

# MEMORANDUM

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Date: November 10, 2020

To: City of Beverly Hills City Council

From: Rob Welch (City of Beverly Hills Engineering Manager) and David DeRosa (AECOM)

**Subject: Response to Holland & Knight Comment Letter Received on November 10, 2020 Regarding the North Portal Final Environmental Impact Report/Agenda Item F-1A and 1B**

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## Response to Comments

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The letter received as noted above commented on several items regarding the North Portal Environmental Impact Report (EIR) specifically related to the Beverly Drive alternative (the Project). This memorandum summarizes the comments received and provides a response.

**Item #1 – “The Project requires a physical taking that the DEIR Project Description does not disclose.”** The comment specifically references the possible temporary removal of the building canopy which overhangs the public right-of-way over the sidewalk on the west side of Beverly Drive.

The Draft EIR acknowledged that, “Construction of the Project may also require the temporary removal and subsequent reinstatement of the boxed canopy on the east elevation of the Wilshire Beverly Center.” (page 3.4-14). The EIR analysis took a conservative approach, determining that possibly removing the canopy may be necessary as a result of piling equipment and other equipment such as cranes that would need a vertical clearance taller than the building canopy.

However, upon further investigation as a result of receiving the Holland & Knight comment letter, the following details are provided which conclude that removing the canopy will not be required.

One, the canopy and the construction staging and laydown perimeter do not overlap. As shown at the September 16, 2020, Draft EIR public meeting, the western extent of the construction staging and laydown noise barrier will be located approximately halfway into the tree wells on the sidewalk (Attachment 1). Two, per the site survey figure provided in the Holland & Knight comment letter on the Draft EIR received on October 6, 2020, (Attachment 2), the canopy overhang does not overlap the tree wells on the

sidewalk, and in fact, provides a separation distance of approximately four to five feet to the midway point of the tree wells. Compared to the canopy marquee at the Saban Theater in Section 1 of the Purple Line Extension, piles were installed within two feet of the marquee successfully and without impact or incident. In this case, a minimum distance of four feet to the construction staging and laydown noise barrier is more than sufficient to not impact the canopy or require it be temporarily removed during construction.

**Item #2 – General Plan Inconsistency/Transportation.** The comment is stating that the EIR is required to conduct an analysis of inconsistencies with the General Plan and refers to their previous comment letter regarding goals and policies in the City's General Plan Circulation Element related to roadway and intersection improvements, maintaining vehicle flows on City roadways and intersections, and maintaining operations on regional roadways.

The goals and policies noted in the comment letter are regarding traffic operations and congestion. As discussed in Section 3.12.1, Senate Bill 743 (SB 743) directed the Office of Planning and Research (OPR) to develop revisions to the CEQA Guidelines to establish new criteria for determining the significance of transportation impacts and define alternative metrics for traffic level of service (LOS). Specifically, SB 743 results in the elimination of auto delay, LOS, and other similar measures of vehicular capacity or traffic congestion as a basis for determining significant impacts for transportation projects under CEQA. Appendix G of the CEQA Guidelines states that a project would have a significant impact related to transportation if it would conflict with a program, plan, ordinance, or policy addressing the circulation system. However, the goals and policies considered under this impact threshold should be those goals and policies that protect the environment. Since the State has deemed that congestion and LOS are not related to environmental protection and has eliminated these metrics from CEQA analysis, the specific goals and policies related to vehicle capacity and congestion are not applicable to CEQA, and therefore, were not included in the Draft EIR. Rather, the City's Circulation Element goals and policies related to the EIR were described in Section 3.12.1 and included a variety of goals related to the overall circulation system, transit, neighborhood traffic management, transportation demand management, and pedestrians and bikeways.

As described under Impact TR-3 in Section 3.12.4, the Project would require removal of the majority of the southbound right-turn pocket. The configuration would consist of one through lane and one shared through-right-turn lane on the southbound Beverly Drive approach. A minimal amount of storage (length of one vehicle) would be provided to allow vehicles turning right onto Wilshire Boulevard to yield to pedestrians. Lane geometries on Wilshire Boulevard would remain as is. As stated under Impact TR-3, the new configuration will be designed using current roadway and intersection design guidelines as specified in the *California Highway Design Manual* (California Department of Transportation, 2019), and no design exceptions are anticipated. Consequently, the modified intersection configuration is not anticipated to contain any hazardous geometric design features and the impact would be less than significant.

Fehr & Peers prepared a Traffic Operations Report showing intersection operations (LOS) with lane geometry changes adjacent to the Project. The intersection of Beverly Drive and Wilshire Boulevard was studied with existing and future traffic volumes with the removal of the majority of the southbound right-turn lane. The forecasted increase in delay per vehicle would be up to 5 seconds during the peak travel hours. In addition, it should be noted that General Plan Circulation Element goal/policy CIR 1.4a included in the original comment letter states that congestion may be accepted, provided that provisions are made to improve the overall system and/or promote non-motorized transportation, such as bicycling and walking. The Project would provide a secondary access point to serve the Wilshire/Rodeo Station, which would support non-automobile travel, and reduce vehicle travel, in the City. As a result, CEQA Guidelines Section 15064.3 presumes that the Project would cause a less than significant transportation impact.

