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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**
12

13 LIVABLE SAN DIEGO, an unincorporated) Case No. 37-2023-00014623-CU-TT-CTL
14 association;)
15 Petitioner,) **PETITIONER’S OPENING BRIEF IN**
16 vs.) **SUPPORT OF PETITION FOR WRIT OF**
17) **MANDATE**
18 CITY OF SAN DIEGO, a public body corporate) (California Environmental Quality Act)
19 and politic, and DOES 1 through 5, inclusive,)
20 Respondents.) Judge: Hon. James Mangione
21) Dept.: C-75
22) Date: November 15, 2024
23) Time: 9:00 AM
24) Action Filed: April 7, 2023
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1 **INTRODUCTION**

2 In February of 2023, the San Diego City Council considered and approved a package of 84
3 amendments to the City’s Land Development Code. Among these many amendments was what the
4 City labeled “Item No. 5,” which would create an entirely new definition in the Municipal Code.
5 Specifically, the new definition of what the City euphemistically called a “Sustainable Development
6 Area” (“SDA”) was intended to replace the “Transit Priority Area” (“TPA”) definition, which was
7 initially developed by State law and had been used by the City for over a decade in a variety of City
8 regulations and policies. City staff represented that the adoption of Item No. 5, the SDA definition,
9 “would affect locations eligible for the City’s local housing incentive programs and regulations.”

10 The TPA definition had identified locations within a half mile of transit for incentivizing
11 housing projects and programs. The SDA definition expanded that distance to one mile by what the
12 City described as “walk, roll, bike and other micro-mobility access to transit.” The SDA definition,
13 staff assured, “expanded land areas beyond the TPA definition” and “refocused development
14 incentives” in those areas. Indeed, the SDA definition would greatly expand “development incentives.”
15 Staff identified over 5,000 more developable acres. It noted “approximately 688 more developable
16 acres eligible for the Complete Communities Housing Solutions program” and “approximately 4,612
17 more developable acres eligible for the ADU Home Density Bonus Program.”

18 Several members of the public expressed concerns about the environmental impacts associated
19 with this entirely new approach to housing incentives and regulation. They noted that the City had
20 relied upon, and justified the reliance upon, the TPA definition as an appropriate mechanism to
21 encourage higher development intensity adjacent to transit. City staff prepared a memorandum for the
22 LDC Update, which claimed that prior environmental analyses had previously addressed such impacts.
23 Yet none of the four environmental documents the City cited concerning Item No. 5 considered
24 anything like the SDA. Indeed, the 2015 Program Environmental Impact Report (“EIR”) for the City’s
25 adoption of its Climate Action Plan (“CAP”) specifically noted that a “TPA is an area within a half-
26 mile of high quality transit.” A 2022 addendum associated with an update to the CAP likewise relied
27 upon the existing TPA definition, as did a 2020 addendum for an update to the City’s Housing
28 Element. The same is true for the 2020 Program EIR for the Complete Communities Program, which

1 specifically noted that its analysis “anticipates that future development under the Housing Program
2 would occur within TPAs” Yet, despite the fact that there had never been any analysis of the
3 impacts associated with significantly expanded land areas and significantly changed development
4 incentives, City staff refused to conduct any additional analysis of environmental impacts.

5 The California Supreme Court has explained that the “central purpose of [the California
6 Environmental Quality Act (‘CEQA’) is to ensure that agencies and the public are adequately informed
7 of the environmental effects of proposed agency action.” An agency can only rely upon a prior EIR
8 when the later proposal is “either the same as or within the scope of the project” described in that prior
9 EIR. As noted, even staff itself acknowledged substantial additional acreage “beyond the TPA
10 definition,” as well as “refocused development incentives.” The City chose to redefine a “Transit
11 Priority Area” into a “Sustainable Development Area” for a reason – because the scope of the two are
12 not identical, and the latter is certainly not “within the scope of” the former. And even if it were
13 arguably “within the scope,” there are significant changed conditions, changed circumstances, and new
14 information, each of which require the preparation of an EIR.

15 Accordingly, this Court should grant the writ and overturn the approvals of the Project.

16 **FACTUAL BACKGROUND**

17 **I. The Proposed 2022 LDC Update Included a New Definition of Proximity to Transit**

18 In January of 2023, the San Diego City Council considered 84 amendments to the City’s Land
19 Development Code, what staff referred to as the “2022 LDC Update.” AR4185. According to the staff
20 report, 53 of these amendments applied Citywide. AR4186. Perhaps the most controversial of which
21 was what was labeled “Item No. 5”: a “new definition of a Sustainable Development Area” or “SDA.”
22 *Id.* Staff represented Item No. 5 would create “a new definition for geographic designation for certain
23 housing programs that currently use the geographic area defined as a Transit Priority Area (TPA) in
24 San Diego Municipal Code Section 113.0103.” *Id.* The staff report explained: “The proposed changes
25 would affect the locations eligible for the City’s local housing incentive programs and regulations.”
26 AR4187. It claimed:

27 The existing definition of a TPA, which is rooted in state law, is a high-level definition
28 that measures the areas located near transit by measuring a 0.5-mile straight line distance,
rather than a walking distance. At the time that the definition was originally applied to the
City’s development programs, more refined data showing the areas of the City that were

1 within a close walking distance to transit – taking into account physical barriers such as
2 freeways and steep hillsides – was not available. As more refined data has become
3 available, the ability to focus development in the areas of the City that truly have the best
4 access to transit is now technically feasible.

4 *Id.*

5 Staff claimed:

6 To define a new SDA, City staff identified areas that have good walk, roll, bike and other
7 micro-mobility access to transit. Taking this into consideration, people who live in homes
8 located 0.75 miles from a major transit stop, at an average walking pace of three miles
9 per hour, can reach their destination in about 15 minutes.... [I]n communities with
relatively less vehicular travel ..., people who live in homes located one mile from a
major transit stop, at an average walking pace of three miles per hour, can reach their
destination in about 20 minutes.

