

BRENTWOOD RESIDENTS COALITION

August 18, 2010

Maya Zaitzevsky
Office of Zoning Administrator
Los Angeles Department of City Planning
200 North Spring Street, Room 721
Los Angeles, California 90012

**Re: BRC Opposition to CUP Application and MND
ENV-2009-3085-MND; Case No. ZA-2009-3083-CU
16190 West Mulholland Drive**

Dear Ms. Zaitzevsky:

The Brentwood Residents Coalition (“BRC”)¹ opposes the application of the Bel Air Presbyterian Church (the “Applicant”) for a conditional use permit (“CUP”) authorizing a school on property located in an RE40 zone based on the inadequacy of environmental review, in violation of the California Environmental Quality Act (“CEQA”).

SUMMARY OF ARGUMENT

The CUP application must be denied and the proposed mitigated negative declaration (“MND”) rejected for *two* separate and independent reasons.

First, the MND fails to apply the CEQA-mandated “baseline” for assessing the project’s likely environmental impacts. Under CEQA, the baseline for measuring a project’s impact is the *existing physical conditions* in the vicinity of the project site. The baseline is not therefore derived from prior uses, permits, or the level of development that *could be* but is not present at the time of environmental review. *Communities For A Better Environment v. South Coast Air Quality Management Dist.*, 48 Cal.4th 310, 315 (2010). The MND violates this CEQA-mandated baseline standard by utilizing the previously-permitted student population of 240 middle school students as the baseline against which the environmental impacts of the proposed 155-student preschool is measured – not the existing condition of the project site, which is a vacant lot with no

¹ The BRC is a grass roots, non-profit advocacy group whose purposes are to preserve and enhance the environment and quality of life in Brentwood, to protect the integrity of residential neighborhoods, to assist with planning, to uphold zoning and municipal codes, to encourage traffic safety, and to educate the public on issues that affect quality of life and the environment.

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structures, no students and no school.² The erroneous baseline utilized in the MND renders the environmental analysis inadequate under CEQA.

Second, the MND analyzes a preschool use – and only a preschool use. But, contrary to the MND, the Applicant’s project is not limited to a preschool. This is particularly significant because the project site is immediately below the Bel Air Skycrest residential community, which would be directly impacted by the Applicant’s planned intensification of the project site’s non-preschool uses. The proposed facility will have a 4,500 square foot gathering room, 3,500 square feet of administrative offices, and large outdoor facilities, including covered courtyards, which are clearly designed to accommodate more than a 155-student preschool. The Applicant admits its intention to use the facility for hundreds of non-preschool functions, but it has presented a moving target in terms of its actual planned use of this multi-use facility. The Applicant initially stated that it would use the facility five *nights* per week for non-preschool evening events with up to 150 attendees, with such events lasting as late as 10 p.m. – a completely new and obviously intrusive usage given the proximity of the project site to the residential neighborhood. The Applicant also plans to use the facility for Sunday School purposes, thereby transferring Church-related functions from the north to the south side of Mulholland – into the residential neighbors’ backyards every Sunday morning, which is traditionally a “day of rest.” Remarkably, *none* of these non-preschool uses or impacts are considered in the MND – an obvious flaw precluding approval of the MND or issuance of a CUP.

A. The MND Fails To Apply The Proper CEQA-Mandated Baseline

1. The Baseline For Assessing A Project’s Environmental Impacts Is The Existing Physical Condition At The Commencement Of Environmental Review

CEQA requires a public agency to prepare an environmental impact report (“EIR”) for projects that “may have significant environmental effects.” *Communities For A Better Environment v. South Coast Air Quality Management Dist.* 48 Cal.4th 310, 315 (2010). The threshold for requiring an EIR is quite low, reflecting the statutory preference for resolving all doubts in favor of a complete environmental review. *County Sanitation District No. 2 v. County of Kern*, 127 Cal.App.4th 1544, 1579 (2005). Thus, a negative declaration is improper “whenever it can fairly be argued that the project may have a significant environmental impact.” *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 75 (1974); *See Leonoff v. Monterey County Bd. of Supervisors*, 222 Cal.App.3d 1337, 1348 (1990) (holding that “a public agency should not file a negative declaration if there is substantial evidence supporting a fair argument that the project may have a significant effect on the environment”).

