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February 10, 2015

Mayor and City Council
City of Wildomar
23873 Clinton Keith Road
Wildomar, CA 92595

RECEIVED
FEB 11 2015
WILDOMAR CITY CLERK'S OFFICE

Re: Public Hearing Item No. 2.1 on February 11, 2015 City Council Agenda (Wal-Mart Development Project--Planning Application No. 13-0086 and all related entitlements)

Dear Mayor and City Council:

On behalf of my client, CREED-21, I am writing in opposition to the above-identified Project. The Project should be denied because its approval would violate the California Environmental Quality Act ("CEQA"), the Planning and Zoning Law, the Wildomar Municipal Code, and other laws. These comments supplement any other objections that may be, or have been, offered in opposition to this Project. The specific reasons for denying the Project are set forth in Attachment 1 to this letter and are supported by evidence in the administrative record for the Project and the index and evidence submitted concurrently with this letter on DVD. My client is also relying on any other comments made on the Project that are not inconsistent with my client's specific reasons for denying the Project.

If you do not make a decision on the Project tonight, please provide me with written notice of the next public hearing or other meeting at which you will consider this Project. Additionally, please provide me with written notice of whatever action you do take tonight.

Thank you for your attention to this matter.

Sincerely,

BRIGGS LAW CORPORATION

Anthony N. Kim

Enclosures (index and DVD)

I. Traffic and Transportation

1.01 The finding that traffic impacts will be significant triggered the obligation to consider all feasible mitigation measures. The only mitigation measures considered involve the payment of development fees towards infrastructure improvements. No mitigation measures aimed at reducing traffic were considered. There are feasible mitigation measures available that reduce traffic levels. For example, the CAPCOA report ("Quantifying Greenhouse Gas Mitigation Measures") has an entire chapter dedicated to reducing traffic levels that, although aimed at mitigating greenhouse gas emissions, are equally applicable here. Such measures include increasing access to transit, developing the site in a way that promotes the use of alternative transportation, limiting parking supply, encouraging car-pooling, and taking measures that make alternative transportation more convenient (*e.g.*, providing bike parking and on-site showers). Ex. T1.

1.02 The mitigation measures identified are uncertain. For example, for improvements funded by fee assessments and constructed pursuant to capital improvement programs, the EIR states that improvements under each of the analysis scenarios--*i.e.*, existing, opening year, general plan buildout, etc.--will tier off the preceding scenario. Then the EIR goes on to state that "implementation of improvements identified herein is, however, subject to prerogatives and priorities of the City and other affected jurisdictions." In other words, the mitigation measures may or may not be implemented at all. In this respect, mitigation in the form of payment of fees is useless if it does not result in actual mitigation, and such mitigation does not constitute the type of certain, enforceable mitigation that CEQA requires.

1.03 While the EIR states that the project applicant will have to pay fees toward certain infrastructure improvements, it does not identify which program it will pay fees into for a specific improvement and it does not even identify the specific improvement that wil achieve the promised mitigation. The City's Capital Improvement Program and Development Impact Fee report fail to identify the specific improvements. *See, e.g.*, Exs. T2 & T3. Consequently, there is no way to determine that the required mitigation measures will achieve their goal or that the measures will be satisfied by the proponent.

1.04 The EIR states that certain infrastructure improvements may or may not coincide with construction and opening of the Project. Since the existing Lake Elsinore store may be operational at the same time as construction of the Project, there is the potential for traffic impacts resulting from the operation of both stores. However, there is no analysis in the EIR of this issue.

1.05 Insofar as the EIR states that certain infrastructure improvements outside of the City cannot be implemented or assured, such mitigation measures are impermissibly uncertain and thus not in compliance with the requirements of CEQA. All mitigation measures must be certain and enforceable.

