CHILL THE BUILD
August 12, 2022

Highrose: A Path to Safety First

A. FACTUAL BACKGROUND

- Applicant Highrose El Porto, LLC applied for Precise Development Plan and associated entitlements on March 4, 2021 for a four-story, 79 unit (including six "very low-income household units"), residential project, including an attached 127 vehicle subterranean garage, to be located at 401 Rosecrans Ave. (APN No. 4137-001-031) (former Verandas banquet facility) and 3770 Highland Ave. (APN No. 4137-001-027) (former Tradewinds Village).[1]

- The project application was deemed complete January 6, 2022; thereafter, a claimed "non-discretionary" project approval was issued by Community Development Director Carrie Tai, as acknowledged by Frank L. Buckley, as permittee, on March 29, 2022 (PE-21-00015, CDP-21-00015, SUBDIV-21-00002, PDP-21-00001 and Tentative Parcel Map No. 083628).[2]

- Timely appeals to the Community Development Director's decision were filed with the Planning Commission in accordance with MBLCP Section A.96.160 and the Director's decision was affirmed by the Planning Commission on June 8, 2022.

- Timely appeals of the Planning Commission's decision were filed with the City Council, and the review of the decisions by the Community Development Director and the Planning Commission, along with the applicant's requested adoption of [Proposed] Resolution No. 22-0124, is scheduled to be considered by the City Council on August 16, 2022 (Agenda Item L15).

B. REASONS THE CITY COUNCIL SHOULD REVERSE THE DECISIONS BELOW

- The project approval violates CEQA because subjecting City residents to potentially grave environmental and safety living at the project simply cannot be categorized as "ministerial." Such a decision, which could expose residents to listed carcinogen and reproductive toxins, and further result in such toxins being released into coastal resources, by its very nature is discretionary.

- CEQA should not be conflated with other environmental reviews. The applicant, on Page 50 of its power point prepared in advance of the August 16, 2022 City Council hearing and entitled "Consideration Of Five Appeals Of A Precise Development Plan And Associated Entitlements At 401 Rosecrans Avenue and 3770 Highland Avenue,", premises a significant portion of that presentation on a fundamentally erroneous conflation of CEQA review with other (indeed, seemingly, all) other environmental review.

- CEQA is not the end all be all when it comes to public safety and environmental review requirements. Not only is the premise erroneous, it does not disclose to the Council what the Council likely already knows (or the City Attorney would so advise it, presumably), which is that CEQA versus substantive environmental laws are separate legal frameworks, with vastly differing purposes, and vastly different mechanisms for protecting the health and safety of City residents.

- The developer could be misleading and confusing what CEQA does. CEQA is designed to bring out environmental issues for discussion. There are other laws that are used to protect the health and safety of a city's population and the environment. While, to be sure, "CEQA," at times, is colloquially referred as a surrogate for environmental approval, it is, in fact, just the opposite – it is no more than a legislatively enacted informational document purposed to identify potential adverse environmental

[1] The project was described as being located within the non-appealable portion of the coastal zone and within the North End Commercial District, Area District III.

[2] The Applicant contends the approval was issued March 28, 2022; it is not disputed that the acknowledgement by the permittee is dated March 29, 2022.

impacts of a proposed project -- the core purpose of CEQA is to adequately inform the public and the local agencies it enlists to sponsor such projects. CEQA requires nothing less but also requires nothing more. CEQA is misunderstood by those using it a "environmental study."

- CEQA does not care about political policies like density bonus. Its goal is to bring forth the facts. Stated another way, CEQA neither endorses, nor eschews, the wisdom or other political or other motives of an elected local agency endorsing (or not) the environmental impacts of any particular project as part of approving the project; in fact, a local agency, if adequately informed and otherwise duly acting (pursuant to the Brown Act, etc) may opt to approve a project that admittedly presents potentially significant environmental impacts to the environment based on making certain findings sufficiently supporting a "statement of overriding considerations."