Without the North Portal, all subway riders that have an origin or destination in the Business Triangle would need to cross Wilshire Boulevard. While the North Portal cannot be guaranteed to eliminate all Wilshire Boulevard pedestrian crossings between the Wilshire/Rodeo Station and the Business Triangle, the number of pedestrian crossings will be reduced with the North Portal. The Wilshire/Rodeo subway station will contain wayfinding signage to direct passenger to the appropriate portal location based on their destination. Therefore, the Project is expected to reduce pedestrian crossings at the Wilshire Boulevard and Beverly Drive intersection which will result in fewer interactions between vehicles and pedestrians in the project area.

The comment also claims that bottleneck conditions with the removal of the southbound right-turn pocket would create an unacceptable hazard to emergency access vehicles. As described under Impact TR-4 in Section 3.12.4, the Project would not change emergency access in the study area, and fire, police, and medical personnel generally access the station area from areas north and east of the North Portal site. Given that the North Portal would not change emergency access in the study area and would provide a secondary access point to the subway station, the Project would not have an impact on emergency access.

**Item #3 – Providing a response to public agency comments 10 days before a proposed FEIR certification.** CEQA Guidelines Section 15088(b) states that, “The lead agency shall provide a written proposed response, either in a printed copy or in an electronic format, to a public agency on comments made by that public agency at least 10 days prior to certifying an environmental impact report”.

The City of Beverly Hills staff met and exceeded this requirement by providing a written response to Caltrans and Metro comments (the only two public agencies to comment on the Draft EIR) on October 15, 2020. This is twenty-six (26) days prior to the November 10, 2020, City Council meeting regarding the certification of the environmental impact report. The two agencies were provided only responses to their individual comment letters, and not the full compiled Final EIR/Response to Comments.

