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## VIA PERSONAL DELIVERY

Members of City Council  
City of Los Angeles  
200 N. Spring Street  
Los Angeles, CA 90012

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**Re: CEQA Appeal of Environmental Determination for Tree Removal Permit for 10768 W. Bellagio Road Pursuant to Public Resources Code Section 21151(c) (CEQA Document ENV-2017-3314-CE)**

Honorable Members of the Los Angeles City Council:

This firm represents Dr. Linda Whitford ("Appellant"). On or about January 30, 2019, the Board of Public Works ("Board") withdrew consideration of a tree removal permit for the removal 21 protected trees to facilitate a so-called "renovation" of the Bel-Air Country Club ("BACC") in the neighborhood of Bel Air (the "Project"). The Board's withdrawal of the permit request was accompanied by an exemption from the California Environmental Quality Act ("CEQA").

Pursuant to Public Resources Code Section 21151(c), FWD hereby appeals the conclusion that the Project is exempt from CEQA. This section of the Public Resources Code allows any interested party to file an appeal of a CEQA decision to the public agency's elected decision-making body. PRA Section 21151(c) states as follows:

*"If a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decisionmaking body, if any."*

### **I. California Environmental Quality Act**

CEQA requires that an agency analyze the potential environmental impacts of its proposed actions in an environmental impact report except in very limited circumstances. See, e.g., Cal. Pub. Res. Code § 21100. The EIR is the very heart of CEQA. *Dunn-Edwards v.*

*BAAQMD* (1992) 9 Cal.App.4th 644, 652. "The 'foremost principle' in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109. CEQA applies to agency projects that may have an adverse environmental impact. *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 259 (1972); *Friends of B Street v. City of Hayward*, 106 Cal.App.3d 988, 1003 (1980) (project that included removal of trees caused significant effect on environment). CEQA has two broad purposes: 1) avoiding, reducing or preventing environmental damage by requiring alternatives and mitigation measures (14 Cal. Code Regs. § 15002(a)(2)-(3) (hereinafter "CEQA Guidelines")); and 2) providing information to decision-makers and the public concerning the environmental effects of the proposed project. CEQA Guidelines § 15002(a)(1).

To achieve its objectives of environmental protection, CEQA has a three-tiered structure. CEQA Guidelines § 15002(k); *Comm. to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1185 – 86. First, if a project falls into an exempt category, or it can be seen with certainty that the activity in question will not have a significant effect on the environment, no further agency evaluation is required. *Id.* Second, if there is a possibility the project will have a significant effect on the environment, the agency must perform a threshold initial study. *Id.*; CEQA Guidelines § 15063(a). If the study indicates that there is no substantial evidence that the project may cause a significant effect on the environment the agency may issue a negative declaration. *Id.*, CEQA Guidelines §§ 15063(b)(2), 15070. Finally, if the project will have a significant effect on the environment, an environmental impact report ("EIR") is required. *Id.* Here, since the City proposes to exempt the Project from CEQA entirely, we are at the first step of the CEQA process.

A strong presumption in favor of requiring preparation of an Environmental Impact Report ("EIR") is built into CEQA which is reflected in what is known as the "fair argument" standard, under which an agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a project may have a significant effect on the environment. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Friends of "B" St. v. City of Haywood* (1980) 106 Cal.App.3d 988, 1002.

"The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' [Citation.] The EIR is therefore 'the heart of CEQA.' [Citations.] An EIR is an 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.'" *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.

Under CEQA and the CEQA Guidelines, if a project is not exempt and *may* cause a significant effect on the environment, the agency *must* prepare an EIR. PRC §§ 21100, 21151; 14 Cal. Code Regs. §15064(a)(1), (f)(1). "Significant effect upon the environment" is defined as "a substantial or potentially substantial adverse change in the environment." PRC §21068; 14 Cal Code Regs §15382. A project "may" have a significant effect on the environment if there is a "reasonable probability" that it will result in a significant impact. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 n.16; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309, 248 CR 352. This standard sets a "low threshold" for preparation of an EIR. *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App. 4th 903, 928; *Bowman v. City*

*of Berkeley* (2004) 122 CA4th 572, 580; *Citizen Action to Serve All Students v. Thornley* (1990) 222 CA3d 748, 754; *Sundstrom v. County of Mendocino* (1988) 202 CA3d 296, 310.