10 *Id.* Accordingly, staff recommended the City Council adopt Item No. 5, which would create the new
11 SDA as follows:

12 Sustainable Development Area means the area within a defined walking distance along a
13 pedestrian path of travel from a major transit stop that is existing or planned, if the
14 planned major transit stop is included in a transportation improvement program or
applicable regional transportation plan, as follows:

- 15 a. Within Mobility Zones 1 and 3, as defined in Section 143.1103, the defined
walking distance is 1.0 mile.
- 16 b. Within Mobility Zone 4, as defined in Section 143.1103, the defined walking
distance is 0.75 miles.
- 17 c. For parcels located in Mobility Zone 4, in an area identified as a High or Highest
18 Resource California Tax Credit Allocation Committee Opportunity Area, the
defined walking distance is 1.0 mile.

19 In addition, an adopted specific plan prepared in accordance with section 122.0107(a),
20 shall be within the Sustainable Development Area if the Sustainable Development Area is
within a portion of the adopted specific plan.

21 AR4186.

22 Even before the City Council’s consideration of Item No. 5, the City Planning Commission and
23 many city residents and organizations had grappled with the proposed change. For example, at an
24 October 27, 2022 Planning Commission meeting, a commenter explained:

25 So we need to focus transit development not on what’s possible. Certainly, somebody can
26 ride a bike a mile to get to a bus stop. But [] are they likely to do that? The answer is [] no
.... In fact, studies have even shown that it matters what kind of transit. A half mile is
27 actually the accepted standard for something like fixed rail, like a trolley or subway, but a
quarter mile is actually what’s recommended when somebody is going to be taking a bus,
28 because of the [] less efficiency of buses over those higher speed mobility methods.

1 AR5076:034:6 – 17. At a December 8, 2022 Planning Commission meeting, staff presented an analysis
2 “of the proposed SDA areas compared to the existing TPA.” AR5076.115:7 – 10. Staff stated that the
3 “SDA provides approximately 5,224 more developable acres than the current TPA.” AR5076.115:12 –
4 15. Staff also stated that the “SDA includes approximately 688 more developable acres eligible for the
5 Complete Communities Housing Solutions program” and “approximately 4,612 more developable
6 acres eligible for the ADU Home Density Bonus program.” 5076.116:6 – 16.

7 **II. The City Council Approved The LDC Update Without Any Additional Environmental** 8 **Review**

9 Despite the significantly different approach to determining proximity to transit, City staff
10 claimed no additional environmental review and analysis was necessary, asserting: “Implementation of
11 this project’s actions would not result in new significant direct, indirect, or cumulative impacts over
12 and above those disclosed in [] previously certified” environmental documents. AR4198. It listed nine
13 such documents, dated from 1997 to 2022. *Id.*

14 A “CEQA Evaluation Memo” stated staff had “completed a Guidelines Section 15162
15 consistency evaluation” AR21299. It acknowledged that adoption of the amendment in Item No. 5
16 would result in an several net increases of developable acreage within the City:

17 The SDA definition expands land areas beyond the TPA definition while also refocusing
18 city development incentives in areas that are more transit-supportive (including removing
19 other areas from the current eligibility). For the City’s local housing incentive programs,
20 the data summary below shows the approximate acreage of developable land net
21 increases in the areas identified as in the TPA outside of the SDA or in the SDA outside
22 of the TPA. Some highlights from this data include:

- 23 • The SDA provides approximately 5,224 more developable acres than the current TPA
- 24 • The SDA furthers Fair Housing Goals by providing approximately 3,342 more
25 developable acres in High and Highest Opportunity Areas determined by the
26 California Tax Credit Allocation Committee
- 27 • The SDA includes approximately 688 more developable acres eligible for the
28 Complete Communities Housing Solutions Program
- The SDA includes approximately 4,612 more developable acres eligible for the ADU
Density Bonus program
- The SDA also excludes 2,309 developable acres from the current TPA where these
areas presently allow for additional incentives in areas located a farther walking
distance from transit than the acreages described above.

AR21310 (emphases in original).

1 The CEQA Evaluation Memo included a “Consistency Evaluation Matrix” in order to identify
2 which environmental document(s) staff believed related to which of the 84 LDC Update amendments.
3 AR21317. For Item No. 5, the matrix identified four environmental documents: an addendum to the
4 General Plan Housing Element Update, the Final PEIR for the Complete Communities Program, the
5 Final PEIR for the City’s Climate Action Plan (“CAP”), and an addendum to the CAP PEIR. *Id.*

6 The CEQA Evaluation Memo indicated staff had evaluated the LDC Update in relation to the
7 three criteria identified in CEQA Guidelines Section 15162. AR21302. It did not consider whether the
8 various LDC Update amendments were the same as, or within the scope of, the projects analyzed in the
9 prior environmental documents. *Id.*

10 The CEQA Evaluation Memo states that adoption of the SDA definition would result in the
11 following:

- 12 • The SDA provides approximately 5,224 more developable acres than the current TPA
- 13 • The SDA furthers Fair Housing Goals by providing approximately 3,342 more
14 developable acres in High and Highest Opportunity Areas determined by the
California Tax Credit Allocation Committee
- 15 • The SDA includes approximately 688 more developable acres eligible for the
Complete Communities Housing Solutions Program
- 16 • The SDA includes approximately 4,612 more developable acres eligible for the ADU
Density Bonus program
- 17 • The SDA also excludes 2,309 developable acres from the current TPA where these
18 areas presently allow for additional incentives in areas located a farther walking
distance from transit than the acreages described above.

