

## LAW OFFICE OF MARC CHYTILO

ENVIRONMENTAL LAW

February 23, 2009

RECEIVED  
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CITY CLERK'S OFFICE  
SANTA BARBARA, CA

Clerk of the City of Santa Barbara  
City Hall  
Post Office Box 1990  
Santa Barbara, California 91301

RE: Appeal of Planning Commission Action February 12, 2009, 1900 Lasuen Road, El Encanto Hotel

Dear Clerk:

Please accept this letter in appeal of the approval of the four modifications, two development plan approvals, transfer of development rights approval, approval of the Mitigated Negative Declaration, adoption of conditions, findings, and all other actions undertaken by the Santa Barbara Planning Commission on February 12, 2009 concerning 1900 Lasuen Road, aka El Encanto Hotel, (hereafter "Approvals"). Santa Barbara Municipal Code ("SBMC") Chapter 1.30. The Appellants, each represented by this office, are Jan and Joanna von Yurt, Robert and Elizabeth Leslie, and Farrokh and Sally Nazarian, each residents of Mission Ridge Road adjacent to the El Encanto Hotel project site.

Although the appellants are residents, this appeal is supported in this appeal by dozens of City residents and several community organizations. The appellants are concerned both that the Approvals are unnecessarily and will substantially and adversely affect their quiet enjoyment of their properties and that the Approvals will cumulatively result in the loss of the El Encanto Hotel's historic charm and features.

The City has engaged in improper piecemeal processing of serial permit revisions dating almost immediately after the 2004 Planning Commission approval of the Master Plan. This piecemeal planning has led to demolition of historical buildings previously identified for renovation, the replacement of existing historical buildings with substantially larger and taller buildings, the incremental destruction of the majority of the site's historical landscaping, the premature relocation of three historical structures while the applicant revised plans for replacement development, and frustration of members of the Historic Landmarks Commission. The review that did occur was cursory - there has been no formal environmental review of any aspect of the 2004 Master Plan or any of the subsequent modifications and substantial conformity determinations - everything has been determined exempt from CEQA until the instant Project was submitted.

The Approvals improperly enable extensive building in setbacks, authorize exemptions from a number of zoning requirements, include improper Measure E allocations and involve transferring

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downtown commercial TDR Credits onto the El Encanto Hotel site in a manner that is incompatible with and detrimental to the surrounding area and exceeds City Charter §1508. The findings associated with the Planning Commission Approval are not supported by evidence and the conditions are inadequate to achieve compliance with the zoning ordinance. The Project is not appropriate in size, scale, use and configuration for the neighborhood and as proposed, is not beneficial for the community.

The Planning Commission improperly found that the Project conforms to the applicable R-H zoning, which requires that resort-residential hotel be developed and operated in such a way as “to insure the least possible conflict with or disturbance of the amenities attached to and associated with adjoining residential areas.” SBMC §28.27.005.

The Planning Commission improperly made its approvals in reliance upon a Mitigated Negative Declaration (“MND”) when the record contains substantial evidence supporting a fair argument of potential significant adverse Project impacts upon the environment. Applicant-proposed mitigation measures are ineffective and unrealistic. An environmental impact report (“EIR”) is required, and Project Approval without first preparing an EIR violates CEQA.

This appeal is also based on the landowner’s failure to fulfill their duty to maintain the historic El Encanto Hotel and its landscaping, designated as a Santa Barbara Structure of Merit, to preserve it against decay and deterioration as required by SBMC § 22.22.070. Specifically, the historical landscaping and historic landscape design concept has been destroyed by serial and piecemealed site renovations, relocations of structures, and removal of landscape plants and features.

The Planning Commission Approval is flawed due to the misrepresentation of the deliberations and conclusions of the Historic Landmarks Commission concerning the compatibility of certain portions of the Project, in particular the Utility Distribution Facility and Valet Parking Structure, with the surrounding community and the acceptability of these proposed design and configuration of these two structures. The Historic Landmarks Commission’s Project Compatibility Analysis relied on by staff and the Planning Commission failed to include public consideration of the criteria at SBMC § 22.22.145, as required by § 22.22.145.C.2 and thus fails to conform to the requirements of the municipal code.

