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August 22, 2022

**VIA EMAIL (ourla2040@lacity.org)**

Department of City Planning
City of Los Angeles
200 North Spring Street
Los Angeles, CA 90012-2601

Re: **Comments to Wildlife Pilot Study**
Case No(s). CPC-2022-3413-CA and CPC-2022-3712-ZC
Env. Case No. ENV-2022-3414-CE
City Council File No. 14-0518

To Whom It May Concern:

This office represents *Neighbors for Hillside Safety*, an unincorporated association of homeowners, residents, and stakeholders, who live and work within the proposed Wildlife Ordinance District being considered as part of the City's Wildlife Pilot Study and the associated Wildlife Ordinance District (the "Ordinance"). We also represent 9922 LLC, a resident and homeowner within the proposed district, and Ardie Tavangarian, who similarly owns property in the district and is an architect with over 40 years of experience building and remodeling homes in the affected communities. Our clients have a number of serious concerns and objections with the Ordinance as proposed, which to date, have been largely ignored throughout the City's processing of this Ordinance and the related Ridgeline ordinance. These concerns include, but are not limited to, the following:

(i) **Failure to perform any environmental review.** As the largest threats to wildlife in the Santa Monica Mountains are vehicle strikes, rodenticides, and displacement caused by wildfires, this Ordinance is likely to harm, not help, wildlife. To date, the City has failed to disclose what, if any, environmental review has been performed in connection with this Ordinance. As no exemptions apply, the City must perform an Environmental Impact Report ("EIR") to understand both the beneficial and potentially harmful impacts this Ordinance will have on wildlife and biodiversity.

(ii) **Reduction of Development Intensity in Violation of the Housing Crisis Act.** The Ordinance calls for a dramatic decrease in the development intensity of the "wildlife district" in direct violation of the California's Housing Crisis Act.

(iii) **No baseline analysis of wildlife impacts.** Although this Ordinance is labeled a Wildlife Pilot Study, the City never prepared any actual "study" to determine how these regulations will impact wildlife. Such a study is required before the City moves forward with this Ordinance.

(iv) **Denying Homeowners the Right to Exclude is a Taking**. The Ordinance restricts the type of fencing property owners can erect around the perimeter of their homes, and is specifically designed to allow wildlife to pass through private property. Property owners have the right to exclude people animals, and objects from their properties, and removal of this right constitutes an unlawful taking.

(v) **A lack of notice to residents and property owners**. Homeowners who reside on or adjacent to buffer areas should be individually notified that large portions of their property are proposed to become "buffer areas" that may no longer be improved and/or used for single or multi-family residential uses.

For these, and many other reasons outlined below, we urge the City to reconsider moving forward with the Ordinance in its current format, or at minimum, prepare an EIR that considers the Ordinance's impacts on wildlife and homeowners alike. We also ask the City to show the science behind this Ordinance. As it stands, our clients are left to presume that the City is doing this "pilot" as an experiment, and our clients are the guinea pigs. This is neither fair, nor reasonable, and the City should not be rushing this Ordinance without having carefully considered its impacts. Finally, although we have outlined some of our main concerns with the Ordinance here, we have recently engaged expert environmental consultants who are looking further into the Ordinance and its purported justifications. Accordingly more detailed comments will be provided later in the process prior to the Planning Commission hearing.

## I. THE ORDINANCE DOES NOT COMPLY WITH THE REQUIREMENTS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

CEQA, found at Public Resources Code § 21000, *et seq.,* is based upon the principle that "the maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern." Pub. Res. Code § 21000(a). In CEQA, the Legislature has established procedures designed to achieve these goals—principally, an EIR. These procedures provide both for the determination and for full public disclosure of the potential adverse effects on the environment of discretionary projects that governmental agencies propose to approve, and require a description of feasible alternatives to such proposed projects and feasible mitigation measures to lessen their environmental harm. Pub. Res. Code § 21002. CEQA is not merely a procedural statute; it imposes clear and substantive responsibilities on agencies that propose to approve projects, requiring that public agencies not approve projects that harm the environment unless and until all feasible mitigation measures are employed to minimize that harm. Pub. Res. Code §§ 21002, 21002.1(b).

CEQA defines a project as "the whole of an action, which has a potential for resulting in either a direct physical change to the environment, or a reasonably foreseeable indirect physical change in the environment." CEQA Guidelines § 15378(a). In this case, the "project" is the passage of the Ordinance. Adoption of a zoning ordinance is a project under CEQA. Enactment and amendment of zoning ordinances are specifically listed under examples of discretionary projects in CEQA. Public Resources Code Section 21080(a). Furthermore, recent case law makes it clear that a zoning ordinance is a project subject to CEQA if it may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2016) 4 Cal.App.5th 103. Because the proposed Ordinance's purpose is to cause physical changes to the environment by changing how private and public land is managed, the adoption of the Ordinance must be subjected to CEQA review.[1]

The CEQA Guidelines establish procedures for calculating the baseline environmental conditions, including a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time of the environmental analysis is commenced. CEQA Guidelines § 15125(a). Agencies may not undertake actions that could potentially have a significant adverse effect on the environment, or limit the choice of alternatives or mitigation measures, before complying with CEQA. CEQA Guidelines § 15004(b)(2). The "lead agency," the public agency that has the principal responsibility for carrying out the project, is responsible for conducting an initial study to determine, in consultation with other relevant state and local agencies, whether an environmental impact report, a negative declaration, or a mitigated negative declaration will be prepared for a project. Pub. Res. Code §§ 21067; 21080.1(a); 21083(a).