19 AR21310 (emphases in original). It proceeded to downplay this significant departure from prior
20 analysis, saying “some areas will be added that were not specifically included in Complete
21 Communities” and the Complete Communities PEIR. *Id.* (emphasis added). And it claimed these areas
22 “are immediately adjacent to the areas covered by the Final PEIR for Complete Communities” *Id.*

23 Several members of the public submitted letters expressing concerns about Item No. 5 and the
24 lack of adequate environmental analysis. Petitioner submitted a letter on February 13, 2023, noting that
25 the adoption of the SDA definition constituted a “new project” that was not previously subject to
26 environmental review and analysis. AR23079. Petitioner noted: (1) even by staff’s admission, the SDA
27 definition would go well beyond the acreage considered in the Complete Communities PEIR, (2)
28 including specific plan areas would result in allowing an “unknown number of additional acreage to be

1 developed than considered in any environmental analysis,” and (3) the development of an unlimited
2 number of ADU’s within the SDA areas had never been analyzed. AR23079 – 80. Petitioner also
3 responded to staff’s claim that “the Complete Communities PEIR ‘acknowledged that TPA boundaries
4 may shift or new TPAs may be added,’ noting that the PEIR “never indicated that the use of TPAs
5 would be abandoned entirely and an entirely new approach to calculating for incentivizing
6 development would be adopted.” AR23080. Petitioner’s letter also observed that nowhere in the
7 PEIR’s list of “potential future approvals” was there any mention of “a possible change in how
8 proximity to transit is considered.” *Id.*

9 An in-depth submittal from Neighbors for a Better San Diego (“NFABSD”) noted several
10 problems, including that the proposal “violates San Diego’s Climate Action Plan” and that the
11 “justification and analysis of these changes has not been properly presented or analyzed”
12 AR23954. NFABSD observed that “professional and academic research overwhelmingly confirm that
13 ... [the] vast majority of people will not walk beyond one-half mile – or about ten minutes – to transit.”
14 AR23959. It included citations to several surveys and analyses. AR23968 – 71. And it cited relevant
15 research from the San Diego Association of Governments (“SANDAG”), which determined:

- 16 • 92% of people in the San Diego transit region walk 10 minutes or less to access
17 transit (1/2 mile or less)
- 18 • 70% walk 5 minutes or less to access transit (1/4 mile or less)
- 19 • Only 8% walk further than 1/2 mile

20 AR23964 & 23970 (citing “On-Board Passenger Survey: Results of the 2015 On-Board Transit
21 Passenger Survey for San Diego Region”).

22 NFABSD also criticized city staff for failing to “provide transparent, accurate, and complete
23 analysis” of the number of residential units Item No. 5 could engender. AR24002. Performing its own
24 analysis, and limiting such analysis to the Complete Communities Housing Solutions Program’s
25 impacts in commercial zones and the City’s Bonus ADU Program in residential zones, NFABSD
26 concluded Item No. 5 could result in 2,024,385 housing units when the Regional Housing Needs
27 Assessment goal is 108,036 units. AR24006.

28 NFABSD provided significant critique of the City’s assumptions about the relationship
between Item No. 5 and its Climate Action Plan goals. AR24008 – 12. It noted that “modeling of San

1 Diego’s limited future population growth demonstrates that increasing the SDA distance actually
2 decreases overall transit adoption citywide.” AR24012. And it concluded: “the dense development that
3 SDAs will allow beyond ½ mile from transit is likely to result in significant increases in GHG and
4 VMT, in direct conflict to San Diego’s CAP.” AR24044.

5 NFABSD also observed that cumulative environmental impacts were being ignored:

6 Overall, the SDAs as proposed will expand 7,533 acres beyond the previous TPAs per the
7 Planning Department. These reported 7,533 incremental acres ... do not include the
8 unknown additional acres that will be added to the SDA with the recent inclusion ... of
9 specific plans No new acreage metrics have been provided by the Planning
10 Department since that code change was [proposed], nor have these areas been added to
11 the SDA maps or a complete list of the existing specific plans been provided to [the Land
12 Use and Housing Committee], the [City] Council or the public.

13 AR24040.

14 NFABSD commented that the City’s 2020 approval regulations regarding Accessory Dwelling
15 Units (“ADU’s”) had not undergone any environmental review. AR24053. It observed that the new
16 rules allow “unlimited ADUs on single-family lots” AR24054. It urged: “An EIR evaluating both
17 the impacts of the San Diego ADU code, including the Bonus Density Program, and its expansion with
18 the adoption of the SDAs should be done to gauge the impacts of this ... program.” AR24056.

19 At the February 14, 2023 City Council meeting, several residents and organizations spoke in
20 opposition to Item No. 5. *See e.g.*, AR5076.190 – 210. And nearing the conclusion of the meeting,
21 Council member Dr. Campbell expressed concern about Item No. 5, noting: “studies of urban areas –
22 good, scientific studies, many of them, have shown that most people ... will not walk to mass transit if
23 it’s more than a quarter mile away.” AR5076.364. She also expressed that it “may be better to change
24 density increases once the mass transit is already online, or soon to be online, so that we are placing it
25 where it’s needed most, and not guessing – where is it going to be in 20 or 30 years.” *Id.* And she
26 explained: “An issue of importance like this should be studied on its own, and the public should be
27 given more than four business days of knowledge that this is coming up, to be able to express their
28 opinion on it.” AR5076.365.

Despite these and other legitimate concerns, the City Council approved the 2022 LDC Update,
including Item No. 5, by a vote of five to four. AR5076.385.

1 **STANDARD OF REVIEW**

2 Under CEQA, an agency has committed a prejudicial abuse of discretion “if the agency ‘has
3 not proceeded in a manner required by law or if the determination or decision is not supported by
4 substantial evidence.’” *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*
5 (2007) 40 Cal. 4th 412, 426 (quoting Pub. Res. Code § 21168.5). “[A]n agency may abuse its discretion
6 under CEQA either by failing to proceed in the manner CEQA requires or by reaching factual
7 conclusions unsupported by substantial evidence. Judicial review of these two types of error differs
8 significantly: While we determine de novo whether the agency has employed the correct procedures,
9 ‘scrupulously enforce[ing] all legislatively mandated CEQA requirements,’ we accord greater
10 deference to the agency’s substantive factual conclusions.” *Banning Ranch Conservancy v. City of*
11 *Newport Beach* (2017) 2 Cal.5th 918, 935 (citations omitted).

12 **ARGUMENT**

13 **I. The Public and Decision Makers Were Never Apprised of Project Impacts**

14 The California Supreme Court has observed:

15 The central purpose of CEQA is to ensure that agencies and the public are adequately informed
16 of the environmental effects of proposed agency action. The subsequent review provisions, as
17 *Save Our Neighborhood* recognized, are accordingly designed to ensure that an agency that
proposes changes to a previously approved project “explore[s] environmental impacts not
considered in the original environmental document.”

