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July 25, 2008

Via Federal Express

Martha Blake
City of San Diego Development Services Center
1222 First Avenue, MS 501
San Diego, CA 92101

Re: Friends of Rose Canyon, Endangered Habitats League and Center for Biological Diversity Comments on University Towne Center Revitalization Project Final Environmental Impact Report (Project No. 2214, SCH 2002071071)

Dear Ms. Blake:

Friends of Rose Canyon (FRC) and Endangered Habitats League (EHL), represented by Shute, Mihaly & Weinberger LLP, and the Center for Biological Diversity (CBD) submit the following comments regarding the proposed University Towne Center Revitalization Project ("Project") in the City of San Diego. We are writing to express our grave concerns regarding the inadequacies of the Final Environmental Impact Report (FEIR) for the Project.

SUMMARY

Although we have numerous concerns regarding the legal inadequacy of the document, below are some of the key points:

- Overwhelming Traffic. The Project would bring a crush of new traffic to University City, overwhelming the community's streets, inters and freeways. Caltrans raised significant concerns about the Project that have not been addressed.

- New, Unsustainable Water Demand. The Project would impose a new massive demand for water on an existing supply that is in serious jeopardy. Given the Governor's drought declaration, the state-wide recognition of the crisis of the Bay-

Delta and the State Water Project, Metropolitan Water District's and San Diego County Water Authority's on-going but unresolved response to the Delta Smelt Decision, and the City Attorney's warning against reliance on prior estimates of water availability, there is no basis for the City to conclude that the Project demand could be met.

- Bulk and height out of scale for University City. Anyone who has walked the UC community knows that the massive bulk and scale of the proposed Project would forever change the character of the community. The FEIR's very recent change to conclude the Project would be consistent with the surrounding community is beyond the pale.

- Significant Expansion of Development Rights. Westfield is requesting significant expansion of its existing development rights, obliterating the previously-approved parameters for growth in the community. UCPG voted overwhelmingly to deny the Project due in large part to its failure to live within the contours of this vision for the community. Westfield is asking the City to do an end run around that vision.

- Vague Project Description. The components of the proposed Project are so vaguely defined that it is impossible for the City to know what Westfield is asking the City to approve; it is a complete mystery what would eventually spring up on the site. The nebulous Project description makes reasoned environmental review impossible. And approval of the Project would abdicate to the developer the City's responsibility for and control over land use planning.

- Constantly Changing Project and Environmental Determination. The Project and the environmental review are in a state of flux. The Master Planned Development Permit that is the heart of this project was not made available until *after* the final environmental document was published and has been amended at least twice since that time. Likewise, just days ago the City released an amendment to the environmental review, making significant changes in the document's conclusions. This scrambled effort to patch holes in the proposal and EIR confirms that the Project is not yet ready for final consideration by the City Council.

THE ENVIRONMENTAL ORGANIZATIONS

FRC is a nonprofit organization dedicated to the protection, preservation and restoration of Rose Canyon and the Rose Creek watershed. FRC supporters use and enjoy the natural, recreational and scenic resources of Rose Canyon. FRC works with the City Park and Recreation Department to organize nature walks and habitat restoration projects that bring

hundreds of people a year from all over the City of San Diego, including students, families, and scout groups, into Rose Canyon. FRC also works with other Canyon "friends" groups and environmental organizations on region-wide Canyon protection efforts, and with the Rose Creek Watershed Alliance to address issues throughout the watershed.

EHL is a nonprofit organization dedicated to protecting the unique scenic, biological, and natural resources of Southern California. Through participation in community and regional planning processes, EHL promotes sustainable land use planning that both serves area residents and preserves native landscapes. EHL and its members are directly affected by decisions that destroy wildlife habitat, diminish recreational opportunities, increase traffic congestion, result in water contamination, and generally threaten the environment and impair their community's quality of life.

CBD is a nonprofit organization with offices throughout the United States. CBD's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands and waters, and public health. Because climate change from society's production of greenhouse gases is one of the foremost threats to the earth's biodiversity, the environment, and public health, the CBD's Climate, Air, and Energy Program works to reduce greenhouse gas emissions in order to protect these resources.

COMMENTS

I. The FEIR Does Not Provide the Most Basic Details About the Project and Because of This Silence It Is Impossible to Analyze the Project's Impacts.

In FRC's previous letter, it pointed to the DEIR's failure to describe what may ultimately be constructed on the existing shopping center site. *See* FEIR Technical Appendix O, Response to Comments (RTC) 14.1, 14.2, 14.11 - 14.14. FRC explained that the EIR's silence on critical details of the Project crippled virtually all of the document's impact analyses – how can the decision makers and the public meaningfully understand the impacts of the Project if it does not know how tall the buildings will be, where the structures will be located, and the mix of retail and residential uses? Planning Commissioner Naslund expressed precisely this sentiment at the Commission's hearing on the Project, explaining that the range of development options under the Project is too broad for the decision makers to understand what it is that they are being asked to approve. *See* Videorecording of City Planning Commission hearing (May 22, 2008) at 62440. And the record contains other evidence that staff likewise were uncomfortable with the vague and changing nature of the proposal. The failure to provide meaningful detail is especially egregious because the EIR is intended to support construction of "any of the land use combinations represented by the range of land use scenarios." *See* RTC 9.3. CEQA requires the EIR to analyze a specific development proposal, not a host of conceptual land use scenarios.

The FEIR appears to recognize the lack of meaningful detail regarding the Project, but suggests two excuses for the FEIR's vague description. Neither excuse has merit.

A. The *Dry Creek* Case Highlights the Inadequacy of the UTC Project Description.

The FEIR cites *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, allegedly in support of its vague description of the Project. *See* RTC 9.3. Instead of supporting the EIR's approach, however, the facts of that case highlight the deficiencies in this EIR's project description. In *Dry Creek*, the EIR for a sand and gravel mining operation provided significant detail regarding key components of the project, such as the width, slope, depth and height of a bypass channel and in-stream diversion structure; schematic designs of the proposed structures; and figures and cross-sections illustrations of the project design. *Id*. at 28-30. Despite the detail provided by this preliminary engineering work, petitioners in that case argued that only "precise engineering designs" of the facilities would satisfy CEQA. *Id*. at 27. The court rejected petitioners' argument, finding that CEQA did not require the County to prepare "a detailed engineering plan" of the project before completing environmental review. *Id*. at 28. The court noted that CEQA does not require the level of detail contained in *final* design, engineering and construction plans in order to understand the impacts of a project. *Id*. at 35, 36.

Unlike the petitioners in *Dry Creek*, FRC has not claimed that the EIR for the Project here must provide "precise engineering designs" or "detailed engineering plans" of the components of the Project.[1] Rather, FRC has explained that CEQA requires sufficient detail about the components of a project to enable the decision makers and the public "to understand and to consider meaningfully the issues raised by the proposed project." *Id*. at 26. Unlike in *Dry Creek*, where the EIR included schematics, figures, illustrations, and data about the components of the proposed project based on preliminary engineering, here the EIR provides no detail at all. Without even the most basic description of the proposed features of the Project – such as a site plan showing the actual (rather than conceptual) location of buildings and visual simulations of the site as it would be experienced from adjacent areas – there cannot be any meaningful review.

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[1] Indeed, as FRC has explained to the City in the past with regard to the contract with Project Design Consultants for the proposed Regents Road Bridge Project, it would be inappropriate to prepare 100 percent engineering and design of a project prior to the completion of environmental review.

B. The FEIR Cannot Rely on the Master Planned Development Permit to Fill the Gaping Holes in the Project Description.

The FEIR suggests that the Municipal Code process for Master Planned Development Permits, which we understand includes a permit, design guidelines, and a revitalization plan (collectively, "Master PDP"), excuses the EIR from providing detailed information about what the Project will look like and how it will operate. *See* RTC 9.3, 14.11. The City's reliance on this document provides no cover.

The Municipal Code states that Master PDPs may be processed for developments that "propose to incorporate conceptual development criteria for *portions of the project* intended for future use or development." Municipal Code § 143.0480(a) (emphasis added). The purpose of the Master PDP is to provide "flexibility for projects in which *not all of the project components* are fixed at the time of approval." FEIR at 3.6 (emphasis added). Thus, the Code contemplates that while the majority of a proposed project will be fixed at the time of project approval, a few components may be permitted some flexibility for a later date. Here, *none* of the components of the Project are fixed, yet Westfield expects the EIR to be sufficient to support construction of the Project. *See* RTC 9.3. The FEIR would take the small bit of wiggle room contemplated in the Municipal Code for "portions" of a planned development project and stretch it to cover the entire Project. Its effort to take advantage of this small amount of flexibility should be denied.

Although the City now suggests that the public should have been able to understand the full scope of the Project from the Master PDP and extrapolate the environmental impacts of the Project, the Master PDP was not included in the DEIR and only a few pages are appended to the FEIR. *See* FEIR Appendix E. The body of the EIR is obligated to include a sufficient description of the project. CEQA requires that project description information and analysis related to impacts from developing the project be presented in the EIR. *See Santa Clarita Organization for Planning the Environment v. County of L.A.* (2003) 106 Cal.App.4th 715, 722 (agency's analysis must be contained in the EIR, not "scattered here and there in EIR appendices").

Despite the City's claim that the Master PDP was "on file with the City throughout the public review period for the EIR" (RTC 14.11; *see also* RTC 14.12), the Master PDP is dated March 18, 2008 – more than 5 months after the comment period on the DEIR closed. As far as we know, the Master PDP was not made available to the public until May 19, 2008. It is particularly remarkable that the City would claim that the Master PDP has been available for public review, given that the FRC expressly requested the document through its Public Records Act request on April 18, 2008 and the City provided no response whatsoever for more than two months. *See* Exhibit A (SMW letters to City, April 18, 2008, May 20, 2008, June 20, 2008, and

July 8, 2008). All of the Exhibits to this letter are included in the accompanying CD for your review and inclusion in full in the administrative record.

In addition, Westfield's proposal for the Master PDP has been a moving target. While it appears that the original proposal was published March 18, 2008, the document was "revised" on May 1, 2008 and an "errata" was published on June 5, 2008. Even the FEIR recognizes that the Master PDP is only a "current proposed draft." RTC 9.3. Thus, it was impossible for the public to review any final proposal for the Master PDP during the public comment period on either the draft or final EIR. As discussed in detail in Section IV(D) below, the late-availability of what the City itself recognizes is a critical document to understanding the Project is sufficient grounds to require recirculation under CEQA.

Finally, based on Westfield's testimony at the Planning Commission's hearing on the Project, it is unclear whether and when certain Project elements would be implemented and whether additional development will be proposed on the site in the future. For example, while the EIR describes a pedestrian bridge to connect the Project site to adjacent neighborhoods (*see* FEIR at 3-14), and relies on it in part to characterize the Project as pedestrian-friendly, the developer asserted at the Planning Commission hearing that this Project element will be deferred until some unidentified future date. The record demonstrates that this component may never be built.

In another example, the record reflects that the City and the developer anticipate that the Project may include even more development on the site of the existing Sears parking lot even though such development is not part of the current proposal and is not evaluated in the EIR. The record, for evidence, contains statements by the developer that refer to "[w]hen redevelopment occurs at the existing Sears site . . . ." Such an approach would be inconsistent with CEQA requirements that the Project and any related impacts be assessed in their entirety prior to Project approval. Deferring analysis of any proposed new development on the Sears site until some unspecified future time would constitute impermissible segmentation of the Project.

The deficiencies in the Project description are inexcusable and remain uncorrected. The EIR must be substantially revised to provide sufficient detail about each component of the Project capable of generating significant environmental impacts so that the public and decision-makers have sufficient information to understand the Project's full impact. Although the developer may desire a completely unfettered approach to its future development in order to maximize its profits, the City cannot be released from its obligation under CEQA to define the Project in a manner that allows for meaningful analysis.

II. The FEIR's Analysis of Environmental Impacts And Proposed Mitigation Measures Remains Inadequate Under CEQA.

A. The FEIR's Analysis and Mitigation of the Project's Traffic Impacts Are Thoroughly Inadequate.

The average University City resident probably worries about the Project's traffic impact more than any other potential environmental effect. Dropping 18,000 new vehicular trips onto a roadway network already plagued by traffic congestion is certain to have far reaching effects on residents' lives. While the EIR does acknowledge the tip of this iceberg, its analysis is far from adequate under CEQA.

As the University Community Planning Group and FRC noted in comments on the DEIR, the traffic analysis in the DEIR was fundamentally flawed. Caltrans also weighed in on the inadequacy of the EIR's traffic analysis. In letters dated September 21, 2007 and May 13, 2008, Caltrans was sharply critical of the EIR's methodology, analysis and approach to mitigation. *See* Exhibit B (Caltrans letter to City, May 12, 2008).

Largely in response to public comment, the City made extensive revisions to the traffic analysis in the FEIR. Yet these revisions fail to provide the necessary explanations, technical support, and documentation for the EIR's unsupported and self-serving assumptions regarding existing and projected traffic levels. Revisions to the description of existing traffic levels, analytical defects in analysis of Project impacts, and the issues repeatedly raised by Caltrans undermine the integrity of the entire traffic analysis.

Based on these continuing discrepancies and the additional deficiencies discussed below, we conclude the EIR is so fundamentally and basically inadequate that public comment on the DEIR was essentially meaningless. Consequently, neither the public nor the decision makers have any indication that the revised traffic analysis accurately evaluates the Project's traffic impacts. The traffic analysis must once again be revised to correct these serious flaws. In this instance, we recommend the City retain a third-party, objective transportation engineer to conduct a peer review of the analysis.

Though we do not itemize all of the traffic analysis' deficiencies here, the following sets forth examples of some of the most egregious flaws in the FEIR.

(1) The FEIR Understates the Severity of Existing Traffic Congestion, Impairing the Analysis of the Project's Traffic Impacts.

The FEIR makes clear that the DEIR substantially underestimated existing traffic congestion on area streets, intersections and freeways. For example, Caltrans explained in its

September 21, 2007 letter that the DEIR had understated traffic at the intersection of I-5 and Genesee Avenue. In response to this comment, the FEIR made substantial revisions to the traffic analysis and thus made clear that traffic at this location is actually much worse than disclosed in the DEIR. For example:

- The DEIR identified the intersection of Genesee Avenue and the I-5 southbound ramps as operating at LOS C in the p.m. peak hour whereas the FEIR shows this same location as operating at LOS D (FEIR at 5.3-9);

- Genesee Avenue's northbound ramps with I-5 were identified as operating at LOS C in the a.m. peak hour in the DEIR, whereas the FEIR shows this same location as operating at LOS E (FEIR at 5.3-9); and

- The DEIR identifies Genesee Avenue's northbound ramps with I-5 as operating at LOS B in the p.m. peak hour whereas the FEIR shows this location to be operating at LOS D (FEIR at 5.3-9).

Despite the revisions to downgrade the existing conditions, Caltrans informed the City no less than eight times in its May 12, 2008 letter that the FEIR still does not accurately report existing conditions at the I-5/Genesee interchange. Caltrans explains that this intersection actually operates at LOS F (i.e., gridlock) during the a.m. and p.m. peak hours. *See* Exhibit B (Caltrans letter to City, May 12, 2008, at 2, 3). Upon reviewing the City's EIR prepared for the Monte Verde Project, we agree that the UTC Project EIR continues to understate the severity of existing traffic congestion at this location. The City's own prior analysis shows this intersection operating at LOS F under 2005 Baseline conditions and "with project" conditions. *See* City Monte Verde Project Final Environmental Impact Report (July 2006) (Project No. 6563, State Clearing House No. 2003091106) ("Monte Verde Project EIR"), incorporated herein in its entirety by reference.

There are also dramatic discrepancies between the DEIR and the FEIR pertaining to the operation of the I-805 freeway. Whereas the DEIR reported that I-805 from I-5 to La Jolla Village Drive operates at LOS B in the a.m. peak hour, the FEIR reports this same segment as operating at LOS F (or gridlock) (FEIR Tables 5.3-4 and 5.3-12). Similar discrepancies exist for I-805 from La Jolla Village Drive to Nobel Drive, I-805 from Nobel Drive to Governor Drive and I-805 from Governor Drive to SR-52. *See* RTC 3.20; Exhibit B (Caltrans letter to City, May 12, 2008).