² The only current use on the project site is parking, which would continue under the project.

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To determine whether a project may have a significant effect on the environment, the agency must first determine the “baseline” against which the project’s potential environmental impacts are to be measured. *Communities For A Better Environment*, 48 Cal.4th at 315. The existing physical condition at the time of environmental review ordinarily constitutes the baseline for purposes of assessing a project’s environmental impact. *Woodward Park Homeowners Assoc. v. City of Fresno*, 150 Cal.App.4th 683, 706-707 (2007). This standard for determining the CEQA baseline was recently confirmed by the Supreme Court:

“Section 15125, subdivision (a) of the CEQA Guidelines provides: ‘An EIR must include 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 environmental analysis is commenced, from both a local and regional perspective. *This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.*’” *Communities For A Better Environment*, 48 Cal.4th at 320, quoting CEQA Guidelines §15125 (a)(italics added in opinion).

This holding affirms that “the baseline for CEQA analysis must be the ‘existing physical conditions in the affected area,’ that is, the ‘real conditions on the ground,’ rather than the level of development or activity that *could* or *should* have been present according to a plan or regulation.” *Communities For A Better Environment*, 48 Cal.4th at 320.

2. The Baseline For Measuring This Project Is Zero Because There Was No Structure Or Use At The Commencement Of Environmental Review

The MND does not properly analyze the potential environmental impacts of operating a preschool on the project site because the MND relies upon the permit authorizing the Stephen S. Wise Middle School (“SSW Middle School”) to operate a 240-student school on the property to establish the baseline for assessing the proposed preschool’s environmental impacts.³ But the SSW Middle School ceased operating on the project site on June 11, 2009, and the modular units from which it operated that school were removed in January 2010.⁴ Environmental review of the Applicant’s project, however, did not commence until well after April 2010 when the Master Land Use Application and Environmental Assessment Form for this project were submitted to the City. *Communities For A Better Environment*, 48 Cal.4th at 320 (baseline is determined at the time environmental review commences or notice of preparation is issued); CEQA Guidelines §15060(b), (c)). Thus, the existing physical condition of the property at the

³ See MND at pages II-1/-3 (describing CUPs for the SSW Middle School); IV-70/-71 (describing the baseline for traffic analysis as the *prior* use of project site as a middle school accommodating 240 students in nine temporary modular units).

⁴ The CUP to operate a 240-student school on the project site also expired in January 2010.

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time environmental review commenced was an empty lot, with no uses other than the ongoing parking lot usage. The baseline against which the proposed preschool use must be measured is therefore its use as an empty lot, with no school, no students and no buildings.⁵

The MND, however, uses the SSW Middle School permit, allowing a 240-student school, as the baseline against which the project's 155-student preschool is measured. But, as the Court of Appeal in *Woodward Park* explained, the proper baseline for a project to be developed on a vacant lot is the property's existing "vacant" condition, not what was once present on the site or could legally have been developed on the site:

"If an EIR for a construction project on vacant land uses something other than vacant land as its baseline, the EIR will report only a portion of the impacts the project will have. For instance, if a hypothetical project half the size of the proposed project is used as a baseline, the EIR will report only half the project's impact. The EIR would fail to inform the public of the other half. It would also necessarily lack consideration of mitigation measures for the omitted portion of the project's impact." *Woodward Park*, 150 Cal.App.4th at 707.

Here, the MND improperly treats the SSW Middle School's *permitted* 240-student population as the baseline, instead of the property's existing condition, which is an empty lot (used only for parking). By using an improper baseline, the MND fails to inform the public, and the Bel Air Skycrest residents in particular, of the potentially adverse impacts due to the project's proposed intensification of the project site from an empty lot to a 155-student preschool. Thus, the MND does not disclose or evaluate the project's likely noise, illumination, or aesthetic impacts on the immediate neighbors in the Bel Air Skycrest community. As recognized in *Woodward Park*, the assumption of an erroneous baseline improperly assumes away the environmental impacts that must be disclosed and analyzed in the environmental review process. The MND is therefore invalid.⁶

⁵ The SSW Middle School, its students, and the structures from which the school operates are now located at 15900 Mulholland, still on the Mulholland Institutional Corridor, west of the 405 freeway, where this use continues to impact the local environment.

