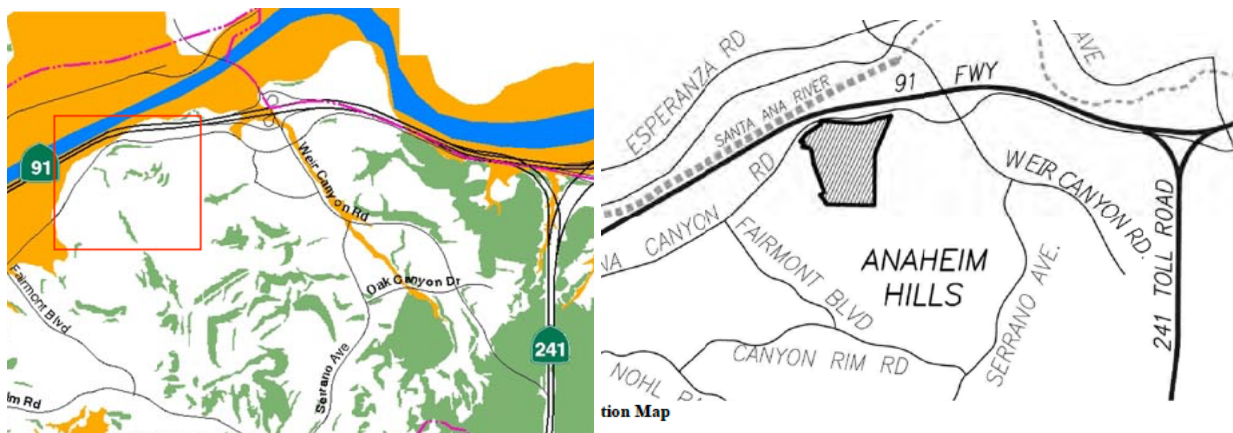
The Project must incorporate feasible mitigation, including the VMT-related measures listed in the California Air Resources Board's 2022 Scoping Plan. This includes unbundled parking. The EIR claims “unbundled parking was evaluated; however, it would be inconsistent with AMC Section 18.42.030.0203, which addresses residential parking requirements.” (EIR, p. 4.15-14.) This conclusory statement about this mitigation measure's feasibility lacks any evidence, especially given that the Project is relying on *several* deviations from other sections of the City's municipal code.

The EIR improperly dismisses another feasible mitigation measure, claiming that while “the inclusion of affordable housing in new developments can reduce the amount of VMT,” the “Property Owner/Developer determined that affordable housing would not be economically feasible given the substantial costs to acquire and develop the Project Site.” (EIR, p. 4.15-15.)

Again, this conclusion is not supported in the EIR. The Project undermines the State's goals to reduce VMT and locate development in infill areas close to transit. The EIR must adequately analyze and incorporate feasible mitigation measures, including unbundled parking, expansion of transit service and/or infrastructure near the Project, and incorporate of affordable housing.

VI. The EIR Fails to Adequately Analyze, Mitigate, and Disclose the Project's Geological Hazards

There have been historic landslides within eastern Anaheim, including in 1993 and 2005. The City's General Plan EIR identifies portions of the Project site as having "earthquake-induced land slide potential." (General Plan EIR, p. 5.5-3.)



(Left: General Plan EIR, "land slide potential" sites mapped in green,
Right: Project EIR Location Map)

The Project's Geotechnical Report identified that portions of the site "are mapped with the potential for earthquake" and have "a high landslide susceptibility and are considered unstable in place," "primarily a result of adverse geologic structure and bedding in the formational materials." (Geotechnical Report, p. 14.)

The Project's Geotechnical Report noted the presence of "Landslide Debris" at the northwestern facing slope between the proposed Hills Club & Preserve and Office/Retail Park sites. (Geotechnical Report, p. 11.) Despite the site's mapping for land slide potential and identified landslide debris, "no borings were drilled in this location." (*Ibid.*)

The Applicant must fully analyze and identify the proper mitigation by drilling boreholes, which allow determination of the depth (slip plane) of the landslide. If the prior landslide was deep or wide, a tie-back system may be required as mitigation to stabilize the earth. The only way to know is to assess the depth. Yet, the Geotechnical Report admits this analysis was not done.

Furthermore, the Report admitted that "boring exploration was not performed within the landslide to confirm the presence of the slide" and that "[w]alking the area during the site

reconnaissance and boring exploration had limited observation of the ground surface due to the overgrown vegetation...” (Geotechnical Report, p. 15.)