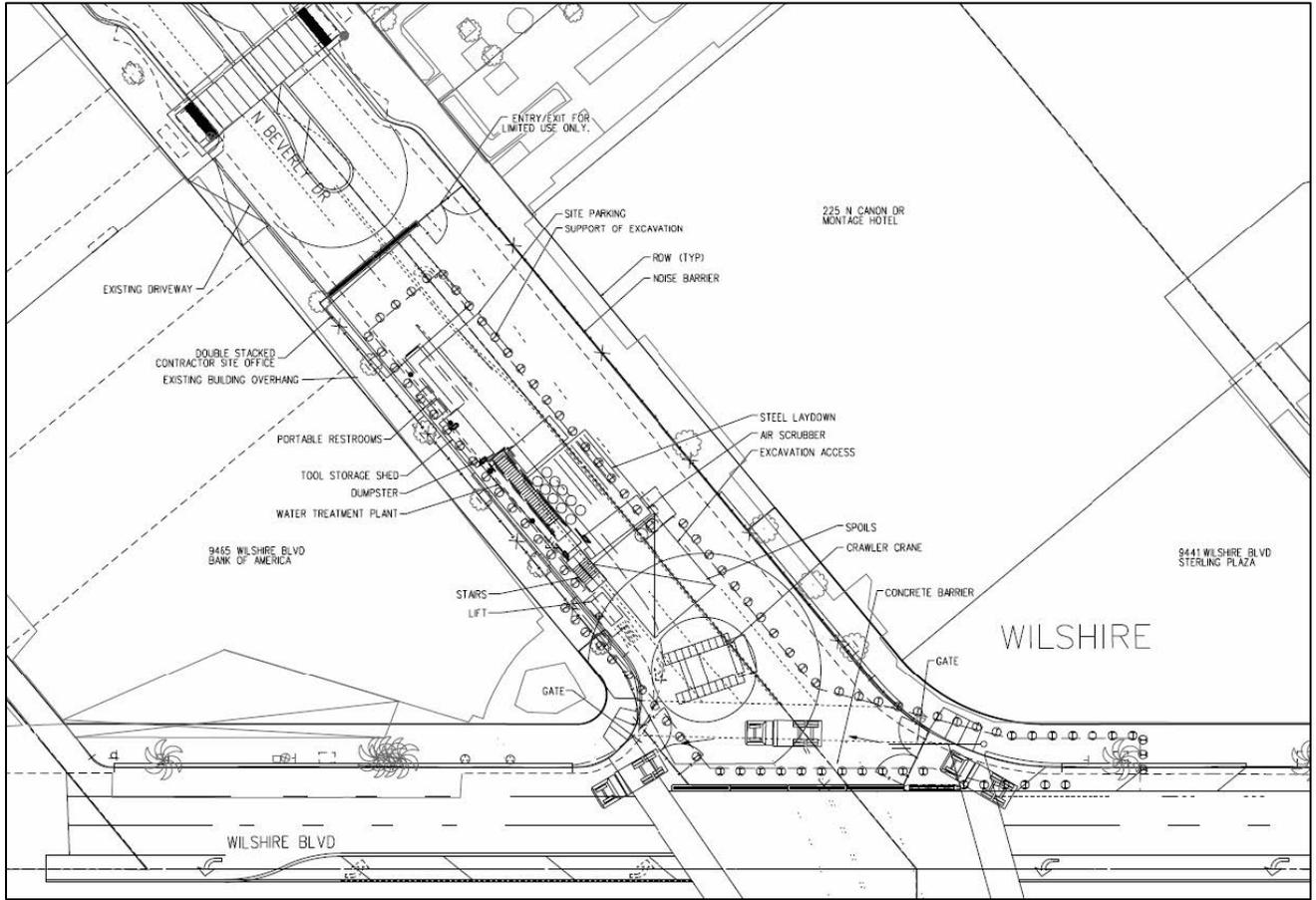


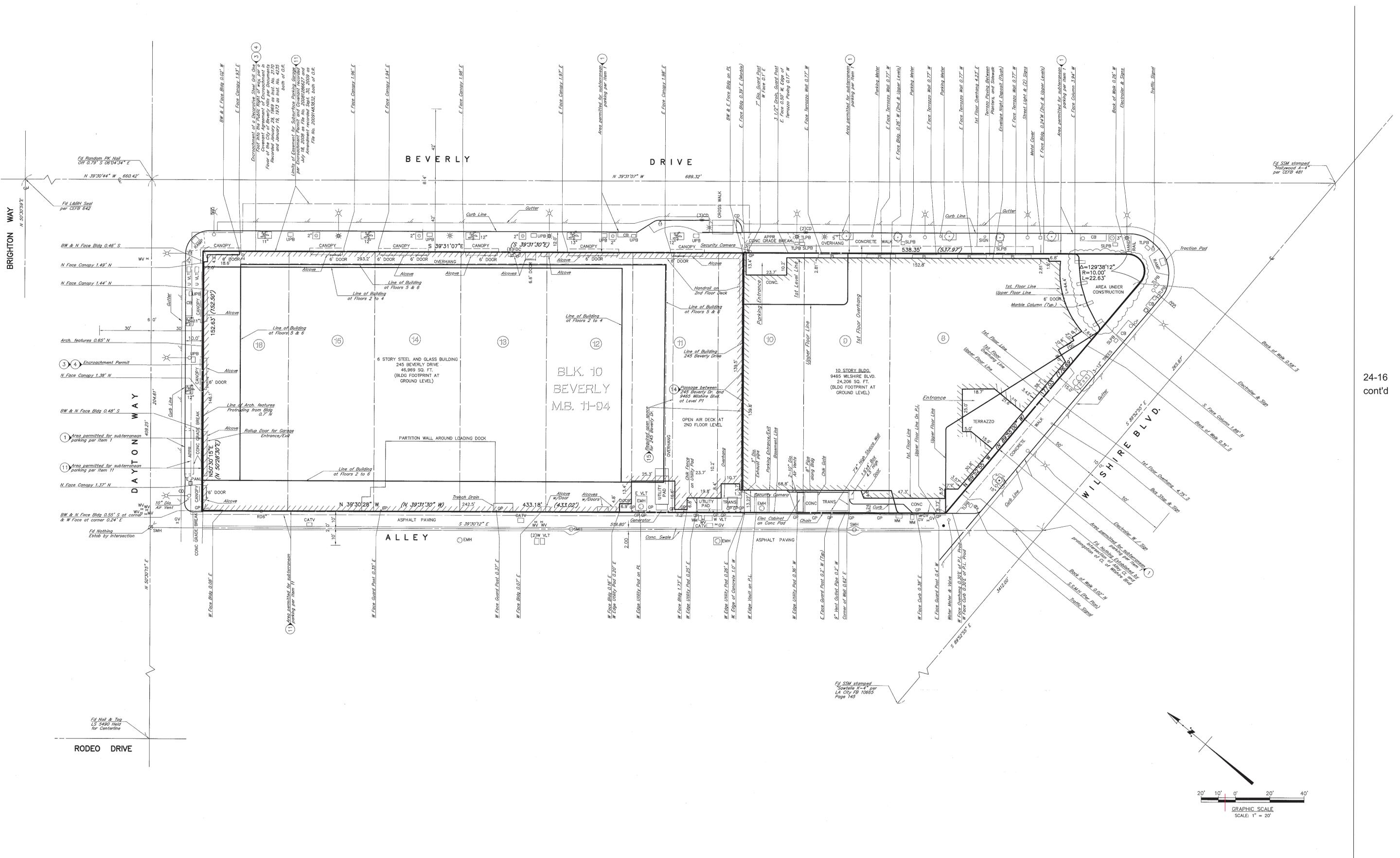
Rob Welch  
City of Beverly Hills Engineering Manager



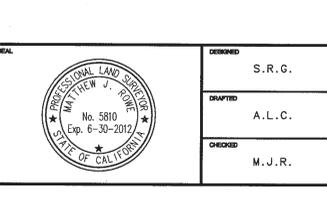
David DeRosa  
AECOM Project Manager

# Attachment 1: Beverly Drive Construction Footprint





24-16 cont'd



| REV      | DATE | DESCRIPTION  | BY  | APP'D |
|----------|------|--|-----|-------|
| 9/14/10  |      | ALTA UPDATE  | FJW | MJR   |
| 3/25/09  |      | INCLUDED STEWART TITLE OF TEXAS AND FIRST AMERICAN OF CALIF. | FJW | DRH   |
| 3/3/08   |      | REVISED TO INCORPORATE LENDERS COMMENTS                      | FJW | DRH   |
| 1/30/08  |      | ALTA UPDATE  | FJW | DRH   |
| 9/22/05  |      | REVISED PARKING COUNT  | DJL | DRH   |
| 8/25/05  |      | PROFORMA REPORT, ADDED ITEM 14 TO MAP                        | DRH | DRH   |
| 07/26/05 |      | ALTA UPDATE  | KDM | DRH   |
| 04/12/05 |      | SCANNED ALTA UPDATE  | KDM | RCO   |
| 10/12/00 |      | ADDED PARKING COUNT RELATING TO EXCEPTION ITEM NO. 7         | RDG | RCO   |
| 09/28/00 |      | ALTA UPDATE  | RDG | RCO   |
| 05/25/94 |      | ALTA UPDATE (SITE PL. & PTR INFORMATION)                     | SRG | RCO   |
| 12/08/87 |      | ALTA UPDATE  | REH |       |

| REVISION | DATE       | DESCRIPTION   |
|----------|------------|---|
| 01       | 06.05.2010 | 13:28:14 DWG Name: W:\16E0070201\SURVEY\DESIGN\PL\VL-AL02.dwg Updated by: 'walle' |