18 *Friends of the College of San Mateo Gardens*, 1 Cal.5th at 951 (quoting *Save Our Neighborhood v.*
19 *Lishman* (2006) 140 Cal.App.4th 1288, 1296) (emphasis added). The Supreme Court explained: “the
20 subsequent review provisions can apply only if the project has been subject to initial review; they can
21 have no application if the agency has proposed a new project that has not previously been subject to
22 review.” *Id.* at 950 (emphasis added).

23 As the court in *Save Our Access v. City of San Diego* (2023) 92 Cal.App.5th 819, noted:

24 The California Supreme Court explained “when a program EIR is employed, if a
25 later project is not ‘either the same as or within the scope of the project ... described in
26 the program EIR,’ then review of the proposal is not governed by section 21166’s
27 deferential substantial evidence standard. [*Sierra Club v. County of Sonoma* (1992) 6
28 Cal.App.4th 1307, 1321 (citing CEQA Guidelines § 15168(c)(5).] Instead, under ...
section 21094, the agency is required to apply a more exacting standard to determine
whether the later project might cause significant environmental effects that were not fully
examined in the initial program EIR.” [*Friends of the College of San Mateo Gardens v.*
San Mateo County Community College Dist. (2016) 1 Cal.5th 937, 960.]

1 TPAs within Mobility Zone 1, Mobility Zone 2, or Mobility Zone 3; and the density and height of the
2 project would be limited by the FAR alone” AR1410 (emphasis added).

3 Section 3.6 of the Complete Communities PEIR identified future actions associated with the
4 proposed project: “Future anticipated actions under the proposed project would include the
5 development of multi-family residential development with an affordable component and
6 neighborhood-serving infrastructure within TPAs, and the construction and use of transportation
7 infrastructure amenities throughout Mobility Zones 1, 2, and 3.” AR1413 (emphasis added). And it
8 specifically explained:

9 The analysis in this PEIR anticipates that future development under the Housing Program
10 would occur within TPAs and would be subject to the applicable development regulations
11 and requirements of the Housing Program. Future development under the Housing
12 Program would be processed with a ministerial review unless site-specific conditions
13 such as impacts to Environmentally Sensitive Lands or historical resources or a Coastal
14 Development Permit warrant a discretionary review.

15 AR1413 – 14 (emphasis added). Likewise, the adopted Complete Communities Housing regulations
16 themselves stated they “apply to any development within a Transit Priority Area where any portion of
17 the premises contains zoning that is commercial, residential, or mixed-use.” SUPPAR1139 (emphasis
18 added).

19 The Complete Communities PEIR’s analysis of impacts rests upon where the development will
20 be located within the TPA and the associated Mobility Zones:

21 Physical impacts associated with the Mobility Choices Program would occur from the
22 installation of transportation amenities within Mobility Zones 1, 2, and 3 ... Thus, while
23 the ordinance would apply to projects citywide, physical impacts associated with the
24 installation of active transportation and transit infrastructure would be limited to within
25 the Mobility Choices Program improvement areas. ... Physical impacts associated with
26 the Housing Program would include potential future multi-family and mixed-use
27 development within TPAs and associated infrastructure and amenity improvements.

28 AR1415 (emphasis added). The Complete Communities PEIR does not assess the physical impacts that
occur outside of the Mobility Zones as defined based on the TPA definition. The CEQA Evaluation
Memo acknowledges that “the SDA definition expands land areas beyond the TPA definition while
also refocusing city development incentives in areas that are more transit-supportive. In some
instances, places outside of the TPA definition will be allowed increased development incentives.”
AR21340 (emphases added).

1 The Complete Communities PEIR included Table 3-4, which identified “potential future
2 approvals required to implement the project.” AR1414. None of these “potential future approvals”
3 discussed the possible adoption of an amendment that would expand the land areas beyond the TPA
4 definition and refocus development incentives. *Id.* The PEIR could have identified adoption of an
5 alternative geographic designation for the Housing Program or a different methodology, just as it listed
6 other future actions. AR1414. It did not do so.

7 **2. The Scope of the CAP PEIR and CAP Update Addendum**

8 The CAP PEIR’s analysis rested on focusing development and incentives within TPAs. It
9 embraced a measure to define proximity to transit which is “an area half a mile of a major transit stop.”

10 The Project Description section of the CAP PEIR stated:

11 CAPs are generally recognized by regional and state agencies as being an important
12 planning tool for reducing emissions at the local level. The City’s CAP outlines five
13 strategies supported by actions for reducing municipal and community-wide GHG
14 emissions. The CAP is a comprehensive document that functions as the framework for
15 City GHG reduction strategies for the short, medium, and long term.

16 AR490. It further discussed the CAP’s scope in relation to reduction of vehicle GHG emissions
17 through development planning and infrastructure improvement:

18 As outlined in the City’s General Plan, future growth would be centered around
19 transportation corridors and urban villages, in “Transit Priority Areas” (TPAs). TPAs are
20 addressed in SB 743 to align regional transportation, land use, housing, and GHG
21 emissions planning through the [Sustainable Communities Strategy] (SCS), which
22 illustrates how SANDAG would meet a GHG reduction target for passenger vehicles
23 established by the CARB.

24 AR495 (emphases added). And it explained:

25 A TPA is an area within a half-mile of high quality transit such as a rail stop or a bus
26 corridor that provides or will provide at least 15-minute frequency service during peak
27 hours by the year 2035. SB 743 defines a TPA as, “an area within half a mile of a major
28 transit stop that is existing or planned, if the planned stop is scheduled to be completed
within the planning horizon included in a Transportation Improvement Program adopted
pursuant to Section 450.216 or 450.322 of Title 23 of the Code of Federal Regulations.”

Id. (emphasis added).

The Project Description of the CAP Update Addendum stated the intention to “update the CAP
strategies and associated targets, measures, and actions and supporting actions to reach a new GHG
reduction target of net zero emissions by 2035.” AR1901. It provided a comparison of the new targets

1 and related measures with the ones in the adopted CAP. AR1903-1905. The CAP Update Addendum
2 did not discuss elimination of the TPA definition or expansion of development incentives.