⁶ The Applicant's preschool will be vacating its current, non-permitted location at 16100 Mulholland, where an athletic field will be constructed. The less intensive athletic field use of the 16100 Mulholland property was required as an offset for major intensification of the 15900 Mulholland property. See Final Environmental Review, Stephen S. Wise Middle School Relocation Project, ENV-2003-4563-EIR. The elimination of a preschool use at 16100 Mulholland does not therefore offset the Applicant's proposed use of the 16190 Mulholland property for a preschool.

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B. The MND Is *Also* Invalid Because Its Singular Focus On The “Preschool” Use Improperly Ignores The Project’s Multiple Other Uses

Separate and apart from the MND’s failure to apply the proper baseline, it is *also* inadequate because it does not describe or assess the likely environmental impacts of the project as actually proposed by the Applicant. The MND considers only one aspect of the project – use of the proposed development for operation of a preschool facility. The project, however, envisions and accommodates multiple uses of the proposed development – not just the preschool use. The Applicant is seeking approval to develop a multi-use facility, but has (so far) effectively subverted environmental review of that project by labeling the planned multi-use facility a “preschool.” CEQA, however, requires environmental review of the entire project – including all of the project’s foreseeable uses and impacts – not just the limited uses that the Applicant chooses to highlight in an effort to deflect attention from the project’s other foreseeable environmental impacts.

The law clearly prohibits this type of piece-meal review. For purposes of CEQA, a “project” is broadly defined to include “an activity which may cause a direct physical change in the environment, or a *reasonably foreseeable* indirect physical change in the environment.” *Public Res. Code § 21065; CEQA Guidelines § 15378, subds. (a), (c).*⁷ Thus, “under *Bozung [v. Local Agency Formation Com., 13 Cal.3d 263, 283-284 (1975)]* the focus must be not on the project alone, but rather on the project’s reasonably foreseeable direct and indirect physical effects.” *California Unions, 178 Cal.App.4th at 1244.* This includes “the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” *Laurel Heights Improvement Assoc. v. Regents, 47 Cal.3d 376 (1988).* This mandated assessment of a project’s *future* impacts precludes “piecemeal review which results from ‘chopping a large project into many little ones--each with a minimal potential impact on the environment--which cumulatively may have disastrous consequences.’” *Rio Vista Farm Bureau Center v. County of Solano, 5 Cal.App.4th 351, 370 (1992).*

The MND here looks only at the use of the proposed development as a preschool. But it is “reasonably foreseeable” that the development would have multiple uses. The project description in the MND states that the proposed project is the construction of “a new 23,100 square-foot preschool,” which is to be comprised of a 14,000 square foot “preschool facility” and, in addition to the preschool facility, (1) a 4,500 square-foot “gathering pavilion”; (2) 3,500 square feet of space dedicated to “administrative offices”; (3) 1,100 square feet for storage; and

⁷ Indirect physical changes to the environment include future impacts that are likely to occur as a result of the project. *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist., 178 Cal.App.4th 1225, 1244 (2009),* applying *Bozung v. Local Agency Formation Com., 13 Cal.3d 263, 283-284 (1975).*

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(4) outdoor facilities including 12,388 square feet of outdoor classroom play yards and 6,712 square-foot outdoor, covered courtyards. This would be a remarkably large facility for accommodating 155 preschool attendees. Not surprisingly, the Applicant has no intention of using the proposed development solely for preschool uses. The foreseeable use of the development for multiple purposes is clear from the *size and design of the structure*, the Application and its stated conditions, and the Applicant's express representations that it intends to use the facility for substantial non-preschool uses.

