Communication from Public

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Comments for Public Posting:	This firm represents Sunshine Hill Residents Association ("SHRA" or "Association") with regard to the proposed funding relocation of oak tree deposits ("Project"). The Association objects to approval of the Project. The City Council is poised to take a discretionary action with environmental implications without preparation of an environmental clearance document, which is required under the California Environmental Quality Act ("CEQA"). Please see the attached letter.

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RE: PUBLIC WORKS TRUST FUND NO. 834 – OAK TREE DEPOSITS FUNDING RELOCATION (Council File 22-1238)

Dear Members of the City Council

This firm represents Sunshine Hill Residents Association ("SHRA" or "Association") with regard to the proposed funding relocation of oak tree deposits ("Project"). The Association objects to approval of the Project.

The City Council is poised to take a discretionary action with environmental implications without preparation of an environmental clearance document, which is required under the California Environmental Quality Act ("CEQA").

I. The Activity the City is Poised to Take Constitutes a "Project" Under CEQA

There is no question that the activity in question is subject to CEQA and constitutes a "project." The California Supreme Court in *Union of Medical Marijuana Patients v. City of San Diego* provides definitive guidance on this threshold question. The Supreme Court stated: "The question posed at that point in the CEQA analysis is not whether the activity will affect the environment, or what those effects might be, but whether the activity's potential for causing environmental change is sufficient to justify the further inquiry into its actual effects that will follow from the application of CEQA. If the proposed activity is the sort that is capable of causing direct or reasonably foreseeable indirect effects on

the environment, some type of environmental review is justified, and the activity must be deemed a project." *Union of Medical Marijuana Patients v. City of San Diego* (2019) 7 Cal.5th 1171, 1198. A local agency's task in determining whether a proposed activity is a project is to consider the potential environmental effects of undertaking the type of activity proposed, "without regard to whether the activity will actually have environmental impact." *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n* (2007) 41 Cal.4th 372, 381.

Here, the activity in question is of the "sort that is capable of causing direct or reasonably foreseeable indirect effects on the environment." The City is proposing to redirect funds that were designed for a specific use and purposes to plant oak trees in medians (and in parts of the City where they did not naturally occur). Such activity is of the sort that is capable of causing direct or reasonably foreseeable indirect changes on the environment.

II. The City Did Not Conduct a "Preliminary Review" As Required by CEQA

There is no evidence in the record that the City has even conducted a "preliminary review" as required by CEQA. (Cal. Code Regs. tit. 14, § 15060).

CEQA mandates a three-tiered review of any action by an agency. *Muzzy Ranch Co. v. Solano County Airport Land Use Com'n* (2007) 41 Cal.4th 372, 380 (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 58, 74). "The first tier is jurisdictional, requiring that an agency conduct a **preliminary review** to determine whether an activity is subject to CEQA." *Muzzy Ranch Co., Supra*, at 380 (citing CEQA Guidelines § 15060, Pub. Resources Code § 21065). CEQA Guidelines § 15060(c) establishes a clear duty stating, "a lead agency must first determine whether an activity is subject to CEQA . . . " Further, this preliminary review must be conducted before any CEQA exemption determination is made. *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117 (faulting a city on the basis that there was "no indication that any preliminary environmental review was conducted before the exemption decision was made.") The CEQA Guidelines buttress this requirement. Appendix A to the CEQA Guidelines, includes a "CEQA Process Flowchart" noting that the first step in the CEQA review process requires a public agency to make a determination whether or not the activity in question is a project in the first instance.

The case of *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106 is instructive. In that case, the City of San Jose adopted an ordinance that provided for a geological study of a designated area in the foothills of the City. The City asserted in the preamble of the ordinance that they had found the activity to be exempt from CEQA pursuant to § 15061(b)(3) (the so-called common-sense exemption). A homebuilder objected to proposed exemption determination from CEQA and wrote a letter to the City arguing that the determination was without any evidentiary support. Notwithstanding the homebuilder's objections, the City adopted the ordinance. There was no comment by any member of the city council (*Id.* at 114) and there was no mention of CEQA in the various staff reports. (*Id.* at 117). The Court of Appeal held that the City had violated CEQA

because the exemption determination was not "supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision." *Id.* at 117. The court keyed in on the fact that the administrative record was "devoid of any evidence regarding possible environmental . . . with the exception of the written and oral objections interposed by appellant." *Id.* at 114. Citing *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, the court further highlighted that "[a]n agency abuses its discretion if there is no basis in the record for its determination that the project was exempt from CEQA." *Id.* The City argued that the homebuilders comments and objections were "entirely speculative," but the court rejected these arguments, noting that the City had the burden of proof and that the homebuilders arguments were sufficient to remove the applicability of the exemption determination "even if exaggerated or untrue." *Id.* at 118.

In this case, there is absolutely no evidence in the administrative record that the City conducted any environmental review for the Project. There is no mention of CEQA in any of the staff reports. Much like in *Davidon,* the administrative record is completely devoid of any evidence regarding possible environmental impacts except for the written and oral comments from members of the public, including the Association. Moreover, as was the case in *Davidon,* there is no indication that any preliminary review was conducted.

III. **Repurposing the Oak Tree Deposits Will Have Environmental Consequences**

The Staff Report ("Report") prepared for the Project notes that the oak tree deposits in question "are typically collected from developers, contractors, and property owners yet some deposits represent monies from defaulted bonds, cash in-lieu of bond deposits, fines, and settlements." Staff Report at p. 2. The Report goes on to state the following: "The BPW worked in collaboration with the UFD to conduct further research on all other deposits made within this RSC. Based on site inspection and review of records, the UFD determined that *either the trees were not planted (per the original purpose of the deposit)* or there was no record of this bond at UFD or the Bureau of Engineering." (emphasis added) Staff Report at p. 3. The City identified 19 different permits with remaining funds that date from 1986 to 2007. Staff Report, Transmittal 2.

What the City has failed to appreciate is that these bonds were required as part of mitigation for specific projects that had their own environmental review under CEQA. The bonds were required to ensure that the planting of mitigation trees would *actually occur* in the area of environmental impact. The bonds provide money to the City to ensure that oak tree planting can occur even if a developer fails to perform or the new trees die within the maintenance period. Planting oak trees *miles away* – sometimes in areas of the City where they did not naturally occur - does not mitigate the environmental, impacts of the original project. Therefore, the Project is not exempt from CEQA. Moreover, the City is significantly changing the original mitigation measures, which requires supplemental CEQA review. If changes to a mitigation measure go beyond determining substantial compliance with the measure as adopted, such that the measure itself is modified or deleted, a lead agency is required to conduct a supplemental

CEQA review. If the measure is cancelled or deleted, the reasons for deleting the measure and the effects of doing so must be evaluated under CEQA. Lincoln Place Tenants Ass'n v City of Los Angeles (2005) 130 Cal.App.4th 1491, 1509-1510,

IV. **Conclusion**

The City cannot proceed to approve the Project without complying with CEQA. To do so would be an abuse of discretion. Please add Channel Law to the mailing list for notices regarding this Project. I may be contacted at 310-982-1760 or at jamie.hall@channellawgroup.com if you have any questions, comments or concerns.

Regards,