

STEPHEN R. COOK  
scook@brownrudnick.com

2211  
Michelson  
Drive  
Seventh  
Floor  
Irvine  
California  
92612  
tel 949.752.7100  
fax 949.252.1514

March 3, 2017

**VIA HAND DELIVERY AND BY EMAIL**

Dana Mahaffey, Associate Planner  
City of Sacramento, Community Development Department  
Environmental Planning Services  
300 Richards Boulevard, Third Floor  
Sacramento, CA 95811  
dmahaffey@cityofsacramento.org

**RE: Comments On Revised Draft Environmental Impact Report For  
The McKinley Village Project (P08-086)**

Dear Ms. Mahaffey:

The Revised Draft Environmental Impact Report for the McKinley Village Project (the "RDEIR") is fatally flawed insofar as it (i) improperly attempts to circumvent a decision by the Court of Appeal that requires the Project EIR's decertification; (ii) fails to correct deficiencies in the EIR's traffic analysis that the Court of Appeal concluded render the EIR noncompliant with the California Environmental Quality Act ("CEQA"); (iii) fails to satisfy the requirements for a supplemental or subsequent EIR in that it ignores significant changes in the circumstances since the original EIR was certified; and (iv) was not recirculated as required by CEQA. If these defects are not remedied, the McKinley Village Project will remain in violation of CEQA, and will continue to impair the quality of life of the residents of the City of Sacramento.

On November 7, 2016, the Court of Appeal of the State of California, Third Appellate District, issued an opinion in the action captioned *East Sacramento Partnerships for a Livable City v. City of Sacramento, et al.*, Case No. C079614 (the "ESPLC Action"), in which the Court of Appeal concluded that the Project's EIR failed to comply with CEQA (the "Opinion"). In particular, the Court held that the EIR's traffic analysis was deficient because the EIR determined, based solely on a mobility element in the City's 2030 General Plan, that the Project's impacts on severely degrading traffic conditions at certain intersections were insignificant. The Court of Appeal explained that the General Plan alone *does not* constitute substantial evidence that the Project's impacts on failing traffic conditions are insignificant. On that basis, the Court remanded the case to the Superior Court for the County of Sacramento for entry of an order requiring the City to decertify the Project EIR, and to bring its traffic analysis into compliance with CEQA.

Not only has the City failed to follow the procedural steps mandated by the Court of Appeal (*i.e.*, decertification of the Project EIR), but the RDEIR is substantively deficient both in light of the Court of Appeal's Opinion and the requirements of CEQA. First, the RDEIR does not correct the defects that the Court of Appeal identified in its Opinion since the RDEIR, like the original EIR, fails to support its conclusion that the Project's impacts on degrading traffic conditions are less than significant with substantial evidence. Second, the RDEIR fails to account for substantial changes



from the time that the original Project EIR was certified—including the City's adoption of the 2035 General Plan—that require the City to prepare a supplemental or subsequent Project EIR pursuant to Public Resources Code § 21166 and 14 Cal Code Regs. § 15162(a)(2). For example, the RDEIR continues to analyze the Project's traffic impacts under the version of Mobility Policy 1.2.2 that was in place when the Project was originally approved. This policy was superseded by the 2035 General Plan.

Accordingly, in order to comply with CEQA and the Court of Appeal Opinion, the City must (i) decertify the Project EIR; (ii) prepare a subsequent or supplemental EIR that both corrects the deficiencies identified by the Court of Appeal and accounts for significant changes since the original Project EIR was certified, including the City's adoption of the 2035 General Plan; and (iii) recirculate the subsequent or supplemental EIR for public review and comment before considering its certification.

#### **A. The City's Approval of the McKinley Village Project**

The McKinley Village Project, which includes the construction of 336 residential units, is located on 49 acres of land zoned for heavy industrial uses. It is surrounded by a major freeway to the north, railroad tracks to the south, and is adjacent to a methane-polluted former landfill. Among other impacts, the Project is expected to generate an additional 3,500 vehicle trips per day in an already congested area.