Thus, the Geotechnical Report failed to fully analyze the identified hazards associated with the Project, which would have allowed for the appropriate mitigation to be identified and required by the EIR.¹¹

The Geotechnical Report ultimately determine there is a potential for “slope instability” and stated the need for mitigation. In particular, “Permanent ground anchor walls are recommended to **mitigate** slope instability of the western and northern facing cut slopes.” (Geotechnical Report, p. 32.; see also p. 22 [“Evaluations for the northern facing retaining walls indicate that the minimum factor of safety for the retaining walls cannot be met ...without mitigation of the upper slope. *Several mitigation methods can be utilized ...*”].)

Despite the explicit stated need for mitigation – including ground anchor walls – in the Geotechnical Report, the EIR concludes there would be a “less than significant impact” as it relates to landslides, and does not make it clear what mitigation measures are required by the EIR, despite the Geotechnical Report’s reference to varying mitigation methods in certain instances. Therefore, the EIR must be revised to conduct the adequate analysis and explicitly identify and incorporate the required mitigation measures from the Geotechnical Report.

VII. Conclusion

Thank you for your consideration of these comments.

Sincerely,



Kathryn Pettit
Josh Chatten-Brown

cc: City Clerk Theresa Bass, City Attorney Robert Fabela, City Manager James Vanderpool,
Principal Planner Heather Allen, Planning and Building Director Ted White

¹¹ The Geotechnical Report further admitted that “Detailed grading plans are not yet available,” at the time of its review. (Id. at p. 21.)

EXHIBIT A



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September 27, 2024

VIA E-MAIL

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Email: tedwhite@anaheim.net

**Re: Comment Letter on September 30, 2024 Planning Commission Agenda Item 1
(Development Application No. 2021-00137)**

Dear Mr. White:

This letter is submitted on behalf of the applicant SALT Development, LLC ("SALT"), in response to the staff report submitted by you in advance of the September 30, 2024 Planning Commission hearing on the above-referenced Development Application for the Hills Preserve project.

We write for two reasons. First, staff mistakenly contends that two of the four required findings for a General Plan Amendment cannot be made. In fact, as we demonstrate below and addressed in further detail in a letter under separate cover from my land use colleague Nadia Costa, all of these findings can and should easily be made. Second, we write to advise the City that in the event the General Plan Amendment is denied per staff's recommendation, the City will be *required* by state housing law to approve the alternative projects SALT has put forward, and will not be able to rely on any ostensible fire evacuation or other health and safety rationales to avoid the application of state housing law. We were quite surprised that the staff report makes no mention of the alternative projects SALT has proposed, so this letter is to ensure that the Planning Commission is fully informed about the consequences of denying the Hills Preserve project.

In the spirit of cooperation, we have presented the City with two options for this site. The first option, the Hills Preserve project, is the project currently before the Planning Commission. Hills Preserve is a mixed-use community with 498 apartment homes (as well as six custom single-family homes), commercial uses, luxury amenities, and numerous public benefits to enhance and expand the existing trail system and other recreation amenities in and around Deer Canyon Park Preserve. The second option is a trio of developments proposed under the state's "Builder's Remedy" law, Gov. Code §

65589.5(d), collectively comprising 1,280 homes on these parcels (“Builder’s Remedy projects”). If the City chooses to approve the Hills Preserve project, SALT will withdraw the pending preliminary applications for the Builder’s Remedy projects. However, if the City denies the Hills Preserve project, SALT intends to file formal development applications for the Builder’s Remedy projects. As described below, the City is legally prohibited from disapproving the Builder’s Remedy projects or approving them in a manner that reduces those projects’ feasibility.

All of the Required Findings for the General Plan Amendment Can and Should Be Made

The staff report contends that the Hills Preserve project will increase evacuation time in the event of a wildfire emergency, and therefore the City cannot make the required finding for a General Plan Amendment that “[t]he proposed amendment would not be detrimental to the public interest, health, safety.” (Staff Report at 22-23). This contention is puzzling because the City has exhaustively studied the potential fire safety impacts of this project pursuant to the California Environmental Quality Act (CEQA), and prepared a detailed draft Environmental Impact Report (EIR) that explains in great detail how the project will have a negligible impact on fire safety and in fact is likely to enhance fire safety in the area. Among other findings, the draft EIR states that in an unlikely worst-case scenario, using extremely conservative assumptions including a combination of a wildfire erupting exactly during rush hour on Friday, in one precise location in Deer Canyon, a simultaneous mass evacuation from every resident in Anaheim Hills, and the absence of any traffic control by the Anaheim Police Department, the total evacuation time which was projected at 186 minutes would only increase by 24 minutes. In any other possible scenario, the impact on evacuation time would be less or none.

