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VIA ELECTRONIC & REGULAR MAIL

Ms. Kristina Berry
Executive Officer
Placer County LAFCO
110 Maple Street
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Re: CEQA Compliance - Olympic Valley Incorporation Proposal (LAFCO #2013-02)

Dear Ms. Berry:

We submit this letter on behalf of our client Squaw Valley Ski Holdings, LLC ("Squaw Valley"), following up on our letters of April 4, 2014, and May 9, 2014, regarding the need for Placer County LAFCO to require preparation of an environmental impact report ("EIR"), rather than a negative declaration or mitigated negative declaration ("MND"), under the California Environmental Quality Act (Pub. Resources Code, § 21000, et seq.) ("CEQA") for the Olympic Valley Incorporation Proposal ("IOV Proposal").

Substantial evidence already exists in the record supporting a "fair argument" that the IOV Proposal "may have" a potentially significant adverse effect on the environment. (See Exhibit B (EPS Memo) to letter from Whit Manley (April 4, 2014).) LAFCO is therefore required to prepare an EIR that is comprehensive and thoroughly analyzes all of the reasonably foreseeable and potentially significant adverse direct, indirect and cumulative environmental impacts that may result from the IOV Proposal. Failure to prepare an EIR would present a considerable litigation risk for Placer County LAFCO, one which could result in substantial attorneys' fees and costs to IOV and LAFCO should respondents lose on the merits.

I. Placer County LAFCO must prepare and certify an adequate EIR before it considers the IOV Proposal.

As explained in our prior letters, CEQA establishes a very low threshold for requiring preparation of an EIR. Public agencies must prepare an EIR, rather than a Negative Declaration or a Mitigated Negative Declaration (MND), if substantial evidence supports a *fair argument* that

a proposed project *may* have a significant effect [1] on the environment. (Pub. Resources Code, §§ 21080, subd. (d), 21082.2, subd. (d); CEQA Guidelines, § 15064, subd. (f).)

Such evidence has been found to include expert testimony from an environmental planner that a proposed incorporation would result in potentially significant adverse impacts from a change in land use policies, similar to the evidence regarding wildfire and transit impacts already contained within Placer County LAFCO's record today. (See *Sacramento County Bd. of Supervisors v. Sacramento Local Agency Formation Com.* (1991) 6 Cal.App.4th 475, 286 Cal.Rptr.171 [requiring Sacramento County LAFCO to rescind adoption of a negative declaration and prepare an EIR for proposed incorporation of the City of Citrus Heights]; review granted and opinion superseded on other grounds at 3 Cal.4th 903 (1992).)

The courts have required lead agencies to prepare EIRs for other projects that have been portrayed as environmentally benign. (See *City of Livermore v. Local Agency Formation Com.* (1986) 184 Cal.App.3d 531, 537 [EIR required for change in LAFCO Guidelines for determining spheres of influence for cities]; *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1194 [EIR required for revised state beach general plan due to potentially significant effects of allowing unleashed dogs on the environment]; *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903 (*Pocket Protectors*) [invalidating MND and requiring preparation of an EIR for residential infill project based on lay testimony of potentially significant aesthetic impacts]; *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323 [invalidating MND and requiring EIR for a senior residential care facility based on "expert testimony" of 30-year HVAC employee claiming potentially significant noise impacts from the project's proposed type of air conditioning units].)

"It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project." (*Pocket Protectors*, *supra*, 124 Cal.App.4th at p. 935, citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 85.) If, as here, a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency must prepare an EIR even though it may

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[1] Public Resources Code section 21068 defines a "[s]ignificant effect on the environment" as "a substantial, *or potentially substantial*, adverse change in the environment." (Pub. Resources Code, § 21068 (emphasis added).) CEQA Guidelines section 15382 further defines a "significant effect" as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic significance."

also be presented with other substantial evidence that the project will not have a significant effect. (CEQA Guidelines, § 15064, subd. (f); see also *Pocket Protectors*, *supra*, 124 Cal.App.4th at pp. 927-928.)

Again, "[t]he fair argument standard is a 'low threshold' test for requiring the preparation of an EIR. [Citation.] It is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency's determination. Review is de novo, *with a preference for resolving doubts in favor of environmental review.* [Citation.]" (*Pocket Protectors*, *supra*, 124 Cal.App.4th at p. 928, italics original; see also *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1579 ["California courts . . . routinely describe the fair argument test as a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review."].)

As the California Supreme Court has repeatedly recognized, "the EIR is the heart of CEQA." (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) "An EIR is an 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' [Citation.] The EIR is also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' [Citations.] Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations.] The EIR process protects not only the environment but also informed self-government." (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1446, quoting *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392.)

Our prior letters and attachments submitted with those letters, including the Economic Planning Systems ("EPS") memorandum, contain facts, and reasonable assumptions predicated on facts, and are therefore substantial evidence in support of a fair argument that the IOV proposal may have a significant impact on several resources. Specifically, the letters provide substantial evidence that the IOV Proposal may result in significant impacts caused by changes in public services, particularly fire protection and transportation. Evidence demonstrating a fair argument of even one potential impact triggers the need for an EIR. Accordingly, LAFCO must prepare an EIR.