- The City Planning Commission used a policy of encouraging affordable housing above environmental concerns. The city has not fully assessed the risk and therefore cannot fulfill its mission to reasonably protect residents that is required by both state and federal laws. Such action recognizes that the agency, although adequately informed, determined to approve a project notwithstanding its potential to result in environmental adverse impacts, perhaps because it found that those impacts were outweighed by enhancing jobs or other legitimate purposes within authorized legislative purview. Where the agency is urged to do that with the adequate information before it, it is entitled and authorized to do so upon making such factual or policy findings. But where the record unquestionably indicates such a risk is present, but the agency is not adequately informed of the extent or nature of such risks, it cannot possibly fulfill its mission to protect its residents -- such a forced or contrived result is violative of the core of the delegation of authority to local agencies to act to protect its citizenry and at variance with the federal and California Constitutions and other doctrines.

- There are other government agencies that may need to be involved given the long standing and complex environmental history of the location to err on the side of safety. By contrast, the second framework, which embodies the imposition of substantive environmental requirements is delegated, under California law, principally to Cal-EPA, including its statewide and their corresponding local agencies (here, in particular, the Los Angeles Regional Water Control Board and the Department of Toxic Substances and Control ("DTSC")).

- Numerous U.S. Federal and state agencies regulate this complex environmental location, like the Regional Water Control Board (RWOCB). Indeed, the El Segundo site from which the groundwater plume of petroleum contamination is emanating into the City of Manhattan Beach has been subject to binding and enforceable orders issued by the RWQCB over the last three to four decades, including, among others, a Cleanup and Abatement Order dated August 25, 1985 and modified as reflected in Amended Cleanup and Abatement Order 88-55.

- The Department of Toxic Substances Control (DTSC) regulates this complex environmental location. Likewise, the DTSC issued an order in 1995 entitled Hazardous Waste Operating and Post Closure Permit which remains in effect, as well, and requires continued monitoring and reporting.

- The refinery also is subject to a Corrective Action Order pursuant to the Resource Conservation and Recovery Act of 1984, which is administered and enforced by federal U.S. Environmental Protection Agency.

- There are fluid-based environmental problems without evidence that the problem will magically go away. In addition, reports on file with the Los Angeles Regional Water Control Board (LARWQCB) establish that even when decreasing trends in LNAPL ("light non-aqueous phase liquids," a paradigmatic example of which is petroleum floating on water as oil and water, as is widely known, are immiscible) are recorded, there is no certainty that such trends will continue or even will remain steady.

    - Toxins exist in the area above ground water. One example that is pertinent here is a letter report submitted to the LARWQCB on January 13, 2014, which, despite a Fourth Quarter

Apparent Product Thickness Map suggesting LNAPL in the vicinity of a particular well near this project that will be before the Council August 16, 2022 (Refinery Observation Well (Well No. 158)), suggesting free product in and around that well to be within the 0.1 to 1.0 LNAPL contour, LNAPL measured on January 1, 2014 reported 12.08 of LNAPL (that is, free product floating on top of groundwater).

- The risk is real, and the city needs to make sure everything reasonably is done for the benefit of city residents. And although the Orders may be decades old, this is, as no doubt is known to the council members, no indication that the threat to public health is not real; far from a relic of the past, it remains (as is typical of groundwater contaminant plumes, real and present, and notwithstanding removal efforts as recently as 2021, reporting required under these Orders confirmed that benzene, a listed carcinogen and reproductive toxin, just on its own (e.g., without considering toluene, ethylbenzene, xylene and other hazardous petroleum constituents – all of which are by nature sufficiently volatile so as to exhibit a propensity to partition and migrate as vapor directly to the surface, into subsurface spaces (such as garages or crawl spaces), and into residential structures remains present and potentially threatening project residents as it is present in groundwater in concentrations nearly an order of magnitude higher than permissible levels.