> "All phases of project planning, implementation, and operation" must be considered in the Initial Study for a project. CEQA Guidelines § 15063(a)(1). After an Initial Study, an EIR must be prepared "[i]f there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." Pub. Res. Code § 21080(d). That is, an EIR must be prepared "if a lead agency is presented with **a fair argument** that the project **may have** a significant effect on the environment …**even though it may also be presented with other substantial evidence that the project will not have a significant effect**." Guidelines § 15064(f)(1) [emphasis added].

The CEQA Guidelines charge public agencies with the responsibility of avoiding or minimizing environmental damage where feasible. As part of this responsibility, public agencies are required to balance various public objectives, including economic, environmental, and social issues. CEQA

[1] Failure either to comply with the substantive requirements of CEQA or to carry out the full CEQA procedures so that complete information as to a project's impacts is developed and publicly disclosed constitutes a prejudicial abuse of discretion that requires invalidation of the public agency action regardless of whether full compliance would have produced a different result. Pub. Res. Code § 21005.

review is integral to that process, informing decision-makers and the general public what significant environmental effects might result from a proposed project. In addition, the process identifies possible means of mitigating any significant effects and presents reasonable alternatives to the project.

**A. CEQA analysis must be prepared as early as feasible in the process.**

A basic tenet of CEQA is that environmental analysis should be prepared "as early as feasible in the planning process to enable environmental considerations to influence project program and design." CEQA Guidelines Section 15004(a). Additionally, "environmental document preparation and review should be coordinated in a timely fashion with the existing planning, review, and project approval processes being used by each public agency. These procedures, to the maximum extent feasible, are to run concurrently, not consecutively" CEQA Guidelines Section 15004(c). Significant or potentially-significant impacts arising from the Ordinance have not been adequately identified, analyzed or mitigated.

Here, the City has required submittal of public comments prior to providing the CEQA analysis for review, thwarting the purpose of public comment. Public review is a central component of CEQA: Courts have consistently held that CEQA afford members of the public a "privileged position" in the process and represent a vital component of decision-making. *Concerned Citizens of Costa Mesa v. 32nd Agricultural Assn.*, 42 Cal. 3d 929, 936 (1986). The CEQA process "protects not only the environment, but also informed self-government." *Laurel Hts. Improvement Assn. v. Regents of the Univ. of Calif.*, 47 Cal. 3d 376, 392 (1988) ("*Laurel Hts. I*"). In particular, CEQA is intended to promote government accountability. *See*, *e.g.*, CEQA Guidelines § 15002(j).

Despite this mandate, the City essentially forces the public to comment on the Ordinance without any knowledge of the contents of any environmental document. Thus, the City's failure to provide the public with access to the Ordinance's environmental documents (if they exist) not only prevents informed self-government, but also sows confusion regarding which portion of the environmental review process—if any—the City intends to follow. The City's choice negates any value of participation, and runs contrary to one of CEQA's central purposes.

**B. Similar ordinances have undergone CEQA review and were required to prepare Environmental Impact Reports.**

There is a significant distinction between the Ordinance and other similar projects that involved wildlife movement, protection, and preservation. Specifically, other similar projects were the result of a detailed public process that was subjected to environmental review (including an EIR) in accordance with CEQA and supported by detailed scientific and technical studies. Here, no such analysis has occurred. The Ordinance and its proposed regulations should be based on relevant technical and scientific studies and subjected to environmental review and public comment in accordance with CEQA, just like the Riverside County Multiple Species Habitat Conservation

Plan,[2] the San Diego Multiple Species Conservation Program,[3] the Orange County Central and Coastal Subregion Natural Community Conservation Plan,[4] County of Los Angeles Significant Ecological Areas,[5] the 2012-2035 Regional Transportation Project/Sustainable Communities Strategy of the Southern California Association of Governments,[6] and other similar plans.

### C. This Ordinance does not qualify for any Categorical Exemption.

The City has the burden to demonstrate whether or not a Categorical Exemption ("CE") applies to a given action. "A categorical exemption can be relied on only if a factual evaluation of the agency's proposed activity reveals that it applies," and factual findings must support the determination. *Save Our Big Trees v. City of Santa Cruz*, 241 Cal.App.4th 694, 705 (2015) (internal marks and citations removed), citing, *Muzzy Ranch Co. v. Solano County Airport Land Use Commn*., 41 Cal.4th 372, 386 (2007). Further, the question of which class of CE applies is a pure question of law. Pub. Res. Code, § 21168.5. The City has not yet specified which CE(s) it intends to apply to the Ordinance. Consequently, any specific discussion of the City's choice is impossible. Nevertheless, no categorical exemption appears to fit the Ordinance and Zone Change.

Indeed, in 2016, when the city proposed adopting an overlay zone for building limitations in hillside areas (which is much more limited in scope than the current Ordinance), it conducted a full initial study and negative declaration.[7] This overlay zoning district was limited to the Bel-Air community in Los Angeles, while the current Ordinance covers not only Bel-Air, but also, Beverly Crest, Hollywood Hills, Studio City, Sherman Oaks, and related communities. It would therefore have a much larger scope, impact many more parcels and people, and would have a much more significant impact on the environment.

Despite the lack of any analysis regarding the applicability of a CE, the CEs that other jurisdictions have attempted to use in the past for similar ordinances include classes 7 (protection of natural resources) and 8 (actions for protection of the environment). None apply here.