First, a 4,500 square-foot gathering pavilion can accommodate more than 600 people under the applicable code. This large public-gathering structure is designed to expand the scope of the Applicant's church-related uses to the south side of Mulholland, not merely satisfy the independent needs of the preschoolers. *Second*, the 3,500 square-feet for administrative offices, divided among the preschool's six administrative employees, would be almost 600 square feet for each administrator. Obviously, this 3,500 square foot space for offices is not needed and will not be used exclusively to accommodate the needs of the preschool's six administrative employees. Again, the Applicant will inevitably be using this space to expand its church-related operations onto the project site. *Third*, the more than 1,000 square feet of storage space and the 20,000 square feet of outdoor covered courtyards and play grounds are far more than needed for a functioning preschool – but well designed for a multi-use facility or a much expanded school facility, whether it be a K-5 or beyond. The foreseeable use of the structure as a *multi-use facility* is also evident from the proposed conditions and mitigation measures – although the MND fails to analyze or even mention anything other than use of the proposed structure exclusively as a preschool. The Master Land Use Permit Application (the "Application") makes clear that the Applicant has designed the structure to accommodate church-related uses independent of the preschool. It states that the gathering pavilion will be used for Sunday School classes, which is not a preschool use. In listing other intended uses for the 4,500 square-foot gathering pavilion, the Application states that it will be "a place for parents, teachers, etc. to gather" – with the "etc." serving as the placeholder for any other non-preschool use that the Applicant desires.

The Applicant initially represented to the community at public meetings that it intends to book or hold *non-preschool functions* on the site *five nights a week* – totaling *260 days a year*, plus Sunday School classes and events, which adds *another 52 days a year*, and an additional 10 non-preschool events annually per Application Condition No. 27, for a total of *322 non-preschool events* annually. More recently, the Applicant has represented that it would limit its evening non-preschool use of the facility to *3 weekday nights a week* (a "restriction" that would, as a practical matter, be impossible to enforce) – for a total of *156 nights a year*, plus weekly Sunday School classes and events, and the 10 evening events per Application Condition No. 27, for a total of *218 non-preschool events a year*.

Moreover, the Applicant's use of the project site to expand its Church uses would not be limited to the 322/218 non-preschool events. The Applicant's intent to use the structure for virtually any weekday or Sunday daytime church-related use that it deems convenient is implied by the representation in its Application that, "[i]n addition, the Church would use the Site for activities

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of religious exercise and faith-based activities subject to RLUIPA.” This is confirmed in the Staff Report for this project, which states that the facilities will be available for “religious and educational assemblies on week nights after 7 p.m. to 10 p.m. and on weekends from 9 a.m. to 11 p.m., when pre-school is not in operation.” See Staff Report, p. 6.

The 4,500 square foot gathering pavilion, the 3,500 square feet of administrative offices, and the extensive outdoor space make clear that the proposed structure has been designed to accommodate these intended non-preschool uses and would easily accommodate future expansion. Thus, despite the Applicant’s characterization of the structure as a “preschool” facility, it is unquestionably a multi-use facility that would be used on a daily basis to expand the Applicant’s church-related activities to the south side of Mulholland, thereby providing additional capacity for uses on the north side, further intensifying the Applicant’s impact on the entire Corridor. This expansion of the Church to the south side of Mulholland would represent a tremendous intensification of the project site that is not even mentioned, much less analyzed, in the MND.

C. The MND Fails To Consider the *Multi-Use Facility’s* Many Adverse Impacts On The Bel Air Skycrest Community

The MND fails to consider any environmental impacts that are likely to result from the Applicant’s non-preschool uses of the proposed structure. By ignoring non-preschool uses during evenings, until 10 p.m., and on every Sunday of the year, and, according to the Staff Report on this project, 9 a.m. to 11 p.m. uses every Saturday and Sunday, the MND ignores what would be most impactful to the neighboring residential community. The Bel Air Skycrest neighborhood is located directly above the project site and would, for the first time ever, be exposed to evening uses, three to five nights per week. Yet, there is no consideration of these potentially significant adverse impacts of the *non-preschool* uses.

CEQA, however, mandates that a project that *may* increase the levels of noise, illumination, traffic, and parking congestion, and impair viewsheds, to the detriment of a residential community, must be analyzed in the environmental documents to determine whether the project’s impacts might be significant. See *Gray v. County of Madera*, 167 Cal.App.4th 1099, 1123 (2008); *Ocean View Estates Homeowners Ass. v. Montecito Water District*, 116 Cal.App.4th 396 (2004). The noise and light that may emanate from the project site during the *non-preschool* activities, and the potential for such noise and light to degrade the quality of life for Bel Air Skycrest residents who live next to the project site, is not considered in the MND. Similarly, the MND fails to consider potential impacts of the non-preschool uses that may result in spill-over parking in the residential neighborhood, increased traffic, and impaired viewsheds, which must also be considered in the MND.