## **II. The Notice of Exemption for the Project is Flawed**

The Notice of Exemption (“NOE”) issued for the Project includes the following description: “*Maintain & Restore Golf Course: Import 17078 Cubic Yards of Dirt & Sand, Remove 3 Protected Trees & 62 Non-Protected.*” The NOE is facially inaccurate and does not describe the project adequately. The Project involves the removal of 21 protected trees. The Justification for Exemption appended to the NOE also states the incorrect number of protected trees proposed to be removed. If a Notice of Exemption does not properly describe the project or the agency's decision, the agency may not rely on filing and posting the notice to trigger a shorter limitations period. *Sierra Club v City of Orange* (2008) 163 CA4th 523; *International Longshoremen's & Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265, 273 (holding that the limitations period does not begin to run if the notice of determination is substantively defective in failing to properly describe the lead agency's actions). Moreover, the standards for subsequent environmental review under Pub Res C §21166 and 14 Cal Code Regs §15162 apply *only* when an EIR or a Negative Declaration was previously prepared for a project. Neither CEQA nor the CEQA Guidelines apply the subsequent review standards to situations in which the lead agency has approved a project on the basis that it is exempt from CEQA. *Apartment Ass'n of Greater Los Angeles v City of Los Angeles* (2001) 90 CA4th 1162, 1172.

There is no evidence in the record that the City Planning Department's Environmental Compliance Unit has reviewed the newly disclosed project scope and has rendered a conclusion regarding the appropriate environmental review for the Project. Under these circumstances, the Board should have refrained from taking any action on the Project (including withdrawal) until appropriate review from the Environmental Compliance Unit. In any event, as explained below, the Project is not exempt from CEQA.

## **III. Non-Compliance with CEQA**

### **a. The Project is Not Eligible for Either “Existing Facilities” or “Minor Alterations to Land;” The City Has Piecemealed the Review of the Project**

The City has asserted a variety of claims for exemption from CEQA. The NOE notes Class 1, Category 8 as the appropriate exemption which is for “Existing Facilities: Maintenance of existing landscaping, native growth, water supply reservoirs; and brush clearance for weed abatement and fire protection (excluding the use of economic poisons as defined in Division 7, Chapter 2, California Agricultural Code).” The Board of Public Works' Staff Report also references the Class 4, Category 3 Exemption: “Minor Alterations to Land: New gardening, tree planting, or landscaping, but not including tree removal except dead, damaged or diseased trees or limbs.” Neither exemption is appropriate because the City failed to take into consideration the “whole of the action” as required by CEQA. “There is no dispute that CEQA forbids ‘piecemeal’ review of the significant environmental impacts of a project.” *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1358. “This standard is consistent with the principle that ‘environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal impact on the environment—which cumulatively may have disastrous consequences.’” *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396

There is absolutely no evidence that the City looked at the entirety of the action when it originally concluded that the Project was exempt from CEQA. The City engaged in piecemealing.

**b. Unusual Circumstances Pertaining to Biological Resources Renders CEQA Exemption Unavailable**

In any event, both of the cited exemptions from CEQA are not applicable due to “unusual circumstances.” Application of both exemptions is limited by the factors described in section 15300.2. An exemption should be denied if one of the exceptions listed in section 15300.2 of the Guidelines applies. Section 15300.2, subdivision (c), of the Guidelines provides for one such exception and states that if there is a “reasonable possibility” of a “significant effect on the environment due to unusual circumstances,” then the categorical exception cannot apply. A “circumstance is ‘unusual’ . . . judged relative to the typical circumstances related to an otherwise typically exempt project.” *Voices for Rural Living v. El Dorado Irr. Dist.* (2012) 209 Cal.App.4th 1096, 1108–09.

Furthermore, as pointed out by the California Supreme Court in the *Berkeley Hillside Preservation* case,

A party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance.

*Berkeley Hillside Pres.*, *supra*, 60 Cal.4th at p. 1105. The California Supreme Court, in *Berkeley Hillside Preservation*, continued its analysis:

Alternatively, under our reading of the guideline, a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, if convincing, necessarily also establishes “a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”

*Berkeley Hillside Pres.*, *supra*, 60 Cal.4th at p. 1105. Thus, if it can be shown, as is the case here, that the Project *will* have a significant effect on the environment, that alone is sufficient to eliminate the applicability of the categorical exemption.

Based on the threat to certain native trees, in 2006 the City adopted Ordinance 177404 to amend its Protected Tree Ordinance. The Western Sycamore was added to the list of protected trees and their removal was prohibited without the issuance of a tree removal permit and a determination from the Board of Public Works that removal was “necessary” in order to allow for “reasonable development.”