Finally, it is critical to note that Caltrans pointed out that the DEIR underestimated traffic on I-805 by 50,000 to 60,000 trips per day. *See* RTC 3.10. Yet, rather than heed the conclusion of the state agency with regulatory authority over the interstate highway system, the

FEIR seeks to defend its faulty methodology, going so far as to suggest that impacts to I-805 would actually be *less* than those originally identified in the DEIR. *See id.*

These are just a few of the myriad discrepancies between the DEIR and FEIR. It is of critical importance for the EIR to accurately disclose the existing operating characteristics of the region's streets, intersections and freeways in order to understand how traffic from the Project would effect the roadway network. Given these extensive discrepancies, and the concerns raised by Caltrans, the EIR's traffic analysis should be revised and recirculated.

(2) The FEIR Uses the Wrong Baseline for Analyzing Traffic Impacts.

The EIR's purported analysis of traffic impacts is crippled in large part because of the document's failure to rely on an accurate baseline for evaluating traffic. Because a project impact is defined by a physical change in the existing environment, the EIR must analyze how a project would affect the actual physical conditions on the ground. The only appropriate baseline for determining whether or not there would be a traffic impact from the Project is the existing traffic conditions on the region's streets, freeways and freeway ramps.

While the EIR identifies existing traffic conditions (*see, e.g.,* FEIR Table 5.3-3), the analysis of Project impacts does not use the existing conditions as the baseline for evaluating traffic impacts. Instead, it uses the development levels established in the University City Community Plan ("Community Plan") as the baseline for determining impacts. *See* Revised Traffic Study at 20. Indeed, the FEIR confirms this fact with the following statement: "Furthermore, project impacts are not measured from the existing analysis." RTC 3.19.

Specifically, the EIR assumes that the following Community Plan projects would be built and actually generating traffic by 2010: (1) Nobel Research Park/IDEC; (2) La Jolla Commons; (3) La Jolla Crossroads; (4) Qualcomm/Campus Point; (5) UCSD; (6) Eastgate Tech Park; (7) Congregation Beth Isreael; (8) Nexus Center; (9) Towne Center Science Park; (10) La Jolla Centre III & I; (11) Costa Verde Specific Plan; and (12) Regency Centre. *See* Revised Traffic Study at 20. If all of these projects were built, they would result in 3.5 million square feet of commercial development, 4,500 resident units and over 700 hotel rooms. *Id*. Although the EIR never identifies the trip generation from all of these projects (which, of course, it should have), it is evident that if these projects were completed they would generate a tremendous amount of traffic. For example, using the trip generation rates from the Project EIR, the office components of these projects would generate over 100,000 trips and the residential uses would generate another 27,000 trips.[2] *See* FEIR Table 5.3-7.

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[2] Inasmuch as the EIR did not include a trip generation rate for office, we used the regional retail trip generation rate. *See* FEIR at 5.3-18.

The Project EIR adds at least 127,000 vehicle trips from these Community Plan projects to the purported traffic baseline. The EIR then evaluates the Project's impacts against this elevated traffic level, rather than against the actual existing traffic conditions. The FEIR's methodology might be acceptable if all of the traffic from the Community Plan's projects would in fact be on the ground in 2010. But this does not appear to be the case. As the following table shows, several of the projects the EIR assumes to be operational in 2010 will not be completed by 2010, have been downsized, or have been withdrawn altogether.

Cumulative Projects List
Revised EIR Table 4-1

PROJECT NAME	TYPE OF DEVELOPMENT	PROPOSED PROJECT SIZE	PROJECT STATUS
Nobel Research Park	R&D/Corporate Office	766,000 SF	Approved for 760,000 SF; Constructed 400,000 SF; No active plans for remainder
La Jolla Crossroads	R&D/Office Residential	162,000 SF; 1,500 multi-dwelling units	1500 units under construction; No permits pursued for 162,00 SF of R&D/Office
Qualcomm/Campus Point	R&D/Office	330,000 SF	Project withdrawn
La Jolla Centre III & IV (a.k.a. Equity Office)	Commercial Office	547,228 SF	Project withdrawn
Costa Verde Specific Plan	Retail Residential Hotel	16.5 acres; 2,931 dwelling units; 400 rooms	Monte Verde approximately 2,180 dwelling units have been constructed; hotel site was approved for conversion of 562 residential units; the project remains in litigation
Regency Centre (a.k.a. Costa Verde Commercial Center)	Retail	75,000 SF	Application initiated in 2004 but currently not active

By adding a minimum of 127,000 new vehicular trips to the area's roadways, intersections and freeways, and using this roadway network as the baseline for evaluating the Project's impacts, the impact of the Project's 18,000 trips appears comparatively benign in terms of the EIR's significance criteria (i.e., change in vehicular delay and volume-to-capacity). Caltrans picked up on this issue when it stated that the change between "with project condition" and "without project condition" showed only a few seconds, or in some cases, tenths of a second delay increases at the freeway ramps, and that this nominal change seemed "unreasonable." *See* RTC 3.7.

Had the EIR evaluated the Project's impacts against existing traffic conditions, rather than the traffic levels under the Community Plan, it would have determined that the Project would significantly impact far more street segments, intersections, freeway segments and freeway ramps than the document currently discloses. Using the intersection of Governor Drive and Genesee Avenue as an example, it is clear that the EIR's approach of using "near-term without project" as the baseline rather than "existing" traffic conditions results in a finding of no significant impact because the increase in delay from the "near-term without project" and "near-term with project" is only 1.1 seconds (note that the EIR's significance criteria assumes a two second increase in delay would constitute a significant impact).[3] However, the increase in delay between existing and "near-term with project" is actually 34 seconds, which clearly constitutes a significant impact.

INTERSECTION	EXISTING		NEAR-TERM WITHOUT PROJECT		NEAR-TERM WITH PROJECT		SIGNIFICANT?
	delay[4]	LOS	delay	LOS	delay	LOS	
Governor Drive/ Genesee Avenue (a.m. peak hour)	90.1	F	122.8	F	123.9	F	No

See FEIR Table 5.3-3; FEIR Table 5.3-11.

While an analysis of the Project's cumulative traffic impacts is required by CEQA, the cumulative impacts analysis should supplement, not replace, the analysis of the Project's

[3] Any intersection affected by a project would operate at LOS E or F and the project would exceed allowable increases in delay. The allowable increase in delay for intersections is 2 seconds. *See* EIR significance criteria at FEIR at 5.3-16 and Table 5.3-6.

[4] Delay is expressed in seconds per vehicle. *See* FEIR at 5.3-35 Footnote 1.

effects against the existing actual conditions on the ground. An adequate traffic analysis would have used a typical methodology such as the following:

- Existing Conditions – establishes the existing baseline for traffic operations within the study area.

- Existing Plus Project Conditions – represents existing traffic conditions with the addition of the proposed Project traffic.

- Existing Plus Cumulative Projects Conditions – establishes a near-term non-project baseline against which traffic generated by the Project can be compared.

- Existing Plus Cumulative Projects Plus Project Conditions – represents Existing Plus Cumulative Projects conditions with the addition of traffic generated by the proposed Project.

- Future Year 2030 Base Conditions – represents projected long-range non-project cumulative baseline traffic conditions for the Year 2030.

- Future Year 2030 Base Plus Project Conditions – represents future year 2030 base traffic conditions with the addition of traffic generated by the proposed Project.

As shown in the attached traffic analysis prepared for the Monte Verde Project EIR, the City required the applicant to evaluate that project's impacts against the existing 2005 traffic baseline. *See* Monte Verde Project EIR, July 2006, incorporated by reference. The City has provided no justification for permitting the UTC Project EIR to deviate from this standard methodology.

(3) The Traffic Analysis Contains Several Other Critical Deficiencies.

(a) The FEIR Fails to Analyze the Significant Impacts of Implementing Mitigation Measures.

Inasmuch as the Project would contribute direct significant near term impacts to the 1-805 freeway, an auxiliary lane between La Jolla Village Drive and SR-52 is required. *See* FEIR at 5.3-54; RTC 3.13. The EIR must analyze the environmental impacts resulting from the construction and operation of that freeway project. *See* CEQA Guidelines § 15126.49a(1)(D) (lead agency must analyze the effects of a mitigation measure if the mitigation measure would cause one or more significant impacts).

Adding this auxiliary lane to the I-805 freeway could have several significant environmental impacts. In particular, the section of the I-805 spanning Rose Canyon (and Rose Creek), north of Governor Drive consists of two bridges. As such, the widening of this section of freeway could be quite complicated and construction of the bridges' abutments would certainly have environmental impacts. Moreover, accessing southbound I-805 via Governor Drive in the p.m. peak period is already hazardous due to the short weave distance between the I-805/Governor ramps and I-52. The addition of an auxiliary lane at this location could result in increased vehicular accidents as motorists entering 805 have to cross several lanes of traffic to continue on 805 while motorists traveling on 805 must cross these same lanes in order to exit on SR-52.

Increasing roadway capacity is also growth inducing in that it encourages additional vehicle trips along the expanded freeway. The increase in vehicle trips, in turn, causes increased air pollution and greenhouse gas emissions. A study by the Sightline Institute has determined that increased emissions from highway construction and additional vehicle travel from the addition of one mile of new highway lane will increase carbon dioxide emissions by more than 100,000 tons over 50 years. *See* Exhibit C (Sightline Institute, Increases in Greenhouse Gas Emissions from Highway Widening Projects, October 2007).

Finally, it is important to note that Caltrans continues to have significant concerns regarding the feasibility of a mitigation measure for impacts to the I-805 SB off-ramp to westbound La Jolla Village Drive. *See* Exhibit B (Caltrans e-mail to City, May 30, 2008). Again, the City must, prior to project approval, analyze any potential environmental impacts associated with this proposed measure. To this end, Caltrans has specifically requested the preparation of a Project Engineering Evaluation Report to resolve issues prior to the City's approval of the Project. These issues include conflicts including the mitigation applicability, scope of the mitigation, environmental clearances and whether it meets Caltrans' design standards. *Id*.

(b) The FEIR Too Narrowly Defines the Traffic Study Area.

Despite FRC's comment that the EIR did not evaluate the full range of traffic impacts because it relied on an undersized study area (*see* RTC 14.41), the FEIR provides no evidentiary basis for the study area used in the EIR. Rather, the FEIR simply asserts that the limits of the traffic study area were developed based on the amount of traffic the Project would produce and criteria contained in the City's Traffic Impact Study manual. *See* RTC 14.41; *see also* RTC 9.3. Unfortunately, this response provides no insight as to how the Traffic Impact Study's criteria relate to the Project.

In investigating this issue further, we reviewed the EIR prepared for the University of California San Diego ("UCSD") Long Range Development Plan, which is incorporated herein

in its entirety by reference. That EIR also refers to the City's Traffic Impact Study Guidelines (which presumably are the same guidelines referred to in the Project EIR). The UCSD EIR states that the geographical area to be studied in a traffic impact analysis must include:

- All roadway segments, intersections, and mainline freeway segments where the proposed project will add 50 or more peak hour trips in either direction; and

- All freeway entrance and exit ramps where the proposed project will add a significant number of peak hour trips to cause any traffic queues to exceed ramp storage capacities.

See Exhibit D (UCSD EIR Appendix I, at 11). There does not appear to be any reason why the UTC Project EIR should have ignored these guidelines for defining the appropriate traffic study area.

Here, the UTC Project DEIR clearly shows volumes far exceeding 50 trips traveling north on I-805 north of the I-805/La Jolla Village Drive interchange and traveling south of the I-805/Governor Drive interchange. Moreover, the La Jolla Village Drive and I-805 ramp would be significantly impacted by the UTC Project, as would I-805 between Governor Drive and SR 52. *See* FEIR Table 5.3-11a; FEIR at 5.3-48. Given these impacts, the EIR should not have terminated its analysis at I-805/La Jolla Village; instead it should have evaluated locations north of this location. The EIR certainly should have evaluated the I-805/SR 52 interchange.

Moreover, the FEIR itself admits that "the trade area for the shopping center extends from Carlsbad to Mission Valley and from the coast to inland North County communities." RTC 9.10. The document goes on to state that the shopping center will serve "residents from other adjacent communities in San Diego and throughout the trade area." *Id*. Given the volume of vehicular traffic generated by the Project and the regional nature of the project, we can find no plausible explanation from artificially restricting the size of the study area. The traffic analysis is fundamentally deficient based on its failure to fully analyze traffic impacts.

(c) The FEIR Fails to Analyze the Traffic Impacts of the Project's Construction.

Despite FRC's request for an analysis of the Project's construction-related traffic impacts (*see* RTC 14.24, 14.26), the FEIR still does not provide this analysis. The discussion of how construction of this massive project would impact area streets and intersections is perfunctory, at best. For example, it states that "because existing traffic conditions in the University City area are currently congested, the addition of construction traffic would

contribute to congestion." FEIR at 5.9-5. Although the EIR concludes that the potential exists for a significant impact on traffic, the document fails to provide a logical, analytical basis to understand the expected construction impacts. Moreover, the document concludes that limiting the export of demolition materials and earth material to non-peak hours would reduce any impacts to a less than significant level. FEIR at 5.9-6. Again, the EIR provides no evidentiary basis for this conclusion.

An analysis of construction-related traffic impacts must include the effects of construction of the Monte Verde Project. Construction of the Monte Verde Project is expected to generate over 700 average daily trips between the hours of 8:30 a.m. and 3.30 p.m. and is expected to take between 5 and 12 years. The impact of the UTC Project together with the Monte Verde Project could certainly overwhelm local streets and intersections as well as nearby freeways and ramps yet the UTC Project EIR fails to disclose these critical impacts.

Attached is an example of the type of construction traffic impact analysis that should have been prepared for the Project EIR. *See* Exhibit E (Solano Beach Joint Development Project Appendix G). As this document – prepared for a project in the City of Solano Beach – makes clear, a construction traffic analysis does more than just identify the number of truck trips expected on area roadways. It provides detail on estimated construction activities and operations, construction trip routes and delay at intersections. Importantly, the Solano Beach study also analyzed cumulative construction related impacts.

(d) The FEIR Relies on the Wrong Significance Thresholds.

In FRC's letter on the DEIR, FRC commented that had the City applied the current traffic thresholds, traffic impacts would be far more severe than disclosed in the DEIR. *See* RTC 14.19. The FEIR maintains that the EIR appropriately relied on the 2004 standards because the Project application was deemed complete in 2001. *See id.* As FRC stated in its letter, we question how the application could have been deemed complete given the number of revisions to the 2002 Project application. Indeed, as recently as February 2007, the City's Development Project Manager confirmed the application's lack of completeness as evidenced by the following meeting minutes: "Laura commented that Westfield has changed their plans every year and has not provided enough details for City staff to be comfortable with their proposal." *See* Exhibit F (Final Mid-Coast Corridor Transit Project City of San Diego, SANDAG meeting minutes, February 12, 2007). And the Master Development Permit which forms the basis of the Project was not published until *after* the FEIR was released.

The City's attempt to mask the severity of the Project's traffic impacts becomes even more apparent in an e-mail dialogue between City staff and the EIR preparers when the EIR preparer explains that the applicant would not want to highlight the fact that use of the current traffic standards would show more severe impacts. *See* Exhibit G (e-mail between M.

Blake and K. Baranek, April 19, 2007). Clearly, the City is fully aware that the EIR understates the Project's actual effect on the community's roadways and freeways. The EIR's traffic analysis should be revised using the current traffic thresholds.

B. The FEIR's Analysis and Mitigation of the Project's Significant Impacts on Visual Resources and Neighborhood Character Remain Inadequate.

(1) The FEIR Provides Inadequate Visual Information About the Project.

In its comment letter on the DEIR, FRC described the kind of information and study that would be required in order to form the foundation for meaningful analysis of the proposed Project's impact to visual resources and neighborhood character. In particular, FRC requested that the EIR include visual simulations for each land use scenario and story poles to depict the contrasting heights between the proposed Project and existing neighborhood. *See* RTC 14.28, 14.29.

