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May 22, 2008

Hand Delivered

Members of the Town Council of Yucca Valley  
Monterey Business Center  
58928 Business Center Drive  
Yucca Valley, CA 92284

Re: *Yucca Valley Retail Specific Plan Environmental Impact Report [SCH 2004071127]*

Honorable Mayor and Members of the Town Council of Yucca Valley:

I am submitting this letter on behalf of Citizens for Responsible Equitable Environmental Development (“CREED”) and other citizens in your community who are concerned about the sufficiency of the Environmental Impact Report (the “EIR”) for the Yucca Valley Retail Specific Plan (the “Project”) under the California Environmental Quality Act (California Public Resources Code Sections 21000, *et seq.*: “CEQA”) and the State Guidelines for Implementation of CEQA (Title 14, California Code of Regulations Sections 15000, *et seq.*: “CEQA Guidelines”). On behalf of them, I submit this letter urging that you do not approve the Project tonight unless and until serious flaws in the EIR are corrected. I request that this letter, along with all attachments to it, be included in the record of the Town’s proceedings for the Project.

1. The EIR Fails to Disclose the Complete Scope of Potential Impacts Because It Is Predicated Upon an Underestimated Baseline

As a threshold matter, the EIR’s analysis of traffic impacts is flawed because the baseline upon which the analysis was conducted was underestimated. Failure to use a proper baseline resulted in the oversimplification and unjustified dismissal of significant traffic impacts.

It is well established that the purpose of an EIR is to provide public agency decision-makers and members of the public with an informational document that explains potentially significant environmental impacts and feasible mitigation measures. (Pub. Res. Code § 21002.1; Guidelines § 15121; *Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 Cal.App.3d 817, 821-822.) In order to be useful, however, the EIR must accurately identify what significant impacts exist. “[T]he significance of a project’s impacts can be ascertained only if the agency first establishes the physical conditions against which those impacts are to be measured.” (Michael H. Remy et al., *Guide to CEQA California Environmental*

*Quality Act*, 198 (11<sup>th</sup> ed., Solano Press 2007).) The idea is to compare “what will happen if the project is built with what will happen if the site is left alone.” (*Woodward Park Homeowners Assn, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707 (“*Woodward Park*”).)

The rule for what constitutes an environmental baseline is set forth in Guidelines section 15125(a), which provides that:

An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significantly.

Applying this rule to projects involving the development of raw land, it follows that significant impacts are determined by comparing the status of the land with the project against the status of the land as it is. Indeed, the Fifth District Court of Appeal in *Woodward Park* held that an environmental impact report prepared for the development of a commercial/retail shopping center on vacant land was “inadequate as an informational document because it failed to analyze consistently and coherently the impacts of the project relative to leaving the land in its existing physical condition,” which was undeveloped. (*Woodward Park*, 150 Cal.App.4th at 710.) “CEQA nowhere calls for evaluation of [environmental] impacts of a proposed project on an existing general plan; it concerns itself with the impacts of the project on the environment, defined as the existing physical conditions in the affected area.” (*Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354.)

The *Woodward Park* court was concerned that the “EIR had a dominant theme of comparing the proposed project with build-out under existing zoning, combined with a scattered, partial discussion of some of the project’s impacts relative to vacant land.” (*Woodward Park*, 58 Cal.Rptr.3d at 120. According to the *Woodward Park* court, this approach led to the “EIR never present[ing] a clear or a complete description of the project’s impacts compared with the effects of leaving the land in its existing state.” (*Id.* at 121.)

2. The EIR's Traffic Analysis Is Flawed

Like the EIR in *Woodward Park*, the EIR for the Yucca Valley Retail Specific Plan is inadequate in light of CEQA because it does not establish an honest baseline. As explained in Orosz Engineering Group's peer-review of the EIR's traffic study (Tab 1), the baseline was flawed for at least five reasons.

First, the EIR's baseline underestimated existing conditions. That is, the traffic section of the EIR notes that the existing traffic count data is from 2005. The data included in the technical appendix notes intersection traffic counts dated June 23, 2004 and vehicle classification counts in 2005. The traffic study is dated July 2006 and the Draft EIR is dated July 2007. Traffic volumes more than two years old are typically too stale to use in a significant EIR (22 study area locations) in a growing area. At a minimum, the EIR should have use traffic data less than two years old to begin the analysis.