Notably, the City Planning Commission made the following finding when it recommended approval to the City Council for the amended Protected Tree Ordinance:

“In accordance with Charter Section 556, the proposed ordinance (Appendix A) is in substantial conformance with the purposes, intent, and provisions of the General Plan. It implements Policy 3 of Section 6: Endangered Species of the Conservation Element<sup>1</sup> of the General Plan by *revising regulations concerning endangered species*; and Policy 4 of Section 10<sup>2</sup>: Habitats of the Conservation Element of the General Plan by creating legislation that encourages and facilitates protection of local native plant and animal habitats. It also implements the California Environmental Quality Act by designating *Juglans californica var. californica* as a protected species, consistent with the recommendations of the California Native Plant Society (6th. Inventory of Endangered Species, RED Code 4-4-4) that this “locally significant” species be “evaluated for consideration during the preparation of environmental documents relating to CEQA.”

The City Council adopted the Planning Commission’s findings. Policy 3 of Section 6: Endangered Species of the Conservation Element of the General Plan states:

“Policy 3: continue to support legislation that encourages and facilitates protection of endangered, threatened, sensitive and rare species and their habitats and habitat corridors.”

Policy 4 of the Habitats portion of the Conservation Element of the General Plan states:

“Policy 4: continue to support legislation that encourages and facilitates protection of local native plant and animal habitats.

Here, the unusual circumstances are the existence of *locally protected species* on the Project site which the Project would negatively impact. **Both the Coast Live Oak and Western Sycamore are locally protected species.** The City Council’s findings and the implementing City’s official CEQA Thresholds Guide quoted above constitute an authorized and definitive legislative finding that this particular project’s special circumstances would have a significant impact on biological resources.

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<sup>1</sup> The Conservation Element clearly lays out the rationale for regulation and protection: “Without protection of habitats suitable for species propagation, entire species of native plants and animals gradually will decline or become extinct. A couple of hundred plants and animals that live in Los Angeles habitats are listed on the federal and/or state endangered, threatened or species of special concern lists. Within the Santa Monica Mountains National Recreation Area alone 26 plants and animals are classified as rare, threatened or endangered and 58 more have been placed on the list of species of special concern by the National Park Service. Within the city more than 180 plant and animal species are listed by the Environmental Affairs Department for the city as a whole.”

<sup>2</sup> It appears that the original source document incorrectly states the section number where the “Habitats” portion of the Conservation Element is found. The “Habitats” section is located in Section 12 (not Section 10).

The City's official CEQA Thresholds Guide states:

**A project would normally have a significant impact on biological resources** if it could result in:

- The loss of individuals, or the reduction of existing habitat, of a state or federal listed endangered, threatened, rare, protected, or candidate species, or a Species of Special Concern or federally listed critical habitat;
- **The loss of individuals or the reduction of existing habitat of a locally designated species** or a reduction in a locally designated natural habitat or plant community;

It is clear that this is a parallel to the definition of a "sensitive biological resource" found in that same document:

For the purposes of the Thresholds Guide, a sensitive biological resource is defined as follows:

- A plant or animal that is currently listed by a state or federal agency(ies) as endangered, threatened, rare, protected, sensitive or a Species of Special Concern or federally listed critical habitat;
- A plant or animal that is currently listed by a state or federal agency(ies) as a candidate species or proposed for state or federal listing; or
- **A locally designated or recognized species or habitat.**

The quoted statement from the CEQA Thresholds Guide above, in combination with the definition of a sensitive biological resource make it clear that the Coast Live Oak and Western Sycamore are a sensitive resource in the City of Los Angeles and that, therefore, the presumption is that the Project will have a significant impact on biological resources. This certainly meets the required showing that there is "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances" as required by *Berkeley Hillside Pres.*, *supra*, 60 Cal.4th at p. 1105.

#### **IV. Project is Not Exempt from CEQA Because the City Has Proposed Mitigation Measures in the Form of Specialized Conditions of Approval for the Project**

Significantly, in evaluating whether a categorical exemption may apply, a public agency may **not** rely on mitigation measures as a basis for concluding that a project is categorically exempt, or as a basis for determining that one of the significant effects exceptions does not apply. *Salmon Prot. & Watershed Network v. Cnty. of Marin* (2004) 125 Cal.App.4th 1098. As held in *Salmon*, if a project requires mitigation measures it cannot be approved via categorical exemption:

Only those projects having no significant effect on the environment are categorically exempt from CEQA review. (Pub. Resources Code, §§ 21080, subd.(b)(9), 21084, subd.