In response to the request for more visual information about the Project, the FEIR includes just two new graphics, Figure 5.2-6, which depicts proposed massing, and Figure 5.2-7, which depicts potential building envelopes. The FEIR provides a massing illustration for just one development scenario (*see* FEIR at 5.2-6), although there are eight different potential scenarios under the proposed Project. Both graphics are aerial views of the site from very high elevations. These overhead illustrations provide no useful information for understanding the extreme heights of the proposed structures. There is no indication whether the drawings are to scale. In sum, these two bird-eye view renderings of the project site are hardly sufficient to inform people on the ground of the Project's aesthetic and visual impact at a human scale.

The Response to Comments claims that the simulations and story poles recommended by FRC as tools to aid in understanding the visual affect of the proposed Project are not required. *See* RTC 14.28, 14.29. It is no response to state that devices intended to help the decision makers and the public have a meaningful understanding of a project and its impacts are not required by law and therefore will not be provided.

(2) The FEIR Uses an Improper Baseline for Analyzing Visual Impacts.

The FEIR is disingenuous in its analysis of the incompatibility between the scale of the proposed Project's high-rise towers and the existing neighborhood surrounding the project site. In particular, the FEIR makes comparisons between the proposed Project's heights and the heights permitted under the proposed re-zoning of the site to CR-1-1. *See, e.g.*, FEIR at 5.2-5 (explaining that the Project "would exceed the 60-foot height restriction specified in the City's Land Development Code for the CR-1-1 zone"), 5.2-6 (describing that the "buildings and architectural features that would be taller than the 60-foot height limit established in the CR-1-1

zone"), 5.2-9 (concluding that the aesthetic impacts would be significant because the Project "proposes structures that could exceed the development regulations in the proposed zoning (CR-1-1)"), 5.2-9 ("the project would exceed the height regulations of the CR-1-1 zone"). The FEIR performs a slight of hand by comparing the heights of the proposed Project against the heights permitted by the proposed change in zoning under the proposed Project.

This, of course, is not the proper comparison for analyzing the compatibility of the proposed Project with the scale of the *existing* community. CEQA provides that the baseline for analysis is the existing environment at the time environmental review is prepared. The City's own Significance Thresholds explain that a project results in a significant impact where a "project exceeds the allowable height or bulk regulations and the height and bulk of the *existing* patterns of development in the vicinity of the project by a substantial margin." FEIR at 5.2-3 (emphasis added). Thus, the FEIR should have analyzed the significant visual impacts of the proposed Project based on the *existing* zoning that currently applies to the project site, which is zone C-C-1-3.

The wrong baseline skews the EIR's analysis of visual impacts. Under the existing applicable zoning, building heights are limited to just 45 feet. *See* Municipal Code, Land Development, Table 131-05E. This 45-foot height limitation has led to development surrounding the project site of generally one- and two-story structures. The proposed Project's soaring high-rise towers of nearly 300 feet (*see* FEIR at 5.2-6; revised by Worley letter, June 6, 2008) would exceed the existing zoning limitations more than six-fold, resulting in a significant impact.

(3) The FEIR Contains Improper and Unsupported Conclusions Regarding Significant Visual Impacts.

(a) The Project Is Not Consistent with the Surrounding Community.

The City's Significance Thresholds provide that a project will result in a significant impact where a project "is located in a highly visible area . . . and would strongly contrast with the surrounding development . . . through excessive height [or] bulk . . . ." FEIR at 5.2-4. As noted above, the FEIR provides just one high-elevation, overhead illustration of the Project's bulk under just one potential development scenario. *See* FEIR Figure 5.2-6. And the FEIR provides only a single overhead drawing of building heights, which flattens the apparent height of the proposed towers. *See* Figure 5.2-7. This is insufficient detail for the decision makers or the public to make an informed decision about the Project.

Despite these poor representations, there can be no doubt that the building heights would "strongly contrast" with surrounding development through "excessive" height and bulk. Indeed, the FEIR as revised recognizes that the heights of the Project could "create a bulk and

scale inconsistency" with at least some existing neighborhoods. *See* FEIR at 5.2-7. As Planning Commissioner Golba explained, the current green and buffered character of the existing project site could be damaged by pushing the tall and bulky Project to the street. *See* Videorecording of City Planning Commission Hearing (May 22, 2008) at 63136. The existing pattern of development has wide green berms along high traffic roadways, adjacent to low rise buildings, and then higher-rise structures set far back. The Project would impose just the opposite -- high rise buildings and multi-story parking garages rising straight up within just a few feet of setback from the sidewalk. The existing open feel of the community could be converted to a "canyon" by the Project. *Id.* at 63240.

And although the draft Findings claim that the "University Community Planning area features a number of highly visible, above-grade parking structures along adjacent blocks of La Jolla Village Drive and Genesee Avenue" (Findings at 46), this statement is patently false. There are no parking garages of a similar scale to that proposed under the Project adjacent to the public right of way. The Findings recognize the "potentially significant impacts of placing large parking garages adjacent to two highly traveled public roadways." *Id.* Thus, the EIR should have concluded that the parking garages associated with the proposed Project would result in a significant impact based on the strong contrast with the surrounding community.

The Findings further conclude that the Project's visual impact on the surrounding community would be less than significant based on this theory: The Project "would not substantially change the visual character of the site since it is already developed with a regional shopping center." Findings at 13. This claim that the proposed Project is visually similar to the existing site is specious; no one disputes that the Project would nearly double the size of the existing shopping center, add potentially hundred of units of new housing to a site that currently contains no residences, and substantially increase the bulk and height of the existing structures on the site.

The City's Significance Thresholds also explain that a project results in a significant impact where:

> [t]he project would have an architectural style or use building materials in stark contrast to adjacent development where the adjacent development follows a single or common architectural theme.

See FEIR at 5.2-4. The environmental document identifies the issue as:

> Issue 1: Would the proposal result in a project bulk, scale, type of materials or style which would be incompatible with surrounding development?

FEIR at 5.2-5. In its comment letter on the DEIR, FRC pointed to conflicting statements and conclusions in the DEIR relating to building styles and materials. *See* RTC 14.28. Rather than make a good-faith effort to address the flawed analysis, the FEIR simply deletes the prior discussion. *See* FEIR at 5.2-8 to 5.2-9. Other portions of the FEIR, however, admit that "the proposed style of the expanded retail portion of the [Project] would not be similar to the reflective glass, stucco, and stone of the nearby office and commercial developments . . . ." FEIR at 5.2-10. The FEIR's incomplete effort to simply erase the relevant discussion of surrounding building styles and materials does not satisfy CEQA. And the Errata's offer that the proposed Project "would introduce high quality building materials" that are "inviting on a pedestrian scale" (*see* Errata at 8), is irrelevant to the CEQA threshold, which asks whether the Project would be consistent with the surrounding community.

Finally, the most recent Errata to the FEIR claims that the Project would not have a significant visual impact on the surrounding community because the heights of the Project towers would be consistent with the Monte Verde Project towers. The Monte Verde Project, which is currently under challenge and may never be built, and required a deviation from applicable zoning, is hardly representative of the surrounding community. The Errata recognizes as much when it notes that "the heights of the buildings would depart from that of the surrounding buildings." *See* Errata at 6. Moreover, the proposed Nobel Heights residential tower would have low-rise residential adjacent to it (across Lombard Place) and across Nobel Drive. *See* Errata at 18.

The Errata simply deletes the prior conclusion that the Project *would* result in significant impacts because "it proposed structures that could substantially exceed the maximum structure height limits in the development regulations of the proposed zone (CR-1-1)." *See id.* at 2. Even as revised to a height of 293 feet consistent with the Monte Verde Project, the Project would still exceed the existing and proposed zoning limitations. Again, the Errata recognizes as much, stating that "the proposed structures in the Master PDP would exceed the allowable height or bulk regulations of the underlying zoning . . . ." *See* Errata at 7; *id.* at 9. Thus, the City's prior conclusion of significance remains.

Moreover, we note that while the FEIR points to the Monte Verde Project in an effort to justify its soaring heights, it utterly fails to consider the cumulative visual impact of the proposed Project and the Monte Verde Project.

(b) The FEIR's Reliance on the Master PDP Is Inconsistent and Does Not Support the Conclusion.

The FEIR concludes that the visual incompatibility "caused by the *excessive* bulk and scale" of the proposed Project would be less than significant. FEIR at 5.2-9 (emphasis added). Incredibly, the FEIR reaches this conclusion by explaining that the impacts on

single-family residences adjacent to the Project's 293-foot tower would be avoided through the developer's proposed Master PDP design guidelines, such as angling the tower back at a 45 degree angle, articulating the tower with offsets and terraces, and landscaping at the ground level. *See* FEIR at 5.2-7, 5.2-9.

In other places, however, the City admits that even compliance with the Master PDP alone would not be sufficient to reduce visual impacts. For example, the draft Findings admit that "[w]here the proposed project would place high-rise residential housing or hotel near existing single-family homes and existing townhouses adjacent to and south of the UTC property, *the potential exists for visual incompatibility*." Findings at 13 (emphasis added). Although the draft Findings attempt to down-play this admission by claiming that "overall compatibility" would be achieved by compliance with the Master PDP (*id.*), "overall compatibility" is not the standard – the Project either would or would not be visually incompatible with the community. Here, the EIR admits that the Project would be incompatible and should have concluded that the visual impact would be significant.

Moreover, as described in Section IV(D) below, the Master PDP was not included in the DEIR, was not made available until a month after FRC's request under the California Public Records Act for the document, and as of just a few weeks ago was still undergoing revisions. Indeed, as best we can tell the public was not given a copy of the Master PDP until May 19, 2008. Thus, the EIR relies on standards and guidelines in a document that has been unavailable for public review in order to reach a conclusion that an otherwise significant impact would be less than significant. The EIR's "trust us" approach is not acceptable, and its conclusion that the "potential impacts relating to visual compatibility caused by the excessive bulk and scale would be less than significant" cannot stand.

(c) There Is No Evidence to Support the Conclusions Regarding Light and Glare, and Impacts on Open Spaces

The City's Significance Thresholds provide that a project will result in a significant light or glare impact if "[t]he project would be moderate to large in scale, more than 50 percent of any single elevation of a building exterior is built with a material with a light reflectivity greater than 30 percent . . . and the project is adjacent to a major public roadway or public area." FEIR at 5.2-5. Given the scant information that has been provided to the decision makers and the public about the actual proposed design of the Project, it is impossible for the FEIR to support its conclusion that "[t]he proposed project does not conflict with the City of San Diego's significance thresholds for light and glare." FEIR at 5.2-13.

Glass, of course, has a light reflectivity greater than 30 percent as do certain metals. The FEIR describes that the Project design would include "glass curtains," "metal panels" and other man-made materials. FEIR at 5.2-12. Although the FEIR claims that the

Project does not propose to use "excessive" glass materials on the lower elevations of certain structures (FEIR at 5.2-12), the FEIR provides no detail as to the actual percentage of glass that will be used for all elevations. Moreover, the FEIR makes the claim that "[t]he natural and man-made building materials would minimize the reflective properties of the new development" (FEIR at 5.2-12), without any explanation as to how it would achieve this alleged minimization. The Project would result in a significant impact based on light and glare.

The Significance Thresholds also provide that a project will result in a significant light impact if "[t]he project would shed substantial light onto adjacent, light-sensitive property or land use . . . ." FEIR at 5.2-5. Residential areas surround the project site and there is an existing natural area on the project site, both of which are recognized in the City's standards as "sensitive to nighttime light." FEIR at 5.2-5. The FEIR concludes that "Project design elements contained in the Master PDP Design Guidelines would minimize overspill onto neighboring properties and lighting impacts would be less than significant." FEIR at 5.2-13. As described above, however, the Master PDP was not available to the public during the comment period on the DEIR.

The FEIR claims that "the project site is not visible from any public parks or scenic vistas in the community" (FEIR at 5.2-2), and "would not block public views from parks . . . ." FEIR at 5.2-11. The FEIR appears to ignore, however, the view from the seven-acre "landscaped open space" in the southeast corner of the project site, which the FEIR refers to as a "park." *See, e.g.*, FEIR at 5.2-12. Although the FEIR does not provide any photographs depicting views of the project site from the open space park, it appears that the Project's high-rise towers would be visible from this area. The FEIR should have analyzed the proposed Project's impact to the open space.

(4) The FEIR Fails to Analyze Wind and Shadow Impacts.

The EIR provides no analysis of the Project's wind impacts. But the Community Plan suggests that a wind analysis should have been prepared. For example, the Community Plan provides that large, bulky, or tall buildings located adjacent to low-rise buildings may create problems such as "undesirable wind tunnels." Community Plan at 113. The Community Plan suggests that terracing may provide mitigation for "dark, windy spaces between adjacent high-rise buildings." *Id.*

Wind analysis is common in large, urban projects and has been a component of other City projects containing high rise towers and dense development. For example, the Monte Verde Project prepared computer modeling of wind patterns. *See* Exhibit H (Monte Verde Project, Planning Commission staff report, March 15, 2007). The EIR for the UTC Project simply fails without explanation to engage the analysis of wind impacts, and for this reason is deficient.

The EIR also provides no analysis of the Project's shadow/solar access impacts. The City's planned development regulations provide that such analysis is required "[w]hen it is determined that the structures or landscaping within a proposed development may have an impact on an adjacent property's access to solar exposure." Municipal Code § 143.0410(i). The EIR dismissed the need for this analysis by concluding that "the proposed project would not result in shadowing or reduced solar access to any surrounding development." FEIR Table 5.1-1. The EIR cites no evidence in support of this conclusion. Indeed, it admits that no studies were prepared. *Id.* The EIR's unsupported conclusion cannot stand.

The Community Plan also mandates analysis of shadow/solar access impacts. For example, it provides that large, bulky, or tall buildings located adjacent to low-rise buildings may create problems such as "excessive shadows." Community Plan at 113. It requires "all structures above 50 feet in height [to] submit solar access and shadow studies as part of the permit application process." FEIR Table 5.1-1. This requirement is mandatory, not discretionary. Because essentially all of the developed Project will be above 50 feet in height and in some cases well-above this threshold, the developer was *required* to submit shadow/solar access studies with its Master PDP application. The failure to prepare this mandatory study cannot be excused.

Shadow/solar access analysis has been included in other City projects. For example, the Monte Verde Project used computer modeling to analyze that project's effect on solar access and exposure. *See* Exhibit H (Monte Verde Project, Planning Commission staff report, March 15, 2007); Monte Verde Project EIR, Ch. 8. The City also prepared studies of shadow and solar access as part of the Downtown Community Plan Update. In that case, the analysis was based on "a series of three-dimensional models of downtown to determine the effects of shadows on sunlight access to parks . . . ." *See* Exhibit I (Downtown Community Plan Update, City Planning Commission staff report, January 25, 2006). And the City agreed to provide a "protection zone" around the new Petco Park to control the shadow impact of any new development on the baseball park. *See* Exhibit J (MOU between City and Padres, 1998). The City has not provided any reasoned basis for conducting shadow analysis in for these projects, but not for the UTC Project. The evidence from these studies suggest to us that the UTC Project towers will cast significant shadows not only on the Project's outdoor areas, but also on the residential uses on the Project site and across Genesee Avenue.

C. The FEIR's Analysis and Mitigation of the Project's Significant Impacts on Air Quality Analysis Remain Deficient Under CEQA.

FRC's October 9, 2007 letter identified numerous inadequacies in the DEIR's analysis of the Project's air quality impacts. *See* RTC 14.30 - 14.33. The FEIR fails to address these comments. FRC's letter is incorporated, so we will not repeat all of the comments here. The FEIR's failure to identify and adopt all feasible mitigation measures and failure to mitigate

significant air quality impacts, however, warrants additional comment. Set forth below are a few of the most egregious examples.