- Regardless of type of construction project, the city's role is substantive (and not "ministerial") when it comes to the health and safety of citizens and the environment (including property and the ocean). The authority comes from other laws like the California Health & Safety Code. This distinction is readily corroborated by comparing state and local laws that govern substantive environmental review, which largely are embodied in the California Health & Safety Code, the California Water Code, and other related statewide or local statutes, regulations and ordinances – and not the Public Resources Code (where CEQA resides).[3]

- The developer, in performing what they call a Phase II Environmental Report, may have actually exacerbated the problem. In this regard, **the applicant actually unfortunately may have worsened this already serious public health situation, an independent basis for compelling the City Council to intervene** under its general policy and health and safety powers and having received false if not misleading information from the applicant – whether or not such was done intentionally to induce the City simply to treat the project approval as ministerial and thus beyond CEQA (which, as noted above, is an impossibly incongruous interpretation) or whether done negligently so as to invalidate the approval, which must be based on information certified to be accurate – by way of example only, one need consider only the following (which is not exclusive):

  - Where they bored holes over FIVE YEARS AGO, they disturbed the land that could have caused the release of toxins. First, it is not in the least bit fanciful to ask (and the City Council in fact may wish to do so) t**o what extent the applicant's prior exploratory drilling at the site exacerbated already well-documented existing contamination as migrating into the City of Manhattan Beach from industrial operations that bear an address in El Segundo** (which the project abuts), thus providing a hitherto unavailable pathway for such carcinogenic compounds (e.g., benzene) to surface into indoor air in the garage or residential units in the City from perched or saturated water-bearing zones whereas they otherwise might have posed

[3] One exception worthy of note but not inconsistent with the overall regulatory framework is the California Coastal Act (discussed further below), which is codified at Cal. Pub. Res. Code Section 30200 et seq., and potentially requires review similar to, but with a different emphasis than, CEQA, and does require securing a Coastal Development Permit where its specific jurisdictional mandates are at issue, for example, promoting accessibility to coastal resources, prohibiting deny public access, and other coastal specific measures (such as measures designed to prevent beach nourishment and erosion by unwarranted use of sea walls, sometimes referred to as "coastal armoring," or measures designed to plan for and/or mitigate sea level rise based on climate change).

a lesser public health risk by virtue of remaining on the order of 25-100 feet below the surface; and

- Second (and again, this may be a question to the applicant), **to what extent would adverse and harmful carcinogenic and reproductively toxic vapor migration potentially impact those people is closest proximity to such potential vapor migration**, e.g., would it be the very sub- community whom the applicant employed, if not exploited, to serve as the vehicle by which the environmental, planning, zoning, and coastal resources impact review that otherwise most certainly would have had to have been conducted here has, so far, successfully been avoided (i.e., those qualifying as "very low-income households").
  - It is unjust to create low income housing on land that has legitimate environmental concerns due to its proximity to the refinery. Since we can anticipate the top floor penthouse, ocean view apartments will not be low income, we can likely expect the low-income units to be on the lowest level, having the lesser preferred views and bearing the most risk from vapor migration dangers. Is this a desired legislative outcome of density bonus law? This would be a pity, if not a shameful violation of the spirit of environmental justice held so dear by council members and residents. In other words, where would be the "very low-income households" units be – presumably, not in the penthouse units.
- **Third, to what extent has seismic activity, such as the recent earthquake on June 3, 2022, at the Highrose project location, aggravated environmental conditions?** Over the past five years, after the Phase II Environ report was conducted, we are aware of several earthquakes felt in the North Manhattan/ El Segundo areas that are in close proximity to the project location.

- The city should ensure the land has no environmental issues and needs verification beyond what the developer has provided. (Claims of improved traffic according to a developer traffic analysis are suspect. No cars were counted for the study and Verandas was misrepresented as a restaurant in the study as if it has consistent restaurant operating hours. It is a venue and had sporadic events that frequently hired ushers to assist with parking and traffic. If this very important detail of labeling Verandas as a "restaurant" is inaccurate, how can the city rely on the accuracy of an environmental report that has shown to have misleading statements, significant omissions, etc.?) Although the precise answers to the foregoing questions may not be known in the absence of what the City Council would deem a sufficiently appropriate review for it to discharge its mandate to protect the health and safety of its residents, even if ultimately the project is approved, it is clear that this must be undertaken, and the potential for the applicant's complicity in resorting to questionable machinations to achieve its objectives is a subject of legitimate inquiry and, indeed, would afford the applicant to clear up any perhaps misapprehended omissions or representations that might seem suspect – clearly, the applicant would have to do so in order to seek to enforce any claim to enforce entitlement rights; they would be deemed invalid ab initio should any material misrepresentations or omissions be found to have accompanied the applicant's submissions. Here, no matter how the unchartered future case law may develop, this case clearly calls for active intervention by the City Council, if only to confirm the applicant's entitlements, should that be the finding.