3 **3. The Scope of the Housing Element Update Addendum**

4 The Project Description in the Housing Element Update Addendum identified several goals and
5 policies. SUPPAR4. Nothing discussed eliminating the TPA's. Policy HE-C.11 provides: "Allow
6 densities that exceed ranges defined in the zone for projects using State density bonus provisions and
7 for projects within designated TPAs." SUPP AR1021 (emphasis added). And Policy HE-C.12
8 provides: "Permit FARs and heights that exceed the adopted maximums for projects that provide smart
9 growth benefits and for projects with unique circumstances that would reduce impacts relative to other
10 projects or transfer development potential between parcels within a TPA." *Id.* (emphasis added). But
11 there was nothing in the Housing Element Update Addendum considering the elimination of the TPA
12 definition or expansion of development incentives beyond the TPA's.

13 **B. The CEQA Evaluation Memo Did Not Correctly Describe Prior Analysis**

14 "The adequacy of an EIR's project description is closely linked to the adequacy of the EIR's
15 analysis of the project's environmental effects. If the description is inadequate because it fails to
16 discuss the complete project, the environmental analysis will probably reflect the same mistake." *Dry*
17 *Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 31 – 32 (citations omitted). As
18 the California Supreme Court has stated, the "central purpose of CEQA is to ensure that agencies and
19 the public are adequately informed of the environmental effects of proposed agency action." *Friends of*
20 *the College of San Mateo Gardens*, 1 Cal.5th at 951. None of the environmental documents identified
21 by staff discussed adoption of an alternative definition to the TPA definition. Accordingly, at the time
22 the public and decision-makers were considering these various approvals and their environmental
23 analysis, there was no reason for them to consider the implications of eliminating the TPA definition,
24 or "expanding the land areas beyond the TPA definition" and "refocusing the development incentives
25 in those areas."

26 Indeed, this very position was rejected by the Court of Appeals in *Save Our Access*:

27 The City's strained argument that removal of the height limit is within the scope
28 of the PEIR is simply not supported by the administrative record. The CPU's proposed
land-use map identified the number of dwelling units permitted per acre for specific lots.
The land use table identified the number of residential dwelling units allowed for each

1 community plan designation along with the City-wide base zone designation and the base
2 zone floor area ratio. The proposed zoning map showed new zoning designations per
3 parcel. The PEIR's project description summary stated, "The land use is analyzed at
4 build-out *using total dwelling unit yield.*" (Italics added.) These documents primarily
5 focused on how many dwelling units were allowed per parcel under the newly proposed
6 zones. There was no discussion or analysis of building heights.

7 92 Cal.App.5th at 852 – 53. The Court concluded: "removing the Coastal Zone height limit from the
8 Midway-Pacific Highway Community Planning Area is a significant change that was not considered in
9 the PEIR." *Id.* at 859. Likewise, removing the TPA definition and adopting a different methodology to
10 asses proximity to transit was a significant change not considered in prior analyses and was not within
11 the scope of the prior environmental documents.

12 The CEQA Evaluation Memo's characterization of prior analysis was incorrect. For instance,
13 the Housing Element Update Addendum did not address the additional developable acres resulting
14 from the SDA definition. The CEQA Evaluation Memo claimed that "Amendment 5 changes the
15 definition of TPA ... The area in question, however, will still be centered around a major transit stop,
16 and the development would predominantly be infill development, similar in nature to what was
17 analyzed in the Addendum to the General Plan Final PEIR for the Housing Element." AR21307. It also
18 claimed the amendment would support the Housing Element policies "by adding approximately 6,603
19 more developable acres near transit that are eligible for the ADU Home Density Bonus, while also
20 removing 1,991 developable acres from eligibility that are currently further outside the walkshed of
21 transit (amendment 5)." AR21306. Despite the City's claim, the Housing Element Addendum did not
22 even mention TPA or ADU Bonus.

23 Likewise, the adoption of the SDA definition provided additional developable acres that would
24 be eligible for the Complete Communities Housing Program which was not addressed as part of the
25 Complete Communities PEIR. The CEQA Evaluation Memo acknowledged: "the Final PEIR for
26 Complete Communities used the Senate Bill (SB) 743 definition of a TPA, which defines a TPA as the
27 area within one-half mile of a major transit stop..." AR21309 (emphasis added). The CEQA
28 Evaluation Memo claimed:

The existing definition of a Transit Priority Area measures the areas located near
transit by looking at a 0.5-mile "as the crow flies" distance, rather than a walking
distance. At the time that the definition was originally applied to the City's development
programs, more refined data showing the areas of the City that were within a close

1 walking distance to transit – taking into account physical barriers such as freeways and
2 steep hillsides – was not available. As more refined data has become available, the ability
3 to focus development in the areas of the City that truly have the best access to transit is
4 now technically feasible.

5 AR21311. While pointing out the lack of information to assess the proposed amendment at the time the
6 Complete Communities PEIR was adopted, the CEQA Evaluation Memo failed to conclude that
7 elimination of the TPA definition or using a different methodology to measure proximity to transit was
8 not considered within the scope of the Complete Communities PEIR. Moreover, it acknowledged:
9 “The SDA definition expands land areas beyond the TPA definition...” AR21309. It noted “the
10 approximate acreage of developable land net increases,” including approximately 5,224 more
11 developable acres than the current TPA and approximately 688 more developable acres eligible for the
12 Complete Communities Housing Solutions Program. AR21309 – 21310.

13 The Complete Communities PEIR identified a total of 20,143 acres of Housing Program
14 Project Area for various land use categories. AR1393. It also identified a total of 20,324 acres of area
15 “that would be eligible for participation in the Housing Program.” AR1408-1409. Therefore, the
16 amendment would increase developable acreage by more than 25 percent over what was analyzed in
17 the Complete Communities PEIR. Yet, there is no environmental analysis provided by the City for
18 these increases.

19 The CEQA Evaluation Memo claimed: “replacing a 0.5-mile radius with an area within a 0.75-
20 to 1.0-mile walking distance from a major transit stop would not result in new or more severe
21 significant impacts over what was previously analyzed in the Final PEIR for the CAP and the
22 Addendum to the CAP PEIR for the CAP Update.” AR21315. Yet, the CAP PEIR analysis rested upon
23 the TPA definition that was defined as “an area within half a mile of a major transit stop that is existing
24 or planned.” AR 495.