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 Los Angeles, CA 90071  
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 www.psomas.com

ALTA/ACSM LAND TITLE SURVEY FOR:  
**BEVERLY WILSHIRE OWNER LP**  
 BEVERLY WILSHIRE CENTER  
 CITY OF BEVERLY HILLS COUNTY OF LOS ANGELES STATE OF CALIFORNIA

|                |                     |       |   |
|----------------|---------------------|-------|---|
| DATE           | JUNE 26, 1984       | SHEET | 2 |
| SCALE          | 1" = 20'            |       |   |
| PROJECT NUMBER | 16E0070201 TASK 100 |       |   |

# Holland & Knight

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Ryan Leaderman  
Partner

November 10, 2020

*Via E-mail (Northportal@beverlyhills.org; MayorandCityCouncil@beverlyhills.org)*

Mayor Friedman and City Councilmembers  
City of Beverly Hills  
455 N. Rexford Drive,  
Beverly Hills, CA 90210

**Re: North Portal Final Environmental Impact Report/Agenda Item F-1A and 1B**

Dear Mayor and Councilmembers:

This firm represents Beverly Wilshire Owner LP (“BW”), the owner of the two office buildings at 9465 Wilshire Boulevard and 235-296 Beverly Drive (the “Properties”) in the City of Beverly Hills (the “City”). The Properties occupy the entire west side of Beverly Drive between Wilshire Boulevard and Dayton Way. BW supports increasing pedestrian mobility in the Rodeo Station North Portal (the “Project”) vicinity, but there are a number of fundamental flaws with analysis of the Beverly Drive alternative in the Draft Environmental Impact Report (“DEIR”) and the Final Environmental Impact Report (“FEIR”).

Neither document discloses the City’s physical invasion onto the 9465 Wilshire Boulevard property requisite to construct the Beverly Drive alternative, and therefore does not analyze the significant effects of the taking on the environment or the costs associated therewith.<sup>1</sup> The City may not certify an EIR that is not executed in compliance with CEQA.<sup>2</sup>

Given the City’s recent and extensive relations with Metro<sup>3</sup> regarding the Wilshire Boulevard subway extension, a reasonable person would expect the City to take a belt and suspenders

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<sup>1</sup> See *Memorandum from Keyser Marston Associates to Susan Healy Keene re Proposed Subway Portal: Economic Impact Analysis*, October 29, 2020 (“Economic Impact Analysis Memo”).

<sup>2</sup> 14 California Code of Regulations (“CCR”) § 15090. Certification of the Final EIR. (“(a) Prior to approving a project the lead agency shall certify that: (1) The final EIR has been completed in compliance with CEQA...”).

<sup>3</sup> The Draft Settlement Agreement between Metro and the City attached as F(1-B) on tonight’s City Council Agenda states that “[t]o the greatest extent possible, the environmental document will be prepared in a manner that complies with the substantive provisions of NEPA so as to accommodate Metro’s procurement role pursuant to Section 2.2.1

approach to environmental review associated with the subway and related projects: to give a stable and accurate Project Description that would fully describe all Project components, including the partial governmental taking of the private property located at 9465 Wilshire Boulevard. Instead, the FEIR and Economic Impact Analysis Memo fail to consistently describe and analyze the Project's environmental or economic impacts, as appropriate.

In order to comply with CEQA and to give BW some expectation with respect to the effect of the project on its property, we strongly urge the City to reject the City staff's recommendation and analyze both the environmental impacts and actual economic of the Beverly Drive alternative in the EIR.<sup>4 5</sup> A new or re-circulated EIR is necessary to fix the FEIR's failure as an informational document because it does not adequately address or describe the significant environmental effects of temporarily taking BW's property.

**I. The City May Not Certify the Project FEIR Because the City did not Execute it in Compliance with CEQA.**

*A. The FEIR Lacks an Accurate Project Description Because it Fails to Describe the Taking of BW's Property.*

Per CCR § 15124, the EIR's Project Description must include a list of government approvals requisite to approve the Project.<sup>6</sup> Since a taking requires government approval in the form of a Resolution of Necessity,<sup>7</sup> the Project Description is fundamentally inadequate for lacking this information. Addition of the need for approval of a taking constitutes significant additional new information, and requires recirculation.

The Project requires a physical taking that the DEIR Project Description does not disclose. In order to remove structural elements holding up the 9465 Wilshire Boulevard canopy, the City and its contractors must come onto private property to remove structural support beams; electrical wires and conduits; and portions of the exterior wall of up to three existing tenants on an historic building. Along with the closure of the Beverly Drive right-of-way and sidewalk, including blocked access to several businesses for several years, these additional actions constitute a comprehensive change in conditions not fully or clearly described in the DEIR. Moreover, this

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if the need arises." See Section 2.1.1. There is zero analysis of displacement and relocation within the DEIR, so it seems that the City would already be violating the express words of the Settlement Agreement, if adopted.

<sup>4</sup> 14 California Code of Regulations ("CCR") § 15090. Certification of the Final EIR. ("(a) Prior to approving a project the lead agency shall certify that:(1) The final EIR has been completed in compliance with CEQA...")

