

Communication from Public

Name: Andrew Brady

Date Submitted: 02/06/2025 03:59 PM

Council File No: 24-1603

Comments for Public Posting: Please see the attached letter from the Project applicant.



DLA Piper LLP (US)
2000 Avenue of the Stars
Suite 400 North Tower
Los Angeles, California 90067-4735
www.dlapiper.com

Andrew Brady
Andrew.Brady@us.dlapiper.com
T 310.595.3208
F 310.595.3300

February 6, 2025
VIA COUNCILFILE AND EMAIL

Planning and Land Use Management Committee
City Council of the City of Los Angeles
200 N. Spring Street
Los Angeles, CA 90012

Re: SAFER Appeal – 638 Berendo Project
Council File No. 24-1603
Related Case Nos.: DIR-2023-4545-TOC-SPR-VHCA-1A; ENV-2023-4546-CE-1A
February 11, 2025, Planning and Land Use Management Committee (“PLUM”) Hearing

Honorable Chair and Members of the PLUM Committee:

We write today on behalf of 3275 Wilshire LP (“Applicant”), applicant for the 638 Berendo Project, a proposed seven story residential development (“Project”) located at 638 S. Berendo St. (“Property”) in the Wilshire Community Plan Area. The Project provides 163 new residential units including 18 affordable units at the Extremely Low Income level. It is located in a “Tier 4” transit priority area 680 feet from the Wilshire/Vermont Metro Rail station and replaces a vacant, underutilized surface parking lot with a high-quality, new residential mixed-income development.

The Project was approved by the Director of Planning via a Director’s Determination on August 16, 2024. It included approvals for Site Plan Review, TOC Incentives, a Housing Crisis Act verification, and the adoption of a Class 32 “urban infill” Categorical Exemption (“Class 32 Exemption”) under the California Environmental Quality Act (“CEQA”). We write today to address the CEQA appeal (“Appeal”) to the Council filed Supporters Alliance for Environmental Responsibility (“SAFER”), a serial project appellant that was formed by union construction labor organization LiUNA for the purpose of challenging new housing projects under CEQA to coerce them into hiring LiUNA. We fully concur with Planning staff that SAFER’s Appeal lacks merit. For the reasons that follow, we believe it should be rejected in full.

SAFER submitted its first appeal of the Director’s Determination to the City Planning Commission (“CPC”) on August 30, 2024. The written justification provided with the appeal stated only that the Project did not validly qualify for the Class 32 Exemption, stating no basis for its claims and providing no evidence in support. Thus, only the CEQA determination was appealed and no valid grounds for the appeal were stated.

As is its standard practice, less than a week before the scheduled November 14, 2024, appeal hearing before the CPC, on November 8th, SAFER did a last-minute document dump on the City, submitting a procedurally invalid supplemental letter that included a total of 66 pages of legal argument and purported expert evidence (“SAFER Letter”). The SAFER Letter raised the same arguments and included the same purported expert reports SAFER has submitted innumerable times to the City on multiple projects. It



February 6, 2025

Page Two

included claims that the Project's heavy construction equipment would emit diesel particulate matter that would cause a significant increase in lifetime cancer risk for nearby residents, that formaldehyde gas from building materials in the Project would cause a significant increase in lifetime cancer risk for future Project residents, and that the Project's construction would cause significant noise impacts. These are the same arguments SAFER makes over and over again with the same invalid, generic, cookie-cutter expert reports it runs off the assembly line and submits to the City for all of the numerous appeals it submits. Particular to this Project, SAFER also argued that the Project would cause a significant impact on a historic resource regarding an adjacent historic building that would be left fully intact and in place by the Project.