25 In fact, when it adopted the Complete Communities Program, the City Council adopted
26 findings reasoning it would “incentivize the development of housing units that are needed to address
27 the region’s housing shortage, and will encourage growth within transit priority areas (TPA) consistent
28 with the City’s CAP.” AR131 (emphasis added). Likewise, the Staff Report for Complete
Communities Program claimed: “the CAP identifies that the greatest GHG emissions reductions can be

1 achieved by strategic land use planning, specifically by locating housing within TPAs, because
2 housing located near transit results in less VMT.” AR3141 (emphasis added).

3 The California Supreme Court has observed:

4 The central purpose of CEQA is to ensure that agencies and the public are adequately
5 informed of the environmental effects of proposed agency action. The subsequent review
6 provisions, as *Save Our Neighborhood* recognized, are accordingly designed to ensure
7 that an agency that proposes changes to a previously approved project “explore[s]
8 environmental impacts not considered in the original environmental document.” This
9 assumes that at least *some* of the environmental impacts of the modified project were
10 considered in the original environmental document, such that the original document
11 retains some relevance to the ongoing decisionmaking process. A decision to proceed
12 under CEQA’s subsequent review provisions must thus necessarily rest on a
13 determination—whether implicit or explicit—that the original environmental document
14 retains some informational value. If the proposed changes render the previous
15 environmental document wholly irrelevant to the decisionmaking process, then it is only
16 logical that the agency start from the beginning under section 21151 by conducting an
17 initial study to determine whether the project may have substantial effects on the
18 environment.

12 *Friends of the College of San Mateo Gardens*, 1 Cal.5th at 951 (quoting *Save Our Neighborhood v.*
13 *Lishman* (2006) 140 Cal.App.4th 1288, 1296).

14 The court in *Martis Camp Community Association v. County of Placer* (2020) 53 Cal.App.5th
15 569, explained:

16 We do not construe *San Mateo Gardens*, as authorizing a lead agency to choose
17 any prior environmental review as long as it has some “informational value.” In *San*
18 *Mateo Gardens*, the Supreme Court was discussing the issue of deciding when proposed
19 changes to a project should be considered a new project, requiring a new EIR under
20 section 21151, as opposed to changes to a previously approved project, subject to
21 subsequent environmental review under section 21166. The court held that when an
22 agency proposes changes to a project, it must determine whether the previous
23 environmental document retains relevance in light of the changes and, if so, whether
24 major revisions to the previous environmental document nevertheless are required.
25 However, the court acknowledged that the subsequent review provisions apply only to a
26 previously approved project that has been subject to environmental review; the provisions
27 do not apply if the agency has proposed a new project not previously analyzed in the
28 original environmental document. By parity of reasoning, we conclude the subsequent
review provisions do not apply when an agency approves changes to a different project
subject to a different environmental document.

26 *Id.* at 606 n.26 (citing *San Mateo Gardens*, 1 Cal.5th at 943 – 44 & 949 – 50). Here, the City has failed
27 to provide any support for the position that the prior environmental analyses in any way applied to the
28 adoption of the SDA definition.

1 **C. The Replacement of the TPA Definition and Increase in Development Incentives**
2 **Will Lead to Significant Environmental Impacts**

3 “Section 21166 and its companion section of the Guidelines appear to control only when the
4 question is whether more than one EIR must be prepared for what is essentially the same project.”
5 *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320. The *Save Our Access* court noted:
6 “We ... apply the fair argument test to review an agency’s determination whether to prepare a new or
7 supplemental EIR in a later new project following certification of a program EIR.” 92 Cal.App.5th at
8 860 (citing *Sierra Club*, 6 Cal.App.4th at 1320 – 21). “[I]f there is substantial evidence in the record
9 that the later project may arguably have a significant adverse effect on the environment, which was not
10 examined in the prior program EIR, doubts must be resolved in favor of environmental review and the
11 agency must prepare a new tiered EIR, notwithstanding the existence of contrary evidence.” *Sierra*
12 *Club*, 6 Cal.App.4th at 1319; *see also Friends of the College of San Mateo Gardens*, 1 Cal.5th at 960.

13 The SDA definition would result in a net increase of substantial developable acres over the
14 current TPA definition. AR21310. But the CEQA Evaluation Memo mischaracterizes this departure,
15 claiming: “some areas will be added that were not specifically included in Complete Communities.”
16 AR21340. In fact, NFABSD noted the amendment would result in over 2 million new housing units.
17 AR24006.

18 A commenter at the October 27, 2022, Planning Commission meeting observed that “it’s one
19 thing to say that our transit planning is going to be dynamic and that it’s going to grow over time. It’s
20 another thing to - for it to be fluid.” AR5076.035. He explained possible implications of an unknown
21 and “fluid” planning by referring to the “Adams Avenue project” that was planned to be within TPAs
22 but resulted in getting out of TPA due to the lack of the rapid bus line that was proposed to be
23 constructed. *Id.*

24 The Complete Communities PEIR’s air quality and GHG impact analysis explained: “As the
25 Housing Program would allow for ministerial approval of multifamily residential developments, future
26 projects would not be required to perform dispersion modeling to determine the potential for CO hot
27 spots.” AR1462. It further provided: “increased congestion within TPAs resulting from development
28 under the Housing Program could increase volumes and delays at intersections, and could experience

1 31,600 vehicles per hour or more, resulting in a potentially significant impact related to localized CO
2 hot spots.” *Id.* (emphasis added).

3 Similarly, regarding future densities, the Complete Communities PEIR stated: “the proposed
4 Housing Program could result in a redistribution of the density that was evaluated within recent
5 community plan update (CPU) Environmental Impact Reports (EIRs). Densities could shift to focus
6 more within TPAs, but is not anticipated to exceed overall CPU densities that were evaluated in the
7 respective CPU EIRs.” AR1455 (emphasis added). In fact, in response to a comment on the Complete
8 Communities PEIR, the City claimed: “Housing developed under the Housing Program would only
9 occur within TPAs that are currently zoned to allow multi-family housing,” AR1174 – 75.