#### 1. The Class 7 and 8 CEs do not apply by their terms.

The Class 7–8 categorical exemptions apply only if the project in question unequivocally "assure[s] the maintenance, restoration, or enhancement" of the environment or natural resources; projects that "diminish existing environmental protections" cannot qualify under the exemptions.

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[2] https://rctlma.org/Portals/0/mshcp/volume1/index.html; Discover the Natural Wonders of Riverside County, p. 5 (https://www.wrc-rca.org/archivecdn/Permit_Docs/Discover_the_Wonders.pdf)
[3] https://www.sandiegocounty.gov/content/sdc/pds/mscp/sc.html.
[4] https://occonservation.org/about-ncc/
[5] http://planning.lacounty.gov/site/sea/wp-content/uploads/2018/09/H-ADDENDUM.pdf
[6] http://rtpscs.scag.ca.gov/Pages/Final-2012-PEIR.aspx
[7] https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=ccfi.viewrecord&cfnumber=16-1472

*Save Our Big Trees v. City of Santa Cruz*, 241 Cal.App.4th 694, 707 (2015); CEQA Guidelines § 15308 ("relaxation of standards allowing environmental degradation are not included in this exemption."). Application of those CEs "necessarily mean[s] that the adoption of [the project] would 'assure the maintenance, restoration, enhancement, or protection of the environment....' [cite] The [public entity] has the burden of proof—there must be substantial evidence to support this categorical exemption finding. In the absence of evidence that the negative environmental effects of [the project] would not be significant, the exemption finding cannot be sustained." *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist*., 178 Cal.App.4th 1225, 1245 (2009).

The court in *Save our Big Trees* surveyed the existing case law relating to the Class 7-8 CEs, and determined that a tree ordinance that was passed by the local government did not fall under the exemptions because it could be interpreted to diminish existing environmental protections. *Save Our Big Trees*, *supra*, 241 Cal.App.4th at 705–713; *see also, Mountain Lion Foundation v. Fish & Game Commn*., 16 Cal.4th 105, 125 (1997) (action that removes rather than secures protections of animal species does not fall within Class 7-8 exemption). In *Save our Big Trees*, the city argued that the court "must look at the Project 'as a whole' to determine whether it will strengthen or weaken existing heritage tree protections," and determined the CE did not apply. *Save Our Big Trees*, *supra*, 241 Cal.App.4th at 708.

An ordinance that represents a mixed bag of environmental impacts—beneficial and adverse impacts—cannot qualify for a Class 7-8 CE. The Supreme Court, in *Wildlife Alive v. Chickering,* addressed this issue unequivocally, finding the Class 7 CE does not apply to an action with "the potential for a significant environmental impact, both favorable and unfavorable." *Wildlife Alive v. Chickering*, 18 Cal.3d 190, 206 (1976) ("When the impact may be either adverse or beneficial, it is particularly appropriate to apply CEQA which is carefully conceived for the purpose of increasing the likelihood that the environmental effects will be beneficial rather than adverse. . . . we have consistently held that CEQA must be interpreted so as to afford the 'fullest possible protection' to the environment."), citing *Bozung v. Local Agency Formation Commn*., 13 Cal. 3d 263, 274 (1975).

Here, the Ordinance does not even "assure" positive impacts on ridgelines, or wildlife movement, or biodiversity, let alone the environment or natural resources in a more general sense. Rather, City legislators and staff appear to hold certain preconceived ideas relating to these general concepts, accepting any speculative benefits as a given. The Ordinance has several potentially significant adverse impacts such as increased fire hazard risks. Under *Wildlife Alive v. Chickering*, CEQA's command to protect the environment to the fullest extent means that the potential adverse effects of the Ordinance render Class 7–8 exemptions inapplicable. The City has proceeded in a way that does not "assure the maintenance, restoration, or enhancement" of the environment or natural resources. CEQA Guidelines §§ 15307–308; *Save Our Big Trees*, *supra*, 241 Cal.App.4th at 707.

The potentially detrimental impacts to wildlife as a result of this Ordinance (resulting in a "mixed bag" of impacts) are currently the subject of additional study by expert environmental consultants that we have retained, and further comment will be provided when that analysis has been prepared.

**2. The Class 7 and 8 CEs do not apply because of unusual circumstances.**

Section 15300.2 of the CEQA Guidelines forbids the use of a CE where a “reasonable possibility” exists that the activity “will have a significant effect on the environment due to unusual circumstances.” *See also*, *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086 (2015). “When unusual circumstances are established, the Secretary’s findings as to the typical environmental effects of projects in an exempt category no longer control. Because there has been no prior review of the effects of unusual circumstances, [an] agency must evaluate potential environmental effects under the fair argument standard , and judicial review is limited to determining whether the agency applied the standard in the manner required by law.” *Id*. at 1116.

Here, there are at least two distinct unusual circumstances that negate the applicability of the categorical exemptions: 1) the increased risks relating to fire hazards, and 2) topography, seismicity, and grading.