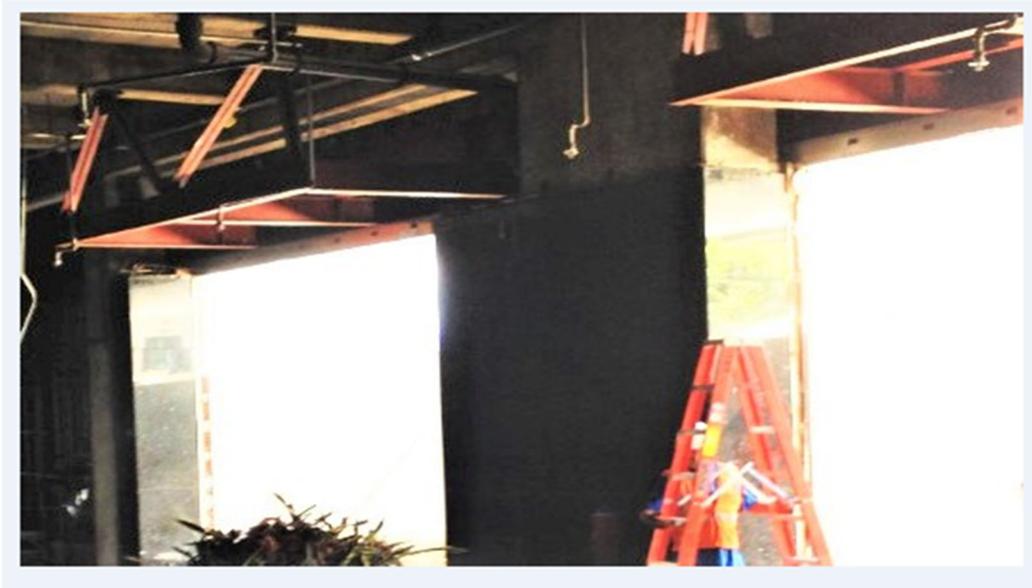
<sup>5</sup> 14 CCR § 15088.5 (a) A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under § 15087 but before certification.

<sup>6</sup> 14 CCR § 15124(d)(3).

<sup>7</sup> Cal. Code Civ. Proc. § 1245.220. ("A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity...")

proposed condemnation requires both disclosure in the EIR's Project Description, and just compensation.<sup>8</sup>

Figure 1 below is a photograph taken when the existing canopy was under construction. It depicts the structural elements *within* the 9465 Wilshire Boulevard property line facing Beverly Drive.<sup>9</sup> For scale, see the gentleman and ladder in the picture below; the canopy removal and replacement would be extensive in scope and size.



**Figure 1: Photograph of Canopy Support Beams from Inside the 9465 Wilshire Boulevard Property Looking East Toward Beverly Drive**

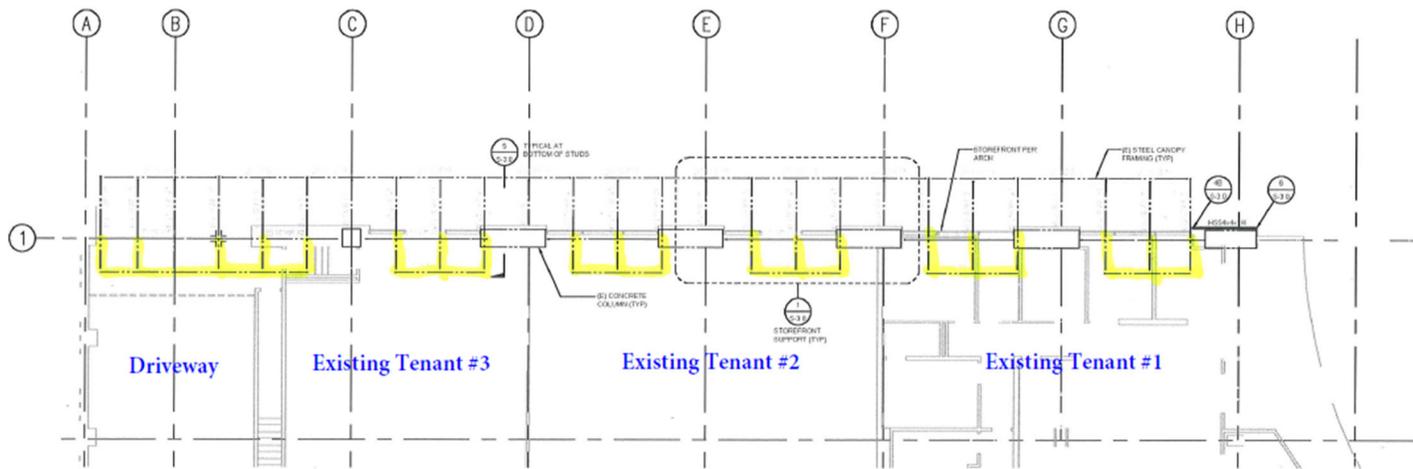
Removal of the canopy does not merely involve slicing the canopy at the exterior of the property line. Instead, in order to secure the canopy removal, protect the remaining portions of the 9465 Wilshire Boulevard property from weather and water intrusion, as well as to provide a secure interior and exterior for these ground floor tenants, City contractors would need to come onto the 9465 Wilshire Boulevard property. This will also cause unnecessary conflicts and inconvenience

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<sup>8</sup> Not only will the removal of canopy result in a direct physical appropriation of the 9465 Wilshire Boulevard property, it will result in loss of use from construction and loss of access. Courts have held that all three of these circumstances constitute takings. *City of Livermore v Baca* (2012) 205 CA4th 1460, 1471 (closure of two of four driveways to commercial property resulting from project construction and temporary loss of landscaping can affect tenant leaseability); *Heimann v City of Los Angeles* (1947) 30 C2d 746, 754 (municipality piled materials in street, erected saw mills, accumulated waste materials over 2-year period); *City of San Rafael v Wood* (1956) 144 CA2d 604, 608 (deposit of large amounts of silt in yacht harbor); *Pierpont Inn, Inc. v State* (1969) 70 C2d 282, 299 (noise, dust, and disturbing vibrations caused by heavy equipment).