- There are problems with the environmental report that was provided by the developer in that minor issues are highlighted while major issues of greater concern are not highlighted or omitted as material issues. However, in that regard -- and CEQA aside -- it is notable that **two aspects of this applicant's environmental documentation submitted to the City, if anything, tends to discredit that effort for multiple reasons, some of which are highlighted below.**

- First, the February 20, 2020 Citadel EHS Phase I (prepared for HighRose El Porto LLC)[4] discusses minor, if not trivial to the point of irrelevance, matters such as:
  - This seems to be a minor environmental issue, yet it is highlighted in the Citadel report. The presence of potentially hazardous ingredients possibly contained in hair care and other consumer products used, or offered for sale, by Fina Hair and Chameleon Day Salon (but, as far as reported or observed by Citadel these products and their contents were properly contained and handled and not released to the environment); and
  - This also seems to be a minor issue, and is also highlighted in the Citadel report. The recitation of the mundane and unremarkable record entry indicating that, in 1995, a modest amount of what was believed possibly to have been photochemical waste was generated (but, again, not released to the environment, as reported by Citadel) by Coastline Chiropractic.
- There is, however, the well documented presence of millions of gallons of contaminated groundwater and its removal over a multi-decade period, and it was measured to be over 12 feet of free product. Why was this not discussed in detail in the Citadel report? Why would a report place major focus on minor issues and no focus on major issues that are of grave concern to public health and safety? Yet, second, while Citadel, mentions -- albeit in a manner grossly disproportionate to its import – the potential impact of the almost unheard of (in terms of magnitude and gravity), petroleum groundwater plume originating in El Segundo and undisputedly flowing southerly into northern Manhattan Beach, Citadel only barely does so and then, only in passing, refers to the DTSC Order and the prior soil and soil vapor investigation effort -- but does not, for example, refer to the well- documented presence (as measured in the millions of gallons of contaminated groundwater removed to isolate and reduce overall contaminant concentrations by targeted LNAPL removal over a multi-decade period). It also does not mention that (or why this might be the case), what had been assumed to be less than a foot of free product was, inexplicably, measured to be over 12 feet of free product.
- Citadel admitted it used nonstandard, informal screening tools to calculate residential screening levels. This deviation from the use of standard tools casts doubt on the reliability of its findings. Moreover, Citadel concludes that guidance documents ("which it admits are informal screening tools and not standards") used to calculate residential screening levels, and without presenting any explanation for the assumptions used in performing those calculations, such as groundwater depth or attenuation factors, indicate there is a tolerable risk – from a screening level standpoint – respecting human health. (This analysis is perfunctory, at best, but in all likelihood not reliable.)

- The environmental report conclusion is not supported by facts as there is the very real threat of vapor intrusion, accumulated methane (which can blow up), and dangerous radon levels. Certainly, there is no support for the conclusion that there is no recognized environmental concern and, apart from soil vapor intrusion, accumulated methane can cause an explosion that could immediately severely injury, or fatalities, and the radon exceedance is not addressed in terms of mitigation. This conclusion is remarkable to the point of not being credible, as would seemingly be clear even to the casual observer.

- **These are the core issues demanding review by the City. They are not simple "check the box" matters. They certainly cannot be determined on the basis of an unreliable consultant report hired by the developer considering it is biased and shows flaws in its approach that suggests incompetency. The report's flaws miss-state the nature and severity of the risks. The Applicant**

[4] Section 1.2 of **the Citadel report does not entitle the City to rely on the report for any purpose;** only Highrose, its law firm and its lenders may do so.