The Planning Commission Approval violates the City Charter § 1506 since the height of several buildings exceeds thirty feet and two stories when calculated in accordance with the City’s adopted height calculation methodologies.

The Planning Commission Approval violates the growth limitations enacted as § 1508 of the City Charter and the specific limitations established at SBMC § 28.87.300 et seq. through the improper and excessive allocation of Measure E’s Minor and Small Addition allotments. Additionally, the Planning Commission Approval utilized incorrect numbers that overstated the

size and area of buildings authorized for demolition and for which credit was taken and relied upon to authorize the Approvals. Portions of the Project, including the Mission Village Podium Parking Structure, were not included in the square footage calculations for new development.

At the Planning Commission hearing, the applicant substantially modified the Project by purporting to relocate the aboveground portions of the Utility Distribution Facility outside the setback, which led the Planning Commission's majority to reverse its preliminary position. No designs or plans were provided, leaving the public to speculate about the amendments and this appeals contends that the changes must be adequately described to determine whether the need for other modifications is triggered. The Utility Distribution Facility was proposed as an integral part of the Valet Parking Structure, which the applicant did not remove from the setback. It is unclear how these structures are affected by the applicant's changes, and rather than request additional information, the Planning Commission improperly approved them at an apparent conceptual level, but taking final action without first obtaining final drawings and revised Project information. Similarly, the Planning Commission relied on an erroneous characterization that the Mission Village hotel room structures were considered separate structures on the basis that there would be dirt piled between them, while in fact the Mission Village hotel room structures are constructed on a single unified foundation (the Mission Village Podium Parking Structure) and are correctly defined as a single building.

This appeal will be supplemented by additional information and argument. We are awaiting the minutes of the Planning Commission hearing on February 12, 2009, mandatory notices of determinations, and an opportunity to review documents submitted to the record in advance of and at the February 12, 2009 hearing that are not available in advance of the filing deadline for this appeal.

This appeal incorporates by reference the issues, argument and evidence identified in this office's letter to the Planning Commission dated February 9, 2009, and our comments on the draft Mitigated Negative Declaration, including all exhibits and comments submitted by experts as part of those comments. These incorporated documents are each in the City's possession, however additional copies may be provided upon request.

While the appellants desire that the El Encanto Hotel complete its renovations promptly and reopen expeditiously, it is important that the approvals reflect the sensitivity of the site, the need to respect the surrounding residences and avoid disproportional impacts on any one group of homes, and that the City's planning requirements be properly adhered to. Our attempts to address and resolve our concerns with Orient Express have been met with defiance and gamesmanship. We implore the Council to recognize the rights of neighbors to a fair and equitable allocation of the Project's impacts to surrounding residences, and to reject the location of the entirety of the Project's "back of house" facilities in the previously historic and quiet northwest corner of the site.

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Sincerely,

LAW OFFICE OF MARC CHYTILO



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Marc Chytilo

# LAW OFFICE OF MARC CHYTILO

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ENVIRONMENTAL LAW

February 9, 2009

Planning Commission for the  
City of Santa Barbara  
Attn: Planning Commission Secretary  
630 Garden Street  
Santa Barbara, California 93102

*By Email:*  
*PCSecretary@SantaBarbaraCA.gov*

RE: El Encanto Hotel Master Plan Revision Negative Declaration

*Dear Chair Larson and Honorable Members of the Planning Commission:*

This office represents several families with homes adjacent to the El Encanto hotel. While these families have specific concerns regarding the impacts that the City's past and present approval of incremental changes to the Hotel and its grounds have had and will have on the quiet tranquility of their neighborhood, they also have a larger concern over the City's process for considering the environmental consequences of land use permitting decision, and the City's compliance with CEQA. The El Encanto Hotel is a community resource, with its historic and picturesque grounds set adjacent to Orpet Park and the Riviera campus. CEQA's environmental review process benefits the entire community, and the errors and non-compliance identified in our comment letter on the draft Mitigated Negative Declaration (DMND) letter are of broad community concern. We request that members of the Commission review those comments and the exhibits. References to Exhibits in this letter are the Exhibits attached to the Negative Declaration comments.