Prior to the CPC hearing, the glaring deficiencies in the SAFER Letter and its alleged expert reports were addressed in separate technical memoranda submitted by the expert Project CEQA consultants, including:

- 11/13/24 Technical Memorandum by CAJA Environmental Services (CEQA Consultant): SAFER misrepresents expert regulatory guidance on Health Risk Assessments ("HRAs"). Short-term diesel emissions from a few months of mobile construction equipment operation are not considered significant by expert regulators and are not required to be analyzed in HRAs. HRAs are not valid tools for such analyses, which assess increases in lifetime cancer risk based on long-term exposures over a 30-year span. HRAs are an inappropriate tool for assessing mobile source construction emissions lasting only a few months. Such short-term emissions from individual construction projects are not considered significant public health risks by the expert agencies that regulate air emissions.
- 11/12/24 Technical Memorandum by Historic Resources Group (Historic Resources): SAFER's claim that the Project would significantly impact the neighboring historic Roseberry Building is false. The Project would entail the removal of a non-historic metal staircase on the rear "back of house" side of the Roseberry Building, which is not a historic feature, where that back side of the building is bare and does not contain the notable historic design features located on the other three sides of the building. Those notable historic features will remain fully intact and visible from the outside with the Project in place. Thus, no "significant impact" under CEQA's applicable "material impairment" standard for historic resources would occur. A material impairment only occurs where the character defining features that make a building eligible for historic designation are destroyed or damaged in a manner that negatively impacts the historic eligibility of the building. The Roseberry Building's character defining features would not be affected at all by the Project, so no significant historic impact would occur. SAFER's contrary claim is baseless, relying on the absurd argument that blocking light into the building on the rear, back-of-house side somehow causes a significant impact on the building. The claim is not worth serious consideration.
- 11/12/24 Technical Memorandum by Douglas Kim + Associates (Air Quality and Noise Expert): SAFER's diesel particulate matter HRA is unreliable and improperly ignores the valid qualitative



February 6, 2025
Page Three

analysis of impacts from short-term construction diesel emissions prepared for the Project. SAFER's HRA is based on various unsupportable assumptions that improperly overstate health risks, including using incorrect larger and more numerous particles to stand in for diesel particulate matter, improperly extending the period where construction diesel emissions would occur *by five-times*, and significantly overcalculating the purported risk to young persons, among other improper assumptions and deficiencies. SAFER's HRA is thus fundamentally invalid and cannot be relied on. SAFER's other claim that the Project would cause significant indoor air impacts from formaldehyde gas in certain composite wood materials is based on improper speculation about the building materials that would be used in the Project, does not address an issue regulated by CEQA – which only addresses outdoor air quality impacts that affect the public at large, assumes decades of steady formaldehyde emissions where the data shows formaldehyde emissions from composite wood materials tail off substantially after only a few years, and ignores the state regulations that comprehensively address formaldehyde gas in composite building materials, which are the state's chosen method of dealing with the issue of formaldehyde in composite wood construction products, not CEQA. Finally, SAFER's allegations of a significant noise impact improperly ignore the CEQA noise study prepared for the Project showing no such impact and are supported only by a noise memorandum that provides no information on the modeling assumptions underlying its baseless contrary analysis. By failing to disclose its key underlying assumptions, SAFER's legally irrelevant contrary noise analysis is not supported by substantial evidence and cannot be relied on.

SAFER's diesel, formaldehyde, noise and historic analyses are invalid and legally irrelevant under the "substantial evidence" test that applies to the City's adoption of the Class 32 Exemption for the Project. Under this standard of review, which is highly deferential to the City's decision-making authority, a court must "presume the agency's findings are correct and resolve all conflicts and reasonable doubts in favor of the findings."¹ "[A]fter resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, [the court] must affirm that finding if there is any substantial evidence, *contradicted or uncontradicted*, to support it."² Thus, if two or more inferences can reasonably be deduced from the evidence, a court "cannot substitute [its] deductions for those of the agency."³ In other words, where there are two conflicting expert opinions on a topic, an agency such as the City has the discretion to decide what expert it will rely on and a court cannot second guess that decision. Finally, to carry its burden under the substantial evidence test, SAFER must set forth "all of the evidence

¹ *Citizens for Positive Growth & Preservation v. City of Sacramento* (2019) 43 Cal.App.5th 609, 629.

² *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1114.

³ *Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 410.



February 6, 2025
Page Four

material to the City's finding, then show that that evidence could not reasonably support the finding."⁴ "Failure to do so is fatal" to SAFER's legal challenge.⁵

SAFER has comprehensively failed to carry its burden by failing to address the substantial evidence relied on by the City. Instead, it relies on legally irrelevant and substantively generic, invalid "expert" reports that do not constitute substantial evidence in the first place due to their aforementioned flaws. SAFER's appeal fails for that reason, alone. But even if SAFER's reports were substantial evidence, which they are not, the City has the discretion to rely on its own expert reports and staff analysis, which are in the record and provide valid substantial evidence in support of the City's adoption of the Class 32 Exemption for the Project. As a result, SAFER's appeal fails and should be rejected.