The City circulated a draft EIR ("DEIR") for the Project for public review and comment from November 12, 2013 until January 10, 2014. Notwithstanding the size, location, and complexity of the Project, the DEIR claimed that all significant impacts related to the Project could be reduced to a less than significant level. Extensive comments were submitted to the City during the DEIR public comment period. In total, the City received nearly 130 comment letters on the DEIR, most of them from responsible agencies, environmental groups, neighborhood organizations, and citizens concerned about the adverse environmental impacts of the Project. For example, Caltrans submitted comments indicating that it had "serious concerns regarding the lack of adequate traffic analysis" in the DEIR. ESPLC also submitted comments on the DEIR that were supported by analysis prepared by expert environmental, planning, and traffic consultants. Instead of providing good faith, reasoned responses to the comments on the DEIR, the City published the Final EIR ("FEIR") with relatively minimal changes. The FEIR failed to adequately address the deficiencies in the DEIR identified by ESPLC and others.

The City Council held its first public hearing on the Project on April 29, 2014. At the hearing, Councilmember Hansen moved to approve the Project before the public comment portion of the hearing was opened. Ultimately, in a split 6-3 vote, the City Council certified the EIR and approved the Project. The dissenting councilmembers expressed concerns given the neighborhood opposition; traffic, air, and noise impacts; and inadequate site access and its associated effect on emergency response times. The City filed its Notice of Determination on April 30, 2014.

#### **B. The ESPLC Action**

On May 30, 2014, ESPLC filed a petition for writ of mandate in the Superior Court for the County of Sacramento to challenge the City's approval of the Project. ESPLC argued that the City's approval of the Project failed to comply with CEQA because the Project EIR (i) failed to adequately analyze the Project's significant health impacts; (ii) failed to address significant and unavoidable traffic impacts; (iii) failed to disclose or to mitigate significant methane impacts; and (iv) failed to



disclose significant unavoidable noise impacts. In addition, ESPLC argued that the Project was inconsistent with the City of Sacramento's 2030 General Plan.

After the trial court denied ESPLC's petition, on June 22, 2015, ESPLC timely filed a notice of appeal of the trial court's judgment. After briefing and oral argument, on November 7, 2016, the Court of Appeal issued its Opinion reversing in part the trial court's denial of ESPLC's petition, and concluding that the Project EIR's traffic analysis failed to comply with CEQA. The Court highlighted the fact that the EIR "found traffic impacts at intersections on 28th and 29th Streets that changed conditions from LOS C to LOS E and from LOS A to LOS D under existing plus project conditions," and that "[u]nder cumulative plus project conditions, several intersections on 28th, 29th, and 30th Streets are at LOS F, with significant delays." As the Court of Appeal explained:

The EIR found these impacts to be less than significant based solely on the mobility element in the City's general plan, without any *evidence* that such impacts were insignificant. Indeed, the Master EIR for the City's 2030 general plan, which adopted the mobility element at issue, recognized that the impact of traffic increases above LOS D-E were "significant and unavoidable." Further, the EIR finds similar changes to LOS conditions in East Sacramento, outside the core area, *are* significant impacts and require mitigation. Accordingly, there is evidence of a significant impact on traffic on 28th, 29th, and 30th Streets. As in *Amador Waterways*, the EIR contains no explanation why such increases in traffic in the core area are not significant impacts, other than reliance on the mobility element of the general plan that permits LOS F in the core area during peak times.

The Court of Appeal went on to explain that the EIR's conclusion that the foregoing traffic impacts were not significant was not supported by substantial evidence because "[t]he general plan alone does not constitute substantial evidence that there is no significant impact." The Court concluded as follows:

Because the EIR fails to explain or provide substantial evidence to support the finding of no significant traffic impact at these intersections, we must reverse the trial court's denial of ESPLC's petition for a writ of mandate and remand the case for issuance of a writ **directing the City to set aside its certification of the final EIR and to take the action necessary to bring the transportation and circulation section of the EIR into compliance with CEQA**....The City need only correct the deficiency in the EIR that we have just described before considering recertification of the EIR. (Emphasis added.)

Thus, the Court of Appeal's Opinion plainly directs the trial court to enter an order requiring decertification of the Project EIR, remediation of the EIR's deficient traffic analysis, and recertification of the EIR.

Neither the City of Sacramento nor the City Council filed a petition for review of the Court of Appeal's decision by the California Supreme Court. However, on December 23, 2016, the City of Sacramento filed a request in the California Supreme Court for the depublication of the Court of Appeal's Opinion. Over a dozen non-parties to the ESPLC Action also filed requests for depublication of the Court of Appeal's Opinion, and ESPLC filed oppositions to those requests. On February 15, 2017, the California Supreme Court denied all of the requests for depublication and declined to review the matter on its own motion, thereby rendering the Court of Appeal's Opinion



final. On February 17, 2017, the Court of Appeal issued a remittitur of the matter to the Superior Court. As directed by the Court of Appeal, on remand, the Superior Court is to enter an order requiring that the EIR be decertified and its traffic analysis brought into compliance with CEQA.