***<u>Fire Risks</u>*****.** The first unusual circumstance is the recent and ongoing problem of devastating fires throughout the region, described in major news reports and experienced first-hand by Angelinos. Fires have ravaged the entire region and have changed the landscape of thousands of acres, including areas proposed for governance under the Ordinance. With climate change promising to exacerbate the conditions that give rise to even more wildfire damage in the coming years, it is not only irresponsible, but dangerous, for the City to adopt the Ordinance using CEs to attempt to avoid CEQA, while apparently ignoring the potential effects of 1) the Ordinance on future fires, and 2) past fires on the Ordinance. Projects that may exacerbate existing environmental hazards or conditions require analysis of the potential impact of those hazards on future residents or visitors. *Calif. Bldg. Industry Assn. v. Bay Area Air Quality Mgmt. Dist*., 62 Cal.4th 369, 377 (2015).

Regarding wildfire, no evidence indicates the City considered the degree to which the Ordinance may exacerbate more severe fire conditions. Further, courts have specifically limited the use of exemptions for risky sites, particularly those prone to wildfires. *Calif. Bldg. Industry Assn, supra* (“limits on exemptions extend to projects located on sites that will expose future occupants to certain hazards and risks—including … sites subject to wildland fire”). A CEQA analysis would allow the City to have at its disposal a scientifically based review of the areas affected by the fires, and the fire risks the Ordinance may propose. None currently exists.

The Governor's Office of Planning and Research adopted, in 2018, comprehensive updates to the CEQA Guidelines and Appendices. This update included adding new impact categories to the checklist in Appendix G of CEQA. Notably, the most significant change to Appendix G is the addition of Wildfire as an environmental impact category. The new Wildfire section includes four questions pertaining to new development in Very High Fire Hazard Severity Zones. These questions focus on whether a project would exacerbate wildfire risk, impair emergency response

or evacuation plans, or risk exposing people or structures to floods and landslides. If projects, such as the proposed Ordinance, would be located in or near state responsibility areas or lands classified as very high fire hazard severity zones, the lead agency must determine if the project would:

(1) Substantially impair an adopted emergency response plan or an emergency evacuation plan;
(2) Exacerbate wildfire risks due to slope, prevailing winds, and other factors, and thereby expose project occupants to pollutant concentrations from a wildfire or the uncontrolled spread of a wildfire;
(3) Require the installation of or maintenance of associated infrastructure (such as roads, fuel breaks, emergency water sources, power lines or other utilities) that may exacerbate fire risk or that may result in temporary or ongoing impacts to the environment; or,
(4) Expose people or structures to significant risks, including downslope or downstream flooding or landslides, as a result of runoff, post-fire slope instability, or drainage changes.

The Ordinance has the potential to do ***all of these things***. And without the benefit of substantive CEQA analysis, the adoption of this untested Ordinance will place lives and structures at greater risk. There is a particularly significant risk relating to item numbers 2 and 4. The state has recognized that not only the loss of structures or human life is a potentially significant environmental effect, but also such effects as releases of pollutants from uncontrolled wildfire, and the potential effects of post-fire runoff, flooding, or landslides. The City should evaluate the potential effects of increased wildfire risk from changes in vegetation management, including modeling the potential from increased air pollutants from an uncontrolled wildfire. Post-fire impacts from flooding or landslides should also be evaluated and disclosed.

In order to adequately address the fire risks, CEQA review of the Ordinance is absolutely necessary. There is no other lesser-scale recommendation or proposal that would be able to analyze or mitigate the fire hazards that are posed by the Ordinance. Each of the questions posed in the CEQA Guidelines is there for a reason. Those questions must be posed, reviewed, analyzed, and addressed by a qualified professional so that the fire hazards are properly mitigated, as necessary. Failure to do so squarely places the blame for the Ordinance's exacerbation of any future wildfire in, around, or near the overlay zones on the City's shoulders.

***Topography, Seismicity, and Grading***. The hillside areas the Ordinance would primarily affect are marked by significant topographical, seismic, and roadway safety challenges the Ordinance would exacerbate. As things stand today, the often substandard road widths already challenge emergency access. Further, the topographic and seismic challenges of the hillside areas can require significant remedial grading to fully mitigate. The Ordinance’s establishment of significant caps on grading can actually thwart the ability of developers (or even those who must stabilize already-developed lots) to actually address those conditions make a building site or surrounding area safe. Further, the required horizontal and vertical clearance from mapped ridgelines may actually require more grading than would currently be required. For example, the Ordinance appears to

provide no exemption from the separation requirements for properties that already have graded pads. Also, because several ridgelines are actually streets, or have streets on top them, the required horizontal and vertical separation would create more severe street access (and, consequently, emergency access) problems. Further, this increased need for grading can lead to more land clearance than otherwise required, more truck trips, and greater air quality, greenhouse gas, and noise impacts from each of the above factors.

Moreover, the Ordinance also imposes grading regulations that would actually make it more likely that more intensive grading would take place. This is easily identifiable in the new setback regulations. A home project with an identical footprint would create substantially more grading and development if it is required to be set back even further from the right of way. In situations where slopes rise from the level of the street, and up to the property, substantially more grading would need to be done at the rear of the property to accommodate the front yard. In situations where the street is higher than the home, and the home slopes down from street level, substantially more grading would be required toward the front of the property. Also, there would be more development associated with driveways, etc. In other words, the Ordinance makes it more likely that **more grading** would be required, not less.

Furthermore, the Ordinance requires that remedial grading be counted toward the maximum by-right grading quantity for a project. However, remedial grading is mandated by the building code for any new construction or project for which the proposed improvements exceed 50% of the replacement value of the existing main building on site. Property owners do not electively choose remedial grading, and it extremely costly. Because the remedial grading is done precisely to combat safety and topography issues that are identified on-site, and because they are mandated by the City, and not by the project applicant, they should not be counted toward the total maximum grading permitted on the site by-right.