<sup>9</sup> “Any canopies to existing adjacent buildings on the west side of Beverly Drive may need to be removed for construction. Any removed building canopies would be reinstated following the completion of construction.” DEIR p. 2-26.

to the employees, visitors, and members of the public present within the vicinity of the Properties. Moreover, the DEIR states that the Project involves reinstating the canopy. Assuming replacement of the existing canopy is as involved as its construction was, there would be substantial construction and invasion of tenancy space. There has been no disclosure or analysis of the full extent of this work in the DEIR's Noise, Air Quality or other sections.



**Figure 2: Steel Canopy Framing at 9465 Wilshire Boulevard Looking Inside and Outside the Property Line**

Figure 2, the diagram above, shows the affected steel canopy framing at 9465 Wilshire Boulevard. In the diagram, which shows construction drawings for the existing steel canopy, Beverly Drive is to the top of the figure, and Wilshire Boulevard is to the right. The demising shows the three affected tenancies. The yellow highlights the steel canopy framing projecting into the tenant space located on private property by several feet. It's not as if the steel canopy is affixed to the building by glue. Its demolition and reconstruction would involve structural changes to the existing building and the need for a physical invasion onto the 9465 Wilshire Boulevard property.

There is an absence of disclosure of the scope of work in the DEIR Project Description. See DEIR, p. 2-26. There is zero disclosure of the temporary taking that must occur in the DEIR regarding the City's physical taking of private property in order to construct the Beverly Drive alternative. There is zero disclosure of the City approvals necessary to conduct a partial and temporary, or perhaps permanent taking of a portion of 9465 Wilshire Boulevard to construct the Project as proposed. And there is zero analysis in the Economic Impact Analysis Memo of the tremendous

cost to City taxpayers to partially condemn on a portion of 9465 Wilshire Boulevard to temporarily take a portion of the property.<sup>10</sup>

An EIR must disclose all components of a project, and failing to disclose the construction on private property fails to disclose the full extent of the Project. Again, this taking requires a government approval that must be listed in the Project Description, per CEQA Guidelines.<sup>11</sup>

*B. The Project's Significant Environmental Impacts and Impacts on the Community Require Additional Mitigation*

The Beverly Drive alternative proposes entirely shutting down N. Beverly Drive for a number of years. Presumably this includes shutting down the sidewalk and access to adjacent tenancy at 9465 Wilshire Boulevard. The construction staging area and the blockade of pedestrian access are not clearly described and therefore not mitigated in the DEIR or FEIR. Moreover, the temporary taking of a portion of BW's property, which is not fully described or analyzed in the DEIR or FEIR, could result in significant effects on the environment, which are yet to be analyzed and mitigated. "An EIR shall identify and focus on the significant effects of the proposed project on the environment....Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects."<sup>12</sup> An agency must mitigate identified significant adverse effects on the environment.

1. General Plan Inconsistency/Transportation

CEQA Guidelines § 15125(d) requires an EIR to conduct analysis of inconsistencies with the General Plan. Moreover, CEQA Guidelines Appendix G Land Use Question XI(b) requires the EIR to analyze whether the Project would "Cause a significant environmental impact due to a conflict with land use plan, policy or regulation adopted for the purpose of avoiding or mitigating an environmental effect." The FEIR fails on both counts by failing to adequately analyze and mitigate inconsistencies with the City's own General Plan.

BW's October 6, 2020 comment letter (Comment 24-5) identified no less than four Circulation Element goals and policies for which the DEIR failed to list or analyze conflicts, or lack thereof. These policies and goals have a genesis in the General Plan's EIR, as each one is denoted "(Imp. 3.7)" which corresponds to the General Plan's EIR and impacts therein. Response to Comment 24-5 states that "the City's Circulation Element goals and policies related to the draft EIR were described in Section 3.12.1 and included a variety of goals related to the overall circulation system, transit, neighborhood traffic management, transportation demand management, and pedestrians and bikeways."

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<sup>10</sup> Attachment A, Economic Impact Analysis Memo.

<sup>11</sup> 14 CCR § 15124(d)(3).

<sup>12</sup> 14 CCR § 15126.2(a).

While a few General Plan goals were listed in the purported section of the DEIR referenced by Response to Comment 24-5, there was zero analysis of the very detailed General Plan Circulation goals and policies. In fact, the only “analysis” was this conclusory statement on page 3.12-13 of the DEIR: “The Project would support transit use by enhancing station access, as well as support several regional and local plans and policies and would not conflict with previously adopted regional or local policies or plans related to roadway circulation. Therefore, the Project would result in no impacts.” The DEIR has no evidence to support this conclusion. If anything, the DEIR acknowledges that one of the two “overarching objectives” of the General Plan Circulation Element is that “... vehicles should move into, out of, or through Beverly Hills as expeditiously as possible.” See DEIR p. 3.12-3. The DEIR has no analysis of the Project’s conflict with this “overarching” goal, or the specific goals and policies found in the Circulation Element that were identified in Comment 24-5.