Second, the EIR's baseline used an inaccurate growth rate assumption of 3% per year. Based on CalTrans traffic data, the historic growth rate along Highway 62 within the study area has grown between 2% and 7% per year, with the average growth rate of 4.3%. Nearby, the growth rate on one portion of Highway 62 has been over 10% per year. The growth rate is high enough not to rely on existing traffic data more than two years old to be representative for the basis of an environmental document.

Third, the EIR's baseline used a gross project trip generation was underestimated. There are significant problems with the data presented in Table 4.15D. One is the primary trip rate for the Retail Store (229,000 SF). The land use code used in the EIR represents a small free-standing discount store. The average building size for the ITE land use code 815 is 106,000 SF. The project is more than double that size. The other is that there have been published studies in the ITE Journal, including one published in August 2006 (Tab 2), that identify much higher PM peak hour trip generation rates for buildings like the one proposed in the EIR.

Fourth, the EIR baseline overestimated pass-by trips. The ITE Trip Generation Handbook reference is outdated. The current handbook is dated March 2001. The current handbook does not recommend a pass-by factor for Land Use Code 813 (Free-standing Discount Superstore) due to its nature as a destination, not somewhere you stop by on your way. Due to the size of the building (over 200,000 SF) and size of parking field (over 1,000 spaces), this type of facility does not lend itself to a quick in and out trip.

Finally, the EIR's baseline overestimated internalized trips. By adding up the 10% internalized trip value, which by itself makes some sense, represents 42.5% of the total traffic generated by the Fueling Station and Fast Food combined. Just the 10% of the Retail Store traffic represents 33% of the trips generated by the Fueling Station and Fast Food traffic, more than the 10% internal trip estimate.

To summarize, by relying on an underestimated baseline and underestimated trip generation, the EIR's analysis of traffic impacts is flawed because impacts that would otherwise be identified as significant had a proper baseline been used go unmitigated and are disregarded.

3. The EIR Relies on Wal-Mart's Objectively Flawed and Incorrect *Market Impact Study*

In concluding that the Project would not lead to urban decay, the EIR relied on the *Market Impact Study* ("MIA") that was prepared by Wal-Mart's own consultant: The Natelson Dale Group ("TNDG"). Apparently, Town staff accepted its conclusions that the proposed Wal-Mart Supercenter will have no significant impact on other area retailers *carte blanc* and without any peer review. However, according to a peer review of TNDG's MIA conducted by Professor Philip King, an internationally-recognized authority (Tab 3), the "no significant impacts conclusion" that TNDG reached simply cannot be supported based upon the factual inaccuracies (and, in several cases, complete lack of data) that pervade it.

To put it bluntly, having Wal-Mart's own consultant prepare the MIA is the classic fox guarding the henhouse. TNDG will say anything it needs to reach the conclusion Wal-Mart wants. For example, in the analysis TNDG prepared for Wal-Mart's lawyers in the City of Yucaipa (Tab 4), it assumed that existing annual grocery sales in that city were in line with regional averages: about \$400 per square foot. On the other hand, when TNDG analyzed the grocery store impacts resulting from it building a Wal-Mart Supercenter in the City of Perris (Tab 5), it assumed that existing annual grocery sales in that city were an astonishing \$865 per square foot! TNDG's Perris study was subsequently peer-reviewed by Professor Alan Schlottmann who, not surprisingly, found the \$865 number posited by TNDG ludicrous. (Tab 6)

As Professor King notes, purely economic impacts are not the purview of CEQA. However, given the challenging economic times for cities, I would strongly suggest that you carefully consider the most current and definitive study on the economic impacts resulting from Wal-Mart Supercenters. According to that study, published last year in the *Journal of Urban Economics* (Tab 7), a single supercenter reduces retail employment by about 150 workers and leads to a decline in retail employment earnings of about \$1.5 million. Earlier

studies have similarly confirmed the tax revenue superiority of local retail over national “big box” retailers and the fact that dollars spent at local retailers are more likely to remain in the community. (Tab 8.) In the specific case of Wal-Marts, crime levels often skyrocket, putting further strains on local government resources. (Tab 9.)