10 But the approval of “expanded land areas beyond the TPA definition” and “refocused
11 development incentives” in those areas, and the substantial developable acres the SDA definition
12 provides, will lead to several significant environmental impacts. Since the new SDA definition
13 provides substantially more developable acres than the TPA, there are significant environmental
14 impacts not previously addressed.

15 The conclusions of the *Save Our Access* court are apropos: “The administrative record supports
16 a fair argument that removal of the Coastal Zone height limit in the Midway-Pacific Highway
17 Community Planning Area may arguably have significant adverse effects on the environment that were
18 not examined in the PEIR.” 92 Cal.App.5th at 860. “Members of the public raised numerous concerns
19 about the impacts of removing the height limit, allowing construction of large buildings above 30 feet,
20 and the corresponding density in the area. These included impacts to traffic, human health, air quality,
21 water quality, and greenhouse gas emissions.” *Id.* at 861. As the Court of Appeals concluded:

22 Even assuming, without deciding, that the PEIR considered certain environmental
23 impacts of full “build out” of permitted residential densities as discussed earlier, the
24 analysis primarily focused on traffic implications with related noise and air quality issues
25 related to vehicular traffic. It is not apparent the analysis adequately considered all
26 potential issues related to building heights above 30 feet.

27 *Id.* at 861.

28 Development associated with adoption of the SDA definition will lead to several significant
impacts. A councilmember speaking at the City Council meeting expressed concern about Item No. 5,
noting: “studies of urban areas – good, scientific studies, many of them, have shown that most people

1 ... will not walk to mass transit if it's more than a quarter mile away." AR5076.364. She also
2 expressed that it "may be better to change density increases once the mass transit is already online, or
3 soon to be online, so that we are placing it where it's needed most, and not guessing – where is it going
4 to be in 20 or 30 years." *Id.* One commenter concluded: "modeling of San Diego's limited future
5 population growth demonstrates that increasing the SDA distance actually decreases overall transit
6 adoption citywide." AR24012.

7 **D. Even if Section 21166 Was Applicable, Additional Environmental Review is Needed**

8 Public Resources Code Section 21166 provides:

9 When an environmental impact report has been prepared for a project
10 pursuant to this division, no subsequent or supplemental environmental
11 impact report shall be required by the lead agency or by any responsible
12 agency, unless one or more of the following events occurs:

13 (a) Substantial changes are proposed in the project which will require
14 major revisions of the environmental impact report.

15 (b) Substantial changes occur with respect to the circumstances under
16 which the project is being undertaken which will require major revisions in
17 the environmental impact report.

18 (c) New information, which was not known and could not have been
19 known at the time the environmental impact report was certified as
20 complete, becomes available.

21 Pub Res. Code, § 21166.

22 The CEQA Evaluation Memo identified the General Plan Housing Element Update, the Final
23 PEIR for the Complete Communities Program, CAP PEIR the 2022 Addendum to the CAP PEIR as
24 relevant to the Item No. 5. AR21317. These environmental documents analyzed environmental
25 impacts of the respective projects which are centered around incentivizing development and
26 infrastructure within TPAs. The Staff Memo claimed that the proposed amendments are consistent
27 with the identified environmental documents and would not result in new or more severe
28 environmental impacts. AR21307, AR21312, AR21315. However, the Staff Memo's analysis is faulty
and ignores the substantial changes and new information that require further environmental analysis.

1 **1. Substantial Project Changes**

2 The CEQA Evaluation Memo provided a comparison of developable acres the SDA allows in
3 relation to the prior TPA definition:

1 For the City’s local housing incentive programs, the data summary below shows the
2 approximate acreage of developable land net increases in the areas identified as in the
3 TPA outside of the SDA or in the SDA outside of the TPA. Some highlights from this
4 data include:

- 5 • The SDA provides approximately 5,224 more developable acres than the current TPA
- 6 • The SDA furthers Fair Housing Goals by providing approximately 3,342 more
7 developable acres in High and Highest Opportunity Areas determined by the California
8 Tax Credit Allocation Committee
- 9 • The SDA includes approximately 688 more developable acres eligible for the Complete
10 Communities Housing Solutions Program
- 11 • The SDA includes approximately 4,612 more developable acres eligible for the ADU
12 Density Bonus program
- 13 • The SDA also excludes 2,309 developable acres from the current TPA where these areas
14 presently allow for additional incentives in areas located a farther walking distance from
15 transit than the acreages described above.

16 AR21340. It acknowledged adoption of the SDA definition would result in a net increase of thousands
17 of developable acres over the current TPA definition, yet, claimed that such considerable increase
18 would not result in significant environmental impacts. AR21310. It proceeded to downplay this
19 significant departure from prior analysis, saying “some areas will be added that were not specifically
20 included in Complete Communities” and the Complete Communities PEIR. *Id.* (emphasis added). And
21 it claimed these areas “are immediately adjacent to the areas covered by the Final PEIR for Complete
22 Communities” *Id.*

23 As acknowledged in the CEQA Evaluation Memo, the Complete Communities PEIR found that
24 “implementation of the project would result in significant and unavoidable impacts” in 13 areas.

25 AR21301. Yet, the City claims more than fifty percent increase in the developable land would not
26 result in any environmental impacts. The Staff’s misleading statements cannot divert from the reality
27 that a net increase of substantial additional developable acres constitutes a substantial change that was
28 not analyzed in the Complete Communities PEIR.

Indeed, commenters noted that the last-minute addition of areas encompassed by a specific plan
within the SDA definition was a substantial change to the project. AR23079 – 80 & 23757.

Additionally, the SDA definition would result in a substantial increase in the number of parcels within
the Very High Fire Hazard Severity Zone. AR23757. Each of these are significant changes to the prior
projects analyzed in prior environmental reports.

1 **2. Substantial Changes in Circumstances**

2 The CEQA Evaluation Memo did not provide any analysis or explanation for how
3 development of ADU’s and the additional acreage that was not previously analyzed in the Complete
4 Communities PEIR and other environmental documents is. For the reasons explained, changes
5 proposed by adoption of the SDA definition constitutes a substantial change to the Complete
6 Communities PEIR, and would lead to “previously unstudied significant environmental impacts.”
7 Accordingly, the City is required to conduct additional environmental analysis.