The draft EIR further found that the Hills Preserve project’s implementation of multiple Fuel Modification Zones and the use of fire-hardened construction materials in the design and construction of the buildings would mitigate any fire risks and enable residents of the new buildings to shelter in place in lieu of an evacuation during a wildfire, keeping evacuation routes clear. In addition, new infrastructure investments by Hills Preserve, including improved roads, additional fire hydrants, and significant voluntary donations toward advanced firefighting equipment would buffer and protect the surrounding neighborhoods in the unlikely event of a Deer Canyon wildfire, making the surrounding areas significantly safer compared to if the development were not to proceed.

Likewise, the traffic issues raised in the staff report do not prevent the City from making the required finding that “[t]he proposed amendment would not be detrimental to the public interest, health, safety.” The draft EIR exhaustively details the project’s potential impacts as it relates to transportation. With respect to non-VMT related issues, such as the operational items noted by staff, there are no unmitigated significant impacts.

The staff report also contends that the City cannot make the required finding that the property is “physically suitable” for the project due to the project’s height, which is taller than neighboring buildings. However, the staff report fails to acknowledge that, as reported in the EIR, all impacts related to aesthetics and land use will be less than

significant (with most of these impacts not even requiring mitigation in the first instance). For example, the project is located near the lowest elevations on the site, which minimizes the visual intrusions on neighboring landowners as well as all relevant public views. The EIR also observes that all retaining walls for the project would be constructed in accordance with applicable development standards, and are being incorporated into the project to minimize grading and to preserve open space. Moreover, the increased height is directly tied to the project's goal to cluster development on the least topographically and biologically sensitive areas. For all these reasons, the City can and should make all required findings to approve the General Plan Amendment.

If the Hills Preserve Project is Denied, SALT intends to File Formal Applications for the Builder's Remedy Projects, Which State Law Prohibits the City from Disapproving or Unreasonably Conditioning

In the event the City were to nevertheless disapprove the Hills Preserve project, SALT would file formal applications for the Builder's Remedy projects, which the City would be legally prohibited from disapproving or approving on conditions that render the project infeasible.

As you are aware, on June 7, 2024, SALT filed "Preliminary Applications," pursuant to Senate Bill 330, the Housing Crisis Act of 2019, Government Code section 65941.1, and the Builder's Remedy of the Housing Accountability Act (HAA), Gov. Code § 65589.5(d) for the three Builder's Remedy projects. The three projects are: 1) Deer Canyon apartments: 725 apartments on 13.95 acres; 2) Deer Canyon Townhomes: 90 homes on 32.26 acres; and 3) Valley View Apartments: 465 apts on 29.8 acres.

As described in our cover letter accompanying the Preliminary Applications, the filing of a Preliminary Application "freezes" all of a city's applicable development standards, such that a housing development project may generally be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application was submitted. (Gov. Code § 65589.5(o)). The applicant then has 180 days from the submission of the Preliminary Application to file the full formal application for the project, which is subject only to the standards in effect at the time the Preliminary Application was submitted. In this case, the filing of the Preliminary Application locked in place SALT's ability to proceed under the Builder's Remedy law, in the event SALT chooses to file formal applications for the Builder's Remedy projects on or prior to December 4, 2024.

The Builder's Remedy law prohibits a city, like Anaheim, that does not have an adopted housing element that is substantially compliant with the Housing Element Law (Gov. Code § 65580 et seq.) from disapproving or conditioning in a manner that renders infeasible a housing development project "for very low, low-, or moderate-income households," even where the project is inconsistent with both the city's zoning ordinance and general plan land use designation. (Gov. Code § 65589.5(d)(5)). Projects for very low, low-, or moderate-income households are defined to include projects that provide 20

percent of the units for lower income households as defined in the HAA. (Gov. Code § 65589.5(h)(3)).¹

Because the City did not have a substantially compliant 6th Regional Housing Needs Assessment (“RHNA”) Cycle Housing Element at the time the Preliminary Applications for the Builder’s Remedy projects were submitted, and the Builder’s Remedy projects are housing development projects that will provide 20 percent of their units for lower income households, the projects are protected by the Builder’s Remedy.² Therefore, in the event SALT files formal development applications for the Builder’s Remedy projects, the City would be prohibited from denying those projects, or condition approval of the Builder’s remedy projects in a manner that would render them infeasible. It is SALT’s intent to file formal development applications for the Builder’s Remedy projects on or before December 4, 2024, if the Hills Preserve project has not been approved by that date.