SAFER's diesel and formaldehyde arguments are invalid for the additional reason that, to establish a violation of CEQA on those issues, SAFER must demonstrate that the alleged diesel and formaldehyde impacts arise from an "unusual circumstance" pursuant to the "unusual circumstances exception" to CEQA categorical exemptions.⁶ To establish this exception, SAFER must show one of two tests: (1) that the project "has some feature that distinguishes it from others in the exempt class" and there is "a reasonable possibility of a significant effect due to that unusual circumstance," or, (2) in the alternative, that "the project will have a significant effect on the environment" with certainty.⁷

With respect to the first unusual circumstances test, with respect to formaldehyde emissions from construction materials, SAFER defeats its own unusual circumstances argument by arguing that such materials are commonly used in multifamily construction projects, including infill development. Thus, the use of such materials cannot, based on SAFER's own argument, be a feature that distinguishes the Project from "others of the exempt class" of urban infill developments the Class 32 Exemption applies to. Similarly, the use of diesel-powered construction equipment is ubiquitous in virtually all construction projects, including multi-family urban infill development, so there is no unusual circumstance involved there, either. SAFER thus cannot make the first showing required to establish the unusual circumstances exception because it does not identify any unusual circumstances. Even so, as noted above, SAFER's deeply flawed expert reports do not constitute substantial evidence of a significant impact, so SAFER's formaldehyde and diesel claims fail on both prongs of the first unusual circumstances test.

⁴ *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.

⁵ *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.

⁶ CEQA Guidelines, § 15300.2(c) ("A categorical exemption shall not be used for an activity whether there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.")

⁷ *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105 (emphasis added).



February 6, 2025
Page Five

With respect to the second alternative test, as noted, the profound flaws in SAFER's purported diesel and formaldehyde "expert" reports do not constitute substantial evidence that the Project may result in a significant impact, much less meet the much higher burden of establishing with certainty that such impacts "will" result. SAFER has thus failed in every regard to establish the unusual circumstances exception applies to its claims regarding alleged diesel and formaldehyde impacts. Its Appeal fails for this additional reason.

The CPC thus properly rejected SAFER's first appeal at the November 14th hearing, denying it in full. SAFER submitted the present CEQA Appeal to the Council on December 11, 2024. Rather than file any new materials or attempt to address the arguments raised by City staff and the Project's CEQA experts in response to the SAFER Letter, SAFER merely resubmitted the exact same SAFER Letter that was rejected by the CPC. SAFER has thus raised no new arguments in this Appeal.

On February 3, 2025, expert Air Quality Consultant Douglas Kim + Associates prepared an additional detailed technical memorandum further demonstrating that the diesel-emission HRA and the formaldehyde gas reports submitted by SAFER are invalid, stacking together false and unreasonable assumptions that are inconsistent with regulatory guidance and industry practice. Based on these improper assumptions, SAFER's alleged expert reports come to grossly inflated and unjustified health risk determinations. Again, these generic, cookie-cutter reports rehashed with all of SAFER's many appeals are deeply flawed and do not ultimately support SAFER's farfetched claim that a standard new multi-family residential development project built in accordance with California and the City's strict building codes and environmental regulations poses a significant human health risk to the surrounding community and future residents.

This is yet another in SAFER's ongoing assault on housing projects in the City. It continues to hold up such projects with a seemingly endless string of baseless administrative appeals, all with the same invalid, generic "evidence." In the midst of a historic housing crisis, we publicly urge SAFER and LiUNA to cease abusing CEQA and the City's appeal process in this manner. These appeals delay and sometimes stop much-needed housing from being built and waste tremendous City staff time that should be put to far better and more productive purposes. SAFER's improper and invalid Appeal should be rejected in full.




February 6, 2025
Page Six

We thank you for your time and consideration.

Best regards,

DLA PIPER LLP (US)



Andrew Brady

cc. David Woon (david.woon@lacity.org)