THE RYAN LAW GROUP

September 6, 2022

VIA ELECTRONIC MAIL
citycouncil@manhattanbeach.gov

City Council of Manhattan Beach
1400 Highland Avenue
Manhattan Beach, CA 90266

Re: High Rose Project

Dear Members of City Council:

In preparation for tonight's Council meeting regarding the High Rose Project, below is a summary of the law and applicable facts which I believe mandates that the High Rose Project undergo a discretionary review to determine the environmental impacts posed by a luxury 4 story apartment complex.

MANHATTAN BEACH MUST CONDUCT AN ENVIRONMENTAL REVIEW OF HIGH ROSE: ITS HANDS ARE NOT TIED

A careful reading of the Density Bonus Law, recent case law and applicable Federal and State environmental standards support an environmental review of the High Rose project to evaluate how documented environmental risk would have a specific, adverse risk on public health and safety and whether such risks can be mitigated. Because this requires the City to exercise its judgment, the substance of this inquiry cannot be "ministerial."

A. Developer received approval for High Rose (per CDC 3-29-22 Approval, the "Approval") pursuant to Government Code 65915 ("Density Bonus Law" or "DBL") from the City of Manhattan Beach ("City"). The DBL includes concessions granted in accordance with Section 65915(d)(1) governing maximum wall/fence heights and setbacks. Section 65915 elsewhere provides that a permit approval pursuant to the CDL law is deemed non-discretionary. The developer has interpreted this to mean that CEQA does not apply.

B. The Approval does not cite the text of Section 65915(d)(1) of the DBL, but the statutory language includes a **mandatory condition precedent in order for the DBL approval. The City Council is required to determine whether such a "specific, adverse impact" exists and whether "there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact…."** The text reads as follows:

1. "(d)(1) An applicant for a density bonus pursuant to subdivision (b) may submit to a city, county, or city and county a proposal for the specific

incentives or concessions that the applicant requests pursuant to this section, and may request a meeting with the city, county, or city and county. The city, county, or city and county shall grant the concession or incentive requested by the applicant **unless the city, county, or city and county makes a written finding**, based upon substantial evidence, of any of the following:

… (B) **The concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety** or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households.

2. Government Code Section 65589.5(d)(2) states: (d) A local agency shall not disapprove a housing development project …. unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following … (2) The housing development project … **would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable** to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete. The following shall not constitute a specific, adverse impact upon the public health or safety…."

C. Here, the risk of indoor vapor intrusions of carcinogens and reproductive toxins has been documented and the City Council must determine **whether there is a specific adverse impact on public health and safety and whether there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact** as mentioned above.

1. The groundwater plume migrating into Manhattan Beach has resulted in indoor air quality impacts in homes in the El Porto neighborhood. *See, e.g.,* Los Angeles Times, June 12, 1988 ("Chevron Plant In El Segundo Lays Plans For Massive Oil-Leak Cleanup").

a) The Los Angeles Times article stated in part:
(1) "Chevron will retrieve 252 million gallons of oil and petroleum products that have spilled into the ground under the refinery …. [s]tate and local officials say [t]he bulk of the spill is under the refinery, although some of it has seeped a

block or two beyond its boundaries in El Segundo….."

2. Although the southern edge of the refinery that abuts Manhattan Beach largely is not subject currently to development (indeed most of it is maintained as support infrastructure for the refinery), this particular project is the notable exception.

3. A review of historical aerial photographs that are publicly maintained by the SWRCB and the DTSC, makes it apparent that the High Rose proposed project is part and parcel of the refinery itself and adjacent to on the order of three dozen above-ground petroleum tanks. *See,* Environmental Audit, Inc., Hazardous Waste Storage And Treatment Facility, Chevron Products El Segundo Refinery, Figure 9, February 8, 2016.

4. Chevron also noted in separate filings that petroleum constituents had partitioned from a liquid phase in the groundwater plume into a vapor phase that had impacted some homes in the El Porto neighborhood.

5. Among these constituents is benzene, is a naturally occurring constituent of crude oil, as well as refined petroleum products.

6. The main compounds in petroleum that typically are required to be assessed are benzene, toluene, ethylbenzene and xylenes (known collectively as BTEX).

7. Benzene, in particular, is extremely toxic. Benzene thus was among the very first chemicals listed as both a "carcinogen" and a "reproductive toxin" deemed to be "known to the State of California" as such pursuant to Proposition 65.

8. Although the developer submitted an environmental report to the City (prepared by Citadel EHS (Applicant's paid consultant) and dated February 20, 2020) , **that report failed to address the question mandated by the statute as to whether the indoor air vapor intrusion constituted "a specific, adverse impact upon the public health or safety,**" or, if so, whether such impacts could feasibly and satisfactorily be mitigated or avoided.