There is no doubt that the fire hazards, topography, seismicity, and grading issues described above present a reasonable possibility of a significant effect on the environment. No legitimate dispute exists that the Ordinance would make wildfire management, for example, more difficult. To date, however, the entire process has occurred in the absence of environmental review. This has deprived the public of any opportunity to participate meaningfully in the process and to understand the potential effects of the options presented, the various trade-offs among these options, and methods of reducing or avoiding the potential effects anticipated.

### D. A Negative Declaration is inappropriate for the Ordinance, as substantial evidence supports a fair argument that a significant impact would occur.

Generally, CEQA presumes the necessity of an EIR, and an agency must prepare an EIR instead of an ND if substantial evidence in the record supports a “fair argument” that a significant impact may result from a project. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 75 (1974). The fair argument test is a low threshold. *Porterville Citizens for Responsible Hillside Development v. City of Porterville*, 157 Cal.App.4th 885 (2007). Further, even disagreement among experts disqualifies

a project from relying upon an ND. *Keep Our Mountains Quiet v. County of Santa Clara*, 236 Cal.App.4th 714 (2015) ("[i]f there is disagreement among expert opinion supported by facts …. the Lead Agency shall treat the effect as significant and shall prepare an EIR"); 14 Cal. Code Regs., §§15064(b),(g).

Here, substantial evidence supports a fair argument that a significant impact would occur in several environmental issue areas, including geology and soils, and wildfire risk. An MND provides the appropriate vehicle for CEQA review ***only*** when "***clearly*** no significant effect on the environment would occur." *Keep Our Mountains Quiet v. County of Santa Clara*, 236 Cal.App.4th 714 (2015). Where, as here, a "fair argument" exists that a significant impact would occur, the City must prepare an EIR.

It is possible that some version of the Ordinance could benefit the City while minimizing environmental impacts. However, the Ordinance as currently proposed will have severe material impacts on residents and property owners and the surrounding area, and those effects require a full CEQA analysis. Absent that analysis the City cannot attempt to rely on an ND or simply adopt the Ordinance.

## II. THE ORDINANCE VIOLATES THE HOUSING CRISIS ACT, WHICH PROHIBITS CITIES FROM SIGNIFICANTLY REDUCING HOUSING INTENSITY THOUGH ZONE CHANGES.

SB 330, known as the Housing Crisis Act ("SB 330"), signed by the governor on October 9, 2019, provides housing-related protections as well as laws that prohibit cities from rezoning areas in ways that would reduce housing opportunities. SB 330, among other things, (i) prevents local governments from downzoning unless they upzone an equivalent amount elsewhere within their boundaries, (ii) suspends the enactment of local downzoning and housing construction moratoriums, (iii) requires timely processing of housing permits that follow zoning rules, and (iv) ensures that the demolition of housing does not result in a net loss of units. Specifically, as it relates to this Ordinance, the law provides as follows:

> (b) (1) Notwithstanding any other law except as provided in subdivision (i), with respect to land where housing is an allowable use, an affected county or an affected **city shall not enact a development policy, standard, or condition that would have any of the following effects**:
>
> > (A) **Changing** the general plan land use designation, specific plan land use designation, or **zoning of a parcel or parcels of property to a less intensive use** or **reducing the intensity of land use within an existing** general plan land use designation, specific plan land use designation, or **zoning district below what was allowed under the land use designation and zoning ordinances of the affected county or affected city, as applicable, as in effect on January 1, 2018**, except as otherwise provided in clause (ii) of subparagraph

> (B). For purposes of this subparagraph, **"less intensive use" includes, but is not limited to, reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, or new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or anything that would lessen the intensity of housing.** Govt. Code 66300(b). [emphasis added]

As explained and summarized in the Legislative Counsel's Digest, the bill "prohibit[s] a county or city…from enacting a development policy, standard, or condition, as defined, that would have the effect of (A) changing the land use designation or zoning of a parcel or parcels of property to a less intensive use or reducing the intensity of land use within an existing zoning district below what was allowed under the general plan or specific plan land use designation and zoning ordinances of the county or city as in effect on January 1, 2018."

The proposed Ordinance is in direct violation of this law as it seeks to significantly reduce the intensity of the use for all parcels within the purposed Wildlife District. It does this by creating substantial new regulations that reduce the possible building envelope through new restrictions on height, floor area ratio, lot size, setbacks, and lot coverage, all items specifically listed in the bill and all of which "would lessen the intensity of housing." Govt. Code 66300(b).

Indeed, the City's own implementation memo from January 17, 2020 entitled "IMPLEMENTATION OF STATE LAW SB 330 – HOUSING CRISIS ACT," directly acknowledges that "SB 330 generally prohibits zoning actions that result in fewer housing units than are permitted as of January 1, 2018. These actions include the adoption of plans that result in a net downzoning or otherwise reduce housing and population, except for specified reasons involving health and safety." The memo goes on to specify that the very regulatory provisions contemplated in the Ordinance (such as height, floor area ratio, etc.) are not permitted:

> These provisions require an analysis by City Planning that any legislative action, until 2025, would not lessen housing intensity, as described in Section 13 of SB 330 to include reductions to **height, density, or floor area ratio, new or increased open space or lot size requirements, or new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or anything that would lessen the intensity of housing.** These restrictions apply to any zone where housing is an allowable use, even if the intent is not to reduce housing intensity. This provision does not impact zoning efforts that reduce intensity for certain parcels, as long as density is increased on other parcels and therefore result in no net loss in zoned housing capacity or intensity. Jan. 17, 2020 Implementation Memo [emphasis added]

Regulations reducing the size of homes in a large area of the City, most of which consists of residential/housing-related land uses, obviously also reduce the density within that area.