1.06 The EIR states that the project applicant shall prepare a construction area traffic management plan to be reviewed by the City Public Works Department. Such a measure is uncertain and an improper deferral of mitigation. When mitigation is deferred, the EIR and final approval must specify the standards that will be met and/or the criteria that will be applied in evaluating the future specific mitigation measures so that, at the time of approval, the lead agency and public are satisfied that no significant impacts will occur in the future. The EIR and final approval do not accomplish this for the Project. This very issue was decided against the lead agency and the proponent of a Walmart Supercenter like the one contemplated by the Project. *See* Ex. T4, p. 5.

1.07 According to the draft EIR (p. 4.2-59, "[i]f an impacted facility requires improvements other than, or in addition to, those already identified within a regional or local fee program, the Project would contribute a 'fair-share' percentage toward the costs of the recommended improvements. Fair share fees assessed of the Project in this manner would be collected by the City and deposited to a dedicated Capital Improvement Project account, created for the express purpose of constructing the required improvements." Elsewhere the draft EIR indicates (*e.g.*, p. 5-7) that fair-share fees will be used to mitigate cumulative traffic impacts. The draft EIR indicates (*see, e.g.*, (p. 4.2-44, -59 & -75) that fair-share fees will be deposited to a dedicated Capital Improvement Project account (or accounts), created for the express purpose of constructing the required improvements. However, there City does not have a Capital Improvement Project account set up for each of the fair-share-funded mitigation measures identified in the EIR. *See generally* Ex. T2 (approved CIP including no such account(s)). Consequently, the Project violates CEQA because there are no certain, enforceable fair-share-based mitigation measures that have been adopted by the City.

1.08 According to the draft EIR (p. 4.2-59), all but one[1] of the mitigation measures require the payment of fees that will be deposited to a dedicated Capital Improvement Project account (or accounts), created for the express purpose of constructing the required improvements. Other than TUMF fees (themselves limited to regional mitigation measures), however, there are no Capital Improvement Accounts that have been created for the promised mitigation measures and nothing in the EIR or the approval documents to ensure that such accounts will be created. *See generally* Ex. T2 (approved CIP including no such account(s)). Consequently, the certain, enforceable mitigation measures required by CEQA are missing.

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[1] The one that does not require the payment of fees deals with construction traffic. That mitigation measure is also deficient, as explained above.

1.09 The first full paragraph on age 5-7 of the draft EIR indicates that the City and other agencies with jurisdiction over the improvements necessary to mitigate the Project's cumulative traffic impacts will be deciding mitigation measures in the future, "consistent with demonstrated demands and pursuant to priorities established through the jurisdictional capital improvements programs." The City is then recognized as "authoritative in determining when and how City improvements should be programmed and implemented to ensure near-term and long-term adequacy of the City roadway system." However, nothing in the EIR or approval documents enables the City to compel the proponent to take fund whatever improvements and other mitigation measures are determined to be necessary later on, and there is nothing that even hints at what such improvements and other mitigation measures might be. Likewise, there is no certainty that the cumulative-impact fees needed in the future will be collected or whether the improvements will be made or even what improvements will be necessary. Consequently, these mitigation measures fail to satisfy CEQA's requirements for certain, enforceable mitigation measures.

1.10 Approval of the Project would not be consistent with General Plan Policies C 2.1, C 2.2, C 2.4, and C 2.5. The required Levels of Service will not be maintained as a result of the Project. The Traffic Impact Analysis and the Supplemental Traffic Analysis (and thus the EIR because it relies on both of them) does not apply Level of Service standards via a program establishing traffic study guidelines to identify traffic impacts and appropriate mitigation measures; there is no such program that has been approved by the City and used by the traffic engineers. The conditions of approval do not require the construction of any and all improvements identified as necessary to meet Level of Service standards due to the Project's direct traffic impacts; to the contrary, the EIR repeatedly indicates that all but one mitigation measure involves the payment of fees toward improvements that may never be implemented.[2] The payment of fees to mitigate the Project's cumulative and indirect traffic impacts is not permitted because there is no substantial evidence that there are programs that will implement the improvements necessary to mitigate these impacts and no substantial evidence that there is funding sufficient to pay for such improvements (even if they otherwise would be implemented) in time to mitigate these impacts. Accordingly, the Project's approval would be inconsistent with the General Plan and therefore illegal.