9. Rather, the Citadel report was a Phase I report conducted, as stated therein in Section 1.3 "in accordance with the American Society for Testing and Materials (ASTM) Standard of Practice E1527-13 ("ASTM Standard").

a) The ASTM Standard is a real property transfer due diligence method designed to potentially entitle a buyer of real estate to

assert an affirmative defense as a "bona fide prospective purchaser" under the federal Superfund law, 42 U.S.C. Section 101(35). **It is not designed to assess whether the type of condition contemplated in this case specific to Government Code Section 65589.5(d)(2) exists pursuant to numerous government-mandated standards designed to address this question, including:**

(1) **USEPA's Vapor Intrusion Guide (October 2015)**
(2) **USEPA's Office of Solid Waste and Emergency Response, Technical Guide for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Vapor Sources to Indoor Air, Pub. No. 9200.2—154 (June 2105)**
(3) **ASTM Method E2600 (Vapor Encroachment Condition)**
(4) **Screening and Evaluating Vapor Intrusion, Cal-EPA - California Department of Toxic Substances Control and California Water Resources Control Boards (February 2020)**

b) The Citadel report (submitted by the Developer) conceded the threat to the site from methane and noted that if the site were located in the City of Los Angeles it would be subject to the methane assessment and mitigation requirements contained in LAMC 91.106.4.1 and Chapter IX, Division 71 thereof) but while admitting these threats could not be "ruled out," it nonetheless relied on the jurisdictional inapplicability of the LAMC within the City of Manhattan Beach.

D. **Neither the Developer nor the City Planning Commission evaluated the documented risks in light of the specific, government-mandated standards as required under the DBL. The City's hands "are not tied" in this matter, in fact the City has the burden to make this evaluation to keep its citizens' safe.**

E. Because the City has the burden to make the evaluation of documented environmental risk, the subject requires the City's judgment. Accordingly, this process cannot be called "ministerial."[1] Recent case law supports this approach.

1. In *Mission Peak Conservancy v. SWRCB*, 72 Cal App. 5th 873 (2021), the court relied on the analysis used by the California Supreme Court in *Protecting Our Water & Environmental Resources v. County of*

[1] Certain affordable housing-related enactments, such as 2017's SB 35, employed the concept upon which the Developer in this matter relies, namely, that certain project approvals are not "discretionary," but rather simply "ministerial, thus, arguably, beyond CEQA.

Stanislaus, 10 Cal. 5th 479, 489 (2020) ("POWER") to set out the test that applies in this case:

Whether an agency's action is discretionary or ministerial turns on the applicable substantive law. The test is whether the law governing the agency's decision to approve the project gives it authority to require changes that would lessen the project's environmental effects[2]. If so, the project is discretionary; if not, the project is ministerial.

2. Here, the City is empowered by the DBL to evaluate how documented environmental risks may jeopardize residents' health and safety based on published Federal and State standards and determine whether mitigation strategies can be implemented.

a) *Mission Peak Conservancy* noted that project approval deemed ministerial was similar to completing a checklist with fixed standards determinable without using judgment. It is not "ministerial" when the agency was required, or otherwise had to, exercise its judgment. The *Mission Peak* court observed the absurd result of making an environmental determination ministerial because in such case, **"[c]onducting an environmental review would be a meaningless exercise because the agency has no discretion to reduce a project's environmental damage by requiring changes.** [3]

CONCLUSION:

The published Federal, state and local vapor intrusion guidance, coupled with the language of the DBL requires the city to do nothing less than a review of how the project might cause environmental damage and how to mitigate the risk. This is not the "one size fits all" checklist that is referred to in POWER that equates to a ministerial review. In this case, the agency needs to evaluate, and consider possible mitigation of measures that could allow the project to proceed safely.

[2] See Guidelines, § 15002, subd. (i)(2) ; *POWER , supra ,* 10 Cal.5th at p. 493, 268 Cal.Rptr.3d 148, 472 P.3d 459. See also *POWER , supra ,* at p. 493, 268 Cal.Rptr.3d 148, 472 P.3d 459.
[3] *POWER , supra ,* at p. 494, 268 Cal.Rptr.3d 148, 472 P.3d 459 ; Guidelines, § 15040, subds. (b)-(c).

Thank you for your consideration of these issues.

Very Truly Yours,

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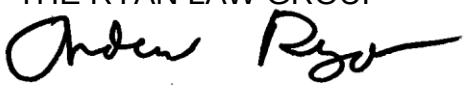

Andrew T. Ryan