4. The Town Has a Duty to Adopt Any Feasible Alternative that Would Reduce or Eliminate the Project’s Adverse Impacts

Both CEQA and the CEQA Guidelines instruct Lead Agencies “not [to] approve projects as proposed if there are feasible alternatives...available which would substantially lessen the significant environmental effects of [a] project.” In fact, alternatives that would lessen environmental impacts *must* be adopted if feasible. (Pub. Res. Code §§ 21002, 21181; Guidelines § 15021(a)(2).) The “policy of the state” reflected in CEQA is that projects with significant environmental impacts *may not* be approved “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects...” (Pub. Res. Code § 21002; Guidelines § 15021(a)(2).)

As the California Supreme Court recently stated:

CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are *truly* infeasible. Such a rule, even were it not wholly inconsistent with the relevant statute (*id.*, § 21081, subd. (b)), would tend to displace the fundamental obligation of “[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so” (*id.*, § 21002.1, subd. (b)).

(*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 368.)

The extent of the alternatives to be analyzed, according to CEQA Guidelines Section 15126.6 is “a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.”

The most manifestly feasible alternative that the EIR should have considered is development of the Project as an innovative and sustainable green building consistent with Wal-Mart's newly-established and environmentally-friendly "sustainable future" strategy. (Tab 10.) While Wal-Mart's sincerity on this issue has been seriously called into question (Tab 11), by Wal-Mart's own admission it has already developed and tested a number of supercenters nationwide that were built on principles of "innovative green technologies designed to reduce operational and construction waste, use recycled and renewable materials, and conserve water and electricity." (Tab 12.) Notably, this alternative is itself a global warming mitigation measure that, if adopted, would not only lessen greenhouse gas emissions, but also reduce impacts related to air quality, waste, water quality, and noise.

Moreover, in March of this year Wal-Mart announced the opening of

its most energy efficient U.S. store – the HE.5 prototype – that will use up to 45 percent less energy than the baseline Supercenter. Building upon learnings [sic] from previous high efficiency stores Wal-Mart opened in 2007 and 2008, the HE.5 begins a new series of prototypes designed for specific climates. This facility is western climate-specific, meaning the efficiency gains are made possible by innovations designed for the conditions of the region.

(Tab 13; emphasis added.) Also recently, Wal-Mart announced the roll-out of a "solar power pilot project" with the goal of such installations generating "up to 30% of the power for each store on which it is installed." (Tab 14.) Consequently, the Town Council needs to ask itself *why* it would allow a Wal-Mart supercenter to be built in the Town to 20<sup>th</sup> Century standards when Wal-Mart is already building these stores to environmentally sensitive 21<sup>st</sup> Century standards.

The EIR claims that the general Project objective "is to provide a new retail commercial use to the Town of Yucca Valley." Subsumed in this general objective is a more specific objective to "Allow the potential for development of high quality commercial uses within an *undeveloped* portion of the Town." While this is unacceptable for the reasons set forth above, alternatives need not meet all project alternatives to be considered feasible. (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477; Guidelines § 15126.6(b).) While it is true that the "no project" alternative would not meet any of the Project objectives, a reduced project size alternative is reasonable and cannot be rejected simply because it does not meet the stated objective of achieving the 233,000 square foot building objective.

Furthermore, the objectives for a project cannot be so narrowly defined so that they essentially preordain the selection of the agency's proposed alternative. Case law under CEQA's federal equivalent, the National Environmental Policy Act ("NEPA": 42 U.S.C. § 4331 *et seq.*) can be helpful in interpreting CEQA. Early CEQA cases relied heavily on NEPA case law. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 80; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 261.) "NEPA cases continue to play an important role in adjudication of CEQA cases, especially when a concept developed in NEPA decisions has not yet been applied to CEQA cases." (*Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 732.)

The position of the Seventh Circuit in *Simmons v. U.S. Army Corps of Eng'rs* (7th Cir. 1997) 120 F.3d 664, 669, is therefore relevant to this case:

The 'purpose' of a project is a slippery concept, susceptible of no hard-and-fast definitions. One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence). The federal courts cannot condone an agency's frustration of Congressional will.

The District of Columbia Circuit Court of Appeal similarly said:

An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action.