8 The CAP PEIR analyzed “the environmental impacts associated with implementing the five
9 strategies of the CAP designed to help the City meet its greenhouse gas (GHG) emissions reductions
10 targets.” AR21313. The CAP PEIR’s Project Description described TPAs and explained the
11 connection between CAP strategies and growth:

12 As outlined in the City’s General Plan, future growth would be centered around
13 transportation corridors and urban villages, in “Transit Priority Areas” (TPAs). TPAs are
14 addressed in SB 743 to align regional transportation, land use, housing, and GHG
15 emissions planning through the SCS, which illustrates how SANDAG would meet a
16 GHG reduction target for passenger vehicles established by the CARB.

17 AR 495. Under CAP Strategy 3 “Bicycling, Walking, Transit & Land Use” provides two actions,
18 Action 3.1 and 3.6, that specifically discusses development and mobility within TPAs. The CAP PEIR
19 explains:

20 **Action 3.1** Implement General Plan Mobility Element and City of Villages Strategy in
21 Transit Priority Areas

22 The target for Action 3.1 is to achieve mass transit mode share of 12 percent by 2020 and
23 25 percent by 2035 in TPAs.

24 The City of Villages strategy is the overarching vision for future land use in the City of
25 San Diego. The strategy would encourage the intensification of land uses in TPAs that
26 would allow more residents to rely on transit for their primary commute mode. The
27 strategy does not specifically assign uses to land in the City, but rather would be
28 implemented with the update and adoption of each community plan.

AR501.

Action 3.6 Implement Transit-Oriented Development within Transit Priority Areas.

The target for Action 3.6 is to reduce average vehicle commute distance by two miles through implementation of the General Plan’s City of Villages Strategy by 2035.

1 Similar to Action 3.1, this action would facilitate the implementation of the City of
2 Villages Strategy, which would result in the concentration of new development in TPAs.

3 AR502.

4 The CEQA Evaluation Memo claimed replacement of the TPAs with SDA “would be
5 consistent overall with Strategy 3.” AR21314. It claimed: “This new geographic designation is
6 intended to align with the City’s Climate Action Plan (CAP) goals” and “locating new homes near
7 transit where people are more likely to have lower rates of vehicular travel is a key component
8 identified in Strategy 3” *Id.* However, as noted by Petitioner and many other commenters, replacing
9 TPAs with SDAs will not result in “new homes near transit” or decrease VMT. Conversely, extending
10 development beyond TPAs and adopting the “0.75 miles or 1 mile walking distance” standard
11 proposed by SDA will result in more vehicle usage rather than residents using transit or other mobility
12 options. AR21177. Petitioner and others commented that studies show people are more likely to walk
13 5-10 minutes or 0.25 or 0.5 miles to use transit. AR 21168; 21170. The City did not provide
14 substantial evidence to show how locating homes beyond 0.5 miles radius and utilizing a methodology
15 that has not been analyzed before would not result in additional environmental impacts. This is a
16 change that was neither anticipated by the previous analysis in the CAP EIR or its Addendum nor
17 analyzed as part of these analysis. Therefore, replacement of TPAs with SDA constitutes a substantial
18 change to the CAP EIR and requires additional environmental analysis to address the potential
19 impacts.

20 3. New Information

21 “Under CEQA, when there is a change in plans, circumstances, or available information after a
22 project has received initial approval, the agency's environmental review obligations “turn[] on the
23 value of the new information to the still pending decision making process.” *Friends of College of San*
24 *Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 951–952.

25 The CEQA Evaluation Memo’s discussion regarding the Complete Communities PEIR admits
26 that the SDA definition stems from new information that was not available at the time TPA definition
27 was adopted:

28 at the time that the [existing TPA] definition [measuring areas located near transit by
looking at a 0.5 mile “as the crow flies”] was originally applied to the City’s development

1 programs, more refined data showing the areas of the City that were within a close
2 walking distance to transit – taking into account physical barriers such as freeways and
3 steep hillsides – was not available. As more refined data has become available, the ability
4 to focus development in the areas of the City that truly have the best access to transit is
now technically feasible.

5 AR21311 (emphasis added). Based on this new, refined data, the staff adopted a completely different
6 methodology for assessing “proximity to transit” and replaced the TPAs with SDAs. It further
7 explained the difference of the new methodology in relation to TPAs: “taking into account physical
8 barriers, a large portion of existing TPAs is beyond a 0.5-mile walk from a major transit stop, and in
9 some instances, some areas were miles away taking into account these physical barriers.” AR21311
10 (emphasis added). While the City utilized this new information to change the core component of
11 development planning, it failed to provide the necessary environmental analysis for the impacts
12 associated with adopting this new methodology and definition.

13 Implementation of the Complete Communities Program, CAP and the Housing Element with
14 the SDA definition will result in substantial change that requires major revisions to the environmental
15 analysis. The Complete Communities PEIR identified the project area as “approximately 20,538 acres
16 of the Housing Program project areas [] located within Transit Priority Areas (TPAs) throughout the
17 City.” AR1352. Under the Complete Communities Housing Program, projects within the TPAs are
18 allowed “additional square footage and building height, which would allow for additional housing
19 units beyond what is otherwise allowed in the respective base zone, PDO, and/or Community Plan
20 land use designation” AR1409. Furthermore, “projects would receive a new Floor Area Ratio (FAR)
21 based upon the project’s location in TPAs within Mobility Zone 1, Mobility Zone 2, or Mobility Zone
22 3; and the density and height of the project would be limited by the FAR alone.” AR1410. Adoption of
23 the SDA definition proposes a substantial change in the developable acres and increase the number of
24 developments that would be able to benefit from the incentives provided under the Complete
25 Communities Program.

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1 **CONCLUSION**

2 Accordingly, the writ should be granted and the approval of the Project overturned by this
3 Court.

4 DATED: September 3, 2024

Respectfully Submitted,

5 **DELANO & DELANO**

6
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