First, a new mitigation measure has been added to the FEIR, purportedly to address impacts related to nitrogen oxides ("NOx") emissions generated by construction equipment. FEIR at 5.4-33; *see also* RTC 14.30, 14.31. Whereas the DEIR determined there was simply no feasible mitigation for this significant impact (*see* DEIR at ES-27), the FEIR makes a feeble attempt to mitigate this impact. The document calls for the preparation of a construction plan and then either staggering the schedules of the Project's construction phases *or* hiring a contractor who would commit to using a high percentage of low NOx equipment in its construction fleet. FEIR at 5.4-33. This approach to mitigation fails on numerous levels:

- it calls for the preparation of a construction plan, and therefore the deferral of the specific method of mitigation until after Project approval;
- it leaves the specific method of emission reduction up to the applicant (rather than the City), again after Project approval;
- it provides no evidence as to how a decision will be made to determine the final approach to mitigation;
- it fails to demonstrate how either of the approaches would reduce emissions to a less than significant level;
- it fails to explain how the measure is fully enforceable through permit conditions, agreements, or other legally-binding instruments; and
- it fails to adopt *both* mitigation methods.

This last point bears emphasis. By identifying both of these mitigation approaches, the EIR all but concedes that both approaches constitute feasible mitigation. Clearly, phasing construction activities would reduce NOx emissions and the use of low NOx emission equipment also would reduce NOx emissions. The FEIR must adopt all feasible mitigation measures – not simply the most convenient – to reduce this significant impact.

Moreover, there are additional mitigation measures that the EIR should adopt to control NOx. For example, the California Air Resources Board ("CARB") publishes verified diesel emission control strategies. *See* Exhibit K (CARB Diesel Emission Control Strategies). These strategies clearly confirm the availability of technology for reducing particulate and NOx emissions. Indeed, the California Attorney General, in comments on the San Diego General Plan, supported the use of new, low emission vehicles and retrofit emission control devices, such

as diesel oxidation catalysts and diesel particulate filters, to control emissions. *See* Exhibit L (Letter from California Attorney General to City, June 11, 2007). The EIR should adopt diesel emission control strategies, along with the phasing of construction and low-NOx equipment, to reduce emissions from the Project to the maximum extent feasible.

Second, the EIR concludes that there are no feasible mitigation measures to reduce operational emissions of reactive organic compounds ("ROC") and particulate matter less than ten microns in diameter ("PM10"). FEIR at 5.4-33. This is not the case. By the EIR's own admission, the main contributor to these emissions is vehicular traffic and reduction of vehicle trips is the best means of reducing emissions. *See* RTC 14.31. While the EIR would have us believe that the applicant's Transportation Demand Management ("TDM") program would reduce vehicular trips, the Project would nonetheless add 18,000 vehicular trips per day to the region's streets and freeways. Moreover, the EIR also makes clear that transit ridership as a result of this project would be almost non-existent. Indeed only ten individuals are expected to ride transit in the a.m. peak hour, while seven are expected to use transit in the p.m. peak hour. DEIR Table 5.3-7. No doubt the provision of over 7,000 parking spaces would thwart any effort to encourage transit use.[5] *See* Exhibit M (Manville & Schoup, People, Parking and Cities).

Clearly, feasible mitigation measures exist to reduce vehicular trips – and therefore vehicular generated emissions – from the Project. The EIR should have identified and evaluated mitigation measures including but not limited to the following:

- a "parking management" mitigation measure. This measure would significantly reduce the amount of parking proposed for the shopping center. In addition, such a measure would charge a fee for parking, with the revenues received to be supplied to either the Metropolitan Transit System and/or the North County Transit District to fund transit opportunities in the area.

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[5] According to Urban Planner Michael Manville, minimum parking requirements are one of the most entrenched, and one of the most disastrous, innovations of modern urban planning. Plentiful parking is correlated with lower levels of transit use. Cities with high levels of public transportation ridership tend to devote very little of their downtown land area to parking. New York and London each devote about 18 percent of their Central Business Districts to parking, and Tokyo devotes only 7 percent. Los Angeles, by contrast, devotes almost 81 percent of the land area of its central business district to parking. In recognition of the harm caused by minimum parking requirements, cities are now adopting parking maximums – caps on the amount of parking permitted in the downtown. Parking maximums, when coupled with efficient prices for on-street parking, can reduce congestion and free up land and capital for more productive uses.

- universal transit passes. A universal transit pass program would provide free transit passes for every employee and resident of UTC.

- carpool and vanpool incentives. Provide ride-sharing service, such as a carpool and vanpool incentives, customized ride-sharing services, a guaranteed Ride Home program (offering a limited number of emergency taxi rides home per employee), and an active marketing program to advertise the services to employees and residents.

Third, the EIR concludes that the Project would affect the ability of the air basin to attain and maintain ambient air quality standards for ozone and that this impact would be significant. FEIR at 5.4-35. Rather than identify all feasible mitigation measures to reduce this impact, the EIR proposes only *one* mitigation measure. This measure (MM 5.4-8) includes only two components, one of which – use of low-ROC paints – is already required in the State of California. The other component – the installation of low emission water heaters – is being blocked by manufacturers' claims of overwhelming technical difficulties. In essence, then, the EIR is left with no new feasible mitigation for this significant impact. The EIR again alludes to the TDM program and transit station improvements (FEIR at 5.4-35), but as discussed above, these project components are not expected to result in any noticeable decline in vehicular trips.

D. The FEIR's Analysis and Mitigation of the Project's Significant Noise Impacts Is Inadequate.

The analysis of the Project's noise impacts continues to be wholly inadequate. The EIR fails to discuss the extent and severity of the impacts identified and fails to evaluate the effectiveness of mitigation measures for both operational and construction noise. The attached Illingworth and Rodkin letter report discusses the inadequacies of the EIR's noise impacts analysis. *See* Exhibit N. This letter will highlight the report's main points.

(1) The FEIR Provides Inadequate Analysis of Construction Noise Impacts.

Like the DEIR before it, the FEIR fails to adequately analyze construction-related noise impacts on nearby sensitive receptors. In response to FRC's comment that the DEIR provided no specific information as to the type and severity of the Project's potential noise impacts (*see* RTC 14.34), the City provides a perfunctory discussion of typical noise generated at construction sites. *Id.*; FEIR at 5.9-6. But the FEIR fails to prepare a comprehensive, Project-specific analysis of the expected impacts from construction on sensitive receptors and ambient noise levels in the area. The EIR's generic discussion will not suffice.

The City also references the City's Noise Ordinance. *See* RTC 14.34. The reference provides little comfort for two reasons. First, compliance with the Noise Ordinance for the "worst-case" equipment is not sufficient alone to support a conclusion that the Project's noise impact would be mitigated to a less-than-significant level; noise impacts may remain significant even after compliance with the Noise Ordinance. Instead, the EIR must evaluate whether the Project would result in a substantial increase in ambient noise levels above the baseline (i.e., existing noise levels without the Project). Second, the EIR does not claim that *the overall Project* would comply with the City's noise requirements. Indeed, it acknowledges that demolition and construction activities would likely result in noise levels that *exceed* allowable levels in the City's Noise Ordinance. FEIR at 5.9-7. Thus, the significant impact remains unmitigated.

The required evaluation of noise impacts would include a thorough description and understanding of the duration of the exposure at a particular receptor and the amplitude of the noise exposure at a particular receptor. The evaluation would include the locations of sensitive receivers in the project area, a description of existing ambient noise levels at these sensitive receivers, predicted noise levels during each phase of construction at the sensitive receivers, a comparison of noise levels during construction to the existing ambient noise levels, the establishment of appropriate significance thresholds to judge if the increase would be substantial, and a finding as to whether or not noise levels would substantially increase. Without a thorough and project-specific evaluation of the construction noise environment, it is impossible to conclude with any accuracy whether temporary or periodic increases in ambient noise levels would be significant.

Consequently, the EIR's proposed mitigation measures to minimize construction noise impacts are also inadequate. The EIR continues to assert that implementation of a short list of standard mitigation measures would mitigate these impacts to a less-than-significant level. *See* FEIR at 5.9-7. The FEIR provides a generic description of a 25-foot high noise barrier but fails to include details regarding the feasibility of erecting such a barrier, the noise sources that it would attenuate, and the resultant noise level. *See* RTC 14.34. Again, the EIR provides no evidence to conclude that the Project's significant construction-related noise impacts would be mitigated to an insignificant level.

(2) The FEIR Defers Mitigation of Noise Impacts Relating to the Future Noise-Sensitive Development Proposed on the Project Site.

The EIR acknowledges that the Project proposes development of noise-sensitive residential uses near major roadways where exterior noise levels may exceed 65 dB CNEL. FEIR at 6-7. The FEIR does not analyze whether the Project would be in compliance with standards established by the City Noise Ordinance or the General Plan for these noise-sensitive receptors. *Id.* The document's statement that noise levels "may exceed 65 dB CNEL" (*id.*),

provides no information about the expected upper limit of the noise exposure and, thus, no basis for this conclusion.

The FEIR goes on to state that:

> because of the urban character of the potential residential units, usable living areas would not likely be impacted by elevated noise from adjacent roadways. However, the potential would exist that noise levels inside the units could exceed the interior noise standard of 45 dB CNEL.

Id. The Project site's "urban character" does not relieve the applicant of the responsibility to comply with the General Plan and other applicable standards nor does it relieve the EIR preparers of fully evaluating the severity and extent of the Project's noise impacts. The General Plan anticipates projects such as this and the noise effects should be evaluated with respect to those guidelines. Noise exposure levels must be presented for the Project site and discussed with respect to appropriate local standards. Here, the document simply presumes, absent any evidence or analysis, that the building would be designed to comply with Title 24 (which seeks to regulate interior noise levels). *See* DEIR at 5.1-24; RTC 14.35. Such a naked conclusion cannot stand.

A legally adequate treatment of this issue would include quantifying existing and future noise exposure levels at the Project site and identifying specific, feasible mitigation methods for reducing noise to a less-than-significant level. The revised EIR should provide this analysis.

E. The Project's Inconsistency with the Community Plan Is Significant and Unmitigated.

FRC commented that the Project's inconsistencies with the Community Plan result in a significant land use impact. RTC 14.5. The EIR recognizes that inconsistency with an adopted plan is a significant impact if the inconsistency relates to a significant environmental issue under CEQA. FEIR at 5.1-16. The EIR establishes that the Project is inconsistent with the Community Plan on several counts. For example, it would:

- exceed the allowable development intensity;
- exceed the amount of vehicular trips allocated to the Project site;
- cause significant and unmitigable traffic impacts;
- exceed the maximum height limits for an infill development area;

- place parking structures and surface parking adjacent to the Urban Node Pedestrian Network, occupying more than 30 percent of the street yard;

- be incompatible with the bulk and scale of surrounding development; and

- locate high-rise buildings along the street and low-rise buildings on the interior of the site.

Thus, the EIR should have identified these inconsistencies with the Community Plan as significant. Its failure to do so renders the document inadequate.

Instead, the EIR claims that the land use impacts would be mitigated by design measures in the Master PDP that "would aim to avoid potentially significant land use impacts." FEIR at 5.1-25; Findings at 11. On its face, this half-hearted mitigation is patently insufficient to sustain a finding that the mitigation would ensure the Project's significant impacts are reduced to a less than significant level.

As described above Section IV(D), the DEIR did not include the Master PDP and the Master PDP – released in full *after* the FEIR – remains subject to amendment and errata. The FEIR includes only a simple summary of the proposed design characteristics for future development, and provides little more than building height limits and setback requirements. FEIR at 3-6. Thus, there is insufficient evidence to support a conclusion that the mitigation would be effective and the impacts would be reduced to less-than-significant levels.

And there is no basis for the City to determine whether the Project satisfies the criteria in the Municipal Code General Development Regulations for Master PDPs, such as:

- The overall development design is comprehensive and demonstrates the relationships of the proposed development on-site with existing development off-site;

- The scale of the project is consistent with the neighborhood scale as represented by the dominant development pattern in the surrounding area or as otherwise specified in the applicable land use plan; and

- Buildings avoid an overwhelming or dominating appearance as compared to adjacent structures and development patterns. Abrupt differences in scale between large commercial buildings and adjacent residential areas are avoided. Instead, gradual transitions in building scale are incorporated.

Municipal Code § 143.0410 (j)(1), (2), and (5). Without a detailed description of the analytical link between the proposed features of the Project and the specific criteria in the Municipal Code, the EIR's conclusion fails.

What information the EIR does provide regarding the design guidelines confirms that the proposed Project does not comply with the above-listed criteria. For example, renderings included in the Aesthetic/Visual Quality section of the EIR showing the maximum building envelope do not represent a design that is "consistent with the neighborhood scale as represented by the dominant development pattern" nor do they represent "gradual transitions in building scale." FEIR Figures 5.2-5 and 5.2-7. Instead, the renderings show a design that dwarfs human scale and dominates the streetscape as compared to the existing adjacent structures.

Thus, the EIR's claim that the Project would not result in significant impacts relating to the Project's inconsistency with the Community Plan cannot be supported and, in fact, the evidence shows the opposite to be true.

F. The FEIR's Analysis and Mitigation of the Project's Significant Water Supply Impacts Is Inadequate.

The DEIR suggested the Project's impact on water supply would not be "excessive" (i.e., "significant") under CEQA. *See* DEIR at ES-24, 5.1-29, 5.1-32, 5.8-6 to 5.8-8. The DEIR suggests that the Project would be consistent with the General Plan goal to "ensure that water is and will be available on an equitable basis." DEIR at 5.1-29. And the DEIR relies on the San Diego County Water Authority's ("Water Authority's") alleged conclusion that "that there are sufficient water supplies to serve the future potable water needs of San Diego County." DEIR at 5.8-8.

After the DEIR was released, however, the US District Court for the Eastern District of California decided *Natural Resources Defense Council v. Kempthorne* (E.D. Cal. 2007) 506 F.Supp.2d 322 (the "Delta Smelt Decision"). The Decision introduces substantial uncertainty into the City's water supply based on (i) endangered delta smelt in the pumps that ultimately deliver water to the City, and (ii) the effects of climate change on water supply reliability. On December 14, 2007, the court ordered restrictions on the flow of water through the Central Valley Project and the State Water Project until the federal government completes a new biological opinion under the Endangered Species Act. In response to the Delta Smelt Decision, the City Attorney advised that "San Diegans may be severely impacted by this recent court ruling" and noted early estimates that future water deliveries to the City may be reduced by 14 to 37 percent below normal. *See* Exhibit O (City Attorney Memorandum, September 17, 2007).

The FEIR recognizes that "[t]he amount of water that [Metropolitan Water District] will be able to supply to Southern California in the near future is unclear given the recent [Delta Smelt] decision" and "the full extent of [the Delta Smelt Decision's] impact on Metropolitan's ability to supply water to Southern California remains uncertain." RTC 9.26. The FEIR blithely concludes in the very next sentence, however, that "[t]his decision should not significantly impact the project's water supply, because the project will essentially demand no more potable water than it does today, due to the off-set discussed." RTC 9.26. This conclusion is unsupportable.

(1) The Project Would Prevent the City from Making Any Real Reductions in Water Consumption.

The claim that the Project would not demand more potable water than the current site demands relies on a shell game. In fact, the Project would require far more potable water than current demand. It proposes, however, to connect other properties' current irrigation demand to a recycled water supply and then to claim water "credit" from those other properties. But those other properties should be connecting to a recycled water supply for their irrigation demand regardless of the UTC Project. Indeed, we understand that City Ordinance already requires certain users to connect to the "purple pipe." If the City enforced its existing requirement and made a commitment to convert existing uses to recycled water, the City would see a net reduction in total potable water demand. Instead, the UTC Project would cannibalize that potable water supply and the City would lose the opportunity to actually reduce its water consumption.

Moreover, Westfield cannot claim as "new supply" any potable water already accounted for in existing water planning documents and that it would cannibalize from other existing users. The Water Authority already critiqued this effort at double counting. *See* Exhibit Q (Water Authority email to City, March 12, 2008).

(2) The FEIR Cannot Rely on Speculative Future Actions Relating to Water Supply to Conclude that the Project's Water Supply Impacts Would Be Less Than Significant.