The Ordinance does not address how and why it is compliant with SB 330, because it is not, and its provisions cannot be rectified or harmonized with either the spirit or the letter of the relevant provisions of the state law. For this reason alone, the Ordinance cannot be adopted in its current form.[8]

## III. THE ORDINANCE CONSTITUTES AN UNLAWFUL TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION.

Separate and apart from the lack of CEQA review, the Ordinance contravenes principles of equal protection and due process (under both the state and federal constitutions), violates vested property rights, and constitutes a regulatory taking of the distinct investment-backed expectations of those it effects. Notably, under the Ordinance, many even modestly sized homes will become legal non-conforming, making it difficult or sometimes impossible to expand those homes or even rebuild them after a disaster.[9]

### A. The Ordinance unlawfully deprives homeowners of the right to exclude.

The United States Supreme Court has clearly and unequivocally stated that the "right to exclude" is a fundamental element of the constitutionally-protected right to private property, and that physical intrusion, whether by government or by private parties acting under government permission, violates that right, and that individuals given a permanent and continuous right to pass over private property amounts to such physical occupation. (See *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 831-32.) In *Nollan*, the US Supreme Court sets forth the state of the law, and the importance of the right to exclude, as compared to other property rights:

> We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] *one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 433 (1982), quoting Kaiser Aetna v. United States, 444 U. S. 164, 176 (1979). In Loretto, we observed that, where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 U.S. at 432-433, n. 9,* "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only

[8] The Ordinance also fails to explain how lot splits permitted under SB 9 and Accessory Dwelling Unit ("ADU") permitted under state law will interface with the requirements provided by the Ordinance. Homeowners should be informed upfront as to whether or not this Ordinance will impact their ability to add an ADU on their lot or subdivided their lot pursuant to SB 9.

[9] It will also become even harder to obtain fire insurance for homeowners (already a problem in this general area, as very few insurers are willing to accept the risk), as the Ordinance is expected to increase fire risks while simultaneously decreasing property values.

> minimal economic impact on the owner," id. at 458 U. S. 434-435. [*Emphasis in original*.]

Thus, not only is the right to exclude an important property right, it is among the "most essential" property rights recognized under the law. (*Id*.) In *Kaiser Aetna*, the Supreme Court held "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." (444 U.S. at 180.)

Here, the proposed Ordinance restricts property owners from erecting wildlife-impermeable fences on the perimeter of private property. Indeed, one of the Ordinance's stated goals is to allow wildlife to move and pass more freely through private properties, and the regulations related to yards (expanding them to allow for wildlife to pass through) and perimeter fencing (making them more easily permeable to wildlife) are specifically designed to allow for animals to travel through private property, as opposed to the roads, where there is a higher risk of car-related fatalities. In other words, the Ordinance restricts property owners from erecting fencing that would secure the entire property from intruders (animal or human), and in fact, is specifically designed to minimize the direct barriers to wildlife, so that they can more freely pass through private property.

There is no doubt that, under the relevant case law, if the City regulated property in such a way so as to allow for human beings to pass through private property, or if other physical objects were allowed to be placed on private property, a Court would be required to find a taking under the above binding authority. (See, *e.g., Nollan*, 483 U.S. at 831-32.) There is no legal reason why wildlife should be treated any differently. If property owners want to exclude animals from entering on their property, they unequivocally have that right, just like they have the right to exclude humans and their pets. The Ordinance (and specifically, the setback and fencing regulations therein), deprive homeowners of that right to exclude wildlife. The City has no right to infringe on the rights of property owners to exclude people, animals, or objects from their properties. The fencing provisions of the Ordinance are therefore unconstitutional on their face (in all circumstances that are not subject to a specific exemption from its regulations), and constitute a compensable taking under binding case law. (*Nollan*, 483 U.S. at 831-32; *Kaiser Aetna v. United States*, 444 U. S. at 180.)

### B. The Ordinance violates equal protection and substantive due process.

The California Constitution provides that, "a person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws." Cal. Const. Art. 1, § 7(a). The U.S. Constitution also prohibits the denial of equal protection through the fourteenth amendment. United States Constitution, amend. XIV, § 1, and 42 USC § 1983. The City must have a rational basis for treating the property owners of the affected areas differently than other areas. The rational basis test requires that the classification be a demonstrably effective means for furthering some actual valid government interest. *E.g., City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432, 440. There is no rational basis for treating the Wildlife District differently than other similarly situated areas of the City, because there is no evidence that supports such an

argument, precisely because the appropriate analyses (that would have been conducted under CEQA under normal circumstances) were never undertaken at all. By definition, this means that the Ordinance lacks a rational basis.

### C. The tree planting requirements constitutes and exaction with no nexus or proportionality to the impacts.

In the development context, an exaction is something the local zoning authority requires a property owner to give to the City, in order to obtain approval to develop land. The "something" can be almost anything: land; a portion of the value of the land; money (a mitigation fee); or in this context, the planting of trees.