**C. The Revised FEIR Violates both CEQA and the Opinion of the Court of Appeal**

As noted, and for the reasons explained below, the RDEIR for the Project does not comply with CEQA or the Court of Appeal's Opinion in the ESPLC Action.

Terra Nova, a leading expert on CEQA issues, reviewed the RDEIR in light of the 2035 General Plan and the Court of Appeal's Opinion, and concluded that the RDEIR complies with neither. Terra Nova's review is attached hereto as Exhibit A, and is incorporated into this letter as though set forth in full.

1. The RDEIR Reflects an Improper Attempt to Circumvent the Court of Appeal's Determination that the Project EIR Must Be Decertified

Upon determining that the Project EIR failed to comply with CEQA, and reversing and remanding the ESPLC Action to the Superior Court for the County of Sacramento, the Court of Appeal expressly directed the Superior Court to issue "a writ directing the City to set aside its certification of the final EIR . . ." Nevertheless, the City has not decertified the Project EIR in accordance with the Court of Appeal's Opinion. Instead, the City attempted to circumvent the Court of Appeal's Opinion by taking advantage of the aforementioned requests for depublication of the Opinion, and the unusual delay that this caused to the remittitur's issuance to the Superior Court, which in turn delayed entry of an order by the Superior Court in the form directed by the Court of Appeal.

Specifically, while the requests for depublication were pending in the California Supreme Court, instead of decertifying the EIR as required by the Opinion, the City purported to "revise" the Project EIR and posted a Notice of Availability of the RDEIR, purporting to commence a review and public comment period of 45 days that expires on March 3, 2015. However, as the Court of Appeal's decision is now final, and the remittitur to the trial court has been issued, there is no justification for the City's attempt to preemptively circumvent an order that the trial court must issue in the form directed by the Court of Appeal. In accordance with the Court of Appeal's express instruction, that order must require the City to decertify the project EIR.

2. The RDEIR Does Not Correct the Fatal Deficiency Identified by the Court of Appeal

As detailed in the accompanying letter from Terra Nova, the RDEIR remains defective for the same reason identified by the Court of Appeal, namely, that it fails to provide substantial evidence to support its conclusion that certain degrading traffic conditions are not significant. Indeed, the RDEIR contains no new analysis and provides no new evidence that could justify its conclusion that LOS F traffic impacts at intersections in the City's "Core Area" are insignificant. Although the City's "explanation" of Mobility Element policy M.1.2.2 has been expanded since the original EIR to explain certain "community values," it does not address the Court of Appeal's statement that "'community values' do not... necessarily measure environmental impacts."

Moreover, although the RDEIR attempts to explain how the Mobility Element is consistent with state policies regarding the reduction of vehicle trips and associated greenhouse gas emissions, the RDEIR does not quantify how the Mobility Policy will improve these environmental



impacts. Rather than providing any evidence (let alone substantial evidence) that the degrading traffic conditions identified by the Court of Appeal do not constitute significant environmental impacts, the RDEIR continues to rely solely on the Mobility Element in the 2030 General Plan to support its conclusion that degrading traffic conditions at certain intersections in the City's "Core Area" are less than significant. As a result, the RDEIR fails to cure the fatal defect identified by the Court of Appeal, or to address the Court's clear and unambiguous statement that "[t]he general plan alone does not constitute substantial evidence that there is no significant impact."

### 3. The RDEIR Does Not Satisfy The City's CEQA Obligation to Prepare a Subsequent or Supplemental EIR

The City is required to prepare a Subsequent or Supplemental EIR pursuant to Public Resources Code Section 21166, which provides as follows:

When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

See also 14 CCR § 15162(a)(2).