Many of the comments submitted on the DMND present substantial evidence supporting fair arguments that the Project may have significant environmental impacts. Substantial evidence in the record includes the fact-based expert opinions of an architect, historian, visual expert, and acoustical engineer, as well as documentary evidence and the observations of area residents on non-technical issues. The comment responses fail to recognize this substantial evidence and improperly rely on evidence from the City and Applicant's experts as justification for the City's failure to prepare an EIR. This approach is contrary to CEQA's very clear mandate that where substantial evidence in the record supports a fair argument that the Project may cause significant environmental effects, an EIR must be prepared even if substantial evidence also supports the opposite conclusion. *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 309. We therefore request that the Commission require the preparation of an EIR for the El Encanto Hotel Master Plan Revision ("Project").

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## **I. Introduction**

The landowners surrounding the El Encanto Hotel have worked successfully with prior hotel owners and operators, who respected the nature of the residential community and accommodated neighborhood concerns and values. This has not proven possible with the new owners, much to the disappointment of these residents.

The root of the community concern is the decision to move all of the “back of house” hotel operations to the northwest corner of the site. The northwest corner has long been a quiet, residential zone with three cottages and a small parking lot, extensive landscaping and trails connecting to the rest of the site. The three cottages were relocated and in their place a 10,000 square foot underground operations facility, with a laundry facility of unknown size and detail, staff facilities, and offices were proposed. To the north, in setback areas and underground, is proposed a new utility distribution facility with boilers, chillers and extensive heavy machinery. Atop these facilities will be a parking structure for valet parking. When that lot fills, Project cars will be valet parked at the proposed Mission Village podium parking structure, causing substantial numbers of new car trips on the roads along the northern side of the Hotel.

Neighbors living to the north and west of the site have raised their concerns with hotel managers, but of late, have been belittled and ignored. What was once a productive, positive relationship has devolved and it is now clear that Orient Express Trains, Hotels and Cruises has no interest in considering or accommodating the wellbeing of their neighbors. They apparently believe that the City is so desperate for revenues that neighborhood concerns can be ignored. Certainly the neighbors too want the Project construction completed and the construction fencing, lights, noise and interruptions to end, and their beloved El Encanto Hotel reopened. But El Encanto Hotel must play by the same rules that everyone else must abide, and must find a way to insure that their activities and operations will have the least possible conflict with the adjoining residential uses, as required by the zoning ordinance. As proposed, these conflicts have been exacerbated, not ameliorated, and thus the surrounding community must insist on a renewed planning effort to ensure that the El Encanto Hotel, once approved, will be a community resource that all can be proud of, and that will ensure the best possible harmony among neighbors.

## **II. Technical Issues**

### **a. CEQA Requires Preparation of an EIR**

CEQA “creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted.” *League for Protection of Oakland’s Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal. App. 4<sup>th</sup> 896, 904-905; Public Resources Code § 21151. CEQA provides that public agencies must prepare an EIR if the record contains

substantial evidence supporting a fair argument that the project may have a significant effect on the environment. *League for Protection*, 52 Cal. App. 4<sup>th</sup> at 904. “If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration.” *Sundstrom* 202 Cal. App. 3d at 309 (emphasis added). “Substantial evidence is “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached” and includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts” CEQA Guidelines, § 15384 (a-b); Pub. Resources Code § 21080 (e)(1) -(2). “[C]redible expert testimony that a project may have a significant impact, even if contradicted, is generally dispositive; and under such circumstances, an EIR must be prepared.” Guide to CEQA, 11<sup>th</sup> Ed., Remy et. al (2007), p. 262.