<u>further boostraps the flawed report with a questionable, untested and implausible legal argument, at least on these facts, that would strip the City Council of its ability to achieve its core mission --- to protect its residents' health and safety.</u>

- As indicated, groundwater is not reported to be present at the relatively shallow depths of the 20 feet (7 of 9 borings) or 30 feet (2 of 9 borings) drilled under the observation of the developer's consultant, Environ, in 2017. Citadel reports certain vapor samples from B-2, B-7 and B-8 were analyzed for human health risk assessments but insufficient detail is presented to evaluate, much less support, that there is not in fact an environmental concern worthy of further review based on the petroleum groundwater plume, completely putting to the side, although only for the moment, the concerning yet unexamined passing references to the reported presence of methane and radon which Citadel does not specify in any detail as to location (in the case of radon above U.S. Environmental Protection Agency accepted thresholds) and likewise does not evaluate whether, for example, the methane would require a vapor barrier to be installed to mitigate that risk, instead essentially sidestepping that issue without analysis by noting that such is required in the City of Los Angeles, or certain portions of it, but the City of Manhattan Beach is not subject to those ordinances.[5]

- The project approval also violates the Coastal Act inasmuch as either: (i) it violates the local coastal plan (LCP); or, (ii) to the extent it is contended that the approval does not do so, it constitutes a de facto amendment of the LCP that could not have been lawfully implemented without the City having obtained advance approval by the California Coastal Commission, which it did not do.

  - The project has at least two serious coastal impacts. First, there is a real risk of contaminated groundwater running into the storm drain at one end of the project location (with access to the ocean). Second, sufficient parking that allows for coastal access is in jeopardy. The additional parking in the immediate area adjacent to the project location is owned by Chevron and is availability is not guaranteed. By HighRose putting in less parking spaces that would be required outside of DBL, we are potentially creating a parking problem with excess residents moving in along with their visiting guests, thus denying others coastal access as this area, already an area that has limited public parking due to its current density. In this regard, and among other things, such as direct disposal of contaminated groundwater into the storm drain, the project as proposed has a significant ability to impact coastal access as it presupposes the availability of parking current subject to the largesse, with the attendant risk of being withdrawn at any time, on parking supplied by the refinery. Absent the assumption that that parking will remain, the impact on parking in the area, and thus access to coastal resources, is significantly diminished. Coastal access is already an issue as parking is very limited in the area.

- The project approval also violates the Planning and Zoning Law because it exceeds, without any applicable exception, exemption or amendment, the density, height, and other siting, design, and characteristic requirements set forth in, inter alia, the City's General Plan, the City of Manhattan Beach's Local Coastal Program, and other applicable laws.

C. WHAT SHOULD THE COUNCIL DO?

- Unfortunately, the City Council faces a classic Hobson's choice -- either it:

  (i) in an unfairly uninformed manner approves the decisions below in the obvious absence of

[5] Indeed, the Citadel report recommends additional methane testing "if the Site is to be re-developed." Page. 6. We have no record that this such testing was done or that appropriate mitigation methods were incorporated into the design drawings or approval conditions. If it wasn't done, and the applicant's own consultant raised it as an appropriate and suitable measure to protect public health and safety, that would seem a necessary step to project approval, no matter what other factors may be involved.

justification or a substantial basis for so doing; or

(ii) commissions, in its discretion and however it deems appropriate, a review of the environmental risks posed by potential approval of the project, and irrespective of CEQA.

Obviously, the only defensible choice is the latter

After that, it may still approve the project, approve it with conditions (such as to address the coastal access and vapor migration issues), or take other action, which could include denying the project,

But any conclusion at this point is premature and would lack substantial justification, absent directing staff or providing for the commissioning of outside competent and objective professionals to undertake a suitable review upon which it can make an appropriate decision.

D. THE COUNCIL SHOULD NOT FEAR LITIGATION

- As noted above, in the absence of what the City Council receiving a sufficiently appropriate review for it to discharge its mandate to protect the health and safety of its residents, even if ultimately the project is approved, it is clear that this review must be undertaken.

- Moreover, given the spectre of the applicant's complicity in resorting to potential material misrepresentations or omissions in submitting documents supporting the approval of the project is indeed a subject of legitimate inquiry that the City Council should be entitled to have clarified and, hopefully, proven to be not mislead. As noted, this also would afford the applicant to clear up any perhaps misapprehended omissions or representations that might seem suspect, a prerequisite to seeking any possible claim to enforce entitlement rights.