Following the City's certification of the Project EIR in 2014, the City of Sacramento adopted its 2035 General Plan. The 2035 General Plan indisputably constitutes a "substantial change" that must be accounted for in the City's review of the McKinley Village Project following the Court of Appeal's Opinion before a subsequent or supplemental EIR can be certified. The adoption of the 2035 General Plan dramatically changes much of the analysis in multiple sections of the RDEIR. For example, the 2035 General Plan substantially revised Mobility Element Policy M 1.2.2, on which the Project EIR's traffic analysis relies. Nevertheless, the RDEIR analyzes traffic impacts under the superseded version of Mobility Policy 1.2.2 that appeared in the City's 2030 General Plan. The changes to Mobility Policy 1.2.2 in the City's 2035 General Plan create potentially significant environmental impacts relating not only to traffic, but to air quality, noise, and emergency services. These impacts must be studied before a supplemental or subsequent EIR can be certified. Thus, the RDEIR is inadequate because its analysis is based on policies and provisions in a General Plan that is no longer valid.

### 4. The City Failed to Recirculate the EIR as Required By CEQA

Not only did the City fail to decertify the Project EIR, fail to correct the deficiencies in the EIR, and fail to prepare a subsequent or supplemental EIR to account for substantial changes as required by CEQA, but the City also created a faulty and invalid process for circulation of, and



public comment on, the RDEIR. Recirculation of an EIR is governed by 14 CCR § 15088.5, which provides, in relevant part, as follows:

- (a) A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term “information” can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not “significant” unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement. “Significant new information” requiring recirculation include, for example, a disclosure showing that:
- (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
  - (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
  - (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.
  - (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.

See *also* Public Resources Code Section 21092.1.

As discussed above, the City is required to prepare a subsequent or supplemental EIR that accounts for the City's adoption of the 2035 General Plan. That subsequent or supplemental EIR will necessarily include “significant new information” within the meaning of Section 15088.5 of the CEQA Guidelines, and will thus require recirculation.

But even if the RDEIR was procedurally proper or substantively adequate (it is not), and even if a partial recirculation of the EIR was appropriate in this case (it is not), the City's circulation of the RDEIR would remain deficient and a violation of CEQA. In its Notice of Availability of the RDEIR, the City acknowledged that it would not recirculate the EIR as a whole, and stated that “[b]ecause the Court of Appeal expressly limited the scope of the cure required to remedy the EIR's deficiency, the City is recirculating only the Revised Draft EIR and Appendix A to the Revised Draft EIR for review and comment.” The Court of Appeal's determination that the Project EIR failed to comply with CEQA was based on its conclusion that the EIR's traffic analysis was deficient. Nevertheless, the City did not recirculate even the complete Section 4.9 of the EIR that discusses “Transportation and Circulation.” Instead, the City circulated only a portion of that section reflecting changes that the City made to the Project EIR. However, as explained in the accompanying letter from Terra Nova, it is difficult if not impossible to evaluate the RDEIR because a reader must flip back and forth between the original EIR that the Court of Appeal found defective, and the very limited RDEIR that the City made available for review. A reader cannot simply review the RDEIR



and understand its discussion in context, as the RDEIR includes, for example, partial data from tables that appear in the EIR. Particularly for an issue as complex and interdependent as traffic, the City cannot, consistent with its obligations under CEQA, simply extract and circulate for review just a fragment of the EIR's traffic discussion.

Accordingly, the City must prepare a supplemental or subsequent EIR that accounts for changes since the original EIR was certified, and that includes an adequate traffic analysis which is supported by substantial evidence. Because that supplemental or subsequent EIR will include substantial new information including, among other things, analysis based on the 2035 General Plan, the City must recirculate that EIR for public review and comment pursuant to CEQA Section 15088.5(a).

**D. Conclusion**

For all of the reasons stated above, the RDEIR does not comply with CEQA or with the Court of Appeal's decision in the ESPLC Action. To comply with CEQA and with the Court of Appeal's decision, the City must (i) decertify the Project EIR; (ii) prepare a subsequent or supplemental EIR that both corrects the deficiencies identified by the Court of Appeal and accounts for significant changes since the original Project EIR was certified, including the City's adoption of the 2035 General Plan; and (iii) recirculate the subsequent or supplemental EIR for public review and comment before considering its certification.

Sincerely,

**BROWN RUDNICK LLP**

A handwritten signature in black ink, appearing to read 'Stephen R. Cook', written over a horizontal line.