Even if it were true, as the FEIR suggests, that the Project would demand no more water than the existing baseline for the Project site (which we dispute), the FEIR assumes that post- the Delta Smelt Decision, the City can expect to receive the same amount of water as currently supplied to the region. *See* RTC 9.26 (concluding impact not significant because "the project will essentially demand no more potable water than it does today"). Of course, the crux of the Delta Smelt Decision is that the current levels of water supply/demand from the Bay-Delta may threaten federally-listed species and are not sustainable. Metropolitan Water recently recognized as much, announcing that its:

> "supplies from Northern California have been cut by nearly 30 percent this year because of dry conditions and court-ordered pumping restrictions in the Delta to protect endangered fish," and "demand for imported supplies could reduce by about 200,000 acre-feet of water over the next 12 months."

See Exhibit P (Metropolitan Water press release, June 10, 2008).

Perhaps recognizing the fundamental flaw in relying on current levels of water supply, the FEIR then suggests a series of highly speculative potential future actions by the City and other agencies that may result in additional water supply or additional water conservation. For example, the FEIR suggests that "[r]estoring the Delta's water delivery capacity is of great import to the Governor and the California Legislature," the Governor has made the issue a "high priority," and the Legislature is looking for a "long-term water supply solution for the Delta." RTC 9.26. The FEIR thus concludes that in light of these efforts of the Governor and Legislature to "rehabilitate the Delta," "the Delta Smelt [Decision] is not expected to impact the project's short-term water supply." *Id.*

Curiously, the FEIR makes a conclusion about the Project's short-term water supply based on the Legislature's long-term goal. Regardless, we do not know the priorities of the State's officials. Even if true, however, the Governor's and Legislature's best intentions for the Bay-Delta cannot make water appear for the UTC Project in either the short- or long-term. The Governor recently recognized as much, issuing a drought declaration that sends a "'loud and clear' signal to the region's residents and businesses that the state's water supply conditions are deteriorating." *See* Exhibit Q (Water Authority press release, June 4, 2008). The FEIR's conclusion that the Project's water supply would be unaffected by the Delta Smelt Decision based on the intentions and priorities of the Governor and Legislature is specious.

In the same vein, the FEIR explains that Metropolitan Water has adopted a Delta Action Plan as a "framework" containing provisions that are "intended to implement" measures to reduce fishery and earthquake-related risks. RTC 9.26. It also notes that Metropolitan Water is engaged in a planning process that "will identify solutions that . . . will ensure a reliable long-term water supply for its member agencies." *Id.* Again, we are not clear how the FEIR reaches a conclusion about the Project's short-term water supply based on Metropolitan Water's long-term plan. Regardless, we do not doubt that Metropolitan Water has every desire to find a long-term solution to the water supply crisis. That desire and intent, however, does not translate to a certain and enforceable supply of water for the City and this Project. The FEIR simply ignores Metropolitan Water's own warnings that supplies may be significantly curtailed. *See* Exhibit P (Metropolitan Water press release, June 10, 2008).

Likewise, the FEIR's explanation that a series of agreements "provide certainty to Metropolitan's Colorado River water supplies" seems to overstate any assurances reached

through the agreements. RTC 9.26. Rather, the agreements describe "*how water shortages are to be shared* amongst the seven states that rely upon the Colorado River for water supplies." *Id.* (emphasis added). Thus, it appears that the agreements identify what piece of the *shrinking* water-supply-pie Metropolitan Water can consume; they do not guarantee that Metropolitan Water's slice will remain the same size. The FEIR's conclusion that the Delta Smelt Decision "is not expected to impact the project's short-term water supply" based on "Metropolitan's ongoing efforts to rehabilitate the Delta and stabilize the Delta's water supply," cannot be sustained.

The FEIR describes the Water Authority's efforts to reduce its reliance on Metropolitan Water's dwindling supplies. *See* RTC 9.26. Although it may be true that the Water Authority "is in the process" of such diversification and "seeks" to increase local water supplies in the future, the success of these efforts is too speculative to support the FEIR's conclusion that there will be adequate water supplies to serve the Project and, thus, the Project's water supply impact is less than significant. As the Water Authority itself explained, many of the state-wide efforts to secure and conserve water "will take time to put in place, putting greater emphasis on the need for the public to immediately reduce their water consumption." *See* Exhibit Q (Water Authority press release, June 4, 2008).

The FEIR attributes to the Water Authority the conclusion that "there are sufficient water supplies to serve the future potable water needs of San Diego County." *See* Findings at 33; *see also id.* at 43. But the Water Authority critiqued the FEIR's sweeping conclusion, noting that the FEIR's Water Supply Assessment does not:

> refer[] to changed conditions regarding [State Water Project] supplies. It seems that the report should disclose that information when making a finding or in the conclusion.

See Exhibit Q (internal Water Authority email, March 7, 2008). And the Water Authority noted that the FEIR omitted the context and limiting conditions that applied to the Water Authority's prior analysis. *Id.* Instead, the Water Authority recommended that the City amend the Water Supply Assessment to expressly refer to the on-going efforts by the Water Authority and Metropolitan Water "to address the changed conditions of the State Water Project" and to note that the Water Authority expected to release an updated water supply projection in June to reflect changed conditions. *Id.* (email from Water Authority to City, March 12, 2008).

As the Water Authority Board's chair explained *after* the Delta Smelt Decision and *after* the Governor issued the recent drought declaration, "we are running out of time, and water supplies from the Sacramento-San Joaquin Bay-Delta are running low. . . . The implications for California are clear: water shortages are more likely, and those shortages could be deeper and longer-lasting than the last drought." *See* Exhibit Q (Water Authority press release, June 4,

2008). Likewise, the chair explained that "[t]he water supply impacts of this court decision to San Diego County will be significant, and supply shortages and mandatory water use restrictions are a very real possibility." *See* Exhibit Q (Water Authority press release, August 31, 2007).

As described in detail in Section II(H) below, the FEIR's analysis of climate change is entirely inadequate. The flaw carries through to the document's water supply analysis. The FEIR entirely ignores the court's determination in the Delta Smelt Decision that climate change will impact "water supply reliability," and that it is "not supportable" to assume that future water supplies will follow historical patterns.

The only certainty at this point is that the region's water supply is uncertain and is at significant risk. The City Attorney advised that the City should "re-evaluate the adequacy of its water assessments and verifications," including the 2005 Urban Water Management Plan on which the FEIR relies, and be wary that the Delta Smelt Decision may cause significant reductions in the City's water supply. *See* Exhibit O (City Attorney Memorandum, September 17, 2007). The FEIR simply ignores this advice.

(3) The FEIR Cannot Rely on Unenforceable Water Agreements to Conclude that the Project's Water Supply Impacts Would Be Less Than Significant.

The FEIR cannot rely on highly-speculative "off-sets" to reach any conclusion regarding either the Project's water demand or the Project's ability to conserve water. The FEIR proposes for the first time a "legally enforceable agreement" between Westfield and the City ("Water Agreement") to:

> off-set any incremental increase in potable water use at the project site by (1) implementing water efficiency measures as part of the project's LEED-ND sustainability program, (2) using reclaimed water for landscape irrigation, and (3) retrofitting to reclaimed water irrigation one or more existing public facilities that use potable water for irrigation.

FEIR at 5.8-9. But the FEIR does not provide the content of the newly-proposed Water Agreement, much less explain how such an agreement would be enforced. As the Water Authority's General Counsel noted, such an agreement is only valuable "if there is an enforceable commitment by the developer to assure reclaimed water use in the future." Exhibit Q (internal Water Authority email, March 10, 2008).

(4) The FEIR Cannot Rely on Speculative LEED Certification to Conclude that the Project's Water Supply Impacts Would Be Less Than Significant.

The FEIR cannot rely on LEED certification to reach any conclusion regarding the Project's water demand and conservation. While touted as an element of the allegedly "enforceable" Water Agreement, the FEIR also suggests that applying for LEED certification is at the discretion of the developer and the private organization that implements the program. Indeed, the FEIR explains that "[i]mplementation of the LEED standards is not a City of San Diego requirement of the proposed project." RTC 9.39, 9.104. And "[t]he City of San Diego does not require LEED certification as part of the project approval process." RTC 9.39, 9.104. Thus, it is unclear whether LEED certification is in fact an enforceable mitigation measure.

It also is unclear what level of LEED certification the Project may achieve. As the FEIR explains, the "City of San Diego does not administer this program and cannot comment on the level of certification being sought by the proposed project." RTC 9.39, 9.104. Further adding to the uncertainty, the FEIR explains:

> The level of LEED certification achieved by the proposed project at Stage 1 is not known at this time since the [US Green Business Council] is currently reviewing the project's Stage 1 application. Stage 2 and Stage 3 certification levels can only be known after the project has been approved and fully designed in detail (Stage 2) and ultimately constructed (Stage 3).

RTC 9.39. And "[t]he level of LEED certification achieved by the proposed project cannot be ascertained due to the fact that LEED certification at the final stage is provided after construction of the proposed project is completed." RTC 9.104.

Despite the heavy uncertainty surrounding LEED certification, the FEIR makes tremendous leaps in its conclusions regarding the Project's water demand and ability to conserve water based on LEED certification. For example, the FEIR concludes that:

- the Project's LEED certification is "anticipated to save approximately 27 percent over current water consumption" (RTC 9.26);
- as part of the LEED program, 90 percent of the Project buildings would use 30 percent less water than the existing water usage on the site (*see* FEIR at 5.8-10);
- project water demand estimates are conservative, due to LEED-based water conservation (*see* FEIR at 5.7-4);

- water demand will be "off-set" by water efficiency measures as part of the LEED program (*see* FEIR at 5.8-9);

- the Project "extensive water conservation measures" as part of the LEED certification process (*see* Findings at 33);

- the Project would result in no increase in potable water demand over the existing demand by "installing water efficiency measures as part of the project's LEED-ND sustainability program" (FEIR at 5.8-11); and

- the Court's Delta Smelt Decision "should not significantly impact the project's water supply, because the project will essentially demand no more potable water than it does today, due to the off-set discussed," such as LEED certification (RTC 9.26).

The FEIR concludes that the Project would not result in a significant water supply impact based in part on LEED certification. "Project demands on potable water supply would not be excessive" – that is, significant – because the Project "would incorporate water efficiency measures as part of the project's LEED-ND sustainability program." FEIR at 5.8-11 to 5.8-12; *see also* Findings at 33. Under CEQA, mitigation measures "must be fully enforceable." Pub. Res. Code § 21081.6(b); CEQA Guidelines § 15126.4(a)(2). By the FEIR's own admission, LEED certification is not enforceable and any water conservation that may result at some point in the future due to that program cannot be known. Moreover, it is our understanding that any benefits achieved are self-reported. Thus, the Project's significant water supply impact remains unmitigated.

G. The FEIR Fails to Support With Substantial Evidence Its Conclusion that Impacts Relating to Sewer Service Would Be Less Than Significant.

The Project would add up to approximately 358,000 gallons per day ("gpd") of wastewater to a sewer line that is considered deficient by the City of San Diego. *See* FEIR at 5.7-2 and 5.7-6. Specifically, the City requires that sewer lines flow at or below half full and the sewer line within Genesee Avenue currently flows at one-half to two-thirds full (sewage currently flows at a rate of 1.09 million gpd in this pipeline). *Id*. Inasmuch as the Genesee Avenue sewer line is already near capacity, any increase in wastewater would contribute to this deficiency. Despite these clear facts, the EIR would have us believe that adding more than 300,000 gpd to a sewer line that is already deficient would not constitute a significant impact. *Id.* The EIR should have identified this as a significant impact of the Project.

The EIR does concede that the Project would result in a cumulatively significant impact on sewer service in the area. *See* FEIR at 7-6. The EIR calls for the applicant to pay its

fair share of the cost of upsizing and relocating the sewer line as mitigation for this impact. *Id.* Fee-based mitigation programs for environmental impacts based on fair share infrastructure contributions by individual projects have been found to be adequate mitigation measures under CEQA. *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 140. To be adequate, however, these mitigation fees must be part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing. *Id.* at 140-41; *see also Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188-89 (explaining that fee-based traffic mitigation measures have to be specific and part of a reasonable, enforceable plan or program that is sufficiently tied to the actual mitigation of the impacts at issue).

Here, the EIR's proposed mitigation simply assumes that the sewer upsizing contemplated by the Monte Verde Project would fully mitigate the UTC Project's cumulative impact on sewer capacity. *Id.* at 5.7-6. Yet, the Monte Verde Project is in litigation and may not be under construction, if at all, until *after* the Project. It is our understanding that the City moved the Monte Verde Project construction date in the FBA to 2010/2011. As a result, the UTC Project EIR provides no evidence that Westfield's fair-share payment would actually cause the sewer line to be upgraded because it provides no discussion of how sewer service would be provided to the Project in the event that the Monte Verde Project is delayed indefinitely. The EIR's conclusion that cumulative impacts relating to sewer service would be less than significant cannot be sustained.

Finally, the UTC Project EIR must consider the significant environmental impacts that would result from any sewer infrastructure project necessary to accommodate the Project's sewer demand, or to mitigate otherwise significant impacts of the Project. The Monte Verde Project EIR provides evidence that such a sewer infrastructure project would result in significant and potentially unmitigable impacts in Rose Canyon. The EIR is flawed for its failure to disclose and discuss such impacts.

H. The EIR's Analysis of the Project's Global Warming Pollution Is Inadequate.

(1) As Part of its Inventory of Global Warming Pollution, the EIR Must Also Analyze Black Carbon Emissions Resulting from the Project.

(a) Black Carbon Has a Significant Impact on Global Warming and as a Short-Lived Pollutant, Mitigation Can Provide Immediate Significant Climate and Health Benefits.

As part of its analysis of global warming impacts, the EIR must also address black carbon, an important short-lived pollutant that contributes to global and regional warming. Black carbon is produced by incomplete combustion and is the black component of soot.

Although combustion produces a mixture of black carbon and organic carbon, the proportion of black carbon produced by burning fossil fuels, such as diesel, is much greater than that produced by burning biomass.

Black carbon heats the atmosphere through a variety of mechanisms. First, it is highly efficient at absorbing solar radiation and in turn heating the surrounding atmosphere. Second, atmospheric black carbon absorbs reflected radiation from the surface. Third, when black carbon lands on snow and ice, it reduces the reflectivity of the white surface which causes increased atmospheric warming as well as accelerates the rate of snow and ice melt. Fourth, it evaporates low clouds. Notably, black carbon is often complexed with other aerosols such as sulfates, which greatly increases its heating potential. *See* Exhibit R (Ramanathan & Carmichael 2008; Jacobson 2001).

Due to black carbon's short atmospheric life span and high global warming potential, decreasing black carbon emissions offers an opportunity to mitigate the effects of global warming trends in the short term. *See* Exhibit R (Ramanathan & Carmichael 2008). Black carbon is considered a "short-lived pollutant" (SLP) because it remains in the atmosphere for only about a week in contrast to carbon dioxide, which remains in the atmosphere for over 100 years. Furthermore, the global warming potential of black carbon is approximately 760 times greater than that of carbon dioxide over 100 years (*see id.* [Reddy & Boucher 2007]) and approximately 2200 times greater over 20 years (*see id.* [Bond & Sun 2005]). It is estimated that black carbon is the second greatest contributor to global warming behind carbon dioxide. *See id.* (Ramanathan & Carmichael 2008).

Unlike traditional greenhouse gases, which become relatively uniformly distributed and mixed throughout the Earth's atmosphere, black carbon exerts a regional influence. The impacts of black carbon on a regional level include both atmospheric heating, as discussed above, and hydrological changes. Hydrological changes occur due to alterations in cloud formation and heat gradients. *Id.* For instance, aerosol pollution has been linked to decreases in the summer monsoon season in tropical areas as well as the drought in the Sahel region of Africa. *Id.* California is an area of particular concern because of the drought-fire cycle. The more drought conditions prevail, the more forest fires burn, and the forest fires in turn emit massive quantities of black and organic carbon. The release of these aerosols intensifies the drought effect.

Another impact of black carbon is accelerated snowmelt; for instance, black carbon is likely contributing to the retreat of Himalayan glaciers and the resulting water shortage in areas of Asia. *Id.* When black carbon settles on snow, it makes the snow darker so that it absorbs more solar radiation. This directly leads to snow melt. In addition, local atmospheric heating due to black carbon increases the melting rate. These same effects may well be operating on the Sierra Nevada, which would reduce water availability throughout California at

crucial times of the year. These localized impacts could also be contributing to a decreased snow pack and earlier snow melt for the San Gabriel, San Bernardino, and San Jacinto mountains.