Comments submitted on the El Encanto DMND including credible expert testimony, present substantial evidence supporting a fair argument that the El Encanto Project may cause significant environmental effects. The comment responses fail to acknowledge the significance of this evidence, relying exclusively on the contrary opinions of the City and Applicant’s experts. The existence of expert opinion that the Project will not have significant environmental effects however is irrelevant to the threshold question of whether an EIR is required where, as here, the record contains substantial evidence showing the potential for significant impacts. CEQA Guidelines, § 15384 (a-b); *Sundstrom* 202 Cal. App. 3d at 309; Guide to CEQA at p. 262.

i. Substantial evidence of potentially significant visual impacts

The El Encanto Hotel is located in an area of extraordinary scenic value that offers panoramic views of Santa Barbara, the Pacific Ocean and the Channel Islands. The aesthetics of the hotel and grounds itself are a highly valued community asset. Numerous public comments including letters submitted by experts present substantial evidence supporting a fair argument that the Project may cause significant aesthetic impacts to the hotel and neighborhood. The comment responses disregard much of this substantial evidence, and inappropriately rely on the opinion of HLC as authoritative evidence of no significant impact.

Visual expert Ken Doud articulates in his comment letter “In my opinion, the potential for significant visual impacts is present due to the magnitude of the changes proposed for that portion of the El Encanto Hotel project that abuts in Mission Ridge Road.” Doud Comment Letter, Exhibit 21 to the LOMC comment letter. Mr. Doud also stated “It is my opinion that the proposed Project’s impacts to visual resources, when combined with the visual resource impacts associated with these other approvals and renovations, cause a considerable and substantial cumulative impact to the visual resources on the site and to the site from surrounding areas . . . [i]nclud[ing] the loss of screening vegetation, the substantial alteration of scenic views along the publicly accessible roads, and the addition of new building and walls visible and potentially visible form off-site and private residences.” *Id.* This fact-based expert opinion constitutes

substantial evidence supporting a fair argument that the Project may have significant aesthetic impacts, and therefore an EIR is required for the Project. Pub. Resources Code § 21080 (e)(1) - (2); Guide to CEQA, p. 262.

The comment response appears to misconstrue CEQA's definition of substantial evidence, stating that the Doud letter "does not provide any additional information that would constitute substantial evidence of potential significant visual impacts." Comment Response 3-4(e). Mr. Doud is a visual expert, and his comment letter expresses his fact-based opinion that the Project may have significant aesthetic impacts. Under CEQA, Mr. Doud's comments constitute substantial evidence and as such an EIR is required for the Project. *Id.*

The opinions of area residents regarding the Project's aesthetic impact provide further substantial evidence supporting a fair argument of potential aesthetic impacts. *Ocean View Estates Homeowners Ass'n Inc. v. Montecito Water District* (2004) 116 Cal. App. 4<sup>th</sup> 396, 402. Robert and Elizabeth Leslie, neighbors to El Encanto stated in their written comments on the DMND "the Character, Charm and Ambiance of this old hotel has been significantly impacted and reduced to the public who both live, walk and drive by the El Encanto (The Enchanted Place) on Mission Ridge and Alvarado." Leslie Comment Letter, p. 2. The Leslies go on to discuss visual impacts related to the north-west corner of the site, stating "[a] further negative impact on our neighborhood is the view from Mission Ridge and Alvarado which will be negatively impacted by having to look at a stucco 5 foot fence and around the parking lot and housing for the Central Utility Power Plant versus the historical 3 lovely old cottages and a botanical garden setting." *Id.* p. 3.

The Leslies raise an additional aesthetic issue, the obstruction of public views and private views across the Project site to the Arlington steeple, blocked by the height increase in the new Main Building. Architect Trevor Martinson presents documentary evidence including panoramic and close-up photographs showing the extent of view obstruction. Martinson Comment Letter, pp. 4-5 and Exhibits L and M. While construction of the Main Building has already been approved on a substantial conformity determination, it was improper to piecemeal out that segment of the hotel renovation such that it is not subject to environmental review. *See Burbank-Glendale-Pasadena Airport Authority v. Hensler ("Burbank Airport")* (1991) 233 Cal. App. 3d 577, 592. Moreover, visual impacts caused by the Main Building are relevant for the assessment of cumulative aesthetic impacts.