STEPHEN R. COOK

**EXHIBIT "A"**





## TERRA NOVA PLANNING & RESEARCH, INC.

---

February 28, 2017

Mr. Stephen R. Cook  
Brown Rudnick LLP  
2211 Michelson Drive, 7<sup>th</sup> Floor  
Irvine, CA 92612

RE: McKinley Village Project (P08-806) Revised Draft Environmental Impact Report (SCH 2008082049)

Dear Mr. Cook:

Following our telephone conversations, this letter is written in response to your request that we review the revised Environmental Impact Report for the McKinley Village Project (revised DEIR), released by the City for public comment on January 18, 2017. This review has been undertaken to analyze whether the revised DEIR conforms to the requirements of the California Environmental Quality Act (CEQA), and the direction provided by the Court of Appeal in its Opinion in this case, as provided below, also in the context of the requirements of CEQA. The court found that:

*“...Here, the EIR found traffic impacts at intersections on 28th and 29th Streets that changed conditions from LOS C to LOS E and from LOS A to LOS D under existing plus project conditions. Under cumulative plus project conditions, several intersections on 28th, 29th, and 30th Streets are at LOS F, with significant delays. The EIR found these impacts to be less than significant based solely on the mobility element in the City’s general plan. However, the EIR finds similar changes to LOS conditions in East Sacramento, outside the core area, are significant impacts and require mitigation. Accordingly, there is evidence of a significant impact on traffic on 28th, 29th, and 30th Streets. As in Amador Waterways, the EIR contains no explanation why such increases in traffic in the core area are not significant impacts, other than reliance on the mobility element of the general plan that permits LOS F in the core area during peak times.*”

*In response to a comment questioning the City’s discretion in establishing its own LOS thresholds of significance, the final EIR states that the LOS thresholds of the City’s general plan reflect “community values.” Such “community values” do not, however, necessarily measure environmental impacts. (Cf. Berkeley Jets, supra, 91 Cal.App.4th at p. 1381 [land use noise threshold not determinative for CEQA].) The core area of the general plan covers downtown and midtown Sacramento and includes both busy commercial and quiet residential streets. The CEQA Guidelines caution that “the significance of an activity may vary with the setting.” (CEQA Guideline, § 15064, subd.(b).)*

***The general plan alone does not constitute substantial evidence that there is no significant impact. “[T]he fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant. To paraphrase our decision in Communities for a Better Environment, a threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant...***

***...Because the EIR fails to explain or provide substantial evidence to support the finding of no significant traffic impact at these intersections, we must reverse the trial court’s denial of ESPLC’s petition for a writ of mandate and remand the case for issuance of a writ directing the City to set aside its certification of the final EIR and to take the action necessary to bring the transportation and circulation section of the EIR into compliance with CEQA....The City need only correct the deficiency in the EIR that we have just described before considering recertification of the EIR.”*** (emphasis added)

#### **Document Format and Content**

The DEIR contains only portions of Section 4.9, Transportation and Circulation, on the basis that “Section 15088.5 requires recirculation of only the significant new information, rather than the entire EIR.”<sup>1</sup> This reasoning fails for two reasons. First, the writer mis-represents the provisions of CEQA Section 15088.5. Section 15088.5(c) reads:

*“If the revision is limited to a few chapters or portions of the EIR, the lead agency need only recirculate the chapters or portions that have been modified.”*

In this case, the recirculated document must include the entire Section 4.9, Transportation and Circulation, not only those paragraphs or pages which the City has edited. It is impossible to consider the revised DEIR’s adequacy in this case, because one must move back and forth between the original EIR and the revision to understand the discussion in context. This includes eviscerated Tables, where only portions of the Table are provided in the revised DEIR, and the balance must be found in the original. Particularly for an issue as complex and interdependent as traffic, pulling the discussion out of context is inappropriate, and inconsistent with the requirements of CEQA.

Second, the City was required by the court to “set aside its certification of the final EIR.” As a result of the City’s failure to set aside that certification, there is no EIR on which to depend, and the document should have been recirculated in its entirety, although only the changes in the Transportation and Circulation section were to be made. The court was clear: the City was to only make the changes necessary to this section “before considering recertification of the EIR.” We understand that the City has not complied with the Court of Appeal’s direction

---

<sup>1</sup> McKinley Village Project Revised Draft Environmental Impact Report, page 1-2.

to set aside the certification of the document. The City should not compound that error by improperly distributing only revised pages instead of the document as a whole, as required by CEQA.

In addition, the City's analysis considers the wrong Mobility Element policy, a policy that is simply no longer operative. Since the certification of the original EIR, the City has substantially amended and adopted a revised Mobility Element Policy M 1.2.2. The revised DEIR should have analyzed the revised policy, not the original, since the original no longer applies or exists.