Black carbon is also detrimental to human health. Black carbon has been linked to a variety of circulatory diseases. One study found an increased mortality rate was correlated with exposure to black carbon. *See* Exhibit R (Maynard 2007). The same is true for heart attacks. *See id.* (Tonne 2007). Another study found that residential black carbon exposure was associated with increased rates of infant mortality due to pneumonia, increased chronic bronchitis, and increased blood pressure. *See id.* (Schwartz 2007).

In developed countries, diesel burning is the main source of black carbon. Diesel emissions include a number of compounds such as sulfur oxides, nitrogen oxides, hydrocarbons, carbon monoxide, and particulate matter. Diesel particulate matter is approximately 75% elemental carbon. *See* Exhibit R (EPA 2002 Diesel Health Assessment). The proposed project will require the use of diesel-powered heavy duty trucks, construction equipment, and yard/warehouse equipment. Thus, it is crucial that black carbon be addressed as part of the environmental review for the Project.

(b) Analyzing Particulate Matter is Insufficient to Address Black Carbon.

Particulate matter (PM) refers to the particles that make up atmospheric aerosols. The primary constituents of PM are sulfates, nitrates, and carbon compounds. Sulfates and nitrates form in the atmosphere from the chemical reaction of sulfur and nitrogen dioxides. These may often be present as ammonium sulfate or nitrate salts. Carbon compounds may be directly emitted, e.g. black carbon emitted from combustion, or may form in the atmosphere from other organic vapors, e.g. oxidation of volatile organic compounds.

Because PM can be reduced through mitigation of other constituents of PM than black carbon, it is essential that black carbon emission reduction strategies be considered independently from PM reductions. The proportions of the constituents of PM vary over time and by location. *See* Exhibit R (EPA 2004 Particle Pollution Report). According to a recent series of surveys conducted at various U.S. cities under the EPA's "Supersite" program, black carbon was often only about 10% of total measured PM2.5.

In contrast to total PM2.5, diesel PM is composed largely of black carbon. Nonetheless, some diesel PM reduction strategies do not affect black carbon. For instance, diesel oxidation catalysts can reduce diesel PM emissions as a whole by approximately 20 to 40%, yet they do not decrease black carbon emissions. *See* Exhibit R (Walker 2004). In addition, while low-sulfur fuel will reduce sulfate emissions, in and of itself low-sulfur fuel will not reduce black carbon. Low-sulfur fuel is important because it allows for better technology to

reduce black carbon. *See, e.g.* 69 Fed. Reg. 38957, 38995 (June 29, 2004). Yet those reductions can only occur once the technology has been implemented.

(c) Methods Are Available to Specifically Quantify Black Carbon Emissions from the Project.

Like greenhouse gases, black carbon emissions from various types of engines and activities can be estimated through numerical calculations. *See* Exhibit R (Bond 2004). Thus, there is no reason why black carbon can reasonably be omitted from these estimates.

The estimated black carbon emissions from the project can be inventoried similarly to other greenhouse gas emissions:

- Estimate the mass of diesel fuel consumed by each type of diesel engine, e.g. machinery, truck, construction equipment, etc. . . .

- Calculate a black carbon emission factor (EF) using reference values available in the literature. For instance, Bond and colleagues provide an equation for "EFBC" from various types of diesel engines that takes into account 4 different factors.

- Multiply the emission factor times the mass of diesel (in kilograms) used for each engine type. This will provide the grams of black carbon emitted by that engine type.

- Sum all black carbon emissions from each engine category to obtain total black carbon emissions from the project.

After obtaining the total black carbon emissions from the project, the relative global warming impact of the emissions can be compared to other global warming pollutants. Carbon dioxide-equivalent values can be obtained by multiplying total black carbon emissions (in kilograms) from the project by the global warming potential (GWP) for black carbon. Although there is some variation in estimated GWP values, representative black carbon GWP values are: 760 over 100 years or 2200 over 20 years (Bond & Sun 2005).

(2) The EIR's Significance Determination for the Project's Global Warming Pollution is Flawed.

The EIR concludes that the Project's impacts on greenhouse gas emissions would be less than significant because "the proposed project would be consistent with the goals of California's AB 32." FEIR at 5.4-44. The FEIR's reasoning fails on multiple grounds.

(a) Because AB 32 Emission Reduction Targets Only Reflect an Interim Step toward the Reductions Needed to Stabilizer the Climate, Purported Consistency With AB 32 Targets Is Not a Valid Threshold of Significance.

A threshold of significance for greenhouse gas emissions must look beyond 2020 to 2050 emission reduction targets. Under, CEQA a determination of the significance of an environment impact calls for "careful judgment . . . based to the extent possible on scientific and factual data." CEQA Guideline § 15064(b). Accordingly, a significance threshold for greenhouse gases must reflect the grave threats posed by the cumulative impact of additional new sources of emissions into an environment where deep reductions from existing emission levels are necessary to avert the worst consequences of global warming. *See Communities for Better Env't v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 120 ("the greater the existing environmental problems are, the lower the threshold for treating a project's contribution to cumulative impacts as significant"); *see also Center for Biological Diversity v. National Highway Traffic Safety Administration* (9th Cir. 2007) 508 F.3d 508, 550 ("we cannot afford to ignore even modest contributions to global warming"). The scientific and factual data are clear that reaching 1990 emission levels by 2020 is only the first step toward climate stabilization. As the physical changes to the environment and emissions resulting from projects approved today will most certainly endure past 2020, there does not appear to be any legitimate basis to adopt a threshold of significance that myopically focuses on 2020 emission reduction targets.

Under CAPCOA's analysis, the only two thresholds that are highly effective at reducing emissions and highly consistent with AB 32 and Executive Order S-3-05 are a threshold of zero or a quantitative threshold designed to capture 90 percent or more of likely future discretionary projects (a 900-ton CO2 Eq threshold). Here, the Project would result in a net increase of over 33,000 CO2 Eq tons of greenhouse gas pollution, well over either the 900 or zero ton threshold. In addition, even the ambitious emissions reduction targets set by Executive Order S-3-05 in 2005, which were consistent with contemporaneous science indicating that reductions of 80% below 1990 levels by developed countries were sufficient to stabilize the climate, are now believed to be insufficient.

Given the recent extreme losses in arctic sea ice, scientists at the National Snow and Ice Data Center have concluded that "the observed changes in the arctic indicate that this feedback loop is now starting to take hold." Based on these and other recent climate change observations, leading scientists now state that "humanity must aim for an even lower level of GHGs." As our current scientific understanding now calls for even greater reductions and indicates that we already may have passed a climactic tipping point, the scientific and factual data point to a threshold of zero in order to ensure that new projects do not have a cumulatively significant impact on global warming. Indeed, consistent with scientific data, EIRs have adopted a zero threshold of significance because it is the most "scientifically supportable" threshold. *See*

e.g., Exhibit R (DEIR, Venoco Ellwood Full Field Development Project at 4.3-33, SCH # 2006061146).

(b) The EIR Has Not Demonstrated It is "Consistent with the Goals" of AB 32.

Not only is the EIR's exclusive focus on AB 32 targets improper for determining the significance of the Project GHG impacts, but the EIR has not provided any credible demonstration that the Project is highly compliant with AB 32 emission reduction goals. Rather, the EIR appears to reason that Project impacts are less than significant because the Project is reducing emissions "to the extent practical." FEIR at 5.4-42. Simply doing what is "practical" is not a valid test for significance under CEQA. The significance of an impact is determined by the impacts of a proposed project on the environment. Thus, if scientific and factual data indicate that a project's greenhouse gas emissions would have a cumulatively significant impact on the environment even after a project did all it purportedly could to reduce its emissions, then this impact is still considered significant.

Here, the EIR has made no effort to quantify the emission reductions achieved by its various design features. However, if the City opted to determine significance based on a reductions from a BAU approach, a 90% reduction from business-as-usual, effective immediately, is necessary to meet the emission reduction targets set by Executive Order S-3-05. *See* Exhibit R (CAPCOA, CEQA & Climate Change at 33). A 50 percent reduction from business-as-usual will prohibit California from reaching the goals of Executive Order S-3-05 even if existing emissions were 100 percent controlled. *Id.* at 33-34. Even with the case of AB 32 compliance, a 50% GHG reduction from new development would only meet 2020 targets even assuming existing emissions were also reduced 25-30 percent. *Id.* at 33. Here, because the EIR has made no demonstration that the Project meets this objective, it cannot credible state that it is consistent with AB 32.

(3) The EIR's GHG Mitigation is Inadequate.

The FEIR fails to remedy the deficiencies in Project's proposed mitigation measures identified in comments on the DEIR. For example, the "potential" generation of on-site renewable energy is vague and unenforceable. The adoption of this and similar measures should be mandatory. After all measures have been implemented to reduce emissions in the first instance, remaining emissions that cannot be eliminated may be mitigated through off-site mitigation. Care should be taken to ensure that offsets purchased are real (additional), permanent, and verified, and all aspects of the offsets should be discussed in the EIR. As stated by CAPCOA, a potential cost-effective offset and verifiable offset could include an energy-efficient retrofit of existing building stock in the Project area to offset the remainder of the Project's emissions. *See* Exhibit R (CAPCOA 2008 at 80). Because the EIR does not offset

the remainder of the Project's greenhouse gas emissions, the Project's impacts have not been fully mitigated. Absent full mitigation, the Project's generation of global warming pollution must be considered a significant impact.

One of the first steps towards reducing black carbon is to develop a proper monitoring and reporting system. As discussed above, black carbon must be considered separately from PM.

The Project should monitor and make publicly available the daily concentrations of black carbon. This can be accomplished using measuring devices called aethalometers, which are commercially available and simple to operate. An aethalometer is an electronic box. It works by measuring the attenuation of light in certain wavelengths of particles that collect as air passes through a filter. The units come in rack-mounted as well as portable versions.

The Project should detect and mitigate "Superemitters." Some engines that receive poor maintenance or have mechanical difficulties emit 10 to 15 times the average levels of black carbon. *See* Exhibit R (Bond 2004). While these may be older engines, engine age is not the single indicator of emissions levels. A single superemitter can negate the positive reductions achieved through retrofitting or replacing a number of "average" diesel engines. Therefore, it is essential to add a mitigation measure that requires the project proponents to develop a monitoring system to detect diesel engines of all varieties that emit high levels of black carbon.

A potential monitoring device is the new AE90 aethalometer which has a tailpipe monitoring extension. *See* Exhibit R (presentation by T. Hansen of Magee Scientific). Periodic measurement of vehicles using this device should be required. An incentive program could be created to help vehicle operators rapidly and effectively mitigate the emissions from superemitting vehicles.

The Project should schedule deliveries to reduce truck idling time. Current California regulations require heavy-duty truck engines to be turned off after idling for 5 minutes. *See* 13 Cal. Code Regs. § 2485. This rule, however, does not apply when the truck is in traffic or queuing. *See* 13 Cal. Code Regs. § 2485(c)(2). Idling time due to either of these events can be avoided by careful scheduling on the part of the project proponent. Therefore, the project should be required to develop a delivery schedule that maximally avoids both traffic en route and waiting time at the facility.

The Project should require all heavy-duty diesel delivery vehicles to reduce black carbon emissions. Over 80% of the U.S. depends on heavy-duty diesel trucks to deliver their goods. *See* Exhibit R (American Trucking Industry Fact Sheet). Furthermore, a new 2008 truck has only one-tenth of the fine PM emissions of a 2006 truck. *Id.* This pair of facts shows that it is essential to address black carbon from delivery trucks.

Because black carbon is a component of diesel PM, some strategies that reduce PM will also reduce black carbon. One of the most common options is the use of a catalyzed diesel particulate filter, which can be installed on both new and existing diesel engines. *See generally* 69 Fed. Reg. 38957 (June 29, 2004). The California Air Resources Board (CARB) recently proposed a rule that would require in-use heavy duty diesels to reduce their PM emissions. Although the rule is not in effect yet, the Project should aim to achieve the standards in the rule beginning immediately by requiring the companies that deliver goods to install technology such as diesel particulate filters on their delivery trucks.

The Project should require all mobile cargo handling equipment to comply with the emissions standards for port equipment. Similar to heavy-duty on-road diesel engines, reductions in PM emissions from cargo handling equipment can also reduce black carbon. California law currently requires mobile cargo handling equipment, (e.g. forklifts and loaders, located at ports or intermodal railyards) to reduce their PM emissions to comply with California's on-road diesel standards or with EPA's Tier 4 standards for off-road vehicles. *See* 13 Cal. Code Regs. § 2497. The existence of such a rule for ports is clear evidence that compliance is also feasible in other contexts. Thus, the proposed project must reduce its black carbon emissions by requiring that all cargo handling equipment comply with the rule for port equipment.

The Project should accelerate compliance schedules. Because black carbon pollution causes rapid and significant atmospheric heating as well as substantial human health risks, it is necessary to address this pollutant as rapidly as possible. A variety of regulations, as discussed above, will require reduced diesel emissions. The schedule for compliance with these standards, however, is often many years from the date of enactment. The project should create incentives for early compliance with all regulatory reduction measures so that black carbon can be reduced as rapidly as possible.

I. The EIR's Analysis of Cumulative Impacts Continues to Ignore Basic CEQA Principles.

As FRC noted in its previous letter, the DEIR failed to provide a legally adequate analysis of the Project's cumulative impacts. *See* RTC 14.40 - 14.45. The FEIR does not provide sufficient responses to FRC's comments on this critical CEQA topic, but because the letter is incorporated here we will not reiterate the points FRC raised in its earlier submission. The following are examples of additional deficiencies in the EIR's cumulative impacts analysis.

(1) The EIR Erroneously Defines the Scope of Cumulative Impacts Analysis.

The EIR authors demonstrate a fundamental misunderstanding of CEQA's cumulative impact analysis requirement. The document erroneously concludes that:

> cumulatively significant impacts are only assessed when:
>
> (1) the proposed project would contribute to an existing significant impact occurring in a community where additional increments would exacerbate the impact, and/or
>
> (2) the Community Plan identifies cumulative impacts in the community-wide EIR and the project would contribute significantly to those impacts.

FEIR at 7-3. This faulty interpretation of the CEQA Guidelines excludes other instances where cumulative impacts analyses are not only appropriate, but required.

CEQA defines "cumulative impacts" as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." CEQA Guidelines § 15355. The CEQA Guidelines also specify that "cumulative impacts can result from *individually minor but collectively significant* projects taking place over a period of time." CEQA Guidelines § 15355(b) (emphasis added). A project's contribution is cumulatively considerable if its "incremental effects . . . are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." CEQA Guidelines § 15065(a)(3). Therefore, an EIR is obliged to assess a project's cumulative impacts not only when there already exists a significant impact or when a community plan identifies a cumulative impact, but whenever cumulative conditions may result in significant impacts.

The FEIR completely fails to make this required evaluation of cumulative impacts, and is thus inadequate. For example, the EIR entirely foregoes an analysis of potential cumulative impacts related to increases in ambient noise levels due to increased traffic. Even if the Project would not result in a significant increase in ambient noise on its own, which we do not concede, the EIR is not excused from assessing potential cumulative noise impacts. An adequate analysis of cumulative noise impacts would have analyzed the predicted routes of travel for the new Project-generated trips, evaluated whether cumulative conditions would result in increased ambient noise levels to sensitive receptors along those traffic routes, and evaluated whether the Project would make a cumulatively considerable contribution to these increases. Such analysis is particularly important here given the amount of development occurring in the Project vicinity. The FEIR is completely silent on this issue.

(2) The EIR Erroneously Concludes that No Analysis of Environmental Impacts Is Required in an Already-Degraded Environment.

The EIR's analysis of carbon monoxide ("CO") hot spots represents another example where the EIR preparers failed to comply with CEQA's requirements pertaining to cumulative *and* project-specific impacts. In this instance, the EIR implies that it is not obligated to analyze an environmental impact if the underlying environment is already harmed. Specifically, rather than analyze the Project's contribution toward a CO hotspot, the EIR states that:

> for those intersections where the level of service ('LOS') is already F, it was assumed that, while CO 'hot spots' may be possible, they would not be attributable to project-related traffic but would be considered a cumulative impact as discussed in Section 7.0, Cumulative Impacts, of this report.