Not only has BW provided evidence that there would be gridlock due to the removal of the southbound right turn lane on Beverly Drive with no special pedestrian signal phasing to reduce conflicts between pedestrians and vehicles, the FEIR states on page 3-73 that the threshold for exceeding the threshold for the determination of a “substantial delay increase” is five seconds or more at an E/F signalized intersection. Anyone who has ever been stuck at the Wilshire Boulevard and Beverly Drive intersection at rush hour knows that the level of service at this intersection is generously an F. As stated on FEIR p. 3-73, the Project would cause the delay increase as a result of the Project to be five seconds which would mean by the FEIR’s own description that this would be a substantial increase above the City’s threshold criteria. Considering that the DEIR says that the “overarching” goal of the Circulation Element is to move vehicles as expeditiously as possible through the City, on its face, the Project is inconsistent with its own goals and there is no evidence to support the false conclusion in the DEIR that there is no conflict with the Circulation Element’s own goals.

We focus on this issue because of the serious construction and operational access issues that the Project would exacerbate. The DEIR completely ignores the real and tangible access, safety, and circulation impacts in the vicinity of the Project which by the FEIR’s own terms will get substantially worse as a result of the project. Instead of mitigating the land use and safety impacts that would be caused by queueing, delay of emergency vehicles, blockages of sight lines to allow left turns into the Properties’ parking garage from northbound Beverly Drive, the FEIR ignores these land use conflicts even though real mitigation is possible to eliminate the conflict. The City should commit to deployment of traffic control officers during peak hours; it should change the signalization to minimize pedestrian and vehicular conflicts; it should not prohibit northbound left turns into the Properties’ Beverly Drive entry; and it should select one of the other alternatives that would not have the same land use conflicts as Beverly Drive, which carries regional traffic pursuant to the City’s own Circulation Element.

Moreover, the FEIR misconstrues BW’s comments on the future configuration as traffic issues precluded by SB 743. On the contrary, BW is concerned about the significant land use, safety, and hazard impacts that would occur due to the several years’ long closure of the Beverly Drive

north of Wilshire Boulevard. There has not been any adequate analysis of the conflicts with the General Plan's land use policies and goals which have a genesis in the General Plan's EIR. While SB 743 may apply, there are real land use conflicts as indicated above.

*C. The City Has Failed to Provide Responses to Comments Ten Days Before Proposed FEIR Certification.*

The City released the FEIR on November 5, 2020 only five days before tonight's hearing. However, CEQA requires that the City provide public agencies with proposed responses to public agency comments on the DEIR at least **ten days** before the hearing where the lead agency certifies the FEIR. Public Resources Code §21092.5; 14 CCR §15088(b).<sup>13</sup> To comply with CEQA's text and principles of full and good faith public disclosure, whereby an FEIR must contain response to comments, the City must certify the FEIR no earlier than November 15, 2020. If the City provided public agencies twice as long to review response to comments as it did to the public, including its own stakeholders, residents, and property owners, such as BW, this thwarts informed decision making and public participation.

Consequently, the City's last-minute publication of a 487 page staff report 72 hours before the hearing violates CEQA principles of public participation and informed decision making. California policy is that "...[CEQA documents] be organized and written in a manner that will be meaningful and useful to decisionmakers and to the public."<sup>14</sup> The last minute publication deprives the public from robust participation, especially since the public may not even realize that the City proposes to condemn property pursuant to the Project. Further, "the EIR serves not only to protect the environment but also to demonstrate to the public that it is being protected."<sup>15</sup> This last-minute publication of comments violates both the language of Public Resources Code § 21092.5 and these aforementioned principles of good faith disclosure.

Consistent with the statute and with principles of good faith public disclosure, the common practice of lead agencies is to release the precertification responses to the public 10 days before potential certification.<sup>16</sup> In order to comply with the requirements of Pub. Res. Code § 21092.5, fulfill its duty of meaningful public disclosure, and to keep consistency with the common practice of lead

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<sup>13</sup> "(a) At least 10 days prior to certifying an environmental impact report, the lead agency shall provide a written proposed response to a public agency on comments made by that agency which conform with the requirements of this division...Copies of responses or the environmental document in which they are contained... may be used to meet the requirements imposed by this section.

....

(c) Nothing in this section requires the lead agency to respond to comments not received within the comment periods specified in this division, to reopen comment periods, or to delay acting on a negative declaration or environmental impact report."

<sup>14</sup> Public Resources Code § 21003.

<sup>15</sup> *County of Inyo v. Yorty*, 32 Cal. App. 3d 795.

<sup>16</sup> "In practice, lead agencies provide these responses to the public 10 days before the certification and within the EIR." *Practice Under the California Environmental Quality Act*, Chapter 16, "Final EIRs," §16.8 (B).

agencies, the City must allow ten days between providing comment responses and certifying the FEIR.

## II. The Removal of the Canopy at 9465 Beverly Will Constitute a Taking and Require Just Compensation

As noted above, the Project would involve the temporary taking of portions of 9465 Wilshire Boulevard.<sup>17</sup> While the FEIR notes that the canopy is within the public right-of-way, the FEIR fails to recognize that the canopy is anchored by beams that are on private property. As noted above, the removal of the canopy for construction of the Project would impact three (3) existing tenants, as well as the Beverly driveway.<sup>18</sup> Along with the damages that would result from this direct physical appropriation of BW's property, the pendency of the Project and the FEIR process has resulted in concrete economic harms to the BW, in that the uncertainty regarding potential temporary condemnation of the Properties has and would continue to encumber BW's ability to lease its properties.