The substantial change in the adopted General Plan leads to another conclusion: the revised DEIR is inadequate because it considers a General Plan which no longer exists. Under CEQA Section 15088.5(a), a *“lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review...but before certification.”* In this case, the City's updated General Plan contains substantial new information and changes in policy that must be included in the revised DEIR, because there is no certified EIR at this time. For these reasons, the City must undertake a Supplemental EIR to comply with CEQA. Again, the City's failure to comply with the Court of Appeal Opinion directing the City to set aside the certification is no reason to avoid compliance with CEQA.

### **Analysis**

The revised DEIR contains no new analysis, and provides no justification for significant impacts associated with intersections in the City's Core Area. The “explanation” of the City's Mobility Element policy M.1.2.2 has been expanded to better explain the “community values” of increased bicycle and pedestrian activity, but does not address the court's direction that *“community values do not, however, necessarily measure environmental impacts.”* The revised DEIR states that the threshold of significance relating to LOS is two-pronged:

The first prong of the threshold is to analyze whether “traffic generated by the project degrades LOS from an acceptable LOS (without the project) to an unacceptable LOS (with the project).”<sup>2</sup> If it does, then the project will have significant environmental impacts. The revised DEIR, however, continues to state that the fact that the project will degrade LOS in the Core Area is less than significant solely because of the existence of the now defunct Mobility Element policy. There is no consideration that this policy does not measure environmental impact. The revised DEIR failed to provide an analysis of the environmental impact associated with this degradation. As a result, the impacts associated with the first prong of the threshold of significance remain significant and unavoidable, and should be declared as such in the revised DEIR.

The second prong of the threshold is to determine whether “[t]he LOS (without Project) is unacceptable and Project generated traffic increases the average vehicle

---

<sup>2</sup> CEQA Guidelines, Appendix G.

delay by 5 seconds or more.” In this case, the revised DEIR clearly states that three intersections would experience a reduction from LOS C/D to LOS E/F, and therefore fail to meet this threshold in the Core Area, and four additional intersections would continue to operate at LOS E and F, and meet this threshold during the AM/PM peak hour. In both cases, the only explanation given for a determination of “less than significant impacts” is Mobility Element policy M 1.2.2. The analysis in the EIR shows that this impact is significant, since by any standard, including the City’s own in every other area but the Core, LOS E and F are unacceptable. The revised DEIR, however, fails to address the court’s determination that the *“general plan alone does not constitute substantial evidence that there is no significant impact.”* The revised DEIR also fails to address the issue that *“a threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant.”* In this case, under the requirements of CEQA and consistent with the court’s interpretation, the City offers no substantial evidence that the reductions in LOS that will be experienced in at least 6 intersections will not have a substantial environmental impact, given that LOS E and F are considered unacceptable in the City and throughout California. The LOS standard is well established, and extends well beyond local jurisdictions. For example, the California Department of Transportation will not fund street improvement projects for locations with unacceptable LOS E or F, unless the relevant jurisdiction can first demonstrate that it will improve the level of service to LOS D or better. This represents substantial evidence that the LOS standard of LOS D or better is a tangible and widely accepted measure of environmental impact when considering intersection traffic flow.

#### Appendix A

As described above, the revised DEIR includes no new quantitative analysis of the traffic impacts associated with the proposed project. Instead, the revised DEIR relies on an explanation of the City’s policy M 1.2.2, provided in Appendix A of the document. This appendix attempts at length to justify why an unacceptable LOS in the Core Area is possible and acceptable. The analysis, however, does not provide any explanation of whether a failure in LOS standards is an environmental impact. On the contrary, the analysis provided in the Appendix states that in an urban core which is “transit-rich” results in “decreased per capita vehicle travel and increased use of alternative travel modes.” If this is the case, the traffic model for the General Plan and the McKinley Village project must show that LOS will be improved in this environment. Current traffic modeling technology allows for the assignment of vehicle trips to transit, pedestrian or NEV use. This type of quantified analysis would be substantial evidence under CEQA that the Mobility Element policy is having a positive environmental impact. However, the revised DEIR, the EIRs for General Plan 2030 or 2035 do not provide such an analysis, and do not demonstrate that the City’s Core Area policy will, in fact, have any effect on the environment.