The comment responses do not even address most of the above substantial evidence, including the expert opinion of Mr. Martinson, supported with documentary evidence and the opinion of area residents. *See* responses 4-1 – 4-4. In response to the Leslies' letter, the comment response again reveals the misconstruction of CEQA which pervades the comment responses, specifically citing the opinion of HLC as somehow overriding other substantial evidence. *See* Comment Response 5-1. CEQA is clear that where the record contains substantial evidence supporting a fair argument that the Project may have significant aesthetic impacts, substantial evidence to the

contrary does not relieve the City of the obligation to prepare an EIR. *Sundstrom* 202 Cal. App. 3d at 309.

ii. Substantial evidence of potentially significant impacts to historic resources

Historian Mary Louise Days submitted written comments on the DMND, in which she details numerous deficiencies in the document, and states that an EIR is required. Ms. Days states “[t]he significance of the site and the substantial nature of the project’s impacts, including demolition, alteration, and a complete remake of the site are the bases of a potential significant impact, and an Environmental Impact Report is required.” Days Comment Letter, p. 3.

The comment response refers readers to a separate response (to Mr. Kellam deForest’s statement that an EIR is required), which provides a cursory response that once again misconstrues CEQA’s definition of substantial evidence. Here, Ms. Days, a bona fide expert in assessing impacts to historic resources, stated that in her expert opinion, the Project may significantly impact historic resources. This expert opinion constitutes substantial evidence and as such an EIR is required for this Project.

iii. Substantial evidence of potentially significant noise impacts

The Project includes new valet parking facilities and a “utility distribution facility” in close proximity to sensitive residential uses. The MND relies on an acoustical study with numerous defects and inadequacies as the sole basis for its conclusion that with mitigation, the Project will not cause significant noise impacts.

Acoustic expert Matthew McDuffee of Acentech reviewed the MND and acoustical study, and provided seven pages of substantive comments on the acoustical analysis and the Project’s noise impacts. These comments raise numerous deficiencies in the acoustical study prepared by Newsom Brown, including ambient noise measurements, traffic noise modeling, and assessment of the adequacy of proposed mitigation. Acentech Comment Letter, Exhibit 15 to the LOMC Comment Letter. Mr. McDuffee concludes that “the traffic noise level increase was potentially understated in the Newsom Brown report, which led to the incorrect “less than significant” statement issued in the Mitigated Negative Declaration and Draft Initial Study.” *Id.* p. 7. This fact-based expert opinion constitutes substantial evidence that the Project may cause significant noise impacts, and as such an EIR is required by CEQA.

The Comment response states that Newsom Brown prepared an addendum to address the concerns raised in the Acentech report. Comment Response 3-10. The Newsom Brown addendum merely attempts to explain each of the deficiencies raised in the Acentech report and does not provide any new data. The City cannot use this addendum to trump the substantial evidence presented by Acentech and somehow avoid preparing an EIR. Mr. McDuffee provided extensive evidence that the acoustical study performed for the MND is woefully inadequate and

the Newsom Brown addendum does not correct these deficiencies. CEQA does not permit an agency to hide behind its own failure to collect relevant data and “[d]eficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.” *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311.