If the City is going to create an exaction relating to tree planting, it must have a rational connection (nexus) to the burden the government seeks to avoid. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). It also must have "rough proportionality": the amount of the exaction must roughly correspond to the burden placed on the government, resulting from the proposed development. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Ordinance's tree planting requirements do not comply with either the nexus or the rough proportionality requirements for such an exaction. As such, those provisions of the Ordinance must be modified or removed.

### D. The Ordinance constitutes a regulatory taking of private property without fair compensation.

Disturbingly, the Ordinance creates severe restrictions on development (and redevelopment) in the Wildlife District. Under *Penn Central Transportation Company v. City of New York* (1978) 438 US 104, even if a governmental regulation does not cause a physical invasion or deprive a landowner of all economically beneficial use, it may nonetheless go too far in placing what should be a public burden on private shoulders. *Penn Central* established an ad hoc, fact-based inquiry that addresses three factors to be used in determining whether this type of regulatory taking has occurred: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the nature of the governmental action. (*Id.* at 124.)

As to the first factor, the economic impact of these regulations will vary from property to property, but with regulations as extreme as the deprivation of the use of large portions of one's land for structures and certain designated uses, the impacts are severe. This is more akin to a "conservation easement" (which would obviously require compensation) than to an overlay zone.

As to the second factor, the investment-backed expectations of the owners in the Wildlife District were, obviously, that they would be able to use the entirety of their properties for legal purposes. In the residential context, the restriction on using large percentages of the property, along with the fencing and lighting regulations, deprives property owners of the right to enjoy their properties, as was the expectation when the properties were purchased.

As to the third factor, the government action in this case specifically calls out the proposed Wildlife District for these overreaching regulations. There is an unexplained, irrational, arbitrary and capricious designation of these overlay zones without any scientific backing or CEQA review. The City cannot point to a scientific analysis that was conducted in recent years that took into effect the recent fires, and that was based on scientific principles. As such, the government action has no scientific or legal foundation.

The three factors of the *Penn Central* test are therefore easily satisfied, and the Ordinance effectuates a regulatory taking upon those in the proposed overlay zones.

## IV. WITHOUT AN ACTUAL "PILOT STUDY," IT IS UNCLEAR HOW THE ORDINANCE WILL BENEFIT WILDLIFE AND/OR BIODIVERSITY.

While the Ordinance has been labeled as a "Wildlife Pilot Study," this is not in fact what it is. The Ordinance is a bevy of development restrictions that have been cut and pasted from other jurisdictions' wildlife ordinances, without site-specific tailoring or environmental review. Meanwhile, the other ordinances the City is drew from were tailored for low-density rural areas with mixed agricultural and industrial lands, not fully developed residential communities surrounded by the busiest freeways in the world. Indeed, the original idea for the process was to do a "wildlife pilot study" first, and on the basis of that pilot study, scientifically analyze and determine what elements and regulations would be effective for wildlife and biodiversity based on that study. The City has apparently done the opposite here.

Rather than scientifically studying whether any of these proposed measures will be effective in helping wildlife and biodiversity, the City is putting the cart before the horse by imposing the intensive regulatory restrictions from the Ordinance in place first (which impacts property rights, has potentially significant environmental impacts, etc.), and only after infringing on rights of homeowners within the Wildlife District, doing a post-hoc analysis of the Wildlife District to determine whether the measures were effective before applying it to other areas in the City. The City has gotten the process totally backwards, and cannot simply impose development restrictions on certain parts of the City with no evidence or scientific analysis to back up why the restrictions are effective, and study them later.

To the extent that the City will be pushing forward with the Ordinance with the current slate of regulations proposed therein, the City must provide a real (scientific) nexus between each of the proposed regulations (height restrictions, FAR restrictions, etc.), and the actual goals of promoting biodiversity and wildlife movement. It should also account for and analyze other non-development related conditions that impact wildlife in the area, e.g. vehicle strikes, rodenticides, and inter and intra-species killings. After all, it would seem grossly negligent to encourage wildlife to cross the 405 freeway in order to access this new so-called Wildlife District without even considering the risks to wildlife and motorists of doing so. As currently proposed, there is no evidence that the Ordinance's development restrictions will do anything to promote or protect wildlife and biodiversity. An Ordinance that purports to protect wildlife, but that does nothing to address the

conditions that are most threatening to them (vehicle traffic and rodenticides), can hardly be called a Wildlife Ordinance at all.

## V. THE ORDINANCE'S RESOURCE MAPS ARE BOTH ILLUSORY AND MISLEADING.

The draft Ordinance provides as follows:

> Sec. 1. Section 12.03 of the LAMC is amended to add the following definition in alphabetical order.
>
> Ridgeline. The natural crests of the mountains that bisect and surround the City as shown on the Ridgeline Map, **adopted and maintained by the Director of Planning.**
>
> Wildlife Resource. Features which provide wildlife benefits, ecosystem services, and contribute to the overall quality of the natural and built environment. These features include open space (conservation areas, public property, and undeveloped land), water features (lakes, reservoirs, rivers, streams, wetlands, open channels), and riparian areas. **In addition to the Wildlife Resources identified in Map B: Draft Resource Areas, unmapped Resources shall be identified by the project or project reviewer when they exist on site.**

The fact that the Ordinance acknowledges that there are "unmapped Resources" that are subject to further regulations is a clear violation of due process, as there are property owners within the Wildlife District who would not have been notified that their properties are subject to these regulations until they are already in the process of developing their properties. In order to avoid a violation of due process, the City must make clear from the outset all of the "Wildlife Resources" and "Ridgelines" that are covered by the Ordinance in advance, and all of the parcels that can be effected by them. This cannot be left to a future "reviewer" to determine whether such resources "exist on site." This has to be done now, or it violates the due process rights of all property owners whose properties contain these features, but are not identified on the relevant maps at the time the Ordinance is adopted.