The City Cannot Meet its Burden Of Proving that the Project Presents a Significant and Unavoidable Public Health and Safety Hazard Under the Builder’s Remedy Law

Though the HAA/Builder’s Remedy law does permit a municipality to deny otherwise eligible projects if the municipality can establish by a preponderance of the evidence that the project would create a significant and unavoidable health and safety hazard, the City cannot do so here. The HAA defines a specific, adverse health and safety impact as a “significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions” as they existed on the date a preliminary application is submitted. Gov. Code § 65589.5(d)(2).³ Furthermore, even if a specific adverse impact as defined by the HAA is identified, the project still cannot be denied if there is any feasible way to mitigate the impact. Gov. Code § 65589.5(d)(2).

Therefore, in this case the City could *only* deny the Builder’s Remedy projects, or condition the approval of such projects in a way that makes them infeasible, if the City can prove by a preponderance of the evidence *both* that the project violates some objective, written public health and safety standard that was in place on the date the

¹ Pending changes to the Builder’s Remedy law would not apply to these Builder’s Remedy applications. The new law explicitly grandfathers in all projects for which a Preliminary Application has been submitted prior to January 2025, permitting such projects to proceed under the currently existing Builder’s Remedy law notwithstanding the pending changes. See AB 1893 (proposed amendment to Gov. Code section 65589.5(f)(7)); https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB1893.

² See California Housing Defense Fund v. City of La Cañada Flintridge (Case No. 23STCP02614) Los Angeles Superior Court (Order on Petitions for Writ of Mandate and Complaints for Declaratory Relief, March 4, 2024), page 15 (holding that Builder’s Remedy vests on submission of Preliminary Application if jurisdiction does not have a substantially compliant housing element).

³ Gov. Code § 65589.5(d)(2) refers to the date on which an application is “deemed complete,” but the HAA defines “deemed complete” to mean the date on which a Preliminary Application is submitted. Gov. Code § 65589.5(h)(5)).

Ted White, Planning and Building Director
City of Anaheim
September 27, 2024
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Preliminary Applications were submitted, in a way that creates a significant, direct and unavoidable impact on health and safety, *and* that the impact on health and safety cannot feasibly be mitigated. Needless to say, this is a very high bar for cities to meet, and the legislature has made clear its intent that the conditions constituting a health and safety hazard under the HAA “arise infrequently.” Gov. Code § 65589.5(a)(3). Indeed, I am unaware of any case in which any jurisdiction has successfully used the health and safety proviso to deny a project. To the contrary, I myself prevailed against the City of Huntington Beach in a case in which the City attempted to raise ostensible fire and traffic safety concerns to deny a project. The Court rejected the City’s arguments, finding that the City failed to identify any objective health and safety standards that were violated, except one standard which the project could be easily adapted to meet. See Statement of Decision, *California Renters Legal Advocacy and Education Fund v. City of Huntington Beach*, 30-2020-01140855 (Sup. Ct. October 4, 2021) at 17-18 (**Exhibit A**).

In this case, as noted above, the project has been designed to mitigate any potential health and safety hazards to a level that is far below any threshold of significance. Regardless, there is plainly no way the City can meet its burden of proving by a preponderance of the evidence that the project poses any significant and unavoidable health and safety hazard within the meaning of the Builder’s Remedy law. For that reason, we reiterate that if SALT does file formal applications to proceed with the Builder’s remedy projects, the City will be prohibited by state law from disapproving those applications, or approving them subject to conditions that make them infeasible

There are significant penalties if a local agency fails to comply with the HAA. Where a court finds a violation, it must issue an order requiring compliance within 60 days and can direct the agency to approve the project if it finds the agency acted in bad faith. The court also must award the prevailing party its reasonable attorney’s fees and costs except in the “extraordinary circumstances” in which the court finds that awarding fees would not further the purposes of the statute. If a local agency fails to comply with the HAA within 60 days of an order’s issuance, the court must impose a minimum fine on the local agency of \$10,000 per housing unit in the housing development project as proposed on the date the application was deemed complete and can issue an order vacating the local agency’s action on the project, in which case the project is deemed approved. (Gov. Code §§ 65589.5(k)-(l)).