iv. Substantial evidence of potentially significant land use impacts

CEQA provides that conflicts with applicable policies designed at least in part to mitigate or avoid a project’s effect on the environment are potentially significant land use impacts. CEQA Guidelines Appendix G; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930. The Project does not comport with zoning requirements and conflicts with the intention of Zoning Ordinance to “insure the least possible conflict with or disturbance of the amenities attached to and associated with adjoining residential areas.” S.B.M.C. § 28.27.005. The MND is absolutely silent on the issue of land use conflicts with surrounding communities, constituting either a gross oversight or a snub to adjoining landowners. Staff admits to being “aware of the concerns of the neighbors for sometime” (response to comments # 3-8) but makes no effort to examine the nature of these concerns, and more importantly, fails to evaluate the potential for conflict between the commercial hotel activities and the surrounding residential uses. The relevance and significance of this analysis is underscored by the zoning ordinance itself, as cited above, which establishes a duty by the City to “insure” least possible conflict. The term “insure” connotes an active obligation to secure performance, and cannot be interpreted to condone ignorance of the issue. Given that the analysis omits any evaluation of the issue, and the community has established a clear record of concerns, the environmental review document and Staff Report are each deficient for this omission.

Additional evidence of the significance of the land use incompatibility issues presented by this Project is found in the various numerical limitations embodied in the municipal code, zoning ordinance and General Plan. The Project also exceeds square footage allowed by CC&Rs applicable to the property and allocates an impermissible amount of square footage from the Minor and Small Addition categories of allowable square footage for nonresidential construction projects in violation of the Municipal Code. *See* S.B.M.C. § 28.87.300. The limitations on square footage are designed for the purpose of avoiding or mitigating significant environmental impacts, and substantial evidence of conflicts with such policies triggers the need to prepare an EIR. *See Pocket Protectors*, 124 Cal. App. 4<sup>th</sup> at 930.

The responses to the extensive discussion of land use impacts in our DMND comments and also in the comments of Architect Martinson and others misunderstand the significance of policy conflicts to the Project’s land use impact analysis. For example, our letter on the DMND observes that “[t]he MND completely omits a central category of Project impacts associated with the existence of incompatible land uses. [citations omitted] Omitting an entire class of potential impacts renders the MND inadequate.” LOMC Comment Letter, p. 20. The response to this comment incorrectly equates land use incompatibility with the specific noise, traffic and

historical impacts and concludes that because the MND found no significant impact after mitigation, there are no land use incompatibility issues. *See* Comment Response 3-8. This explanation misses the thrust of the numerous public comments discussing land use incompatibility, which is that the Project's failure to conform to so many applicable requirements demonstrates the Project's potentially significant impact to existing land uses. Comment Response 3-8 also evinces a misunderstanding of the relationship between policy conflicts and environmental impacts, stating that because the Zoning Ordinance allows modifications from setback requirements, that the Project's failure to conform with the setback requirements "is not an environmental issue."

The Staff Report deftly avoids one of the biggest issues of concern to the community, the utility distribution facility located in the northwest corner. The Staff Report relies extensively on the Historic Landmarks Commission review of many design review and, apparently, community compatibility issues (even though this is not in the Historic Landmarks Commission's charter and members of the public were admonished at the Historic Landmarks Commission meetings to narrowly focus their comments). The Staff Report and environmental review documents omit the Historic Landmarks Commission's November 12, 2008 discussion, wherein the Commission's minutes state: "Acceptance of this report does not confer the Commission's acceptance of the current configuration of the Utility Distribution Facility and garage as shown in the drawings." Exhibit 5. Staff prefers to cite an earlier hearing, before the Historic Landmarks Commission was made aware of the Project's piecemealing and when the applicant had insisted upon special approvals of the utility distribution facility to meet what were described as time-critical approvals. Given that the applicant has halted all work on the site and withdrew the application for a separate utility distribution facility approval, that justification was spurious. The Historic Landmarks Commission subsequently expressed dissatisfaction with the piecemeal review process and staff's confusing presentation format. The November 12, 2008 Historic Landmarks Commission minutes, and the individual comments expressed by members of the Historic Landmarks Commission, constitute substantial evidence supporting a fair argument of potentially significant Project land use compatibility impacts.