### A. *Removal of the Canopy Would Result in a Direct Physical Appropriation of BW's Property*

With a "... physical occupation of property, the United States Supreme Court has uniformly found a regulatory taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."<sup>19</sup> Not only does the direct physical invasion from the removal of the canopy constitute a taking, the City is liable for loss of use during construction, lost tenant leaseability, and loss of access.<sup>20</sup>

The removal and reconstruction of the canopy would require the removal of and interference with the support beams on the Properties, affecting three of the tenants paying rent to occupy one of the Properties. As noted above, this will result in both a direct physical appropriation of property. This

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<sup>17</sup> See DEIR p. 3.4-18, Mitigation Measure CUL-A: "For the historical resource, the Wilshire Beverly Center, **a treatment plan for the removal and reinstatement of the existing boxed canopy on the east elevation of the building facing North Beverly Drive shall be required** prior to removal of the canopy." (Emphasis Added.)

<sup>18</sup> See Figure 2.

<sup>19</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982).

<sup>20</sup> Courts have held that all three of these circumstances constitute takings. *City of Livermore v Baca* (2012) 205 CA4th 1460, 1471 (closure of two of four driveways to commercial property resulting from project construction and temporary loss of landscaping can affect tenant leaseability); *Heimann v City of Los Angeles* (1947) 30 C2d 746, 754 (municipality piled materials in street, erected saw mills, accumulated waste materials over 2-year period); *City of San Rafael v Wood* (1956) 144 CA2d 604, 608 (deposit of large amounts of silt in yacht harbor); *Pierpont Inn, Inc. v State* (1969) 70 C2d 282, 299 (noise, dust, and disturbing vibrations caused by heavy equipment); *Heimann v City of Los Angeles* (1947) 30 C2d 746, 754 (municipality piled materials in street, erected saw mills, accumulated waste materials over 2-year period).

could affect leasing at the Properties,<sup>21</sup> impairment of access to the premises,<sup>22</sup> **more queuing to get out of garage**,<sup>23</sup> excessive noise and vibration on the Properties,<sup>24</sup> and construction staging on the premises. The City will be required to compensate BW for these damages, per the cited case law. Other economic impacts of the taking include: the cost of hiring traffic control officers during construction and operations, economic losses due to tenant loss, and the cost of hiring extra guards for ground floor tenants who will have holes in exterior walls.

*B. The City is Potentially Liable for Promulgating the FEIR as a Pre-Condemnation Activity Because it Excessively Delays Eminent Domain Action*

Not only is the City liable to compensate BW for the direct physical appropriation, a **condemning authority may be liable for unreasonable conduct during pre-condemnation activities where it excessively delays eminent domain action.**<sup>25</sup> "A claim for pre-condemnation damages may be raised by a property owner if they show that the public entity placed obstacles in their path relating to the use of the property."<sup>26</sup> The FEIR alludes to the possibility of condemning the subject property without issuing a notice of intent to condemn. Therefore, the FEIR is potentially a pre-condemnation statement which could interfere with the ability to lease the Properties, and the economic uncertainty that it creates constitutes unreasonable behavior. Where a property cannot be sold or developed because of pre-condemnation statements, the City may be liable for this economic damage.<sup>27</sup> The City has engaged in unreasonable conduct by issuing pre-condemnation statements that create uncertainty and, therefore, interfere with BW's future expectation of value in the Properties.

### III. Conclusion

The FEIR does not adequately analyze adverse environmental impacts. It lacks a complete Project Description. There is an absence of mitigation. The City did not provide adequate time for the public to review proposed responses to comments. Further, the Project proposes components that would constitute a taking of BW's property that would require just compensation. The City has alternatives that would not have the same costs or the same significant impacts. We strongly urge the City Council and the Mayor to slow down this train to approval in order to adequately analyze

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<sup>21</sup> BW expects that it may have economic losses due to potential tenants becoming more hesitant to rent during the construction period. *City of Livermore v Baca* (2012) 205 CA4th 1460, 1471

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Pierpont Inn, Inc. v State* (1969) 70 C2d 282, 299, *Los Angeles County Flood Control Dist. v Southern Cal. Bldg. & Loan Ass'n* (1961) 188 CA2d 850, 852 (recognizing damages to residence adjacent to project construction resulting from vibration during excavation).

<sup>25</sup> *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 [104 Cal. Rptr. 1, 500 P.2d 1345]. ("... when the condemner acts unreasonably in issuing pre-condemnation statements, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated...")

<sup>26</sup> *Jones v. City of Los Angeles* (1979) 88 CA3d 965.

<sup>27</sup> *Id.*

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the Project and mitigate its impacts so as to comply with the law. The stakeholder most affected by the Project has serious objections and would respectfully request time to work through these issues with the City in good faith, instead of being given only 72 hours to address a Project that would have serious and deleterious impacts on the Properties.

Respectfully yours,

HOLLAND & KNIGHT LLP

A handwritten signature in blue ink, appearing to read "Ryan Leaderman".

Ryan Leaderman  
Partner

cc: Jessie Holzer  
Susan Healy-Keene  
Keith Fink  
Teresa Chauvin  
Karl Lott