In summary, the City can and should make the required findings to approve the General Plan Amendment for the Hills Preserve project. But in the event it does not, SALT intends to file formal applications for the three Builder’s Remedy projects no later than December 4, 2024.

We would be happy to discuss the Hills Preserve or Builder’s Remedy projects with you at any time. I can be reached by e-mail at ken.stahl@msrlegal.com, or by phone at (949) 688-2980.

Ted White, Planning and Building Director
City of Anaheim
September 27, 2024
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Very truly yours,

MILLER STARR REGALIA

Kenneth A. Stahl

Kenneth A. Stahl

Enclosures: See Statement of Decision, *California Renters Legal Advocacy and Education Fund v. City of Huntington Beach*, 30-2020-01140855 (Sup. Ct. October 4, 2021)

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EXHIBIT B

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO**

MINUTE ORDER

DATE: 02/03/2023

TIME: 04:00:00 PM

DEPT:

JUDICIAL OFFICER PRESIDING: Ronald F. Frazier

CLERK: Sarah Doski

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2021-00033583-CU-TT-CTL** CASE INIT.DATE: 08/05/2021

CASE TITLE: **PQ-NE Action Group vs City of San Diego [E-FILE]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

APPEARANCES

The Court, having taken the above-entitled matter under submission on 2/2/23 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Petitioner PQ-NE Action Group's Petition for Writ of Mandate is GRANTED IN PART. (ROA 1, 49.)

This proceeding concerns Respondent City of San Diego's approval of a residential development known as a Junipers Project ("Project") located in the Rancho Penasquitos area. Real Parties in Interest Carmel Partners, LLC and Carmel Land, LLC ("RPIs") are the Project applicants.

Petitioner seeks a writ of mandate vacating the City's approval of the Project.

Whether the EIR Adequately Considers Cumulative Impacts

An Environmental Impact Report ("EIR") must consider a project's "cumulative impacts." (14 C.C.R. § 15130(a).) "[A] cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts." (14 C.C.R. § 15130(a)(1).) "The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and *reasonably foreseeable probable future projects.*" (14 C.C.R. § 15355(b).)

Petitioner asserts the EIR failed to adequately consider the cumulative impact of the Project together with the Millennium PQ and Trails at Carmel Mountain Ranch projects. In opposition, Respondent and the RPIs assert these projects did not qualify for inclusion in the cumulative impacts study. Specifically, Respondent and the RPIs assert the City used the Project's Notice of Preparation of the EIR (April 10, 2018) as the cutoff date, and neither the Millennium PQ nor the Trails projects were analyzed because neither of these applications was "deemed complete" before this date. (AR 43:11381-11406; 15:4859.)

"[M]ere awareness of proposed expansion plans or other proposed development does not *necessarily* require the inclusion of those proposed projects in the EIR." (*Gray v. County of Madera* (2008) 167

DATE: 02/03/2023

MINUTE ORDER

DEPT:

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Calendar No.

Cal.App.4th 1099, 1127 (emphasis added).) However, "any future project where the applicant has devoted significant time and financial resources to prepare for any regulatory review *should be considered* as probable future projects for the purposes of cumulative impact." (*Id.* at pp. 1127-28 (emphasis added).) "Projects that are undergoing environmental review are reasonably probable future projects." (*Id.* at p. 1127.)

Here, the administrative record reflects both the Millennium PQ and Trails projects were reasonably probable future projects known to the City well before the draft EIR was published. Although the City attempts to assert it was not obligated to consider these projects because neither of the applications was "deemed complete" before the Project's April 10, 2018 Notice of Preparation was issued, the court is not persuaded.

The EIR states the Millennium PQ application was deemed complete on June 14, 2019 and the Trails application was deemed complete on January 31, 2020. (AR 15:4859.) However, the record and judicially noticeable documents demonstrate the City was concurrently evaluating the Project, Millennium PQ, and the Trails for many months prior to the publication of the draft EIR. (AR 225:24408-24412, 15:4991; Pet. RJN at Exh. A.) The City was clearly aware Millennium PQ and Trails were reasonably probable future projects.

The court is sympathetic to the City's desire to apply a bright-line rule. However, the legal authorities reflect a more flexible approach. (14 C.C.R. § 15355(b); *Gray* at pp. 1127-28.) RPIs cited both *Gray* and *South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321 as support for their position that the City's selection of the Notice of Preparation date as the cutoff was reasonable. Notably, however, both these cases are distinguishable on their facts from the case presented here. In *Gray*, the court noted "the County could not locate any project where an applicant has filed for review with the County Planning Department" before determining the County had reasonably exercised its discretion to set the date of the project application as the cutoff. (*Gray* at p. 1128.) By contrast, here there is evidence the City was aware of other probable future projects in close proximity to the Project.