The fact that the Project requires so many exceptions from established requirements, and further directly violates the Municipal Code's limitation on allocating square footage from the Minor and Small Addition categories, constitutes substantial evidence supporting a fair argument that the Project may cause significant land use impacts. *See Pocket Protectors*, 124 Cal. App. 4<sup>th</sup> at 930.

v. Substantial evidence of potentially significant cumulative impacts

The proposed Project follows in a wake of numerous incremental and piecemealed substantial changes to the hotel and grounds including the complete demolition of the Main Building and its replacement with a taller and more massive building that is considerably bulkier than the previous building. The historic cottages in the Northwest corner were relocated without

memorializing the surrounding landscaping, and the serene quality of that northwest corner was completely eliminated by the removal of most of the landscaping around the three cottages with no mechanism for replacement using historically relevant plants and arrangements. Eucalyptus trees on the northern perimeter of the site, of the same vintage and thus presumably possessing the same character of the eucalyptus trees identified as historic by HLC, were cut down by the site owner without mitigation. The applicant began asking for modifications and changing the entitlements within months of the final approval of the Master Plan, beginning with a phasing process and leading to six substantial conformity determinations and a modification, prior to this request. None of those substantial conformity determinations or the modification underwent environmental review, and they cumulatively and adversely affected the site's historical resources, visual qualities and neighborhood compatibility. The previously approved demolitions and other changes establish that the Project will have cumulatively significant impacts including aesthetic, historic, and land use impacts.

b. Inadequate Responses to Comment

As discussed above, the responses to comment failed to recognize the substantial evidence submitted and improperly relied on their experts and evidence while disregarding experts with contrary opinions. It is well established that substantial evidence cannot be overridden by other substantial evidence to avoid preparation of an EIR. *Sundstrom* 202 Cal. App. 3d at 309. The existence of a clash of experts is itself indicates that an EIR must be prepared. Experts Doud, Martinson, Days and McDuffee provided their fact based opinion that the Project may have significant environmental impacts. Because this expert opinion is in the record, the Commission must direct the preparation of an EIR. Any decisions undertaken in reliance upon the MND constitute violations of CEQA.

c. Square Footage Issues

The Project involves the placement of a large amount of new square footage and activity onto a highly constrained site. These site constraints include its visibility by roadways that have scenic importance, its historic features and character, and the surrounding neighborhood.

i. Allocation Violates the Municipal Code

The Project requests an allocation of 7,021 square feet of non-residential square footage from the Minor Addition and Small Addition categories of allowable square footage for nonresidential construction projects. Staff Report, p. 2. Municipal Code section 28.87.300 however, provides that the "combined total of Minor and Small Additions shall not exceed a cumulative total of three thousand (3,000) square feet." The Project site consists of only one parcel (APN 019-170-022) and thus the allocation of 7,021 square feet from the Minor and Small Addition categories directly violates the Municipal Code. Any permit issued in violation of § 28.87.300 is null and void. §29.98.001.

ii. Approval Violates Recorded Covenants, Conditions and Restrictions  
Expressly Benefitting the Surrounding Community

The City's prior approval of expanded development on the site in 2004 is codified in Covenants, Conditions and Restrictions that, by their face, were required and recorded to benefit landowners surrounding the Project parcel. Exhibit 4. These legally binding and enforceable limitations included a total limit on additional development on the site. *Id.*, p. 2. The application at issue adds over 17,000 square feet of additional development to this site. This increased intensity of site utilization conflicts with the recorded Covenants, Conditions and Restrictions and creates further land use conflicts with surrounding landowners.

iii. Source of transfer of development rights credits

The application relies on 10,000 square feet of transferred development rights from another site. No substantive information is provided about the sending site, other than the MND's passing reference to development approved at 210-222 East Yanonali Street. No other information has been provided, even with a specific request to the planner. The TDR provision require findings of compatibility at receiving sites, § 28.95.060, an issue that is disputed in this matter. The City must demonstrate the existence and applicability of the sending site credits and the evidence supporting the findings necessary to utilize the transfer of development rights program.