FEIR at 5.4-26. Relying upon this faulty logic, the EIR preparers appear to assume that the more severe the existing problem, the lesser the obligation to analyze the Project's contribution to that impact. This, of course, is not the standard under CEQA. Just because the environment may already be degraded does not give a project proponent free reign to further degrade that environment.

Moreover, despite the suggestion on page 5.4-26 of the FEIR that the cumulative impact of CO would be evaluated in Section 7.0, Cumulative Impacts, we can find no evidence that the cumulative air quality analysis in the EIR evaluated, or in any way considered, the Project's contribution to CO hot spots. A legally adequate analysis would result in the conclusion that the Project's contribution to CO hot spots would be significant, especially in light of the severe degradation of the existing environment.

(3) The EIR's Cumulative Air Quality Analysis Is Fundamentally Flawed.

The EIR concludes, absent any evidence or analysis, that the Project's:

> short-term construction emissions would likely not be significant since construction schedules of other projects in the area may not necessarily overlap with that of the proposed project and because each project would be required to implement standard dust control measured during construction activities.

DEIR at 7-5; Findings at 39. The EIR errs in several fundamental respects. The document incorrectly limits its analysis of the Project's cumulative air quality impacts to emissions from other projects' construction activities. A proper cumulative analysis would have identified the increase in emissions from the construction of the Project and combined those emissions with

emissions from other projects – both construction and operational – and analyzed the effect that these cumulative emissions would have on the region's air quality. Whether construction schedules of these other projects overlap is irrelevant; total emissions from construction and operations must be analyzed.

The EIR also implies that because each project would be required to implement standard dust control measures, the cumulative air quality impacts of these projects would be less than significant. DEIR at 7-5. Yet the EIR itself demonstrates the fallacy of this assumption when it finds that standard dust control measures would not reduce the Project's air quality impacts to a less than significant level. *See* FEIR at 5.4-17 (stating that even with implementation of fugitive dust mitigation measures, the impact to ambient air quality would remain significant and unmitigable).

Moreover, notwithstanding the failure of the EIR to provide a quantitative analysis of the Project's cumulative air quality impacts, the EIR concludes that the Project would contribute to significant and unmitigated cumulative operational emissions of criteria pollutants. FEIR at 7-5. In direct contravention of CEQA, the FEIR provides no mitigation measures for this significant impact.

(4) The EIR's Cumulative Land Use Analysis Is Fundamentally Flawed.

The EIR concludes that the Project would not be consistent with the adopted Community Plan and thus would require an amendment to the Plan. The EIR identifies approximately twenty land use and transportation projects in the Project study area. *See* DEIR Table 7-1. One of these projects, the UCSD Long Range Development Plan, would add almost ten million square feet of development to the University area. *Id*. Given the amount of development pending in the Project vicinity, the public and decision-makers deserve an accurate and comprehensive analysis of the cumulative impacts of the proposed Project. Unfortunately, the DEIR fails to disclose how the region will operate or look upon buildout of these land use projects.

The EIR's cumulative impact analysis also is incomplete and inaccurate because it omits certain land use projects currently pending before the City. For example, the EIR overlooks altogether the proposed Costa Verde Commercial Center, which would construct 75,000 square feet of additional commercial uses at the northwest corner of Nobel Drive and Genesee and the Scripps Memorial Hospital project which consists of approximately 450,000 square feet of hospital and medical office space on Genesee Avenue. The EIR must be revised to include a cumulative impact analysis that takes into account *all* foreseeable land use projects in the vicinity of University City.

In conclusion, the FEIR's analysis of the Project's cumulative environmental impacts remains woefully deficient, leaving decision makers in the dark as to the extent and severity of the Project's cumulative effects. The EIR must be revised to include a legally adequate analysis.

III. The EIR Fails to Adequately Describe or Analyze a Reasonable Range of Alternatives.

The FEIR fails to consider any feasible alternatives that would substantially reduce the Project's environmental impacts, rendering the document inadequate under CEQA. Instead, the FEIR considers alternatives that would, at best, marginally reduce the level of some environmental impacts. FEIR Table 8-1, summarizing the environmental impacts of the alternatives, succinctly demonstrates why the alternatives considered in the document are built of straw – they are nearly identical to the Project in terms of environmental harm. The FEIR concedes that the alternatives are only environmentally superior to the Project "in some respects" and that some alternatives only reduce "one environmental impact of the project." RTC 14.51. Although the FEIR makes much of the fact that some of the alternatives "reduce the size and/or development intensity of the proposed project" (RTC 14.49), these are distinctions without a difference so long as the level of environmental harm across alternatives remains essentially the same. The record reflects City staff's opinion that to be legally-adequate, the EIR must include an alternative that reduces the Project's significant impacts, recommending that the scope of the Project be halved. The FEIR ignores this conclusion.

The EIR's prefunctory consideration of false alternatives flouts the plain language of CEQA and seeks to undermine the EIR's purpose by proposing alternatives that seem different at first blush, but do not actually represent environmentally-superior alternatives. *See Laurel Heights Improvement Assoc. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 400 (describing one of an EIR's "major functions" as ensuring "that *all reasonable alternatives* to proposed projects are thoroughly assessed" [emphasis in original]); *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 736 (deeming an EIR faulty because it "did not produce information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned [internal quotation marks and citations omitted]).

The EIR erroneously overstates the distinctions between the alternatives. For example:

- the FEIR claims that the No Residential Alternative avoids or substantially lessens the environmental impacts "by reducing significant and unmitigable *traffic* impacts, aesthetic impacts . . . , and lessening *other* significant impacts . . . ." RTC 14.47 (emphasis added). This is untrue, as revealed by FEIR Table 8-1. In fact, the No Residential Alternative would have the same significant and unmitigated

traffic impact as the proposed Project and the same level of impacts in every other resource category except aesthetics.

- the FEIR claims that the No Retail Expansion Alternative would "result[] in a substantial reduction of the significant and unmitigable traffic impacts of the proposed project." RTC 14.48. FEIR Table 8-1 again reveals this false claim. The No Retail Expansion Alternative would have the same significant and unmitigated traffic impact as the proposed Project.

- the FEIR claims that the Reduced Building Height Alternative offers the "environmental advantage" of conforming to established patterns of development in the UTC area. RTC 14.50. Once again, though, FEIR Table 8-1 shows that, by the EIR's estimation, the proposed Project and the Reduced Building Height Alternative would have the same less than significant land use impact, but would have the same unmitigable Transportation/Circulation and Air Quality impacts. Thus, the alternative would not serve CEQA's purpose of avoiding or substantially lessening a project's significant impacts.

Of particular concern, the EIR does not consider a single alternative that would result in environmental advantages in two of the greatest areas of concern – significant transportation impacts (i.e. traffic and congestion) and significant air quality impacts. *See* FEIR Table 8-1. Every single alternative considered in the EIR would result in significant and unmitigated impacts in these categories. As noted at the recent Planning Commission meeting, traffic problems in UTC are quite serious already (*see* Videorecording of City Planning Commission hearing (May 22, 2008)), but the Project proposes no alternative that would significantly lessen the traffic impacts of the Project. *See, e.g.,* RTC 9.116 (admitting that the No Residential Alternative would merely reduce traffic 6% and that "significant and unmitigable traffic impacts would still occur"). Beyond failing under CEQA, refusing to consider a project alternative that would not exacerbate traffic problems for the community is irresponsible planning.

The EIR attempts to pass along its burden to present reasonable alternatives to the community, claiming in response to Friends of Rose Canyon's comments on the DEIR that the "commentator does not offer a specific alternative in lieu of those studied by the EIR except to state that the EIR should consider an alternative that conforms to the University Community Plan." RTC 14.51. Yet, as the Supreme Court has explained,"[i]t is the project proponent's responsibility to provide an adequate discussion of alternatives." *Laurel Heights*, 47 Cal.3d at 405. CEQA prevents this effort to place the blame on the community for Westfield's failure to provide reasonable project alternatives.

Moreover, environmentally-superior alternatives have in fact been suggested to the City and essentially ignored. For example, in response to the suggestion that the EIR consider an alternative that does not require deviation from the Community Plan, the FEIR summarily concludes that it would not "satisfy most basic project objectives." RTC 14.51. CEQA does not permit this kind of cursory rejection of reasonable alternatives. While an EIR need not consider "every conceivable alternative to a project" (CEQA Guidelines § 15216.6(a)), "all reasonable alternatives" must be considered. *Laurel Heights*, 47 Cal.3d at 400; *Goltea Valley*, 52 Cal.3d at 565-66. Limiting the proposed Project to the contours of the adopted Community Plan is a reasonable alternative that cannot be rejected simply because it may not perfectly match the developer's self-serving development goals. *See Kings County Farm Bureau v. City of Hanford* 221 Cal.App.3d 692, 737 ("Environmentally superior alternatives must be examined whether or not they would impede to some degree the attainment of project objectives."); *Mira Mar Mobile Community v. Oceanside* 119 Cal.App.4th 477, 489 ("alternatives need not satisfy all project objectives, they must merely meet 'most' of them").

And the developer's objectives for the project are not inflexible. Indeed, the Project objectives were changed between the DEIR and the FEIR; as revised, Project objective 2 eliminates the developer's flexibility to construct hotel and office uses within each district, and Project objective 11 adds the potential rental of residential units. *See* FEIR at 8-1 to 8-2. The City has provided no explanation as to why the developer's objectives for the Project would be so inflexible as to eliminate environmentally-superior alternatives from consideration, but malleable enough to revise in other circumstances.

Finally, though the problems with the alternatives section are myriad, it bears noting that the EIR's identification of the No Retail Expansion Alternative as the environmentally-superior alternative is illogical. The No Retail Expansion Alternative is *identical* to the proposed Project in terms of its impacts to the environment – it does not result in a change in any impact category to a level of insignificance or a level that can be mitigated. *See* FEIR at 8-22; Table 8-1. The Reduced Project Alternative would involve a 435,000 square foot retail expansion, while the No Residential Alternative would involve a 750,00 square foot retail expansion. *See* RTC 14.8. Thus, the alternatives appear essentially the same except that the No Residential Alternative would include 315,000 square feet more retail space. Curiously, the EIR claims that the No Residential Alternative is environmentally superior. FEIR at 8-22. These conclusions defy logic and serve to highlight the charade the EIR makes of the alternatives analysis.

The City should reject this EIR and require that the EIR consider alternatives that do not require massive changes to the community's growth plan and zoning ordinances, and will actually serve the purposes for which CEQA was designed – environmental protection and accountable, informed self-governance.

IV. The EIR Should Be Redrafted and Recirculated.

As FRC noted in its comments on the DEIR (*see* RTC 14.53), CEQA requires recirculation of an FEIR "[w]hen significant new information is added to an environmental impact report" after public comment and review on the earlier draft EIR. Pub. Res. Code § 21092.1. Given the significant new information added to the FEIR, including the most recent errata to the FEIR, regarding the Project's impacts on, among other things, traffic, water supply and air quality, and the very late-availability of the Master PDP on which the FEIR so heavily relies, the FEIR must be recirculated to provide decision makers and the public with the full understanding necessary to make a well-informed decision.

A. The FEIR Contains Significant New Information About Traffic Impacts, and Requires Recirculation.

As discussed above, in response to a comment by Caltrans, the FEIR downgrades the existing level of service ("LOS") for the intersection of I-5 and Genesee Avenue. *See* Exhibit B (Caltrans letter to City, May 12, 2008); FEIR at 5.3-9. Despite this fact, the FEIR, like the DEIR, concludes that the Project would not significantly impact this intersection. *See* FEIR Table 5.3-1; Revised Traffic Study Table 10-1A (Horizon year intersection operations without Genesee Avenue widening (NUC-A), at 72). Caltrans, however, implies that the Project *would* result in a significant impact to this intersection under both with and without the Genesee widening. *See* Exhibit B (Caltrans letter to City, May 12, 2008, at 3 [stating the FEIR at 5.3-33 and 5.3-36 *should show* the intersection of I-5/ Genesee Avenue as LOS F]). Thus, consistent with the FEIR's downgrade of this intersection's existing operation to LOS F, the FEIR also should have determined that the Project's impact on this intersection would be significant. This new significant traffic impact was not previously identified in the DEIR and, as such, the EIR must be recirculated.

Second, the FEIR's revised traffic impact study relies on a proposed restriping of the I-805 SB off-ramp to westbound La Jolla Village Drive to conclude that impacts to this ramp would be mitigated to a less than significant level. *See* FEIR at 5.3-57. Caltrans stated in its May 12, 2008 letter, however, that the mitigation measure would require Caltrans' approval and is not acceptable. *See* Exhibit B (Caltrans letter to City, May 12, 2008, at 3). Inasmuch as Caltrans has concluded that this proposed measure is not acceptable, it is unlikely to be implemented and is infeasible. The traffic impact remains significant and unmitigated. This constitutes a new significant traffic impact not previously identified in the DEIR and requires recirculation of the EIR.

Third, the DEIR assumed that the Project's significant impacts on the I-805 freeway and freeway ramps would ultimately be mitigated by the improvements contemplated by SANDAG in its most recent Regional Transportation Plan. *See* FEIR at ES-18. Caltrans

correctly explained, however, that the EIR could not rely on these freeway improvement projects to mitigate this impact. *See* RTC 3.5. The FEIR concedes that the impact to the I-805 freeway and the ramps caused by the Project would be significant and unavoidable. *See* FEIR at ES-18. This finding is a new significant impact not identified in the DEIR and triggers recirculation of the EIR.

B. The FEIR Introduces Significant New Information and Changed Circumstances Regarding Water Supply, and Requires Recirculation.

(1) The FEIR Proposed a New Mitigation Measure in the Form of the Proposed Water Agreement.

In regard to the Project's water supply impact, the DEIR concluded that the "Project demands on potable water supply would not be excessive." DEIR at ES-42. The DEIR based this determination on the following factors:

- The Project would be required to comply with the City of San Diego Land Development Code and the Recycled Water Service Area requirements, which require drought tolerant species in landscaping, low-water-flow fixtures, and reclaimed water for irrigation;

- The Project land uses (e.g., retail and multi-family housing and possibly hotel and office) "are not high water demand uses" and "would not consume more than the average amount of water for the uses;"

- The Project would replace certain existing fixtures in older retail space with more efficient fixtures; and

- The Project would use high-efficiency irrigation systems for Project landscaping.

DEIR at ES-42, 5.8-6 to 5.8-7. On this basis, the DEIR concluded that the impact would be less than significant and no mitigation was required. *Id.* In particular, the DEIR explained that "[n]o off-site reclaimed water improvements would be required for the proposed project." DEIR at 5.7-5.

The FEIR entirely changes course. Nowhere mentioned in the DEIR but featured prominently in the FEIR is a proposed Water Agreement between the City and Westfield that would impose supposedly enforceable requirements on the Project to reduce its otherwise significant water supply impacts. *See* FEIR Appendix M, at 3. These conditions are new mitigation measures that were not previously identified in the DEIR and that are required to reduce the Project's significant water supply impact. As City staff admitted at the Planning

Commission hearing, recirculation is required when new mitigation is added to a final environmental review document that was not included in the draft environmental review. *See* Videorecording of City Planning Commission hearing (May 22, 2008) at 55545. Recirculation is required here based on the new determination in the FEIR that the water supply impact must be mitigated through the proposed Water Agreement.

Instead of being forthright about introducing new mitigation for the Project's water supply impacts, however, the FEIR attempts to conceal the mitigation measures as mere "off-sets" or "conditions" on Project approval. *See* FEIR Appendix M, at 3; *see also* FEIR at 5.8-12 (claiming that "no mitigation measures are required"). But the plain language of the CEQA Guidelines reveals that these so-called "off-sets" squarely meet the definition of "mitigation." They are measures designed to reduce adverse impacts imposed as a condition of project approval. *See* CEQA Guidelines § 15126.4(a)(1)(A). And they are measures intended to compensate for an impact by providing substitute resources to a project. CEQA Guidelines § 15370. Specifically, the FEIR claims that through the Water Agreement:

> the proposed project will off-set any incremental increase in potable water use at the project site by (1) implementing water efficiency measures as part of the project's LEED-ND sustainability program, (2) using reclaimed water for landscape irrigation, and (3) retrofitting to reclaimed water irrigation one or more existing public facilities that use potable water for irrigation.