(*Citizens Against Burlington v. Busy* (D.C. Cir. 1991) 938 F.2d 190, 196.) Thus, the rejection of a less intense development based upon an artificial project objective was improper. The EIR identified the "Reduced Intensity Commercial Alternative" as the environmentally superior alternative. This alternative was rejected in part because it does not comply with the objective of the 233,000 square foot building plan. This too is not a proper ground for rejecting the environmentally superior alternative.

##### 5. The EIR's Discussion of Wastewater Impacts to Groundwater Is Flawed

The EIR's conclusion that the Project will not result in groundwater and wastewater impacts is incorrect in many ways. First, it projects that the Project will generate "an anticipated combined average flow of approximately 9,620 [gallons per day]" of wastewater.

(4.16-7.) Tellingly, it notes that, “These numbers are based on information provided by Wal-Mart” and its consultant, Nasland Engineering.” (*Ibid.*) It then goes on to note that the Project will accommodate “9,620 gallons per day of wastewater generated by the Project” by installing “A 10,000 gallon on-site” septic system. (3-7.)

When it comes to data provided by Wal-Mart and its consultants, all cities are well-advised to follow the old Russian proverb, “Trust, but verify.” In fact, the standard rule of thumb for calculating a commercial retail project’s daily generation of wastewater is to assume 80 gallons per day of wastewater will be generated for every 1,000 gross square feet of the project. (See *L.A. CEQA Thresholds Guide*, Tab 15.) For example, this standard was recently employed in the EIR for a similar commercial retail project in the City of Hesperia. (Tab 16.) Had the EIR utilized the accepted formula, it would have disclosed that the Project will most likely generate some 18,640 gallons per day of wastewater effluent – almost double what the EIR stated!

This significant error translates into more extensive potential impacts to the Town’s groundwater, water that is internationally famous. (Tab 17.) This groundwater is projected to become even more precious than it already is. (Tab 18.) However, the increasing seepage of nitrates and other things into the groundwater basin is causing increasing degradation to its water quality, and the Regional Water Quality Control Board is currently embarking on a plan to create a “prohibition zone” that would “phase out current discharges of waste from septic systems in the Town of Yucca Valley.” (Tab 19.)

This is particularly significant, given that the EIR fudges on the timing for the actual construction of a wastewater treatment facility and not merely the Hi-Desert Water District’s previously approved nitrate removal project. (Tab 20.) Contrary to what the EIR claims, Hi-Desert Water District’s own information and timeline shows that it is still pursuing funding for the wastewater treatment facility that is so badly needed, and that even if such funding is quickly obtained the facility will not likely be completed until 2017. (Tab 21.)

The logical solution here would be for the Town to impose upon the Project, as an entirely feasible mitigation measure, the requirement that Wal-Mart utilize existing, proven technology (Tabs 22-24) to clean up its wastewater to a level where it can be utilized aboveground for landscaping and other non-potable purposes. Such an approach is currently being seriously examined in Los Osos, an unincorporated community of roughly 15,000 that is entirely on septic tanks and is under scrutiny by its Regional Water Quality Control Board. (Tab 25.)

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In sum, the EIR fails to perform its CEQA function of informing the public and decision-makers of the Project's true potential impacts. Consequently, before you approve the Project, you should insist that the EIR's defects be corrected and the EIR recirculated for public review.

Very truly yours,

LEIBOLD McCLENDON & MANN, P.C.

A handwritten signature in black ink, appearing to read "John G. McClendon". The signature is fluid and cursive, written over a white background.

By: John G. McClendon

A final postscript:

Lest the claim be made that our comments are somehow untimely, the following quote from *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1201, amply rebuts this claim:

“City appears to have thought that the public's role in the environmental review process ends when the public comment period expires. Apparently, it did not realize that if a public hearing is conducted on project approval, then new environmental objections could be made until close of this hearing. (§ 21177, *subd. (b)*; *Guidelines*, § 15202, *subd. (b)*; *Hillside, supra*, 83 *Cal.App.4th at p. 1263.*) If the decisionmaking body elects to certify the EIR without considering comments made at this public hearing, it does so at its own risk. If a CEQA action is subsequently brought, the EIR may be found to be deficient on grounds that were raised at any point prior to close of the hearing on project approval.”

cc: CREED