## 2. Procedural Issues

a. Improper Piecemealing

CEQA prohibits an agency from splitting a project into multiple segments and conducting environmental review separately on each. This approach ensures "that environmental considerations not become submerged by chopping a large project into many little ones, each with a potential impact on the environment, which cumulatively may have disastrous consequences." *Burbank Airport*, 233 Cal. App. 3d at 592.

Numerous significant changes to the previously approved Master Plan have been permitted on the basis of Substantial Conformity Determinations and modifications in a piecemeal fashion. The sum of these incremental changes to the Hotel's historic structures and landscape, and aesthetics is significant. Segmenting out discrete pieces of the El Encanto alteration and processing them before preparation of the MND dilutes the City's review process and is contrary to CEQA's prohibition on piecemealing. *Id.*

b. The Project Is too Intensive for the Site

All existing structures located along the perimeter of the hotel site encroach into the required setbacks and/or into the public right-of-way. Staff Report, p. 8. Exacerbating this non-conformity problem, the utility distribution facility would encroach into the required front setbacks along both Alvarado Place and Mission Ridge Road. *Id.* The surface valet parking lot, Mission Village Cottages 32, 33, 34 and Cottages 27 and 28 also encroach into required setbacks. *Id.*

The numerous modifications to these setback requirements belie a project too intensive for this site. New development must be scaled back to prevent overcrowding of the site and associated impacts to the surrounding neighborhood, including aesthetics.

c. Improper Reliance on HLC

The response to comment states that HLC concluded that the proposed project will not result in a “substantial negative aesthetic effect or incompatibility with surrounding land uses or structures due to project size, massing, scale, density, architectures, signage, or other design features.” P. 7. This statement is not entirely accurate, as HLC members raised substantial concern over these visual compatibility issues on a number of instances. *See* LOMC Comment Letter, pp. 13-14. Moreover, the MND’s wholesale adoption of HLC’s conclusions without independent analysis, as required by CEQA, is inappropriate. *See Friends of La Vina v. County of Los Angeles* (1991) 232 Cal. App. 3d 1446, 1452-1456.

### III. Conclusion

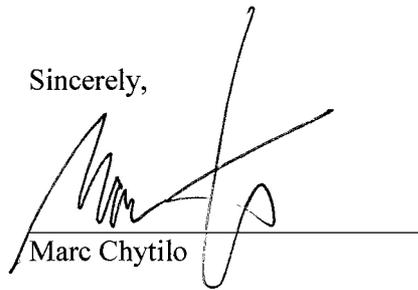
We respectfully request that the Commission refrain from approving the proposed Project until CEQA is complied with and there is clear Project compliance with the zoning ordinance and other authority governing permissible development on this site. We urge the Commission to direct the applicant to revise their plans for the utility distribution facility and the northwest corner of the site, and to work cooperatively with the community in this regard.

CEQA establishes that the environmental review document is supposed to be an environmental full disclosure document. The standard for preparation of an EIR is low -- any substantial evidence supporting a fair argument of a potentially significant impact. That threshold has clearly been crossed, and continuing with a Mitigated Negative Declaration is a disservice to the Planning Commission, the applicant and the public.

The City’s zoning ordinance, Measure E, transfer of development rights program, recorded Covenants, Conditions and Restrictions and the General Plan guide what development is appropriate at various sites in the City. After six substantial conformity determinations and a modification, the applicant now wants four more modifications and two highly questionable

allocations of additional development to this highly constrained site. This Project has grown into a large square peg that is trying to fit into a small round hole. These authorities set that standards for all development, and allowing extraordinary dispensations here renders these planning standards meaningless. The City has witnessed many developments that first seek a relatively nominal approval with limited or no environmental review, followed by an on-going series of modifications and substantial conformity determinations that dramatically change the initial approval and visit substantial incremental impacts on surrounding lands. The Planning Commission should not reward this conduct, and must ensure that the governing authorities are properly observed. This can only be achieved by denying the requested approvals for all the reasons stated above and sending the applicant back to decide what they really need, and submitting a single, complete, and fully analyzed application to gain approval.

Sincerely,



Marc Chytilo