The proposed revisions to LAMC Section 12.03 also notes that the Ridgeline Map is "adopted and maintained by the Director of Planning." However, this implies that the Director of Planning has the ability to make modifications to the maps at any time, and without any notice or opportunity to be heard. In other words, properties that are not currently subject to certain restrictions within the Ordinance because they are not close to a Ridgeline, can be made subject to those restrictions on the whim of the Director of Planning, and the effected property owners would not have notice or an opportunity to be heard regarding those changes, as the Ordinance is currently written.

Any changes to the maps must be made now, and the Ordinance must have final maps that are incorporated into the terms of the Ordinance. The Director of Planning cannot have the ability to unilaterally make changes to the maps without notice and a hearing for those properties being impacted by the changes. Otherwise, the Ordinance violates the due process rights of all property owners whose properties contain these features, but are not identified on the relevant maps at the time the Ordinance is adopted.

## VI. THE ORDINANCE PRESENTS UNDUE BURDENS ON BOTH THE CITY AND HOMEOWNERS ALIKE, WHEN MORE EFFECTIVE, AND LESS IMPACTFUL MEASURES ARE READILY AVAILABLE.

The Ordinance, as currently drafted, imposes substantial burdens on the City as well as homeowners. These involve additional time, money, and resources from the planning department and the department of building and safety, and code enforcement, to ensure that the regulations are properly implemented.

Yet, more effective and less impactful measures are available.[10] The real problems for wildlife are car collisions and rodenticide. The City could achieve its goals of protecting wildlife and promoting biodiversity more effectively if it just 1) banned rodenticide products, and 2) implemented road modifications (such as signage to warn drivers about wildlife, and striping and/or speed bumps to keep speed down) to keep drivers alert, and to keep their driving speeds lower, so as to promote the ability to evade wildlife collisions. Such measures would likely be substantially more effective in achieving the goal of protecting wildlife, and at the same time, would be much less impactful on homeowners.

## VII. THE CITY MUST PROVIDE INDIVIDUALIZED NOTICE TO ANY RESIDENTS OR OWNERS WITHIN THE PROPOSED "BUFFER ZONES."

While the better practice would be to provide written notice to all impacted residents, *at minimum*, the City should provide individualized notice to any residents and homeowners whose property is proposed to be included within one of the many "buffer zones." For many homeowners, these new 50' buffers will make sizable portions of their homes unbuildable for new developments and even small additions. Even without additions, existing homes located within these buffer zones that require any new permits will be subjected to site plan review, which will require additional costs, time, and review under the California Environmental Quality Act ("CEQA"). These are severe restrictions on new development and remodels, and due process principles require that each property owner within the Wildlife District be given clear notice of the actual restrictions that are proposed to be imposed on his or her parcel. The general notices that have been provided to date are inadequate, and are insufficient to provide the requisite notice and an opportunity to participate

[10] Indeed, this fact further highlights the need for CEQA review, as such an analysis would actually evaluate the real problems impacting wildlife, and provide a scientific basis upon which a measured response can be taken to address those issues.

in the process, and still today most owners and residents within the purported District have no knowledge of what is being proposed for their homes.

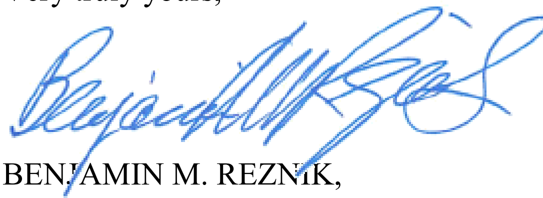
More specifically, property owners must be provided an opportunity to understand what is being proposed – not just generally by the Ordinance, but specifically, as it pertains to their individual parcels. Under these circumstances, each property owner should be provided with a written letter, directing them to a website in which their parcel can be identified, where the property owners can be provided with a list of restrictions that would specifically impact their individual properties. They should also be provided with some explanation as to how they can comment on the Ordinance. The community, residents, and owners have a right to know that this Ordinance will materially impact their ability to use their property in the future, and/or rebuild their existing home in the event of a disaster, and the City has an obligation to provide this to people with such notice and an opportunity to provide substantive input.

**VIII. CONCLUSION.**

For the foregoing reasons, the City should, at a minimum, conduct the mandated CEQA analysis prior to taking any further action on the Wildlife Ordinance. The City must also address the Ordinance's conflict with SB 330's provisions that prohibit the City from reducing the intensity of a use in a zone. To the extent that City decides to move forward with the Ordinance in spite of its violation of the Housing Crisis Act, and the lack of CEQA review and evidentiary support, the City should evaluate the nexus between the Ordinance's goals (related to wildlife and biodiversity), and whether each of the proposed regulations (height limits, grading restrictions, FAR restrictions, etc.) does anything to support those goals.

This office looks forward to the opportunity to engage with the City further regarding this Wildlife Ordinance to ensure that appropriate and sensible measures are taken to protect wildlife and promote biodiversity, while simultaneously protecting the rights of the homeowners who will be impacted by the Ordinance.

Very truly yours,



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