The Appendix explains at length how the Mobility Element policy complies with state policies relating to reduced vehicle trips and associated reductions in greenhouse gas emissions. However, the Appendix fails to quantify how the policy will improve both these environmental impacts. Without a demonstrated decrease in either vehicle trips (reflected in LOS) or in greenhouse gas emissions, the Appendix fails to provide the analysis necessary under CEQA to show the level of environmental impact, and the associated reduction that the

policy will have on that impact. As a result, the Appendix neither addresses the environmental threshold required under CEQA, nor the court's order to demonstrate whether there will be an environmental impact and how that impact will be reduced. Furthermore, the analysis in the Appendix considers a policy which no longer exists. The General Plan 2035 text for Mobility Element Policy 1.2.2 substantially changed from that in the 2030 General Plan. The Appendix's analysis, therefore, is flawed, and should be redone to consider current City policy.

The Appendix also lists a number of improvements that the applicant has been conditioned to complete in order to reduce the project's impacts on area traffic. What the Appendix fails to demonstrate is that these improvements are project-related conditions of approval that would be required to accommodate the project's impacts on the circulation system. They are not, as required in the Mobility Element policy, improvements related to improving the regional transportation network into and in the Core Area. Therefore, they cannot be considered to be implementing the policy, and must be considered only as they relate to direct project impact improvements.

Finally, we note that the Appendix continues to include the addition of a vehicular and/or bicycle tunnel at Alhambra Boulevard as a condition of approval. As we have noted in our previous reviews of the environmental documentation for this project, the original EIR had absolutely no analysis of the impacts associated with the tunnel, stating that the tunnel had not been analyzed because it was infeasible. The City, however, continues to give the applicant credit for this access alternative as part of the suite of conditions of approval that purport to mitigate the project's traffic impacts. It is not acceptable under CEQA to provide no analysis of the impacts of a condition of approval, and then to impose it on a project and expect it to be implemented.

### **2035 General Plan**

In 2013, shortly after the approval of the proposed project, the City adopted changes to its General Plan. Although the original EIR was prepared under the 2030 General Plan, the revised EIR should analyze the project's consistency with the 2035 General Plan, since it is now the document that governs the City's land use decisions.

Most significant in this change as it relates to the traffic impacts for the project is the horizon year adopted with the General Plan update. The original EIR studied a horizon year of 2030, consistent with the adopted General Plan at the time. However, the 2013 update changed that horizon year to 2035. The revised EIR must include traffic analysis for horizon year 2035. Without this analysis, it cannot claim that the project is consistent with the General Plan.

The 2035 General Plan includes comprehensive and extensive changes to the Mobility Element that have not been considered in the revised EIR. Perhaps most significantly, the 2035 General Plan significantly modifies Mobility Element Policy 1.2.2, including changes, additions and deletions to roadways where unacceptable levels of service are made acceptable, including the removal of Alhambra Boulevard and addition of Elvas Avenue and H Street as acceptable LOS E roadways. These changes have the potential to significantly

affect the impacts of the proposed project on both neighborhood roadways and the regional traffic system.

The potentially significant impacts of the changes in Mobility Element Policy 1.2.2 are far reaching. They include, but are not limited to not only traffic, but also to air quality, noise and emergency services. There must be an analysis conducted to consider how much more significant the changes and additions will negatively impact air quality, as a result of increased idling, "hot spot" creation at failed intersections, and GHG emissions over many years of congested traffic. The revised EIR must consider how much more noise will result to adjacent sensitive receptors, including parks, playgrounds, schools, homes, and care facilities, as a result of stalled traffic which will be made worse by the proposed project. Similarly, the revised EIR must consider what impacts the proposed project, when added to the expanded number of failed intersections in the neighborhood, will impact response time for police, fire and ambulance services in the area. In other words, the revised EIR must consider the totality of its potential traffic impacts in light of the increased congestion generated by the changes made in the 2035 General Plan, and determine whether all the impacts of the project will be greater because of these regionally reduced levels of service.

Finally and most importantly, because the City has adopted major revisions to its General Plan which contain substantial new information and changes in policy, and because there is no certified EIR for the project at this time, the City must undertake a Supplemental EIR for the project to comply with CEQA.

### **Conclusion**

As described above, the revised DEIR does not meet the requirements of CEQA, nor the direction provided by the Court of Appeal. The City has failed to provide, both in form and content, the analysis necessary to address the significant impacts associated with traffic as a result of the proposed project.

Sincerely,



Nicole Sauviat Criste  
Principal