II. Urban Decay

2.01 The finding that the Project will not result in significant urban decay is not supported by substantial evidence. For one, the EIR admits the Project will facilitate the closing of a Walmart store just a few miles away in Lake Elsinore. In an attempt to

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[2] The one mitigation measure dealing with construction traffic is defective for other reasons, described above.

downplay the urban-decay impact on the closing store, the EIR states that the soon-to-be vacant building may possibly be re-tenanted in the future. Not only is the assertion speculative and not supported by substantial evidence, but Walmart's own record on re-tenanting old buildings is highly suspect. Exs. UD1-UD6. Furthermore, the EIR's conclusion that "the shopping center would still function as a well-tenanted neighborhood-scale shopping center anchored by the existing Vons store" is baseless because the closing of an anchor store like Walmart negatively affects immediately surrounding businesses--hence the term "anchor" store, and there is no substantial evidence that Vons can assume the role of anchor tenant. Ex. UD 6.

2.02 The urban-decay analysis is defective as to grocery sales impacts because it does not consider the strong possibility that at least one of the eight supermarkets in the surrounding area will close. For example, the analysis states that currently the eight grocery stores are making $509 per square foot, which is more than the median rate nationally ($473) and in the western United States ($418). It then concludes that the addition of a Walmart store would not cause the closure of any of the existing grocery supermarkets as it would only decrease revenue for all grocery stores to $431 per square foot. The problem with the analysis is that it simply calculates the amount of revenue as being proportionate to the square footage of Walmart's grocery component. The truth is that the new Walmart store will decrease revenue much more drastically for other grocery stores because it sells a wide range of goods and consumers who otherwise wouldn't buy their groceries at Walmart if it were a stand-alone grocery store will now do so.

III. Air Quality

3.01 There are no mitigation measures aimed at the architectural coatings phase of the project. However, mitigation is available. The use of no-VOC paint (or at least low-VOC paint) could be required. *See* Exs. AQ1-AQ5 (regarding rules for using low-VOC paint in other air quality districts and availability of low- and no-VOC architectural coatings). Any finding that there are no additional feasible mitigation measures for air-quality impacts is unfounded.

3.02 There is no evidence that mere adherence to existing SCAQMD regulations, such as wetting demolition and/or construction areas, will mitigate air-quality impacts. Relying on compliance with regulatory requirements to satisfy mitigation requirements or to avoid having to disclose and analyze potentially significant impacts in an environmental impact report is not allowed under CEQA.

3.03 Insofar as the EIR states, under Mitigation Measure No. 4.3.4, that certain measures will be taken to reduce energy consumption, such measures are uncertain and are not made enforceable, in violation of CEQA. For example, the EIR states "that the items listed below are not all required and merely present examples." The measures must be identifiable and enforceable.

3.04 The EIR wrongfully relies on the South Coast Air Quality Management District's Localized Significance Threshold Methodology ("LST") because the LST only

applies "to projects that are less than or equal to five acres." Ex. AQ6. This Project exceeds five acres. The LST mass rate look-up table on which the City relies also only applies to projects less than five acres in size. *Id.* In fact, SCAQMD states that it "is recommended that lead agencies perform project-specific air quality modeling for larger projects." *Id.* Furthermore, the EIR fails to state the source receptor area and distance using the LST methodology, which is crucial in determining sensitive receptors. The EIR's disclosure, analysis, and mitigation measures for this impact are therefore insufficient under CEQA.

3.05 The EIR's conclusion that construction-emission impacts will be less than significant is not supported by substantial evidence. The LST methodology only assumes construction emissions occurring between 8 a.m. and 4 p.m. *Id.* Meanwhile, the EIR suggests that Project construction will occur between 6 a.m. to 6 p.m., which is an additional four hours or a 50% increase in emission hours.