Likewise, in *South of Market*, the plaintiffs asserted the EIR had used an outdated list of projects and made "generalized observations that development is 'rampant,'" but the court noted the lack of evidence that the list was "defective or misleading, or that the City ignored projects that were in the pipeline for the purpose of adjudging cumulative impacts." (*South of Market* at p. 336-37.) Thus, "[t]he City had discretion to determine a reasonable date as a cutoff for which projects to include in the cumulative impacts analysis, and plaintiffs have not shown the City's decision to use a 2012 project list was unsupported by substantial evidence." (*Id.* at p. 337.) Here, Petitioner has sufficiently demonstrated Petitioner's decision to exclude Millennium PQ and the Trails projects was not reasonable under the facts. In the court's view, the close proximity of these projects – particularly Millennium PQ, which is adjacent to the Project – renders the City's decision all the more arbitrary.

Thus, the EIR fails to comply with CEQA because it did not adequately consider the cumulative impact of Millennium PQ, Trails, and the Project.

As to these grounds, the Petition is granted.

Whether the EIR Adequately Considers Wildfire Safety Impacts

"An EIR shall identify and focus on the significant effects of the proposed project on the environment."

(14 C.C.R. § 15126.2(a).) This includes "any potentially significant direct, indirect, or cumulative environmental impacts of locating development in areas susceptible to hazardous conditions (e.g., floodplains, coastlines, *wildfire risk areas*)...." (*Ibid.*, emphasis added.)

Within the context of wildfire safety impacts, Petitioner argues the EIR failed to consider the cumulative impacts of the Project together with the Millennium PQ (which will use the same evacuation exit) and Trails projects (which will significantly increase the number of evacuating residents). The court agrees and finds the EIR also fails to comply with CEQA because it did not adequately consider the cumulative impact of Millennium PQ, Trails, and the Project when evaluating the Project's wildfire safety risks.

In their opposition, Respondent and RPIs point out the RPIs commissioned a study on Millennium PQ's impact on evacuation times, and that the study concluded the community's evacuation time would only increase from 3.5 to 3.8 hours if Millennium PQ project were also considered. (AR 21:10659-10662.) As a preliminary matter, this study still does not take the Trails project into consideration. Further, "CEQA requires agencies to discuss a project's potentially significant impacts in the draft EIR and final EIR." (*Sierra Watch v. County of Placer* (2021) 69 Cal.App.5th 86, 103; see also 14 C.C.R. § 15120.) "[T]o the extent an agency omits an adequate discussion of a project's potential impacts in its EIR, it cannot afterward make up for the lack of analysis in the EIR through post-EIR analysis." (*Ibid.*, citing *Save Our Peninsula Committee v. Monterey Cty. Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 130.)

Here, the RPIs submitted the study on the eve of the City Council hearing. (AR 21:10659.) The memo is dated June 11, 2021 and the City Council hearing was held June 15, 2021. No such analysis is contained in either the draft EIR or final EIR. Thus, the EIR fails to comply with CEQA requirements. This deficiency cannot be cured by post-EIR analysis, and in any event the post-EIR analysis is still insufficient because it does not consider the Trails project.

As to these grounds, the Petition is granted.

At hearing, Petitioner argued the EIR also improperly omitted consideration of Pacific Village in its analysis of cumulative impacts with regard to evacuation and wildfire safety. In response, RPIs asserted this issue was waived because it had not been asserted during the administrative process. However, it appears this issue was raised before the agency. (AR 018319.) The court agrees the EIR also fails to comply with CEQA requirements because it omits Pacific Village from its cumulative impact analysis for evacuation and wildfire safety.

Petitioner also argues the EIR's wildfire analysis is not supported by substantial evidence, challenging several of the assumptions made in evaluating the Project's impact on evacuation. As to these grounds, the Petition is denied.

Third, Petitioner asserts the EIR obfuscates wildfire and evacuation risks because it uses a "voluntary" Fire Protection Plan and Wildfire Evacuation Plan. As to these grounds, the Petition is denied.

Whether the EIR Adequately Considers Transportation Impacts

Petitioner asserts the EIR did not adequately analyze and mitigate transportation impacts.

As to these grounds, the Petition is denied. There is substantial evidence in the record to support the EIR's transportation impact analysis.