FEIR at 5.8-9. These elements of the proposed Water Agreement clearly fall within CEQA's definition of mitigation; the FEIR's attempt to relabel the mitigation cannot stand. The FEIR must be recirculated so that the public has an adequate opportunity to review and comment on the newly-proposed mitigation measures.

In addition, the EIR must include analysis that would support the alleged efficacy of the newly-proposed mitigation. As it stands, the content of the proposed Water Agreement has not been made available to the public. There is no evidence supporting the allegations regarding the amount of water that could be conserved through the proposed Agreement. And there is no discussion of the potentially significant environmental impacts that could result through implementation of the Water Agreement. For example, the EIR must discuss the impacts that retrofitting itself would have on the environment. *See* CEQA Guidelines § 15126.4(a)(1)(D); *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986 (impacts caused by mitigation must be discussed). Without this basic and crucial information, the FEIR's conclusion that the Water Agreement mitigation would reduce the Project's environmental impacts below the threshold of significance cannot stand.

(2) The Delta Smelt Decision Introduces Significant New Information and Changes in Circumstances that Triggers Recirculation.

The publication of the Delta Smelt Decision and the Governor's declaration of drought after release of the DEIR are sufficient changed circumstances and new information to require recirculation here. In *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, the discovery of an endangered tiger salamander was sufficient "new information" to spur the agency to voluntarily recirculate draft environmental review. Because the presence of the salamander was not discovered until after the release of the draft EIR, the document could not and did not address all of the potentially substantial adverse environmental effects of the project.

In this instance, the significant reach of the court's Delta Smelt Decision based on the presence of a federally-listed species in the water pumps that supply the City, the significant restrictions on water flows as a result of that decision, and the Governor's announcement of a drought, call into question the City's water supply. As the City Attorney explained, "[t]hese changed circumstances should trigger further analysis under [CEQA] for projects not yet approved by the City . . . ." *See* Exhibit O (City Attorney Memorandum, September 17, 2007). The City Attorney particularly called out the UTC Project as requiring reevaluation in light of this new information and changed circumstances. *Id.*

(3) The New Water Supply Assessment Triggers Recirculation.

Although the DEIR disclosed that the City was in the process of preparing a Water Supply Assessment (*see* DEIR at 5.8-7), the document was not released until the City published the FEIR. *See* FEIR Appendix M. The credibility of the DEIR and FEIR's analysis of the Project's water supply impact and conclusions as to significance are thrown into question by the fact that the environmental documents were published *before* the Water Supply Assessment was complete. Indeed, the record reflects that as late as March 14, 2008, the EIR prepares did not have the benefit of its conclusions.

The Assessment contains significant new information about (1) the baseline environmental condition, (2) the Project's water supply impacts, and (3) the FEIR's proposed mitigation for the Project's significant impacts. It is a critical component of understanding the Project and its impacts. Because this information was not available in the DEIR, and substantially affects the new analysis in the FEIR, the FEIR must be recirculated.

C. The FEIR Adopts a New Mitigation Measure to Reduce a Previously Significant Air Quality Impact Below the Level of Significance and Requires Recirculation.

As noted above, the DEIR concluded that NOx emissions associated with construction of the Project would be significant and could not be mitigated. *See* DEIR Table 5.4-14; *see also* RTC 14.31. Based on Friends of Rose Canyon's comments on the DEIR, "the project applicant has accepted a new mitigation measure that would prevent overlapping construction schedules for Phases 1 and 2 or require the use of low NOx construction equipment." RTC 14.31. Likewise, the FEIR explains that "a new mitigation has been added to the Final EIR to address impacts related to construction equipment NOx (see new MM 5.4-7)." RTC 14.30. The addition of a new mitigation measure to the FEIR that was not identified in the DEIR in order to reduce a significant impact below a threshold of significance triggers recirculation.

D. The Late Availability of the Master PDP Requires Recirculation.

The FEIR through and through relies on the Master PDP. In particular, it uses the Master PDP to (i) provide critical details about the Project description, and (ii) to conclude that the Project's impacts will be less than significant or that the Project's significant impacts can be mitigated. By way of examples of the importance of the Master PDP to understand the Project, we note the following:

- The proposed project is a Master PDP (*see* FEIR at 2, 4-1);
- The Project's "design concept" (FEIR at 3), "general design characteristics" (RTC 14.12), "design information" (RTC 14.12), and "design guidelines" (RTC 14.13) are described in the Master PDP design guidelines, and the Master PDP provides "additional details of the possible project design" (RTC 9.3);
- The Master PDP contains the guidelines and requirements related to architecture, landscaping, lighting, signage and other design elements of new construction (*see* FEIR at ES-10, 3-16);
- The Project design's intent to break down the Superblock development pattern is described in the Master PDP (*see* RTC 9.106) and the Project's proposed layout of uses are contained in the Master PDP (*see* RTC 14.28);
- Information on implementation of the Master PDP is found in Chapter 8 of the Master PDP (*see* RTC 9.29, 9.36);

- Development regulations for future components of the Project are contained in Chapter 5 of the Master PDP (*see* RTC 9.43); and

- The subsequent development review process for future components of the Project is "outlined in the Master PDP" (RTC 9.87).

And by way of examples of the importance of the Master PDP to understand the EIR's conclusions regarding the Project's significant impacts on the environment, we note the following:

- Land use: Project design features described in the Master PDP would reduce potential land use impacts to below a level of significance (*see* FEIR at 5.1-20).

  Although land use policy inconsistencies would occur, no significant conflicts between the proposed project and the applicable planning documents have been identified because the project . . . would feature design measures in the Master PDP that would aim to avoid potentially significant land use impacts (*see* FEIR at 5.1-25).

- Aesthetics/visual: Project design elements contained in the Master PDP would minimize overspill onto neighboring properties and lighting impacts would be less than significant (*see* FEIR at 5.2-13).

  The Project design features that would prevent potential aesthetics impacts associated with siting dissimilar structures adjacent to one another is described in the Master PDP (*see* RTC 9.122).

- Transportation: Mobility development principles for pedestrian, transit, bicycle and vehicle mobility on and around the site are described in Chapter 7 of the Master PDP (*see* RTC 9.41).

- Public facilities: The Master PDP identifies the open space required to meet the population-based parks standards for proposed residential development on the Project site (*see* RTC 9.87, 9.90).

- Land use: The Project's bulk and scale impacts related to the transition between dissimilar uses would not be significant because the

> proposed structures would incorporate design features from the Master PDP to address the transition (*see* RTC 14.6).
>
> Because the Master PDP would ensure structural transitions, screening and articulation, impacts to neighborhood character were not determined to be significant (*see* RTC 14.28).

Indeed, the FEIR makes more than 200 references to the Master PDP, and the City's responses to public comments on the DEIR makes more than 70 references to the document. Given the EIR's saturation with references to the Master PDP, it would be impossible to understand the Project and its impacts without access to the Master PDP.

But the Master PDP was not published until March 14, 2008, was revised May 1, 2008, and, as far as we are aware, was not made available to the public until May 19, 2008 – well-after the DEIR was released and the public comment period closed and well-after the FEIR was released. It would completely thwart CEQA's purpose to permit the City and developer to withhold the lynchpin for understanding and analyzing the Project until after the DEIR and FEIR are complete. The very recent availability of a critical piece to understanding the foundation for the EIR's analysis triggers CEQA's requirement for recirculation.

V. The Draft Findings, Statement of Overriding Consideration and Mitigation Program Cannot Be Supported by Evidence in the Record.

The Candidate Findings of Fact ("Findings"), Statement of Overriding Consideration and Mitigation Monitoring and Reporting Program ("MMRP") are also legally inadequate.

CEQA requires findings of fact to explain why project alternatives identified in an EIR are infeasible and have been rejected. CEQA Guidelines § 15091(a)(3), (c). In particular here, the Findings must explain why the City proposes to adopt a Project that would result in significant and unmitigated impacts, instead of an environmentally-superior alternative. *Id.* § 15126.6(d), (e)(2). The City must point to substantial evidence in the record justifying its conclusion that no other alternative would achieve the Project's objectives while resulting in fewer significant and unmitigated environmental impacts.

As described above in Section III, the selection of the No Retail Expansion Alternative as the environmentally-superior alternative is illogical. Moreover, the range of alternatives analyzed in the Project EIR is not reasonable; the alternatives are so similar as to not offer any substantial environmental benefit as compared to the proposed Project.

CEQA also requires the City to make a finding "specify[ing] the location and custodian of the documents or other materials which constitute the record of proceeding upon which the decision is based." Pub. Res. Code § 21081.6(a)(2); CEQA Guidelines § 15091(e). This finding must be supported by substantial evidence in the record. CEQA Guidelines § 15091(b). The proposed Findings claim that the following categories of documents "are and at all relevant times have been and will be available upon request" from the City:

> [a]ll documents, studies, EIRs, or other materials incorporated by reference in the Draft EIR, and the FEIR, and
>
> [a]ny other relevant materials required to be in the record of proceedings by Public Resources Code Section 21167.6(e).

Findings at 3-4. This claim is patently false and is not supported by substantial evidence in the record. On April 18, 2008, Friends of Rose Canyon submitted a request for documents under the California Public Records Act, Government Code §§ 6500 *et seq.* *See* Exhibit A (SMW letters to City, April 18, 2008, May 20, 2008, June 20, 2008, and July 8, 2008). The City refused to provide a single document in response to this request for more than two months. The City's failure to satisfy this request for documents relating to the Project thwarts CEQA's information disclosure and public participation purposes, and the City Council may not make the finding that the record of proceedings has been available for public review.

CEQA requires the City to make a finding regarding the ways that the Project could foster growth. *See* CEQA Guidelines § 15126.6(d). The City concludes that "[t]he proposed project does not propose any precedent-setting actions that, if approves, would specifically allow or encourage other projects and resultant growth to occur." Findings at 58. Evidence in the record, however, is to the contrary. As Planning Commissioner Naslund explained, amending the Community Plan for this Project could be a precedent-setting gesture. *See* Videorecording of City Planning Commission hearing (May 22, 2008) at 62728. He correctly explained that the developer here has the burden of establishing why the deviation requested by this Project is "unique" and would not open the "floodgates" of similar requests from other developers. *Id.* Indeed, just as this Project relies on the deviations granted in the Monte Verde Project to justify its requested variances from the Community Plan (*see* Errata to FEIR), so too other future developers can be expected to rely on any deviations approved for Westfield to support their project. Westfield has not provided any evidence to overcome its burden on this score.

CEQA requires that mitigation measures adopted in the MMRP be "fully enforceable through permit conditions, agreements, or other measures." Pub. Res. Code § 21081.6(b); CEQA Guidelines § 15091(d). As explained above, however, the EIR proposed numerous mitigation measures of dubious merit and that are not enforceable. These measures

are not fully enforceable and cannot be adopted in the MMRP for the Project. Thus, the significant impacts of the Project remain unmitigated and the MMRP is legally inadequate.

As Planning Commissioner Naslund explained in regard to the developer's proposed reasons for overriding the significant and unmitigated impacts to aesthetics, community character, traffic and air quality, the reasons are "weak" and do not justify the unmitigated environmental impacts. *See* Videorecording of City Planning Commission hearing (May 22, 2008) at 62510; *see also id.* at 65612. In particular, the Commissioner points out that any claimed public transit benefit of the Project is suspect at best. *Id.* The alleged benefits of the Project simply do not balance out the significant and unmitigated harms to the environment and community.

VI. The City Has Failed to Produce the Record, Frustrating the Public's Ability to Comment on the Project.

On April 18, 2008, Shute, Mihaly & Weinberger submitted on behalf of FRC a request pursuant to the California Public Records Act, Government Code §§ 6250 *et seq.*, for documents relating to the Project and the City's environmental review. *See* Exhibit A. The City is "obliged to comply so long as the record can be located with reasonable effort." *Calif. First Amendment Coalition v. Superior Court* (1998) 67 Cal. App. 4th 159, 165-66. Moreover, the City must determine within 10 days of receiving a request "whether the request . . . seeks copies of disclosable public records in the possession of the agency," and inform the requestor of its decision and the reasons supporting its decision. Govt. Code § 6253(c).

As of the date of this letter and despite numerous follow up letters, telephone calls and electronic mail, FRC has not received a full response to its request. Indeed, as of this morning the City has confirmed that it is withholding additional responsive documents until at least next week. And despite many requests by FRC, the City has not told FRC whether it is withholding any documents based on any claim of privilege or exemption.

The City Council could not make any finding that the Record of Proceedings for the Project has been made available upon request of the public. Likewise, we cannot prepare full and meaningful comments on the EIR until we have received all of the requested documents from the City. FRC previously requested that the City defer any hearing on the EIR until the City has provided a complete response to the Public Records Act and allowed a reasonable opportunity for FRC, and any other members of the public, to review the response. FRC respectfully requests that the City Council defer any decision on the EIR.

CONCLUSION

The University Towne Center Project would inundate University City's roads and freeways with traffic, cause extensive environmental harm, and profoundly change the character of the surrounding community. The Project should not be approved with anything less than a thorough, accurate, and complete environmental impact report that meets all the requirements of CEQA. This FEIR fails to meet this simple standard in myriad ways. On behalf of the Friends of Rose Canyon, Endangered Habitats League, and Center for Biological Diversity, we therefore urge the City to refuse to certify the FEIR as adequate, and to take no action on the Project until the EIR has been revised and recirculated for public review.

Very truly yours,

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For Center for Biological Diversity

Enclosures: The exhibits referenced in this letter are included in the accompanying CD for your review and for inclusion in full in the administrative record.

Cc: Mayor Jerry Sanders
City Council
City Attorney
California Department of Transportation
San Diego County Water Authority
Metropolitan Water District of Southern California
SANDAG

EXHIBITS

The following referenced exhibits are included in the accompanying CD for your review and for inclusion in full in the administrative record:

A Shute, Mihaly & Weinberger LLP letter to City (April 18, 2008).

Shute, Mihaly & Weinberger LLP letter to City (May 20, 2008).

Shute, Mihaly & Weinberger LLP letter to City (June 20, 2008).

Shute, Mihaly & Weinberger LLP letter to City (July 8, 2008).

B Jacob Armstrong, Caltrans letter to Martha Blake, City (May 12, 2008).

Jacob Armstrong, Caltrans email to Martha Blake, City (May 30, 2008).

C Sightline Institute, Increases in Greenhouse Gas Emissions from Highway Widening Projects (October 2007).

D University of California San Diego Environmental Impact Report for Long Range Development Plan, Appendix I – Traffic Analysis Report (State Clearinghouse No. 2003081023) (2004) (excerpt).

E Solano Beach Joint Development Project, Appendix G – Construction Related Traffic Analysis (2006).

F Final Mid-Coast Corridor Transit Project, SANDAG Meeting Minutes (February 12, 2007).

G E-mail between Martha Blake, City and Kim Baranek (April 19, 2007).

H Monte Verde Project, City Planning Commission staff report (March 15, 2007).

I Downtown Community Plan Update, City Planning Commission staff report (January 25, 2006).

J Memorandum of Understanding between City of San Diego, et al. and Padres L.P. (August 14, 1998).

K California Air Resources Control Board Diesel Emission Control Strategies.

L Letter from California Attorney General to Marilyn Mirrasoul, City of San Diego (June 11, 2007).

M Manville & Shoup, People, Parking and Cities.

N Illingworth & Rodkin, Acoustical Analysis (May 22, 2008).

O City Attorney Memorandum re: Recent California Court Ruling Implicating Bay-Delta Water Supply Reliability (September 17, 2007).

P Metropolitan Water District of Southern California press release (June 10, 2008).

Q Internal San Diego County Water Authority email correspondence from D. Friehauf to K. Weinberg, et al. (March 7, 2008).

Internal San Diego County Water Authority email correspondence from D. Hentschke to D. Friehauf, et al. (March 10, 2008).

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