3.06 The finding that all feasible mitigation measures for NOx emissions have been implemented is not supported by substantial evidence. Other feasible measures exist. Ex. AQ7.

3.07 The cumulative air-quality analysis is too cursory. Simply saying that VOC and NOx emissions are significant on a project level and thus the cumulative impacts are also significant does not provide the public or decision-makers with the information necessary to make an informed decision or to participate meaningfully in the process. The EIR must disclose all that it reasonably can. Further study is required.

IV. Greenhouse Gas Emissions

4.01 There is no clear baseline or significance standard used for analyzing the proposed project's greenhouse gas emission ("GHG") impact. The EIR's conclusions about significance are therefore not supported by any evidence.

4.02 The EIR's conclusion that State measures, Project design, and Air Quality Mitigation Measures will reduce GHGs in accordance with AB 32 is not supported by substantial evidence. Instead, the EIR provides two conclusory tables (Tables 4.3-17 & 4.3-18) with no supporting data or analysis demonstrating the measures will actually reduce GHGs. Furthermore, the conclusion is premised on, among other things, Mitigation Measure 4.3.4, which itself is uncertain; it states "that the items listed below are not all required and merely present examples." Altogether, the EIR's conclusions as to GHGs are not supported by any, let alone substantial, evidence.

4.03 The EIR's reliance on the business-as-usual approach to GHG analysis is inadequate because that approach only looks at GHG reductions through 2020 (*see* draft EIR, p. 4.3-45). The EIR itself assumes that the Project will have a 30-year project life (*see* draft EIR, p. 4.3-81), but then the EIR fails to look at GHG-emission significance thresholds or targets beyond 2020. Meanwhile, the California Air Resources Board has determined that a 13% reduction in the jurisdiction of the Southern California

Association of Governments (where the City is located) compared to 2005 GHG-emission levels is necessary in order to achieve the goals of Assembly Bill 32. Unfortunately, the EIR fails to look at the Project's effect on achievement of that reduction or with SCAG's or any other agency's policies/recommendations for achieving that reduction. Likewise, even though the Project is likely to be in operation in 2050 (since the 30-year-life assumption is entirely arbitrary but gets close to 2050), and AB 32 requires an 80% reduction over 1990 GHG-emission levels by 2050, there is no analysis of the Project's contribution to achieving, or impairing, that statutory reduction target. The GHG analysis in the EIR is therefore inadequate. *See* Ex. GHG1; *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts*, 231 Cal. App. 4th 1056 (2014).

4.04 There is no analysis of the Project's cumulative GHG impacts. The decision to forego such an analysis appears to be premised on the proposition that the Project's individual GHG impacts are less than significant. Because that premise is false, the EIR must analyze the Project's cumulative GHG impacts. Even if the premise were not false, the EIR must still conduct a cumulative-impact analysis with regard to GHGs because there are statewide and regional plans for reducing GHGs, and the Project will contribute to the very emissions that those plans seek to reduce. *See* CEQA § 15130(b)(1)(B) & (d).

V. Noise

5.01 Insofar as the EIR states that construction noise will be mitigated by requiring properly operating and maintained mufflers, consistent with ***manufacturers' standards***, the measure is non-specific and uncertain since the manufacturer of such vehicles is not identified in the EIR. Furthermore, the actual standard is not specified, meaning that the mitigation measures are not certain and enforceable.

5.02 The analysis of cumulative traffic-noise impacts is fatally flawed. The issue is whether a project contributes to a significant environmental impact, not whether the project causes a significant environmental impact. The EIR fails to adequately examine whether the Project will contribute noise impacts.

5.03 There is no substantial evidence supporting the EIR's conclusion that an 8-foot high screened wall will reduce noise levels below City standards.