(a.) If a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1199–2000.) Mitigation measures may support a negative declaration but not a categorical exemption.

*Salmon Prot. & Watershed Network v. Cnty. of Marin, supra*, 125 Cal.App.4th at p. 1102. A City may condition a project on compliance with regulations of general application, but a City may not apply site-specific environmental mitigation measures in order to reach an exemption determination. *San Francisco Beautiful v. City & Cnty. of San Francisco* (2014) 226 Cal.App.4th 1012, 1032. The City has sought to deem this project “exempt” from CEQA by relying on an environmental mitigation measure, namely, the planting of replacement trees on the property. The City has previously claimed that tree replanting is a “Regulatory Compliance Measure.” But, the tree replanting measure does not even appear in the City’s published list of Regulatory Compliance Measures. The Staff Report to the City Planning Commission for the amended Protected Tree Ordinance affirms that the City views replanting as an environmental mitigation measure. In response to a paragraph labeled “Oversight of the regulations and enforcement of the regulations,” the Staff Report states as follows: “The Street Tree Division of the Board of Public Works is responsible for oversight of the regulations. Enforcement comes in several ways. One, applicants for building permits are required to list protected trees on their site plans. Two, as part of any required environmental review, a plot plan of the site showing all trees must be submitted, and a mitigation for removal of any protected trees is required, in accordance with Code requirements.” Even the City’s CEQA Threshold Guide lists “revegetation” after project construction as a “sample mitigation measure.” CEQA Threshold Guide, Page C-8. There is no absolute requirement to plant mitigation trees under the Los Angeles Municipal Code. The Board of Public Works is merely authorized to condition a tree removal permit on the replacement of the removed tree. The City’s Protected Tree Ordinance states as follows:

The Board of Public Works or its authorized officer or employee *may* [r]equire as a condition of a grant of permit for the relocation or removal of a protected tree, that the permittee replace the tree within the same property boundaries by at least two trees of a protected variety included within the definition set forth in Section 46.01 of this Code, in a manner acceptable to the Board.

LAMC § 46.02(c). The Protected Tree Ordinance uses the word “may” – not “shall.” This is significant. The tree replacements that are traditionally conditioned by the Board of Public Works are discretionary environmental mitigation measures. They are not mandatory “regulatory compliance measures” of general application. Again, under *Salmon*, the City cannot use a mitigation measure to reach a determination that a project is exempt from CEQA. This is fundamental black letter CEQA law.

## **V. The Value of Environmental Review at This Juncture**

Notwithstanding the fact that the applicant has replanted trees (even at a greater than 4:1 ratio), environmental review continues to have value and will not simply be an exercise in paper generation. For example, a Mitigated Negative Declaration (“MND”) could evaluate and determine that more Western Sycamores should be planted as opposed to Coast Live Oaks. Certainly, each protected tree has its own environmental value in our local ecosystem. Moreover, the MND could require that the 62 non-protected trees be replaced at an appropriate ratio as well. When an MND is conducted the City generally requires replacement of non-protected significant

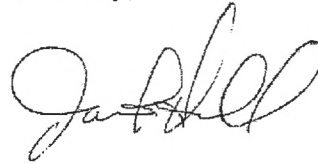
trees as well. The ecologically and horticulturally sound placement of the trees on site (as per an applicant Planting Plan approved by the Urban Forestry Division) is also a consideration and potential mitigation measure. The conditions of approval for a tree removal permit also provide for prior inspections, a bonding requirement, irrigation, and a requirement that the trees be maintained. Simply withdrawing the "tree removal permit application" does not provide the assurance that the planted "mitigation trees" will be adequately protected in the future and survive to maturity. Speculation is not warranted at this point, but there is clearly value in conducting such reviews even under the present circumstances.

## **VI. Conclusion**

Appellant respectfully request that the City of Los Angeles City Council ("Council"), after reviewing this appeal and its records, grant the CEQA appeal and demand that the Board of Public Works require a tree removal permit for the Project.

Finally, this appeal is made to exhaust administrative remedies concerning the tree removal permit and incorporates by reference all objections made by residents and supporting community organizations to the Board of Public Works. Please note that Appellant reserves the right to supplement the justifications for appeal presented. I trust the City will agendize this appeal promptly so that it may be expeditiously reviewed by the Public Works and Gang Reduction Committee (and thereafter the City Council).

Sincerely,

A handwritten signature in black ink, appearing to read "Jamie T. Hall". The signature is fluid and cursive, with the first name being the most prominent.

Jamie T. Hall

*Attorney for Dr. Linda Whitford*