As the Bel Air Skycrest residents will testify, the impacts likely to result from the proposed non-preschool uses are significant. These likely impacts are a function of the proximity of the project site to the residential community and the unique geological conditions – the project site

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is in a “bowl” below the residential community, which functions as an undesirably efficient transmitter of sound from the project site to the surrounding homes. This is particularly true at night and on weekends when sound travels much more efficiently due to the significant reduction in ambient noise. Yet the MND does not even consider that, on *hundreds of evenings* annually and on every Saturday and Sunday of the year, the neighboring residents may be exposed to non-preschool noise at levels inconsistent with the residential character of their community. This complete failure to consider these impacts from the non-preschool uses renders the MND inadequate under CEQA.⁸

The MND also fails to consider parking and traffic-congestion related impacts due to the non-preschool uses. The MND traffic analysis is based on the assumption that the proposed structure will be used only by 155 preschool enrollees and a handful of preschool teachers and administrators. But the facility will be used on a daily basis by an unspecified number of non-preschool users – both during the days and nights. The potential traffic impacts of these non-preschool commuters is not even mentioned in the MND or its traffic analysis. Given the excess capacity of the multi-use structure and the Applicant’s representation that non-preschool uses will occur daily, this defect renders the traffic analysis inadequate.

Parking-related impacts of the non-preschool uses are also ignored in the MND. Planning Department determinations for the Applicant’s property north of Mulholland require that it maintain 500 parking spaces on the 16190 property. But the 500 parking-space requirement is not addressed in the MND – despite the fact that the project will reduce the number of parking spaces below 500, without a parking variance authorizing it to do so, in violation of those previous Planning documents. Significantly, if permitted, the non-preschool uses would occur at the same time as the north side’s Church-related uses, but there is no parking analysis concerning the impact of simultaneous operations on both properties. Given that the 500 parking spaces on the south side are required for uses on the north side, the use of both properties at the same time necessarily means that there cannot be sufficient parking.

Finally, the Applicant’s project would allow it to transfer existing uses from the Church’s facility north of Mulholland onto the project site south of Mulholland, thereby intensifying traffic and other impacts in ways not considered in the MND. Significantly, evening events would place commuters on local streets during peak traffic hours – an impact on the Mulholland

⁸ The MND does not consider the likely noise impacts due to non-preschool operations during evenings and on weekends. Noise emanating from the project site – *e.g.*, car doors, radios, alarms, horns and engines, buses, people talking in the parking lot and outside the structure, and within the structure’s outdoor spaces – will be most intrusive during *evenings and on weekend days* when ambient sound (“white noise”) is at a minimum. The reason that sound seems to “travel” greater distances at night and on Sundays is because there is much less ambient sound, which makes distant noise much more audible and therefore intrusive.

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Institutional Corridor and streets, including various cut-through routes that are used by those commuting to the Corridor's institutions, that are not considered in the MND either. Environmental review is required to assess whether the resulting and unexamined traffic impacts of the non-preschool uses push the already over-burdened Mulholland Corridor to the "tipping point" (*Gray*, 167 Cal.App.4th at 1123) or whether such impacts can be mitigated – which are issues that are not addressed in the MND.

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The MND is grossly inadequate because it fails to assess (1) the project in relation to a proper baseline and (2) the multi-use facility's significant non-preschool uses, which would have a significant adverse impact on the Bel Air Skycrest neighborhood. The Application must therefore be denied and a full EIR is required. Any other result would make a mockery of the CEQA-mandated procedures designed to protect the environment and ensure that public officials are held accountable for the ecological implications of their actions. *See* CEQA Guidelines, Section 15003 (a)-(f).

Respectfully submitted,



Thomas R. Freeman



Wendy-Sue Rosen

Donald G. Keller

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cc: Councilmember Rosendahl
Councilmember Koretz
Bel Air Skycrest
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