VI. Public Services/Utilities

6.01 There is no substantial evidence supporting the EIR's conclusion that the Project incorporates adequate drainage and storm water management systems. For example, the conclusion is premised on a Project storm water management system that is yet-to-be developed and a "proposed drainage system" that will be approved somewhere down the line. As stated in the EIR, "if determined necessary by the City, the Project would also construct those stormwater management system improvements necessary to collect and convey off-site discharges currently entering the Project site from the east." This determination should have already been made and disclosed to the public.

6.02 Even if future water supplies are available for the project, the EIR fails to provide enough information about the environmental consequences of supplying that water. The informational purposes of an EIR are not satisfied unless decision-makers are provided with enough information to evaluate the pros and cons of supplying the amount of water that the project will need. The critical issue to be considered is not simply whether an adequate supply is available, but whether there is an adequate discussion of the foreseeable impacts of the project. While the EIR includes a discussion about water supply, it does not provide information about the impacts of supplying water such as the effect that the project's water use will have on water infrastructure or the availability of water for other purposes.

6.03 The amount of water used on landscaping is not disclosed in the EIR.

VII. Hydrology/Water Quality

7.01 There is no substantial evidence supporting the conclusion that the Project will have less than significant hydrology/water quality impacts. By way of example, the conclusion is premised on mitigation measures in the form of a storm water prevention pollution plan, water quality management plan, and an off-site drainage concept, to be approved at a later date. The EIR alleges these plans will include certain BMPs but qualifies the statement by stating that the listed BMPs are only examples. In this respect, the mitigation measures are uncertain and improperly deferred.

VIII. Biological Resources

8.01 The determination that the project has less-than-significant biological impacts after mitigation is not supported by substantial evidence. For example, while the EIR recognizes that the Project site lies within the Kangaroo Rat Habitat Conservation Plan, no analysis or mitigation is done with respect to this potential impact. The EIR also recognizes that the Project site has suitable habitat for burrowing owls but relies solely on compliance with the Multiple Species Conservation Plan to mitigate any potential impact to burrowing owls. Relying on compliance with regulatory requirements to satisfy mitigation requirements or to avoid having to disclose and analyze potentially significant impacts in an environmental impact report is not allowed under CEQA.

IX. Alternatives

9.01 The EIR does not analyze a reasonable range of alternatives. By way of example and without limitation, the EIR does not consider a smaller scale store. However, Walmart has frequently proposed smaller supercenters. *See* Ex. Alt1-6 (documents showing Walmart pursuing smaller stores).

9.02 The conclusions regarding the alternatives are not supported by substantial evidence.

X. Response to Comments

10.01 The City did not respond to comments as required by CEQA Guidelines Section 15088(b).

XI. Sufficiency of the Evidence

11.01 To the extent that you have attempted to make all findings required under Public Resources Code Section 21081(a) and (b), such findings have not been supported by substantial evidence in the record.

11.02 You have not made the findings under CEQA Guidelines Sections 15090 and 15091. To the extent that you have attempted to do so, such findings have not been supported by substantial evidence in the record.

11.03 Mitigation measures identified in the EIR have not been made certain and enforceable.

11.04 You have not made all of the necessary findings to support the parcel map. To the extent that you have attempted to do so, such findings have not been supported by substantial evidence in the record.

11.05 You have not complied with Government Code Section 66473.5. You have not made the requisite findings, and to the extent that you have made any findings under Section 66473.5 they are not supported by substantial evidence.

11.06. You have not complied with Government Code Section 66474. You have not made the requisite findings, and to the extent that you have made any findings under Section 66474 they are not supported by substantial evidence.

11.07 You have not made all of the necessary findings to approve the zone change. To the extent that you have attempted to do so, such findings have not been supported by substantial evidence in the record.

11.08 You have not made all of the necessary findings to approve the plot plan. To the extent that you have attempted to do so, such findings have not been supported by substantial evidence in the record.

11.09 You have not made of the necessary findings to approve the conditional use permit. To the extent that you have attempted to do so, such findings have not been supported by substantial evidence in the record.