II. To fulfill the requirements of CEQA, the scope of the EIR for the IOV Proposal must be broad.

According to CEQA Guidelines Section 15121, "[a]n EIR is an informational document which will inform public agency decision-makers and the public generally of the potential environmental impacts of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project." An EIR is required to "identify and focus on the significant environmental effects of the proposed project." (CEQA Guidelines, § 15126.2.) Direct and indirect significant effects of the project must be clearly identified and described, giving due consideration to both the short-term and long-term effects. (*Ibid.*)

Based on our review of the IOV Proposal, and EIRs prepared by LAFCO's for similar incorporation projects,[2] the EIR for the IOV Proposal should evaluate, at a minimum, potential impacts to the following resource areas as set forth in Appendix G of the CEQA Guidelines:

- Air Quality
- Hazardous and Hazardous Materials
- Noise
- Public Services and Recreation
- Hydrology and Water Quality
- Utilities and Service Systems
- Biological Resources
- Land Use and Planning
- Population and Housing
- Forestry Resources
- Greenhouse Gas Emissions
- Transportation

The EIR must also include a discussion of potential growth inducing impacts under CEQA Guidelines Section 15126.2, subdivision (d), and a thorough analysis of potential energy impacts in accordance with Appendix F of the CEQA Guidelines. (See *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 209 [explaining that energy analysis described in Appendix F is mandatory for EIRs].)

The EIR should pay particular attention to Land Use and Planning, Hazards and Hazardous Materials, and Public Services. As we explained in our earlier letters, upon incorporation, and in accordance with state law, all areas within the new city boundary would be reclassified as a Local Responsible Area ("LRA"), with the resulting shift in responsibility from the state to the Squaw Valley Public Services District ("SVPSD") for wildland fires. This increase in local service responsibility could result in a significant reduction in fire protection services, and a significant increase in the potential for environmental damage that would occur in a wildland fire. A continuation of the same level of service would also result in a significant

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[2] / See May 9, 2014, letter from Squaw Valley listing examples of EIRs prepared by LAFCOs to study the environmental effects of a proposed incorporation.

increase in potential operating costs to the SVPSD. This constitutes a potentially significant adverse environmental impact. The El Dorado County LAFCO, under similar circumstances, identified this issue as a significant adverse impact requiring the adoption of mitigation to ensure no degradation of wildland fire service levels occurred as a result of incorporation. (See Attachment C to Squaw Valley letter [April 4, 2014].) Therefore, potential impacts caused by these changes in public services must be fully analyzed in the EIR.

Furthermore, as evidenced in the EPS memorandum provided as an attachment to our April 4, 2014, letter, the IOV incorporation could also divert Transient Occupancy Tax ("TOT") revenue collected within the valley away from Tahoe Area Regional Transit ("TART") to the new city. TART requires $450,000 (of the $494,000 in TOT revenue allocated by North Lake Tahoe Resort Association ("NLTRA") for transit in FY 2013-2014), to maintain base levels of service. The new city could reduce the revenue required by TART, resulting in a reduction in base levels of service. This impact must also be considered in the EIR.

III. IOV, through the December 19, 2013 Indemnity Agreement, would incur substantial costs if an adequate EIR is not prepared and, if IOV were to dissolve, LAFCO could be required to pay the same fees/costs.

For all of the reasons explained above (and in detail in our previous letters), Placer County LAFCO must prepare an EIR for the IOV Proposal. If the EIR does not fully comply with the requirements of CEQA, or if Placer County LAFCO chooses to proceed with an MND or other document instead of an EIR, Placer County LAFCO's actions would likely be subject to a Petition for Writ of Mandate and set aside if challenged in court. If litigation ensues, IOV must, upon written request of LAFCO, indemnify LAFCO and pay all litigation fees and costs, including "the legality or adequacy of any determination under the California Environmental Quality Act[.]" (See Agreement to Pay Fees and Costs/Indemnification (Dec. 19, 2013), ¶ 5 [noting environmental review is required for the proposal under CEQA].)

A petitioner who prevails in a CEQA case is generally entitled to recover costs and attorney fees. (Code Civ. Proc., § 1021.5; see *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 269.) California courts have long recognized a "private attorney general" exception to the general rule that attorney fees are not recoverable unless provided for by statute or contract. (See *Serrano v. Priest* (1977) 20 Cal.3d 25, 43; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 892-93 [Code of civil Procedure section 1021.5 applies to the enforcement of rights under CEQA]; *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 254 ["It is well settled that the private attorney general theory applies to an action to enforce provisions of CEQA."]; *San Bernardino Valley Audubon v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 754 ["litigation brought to enforce the

provisions of CEQA ... has been held to involve important rights affecting the public interest, and the private attorney general theory as codified in ... section 1021.5 applies to such suits"].) The fees awarded to a prevailing party generally include those incurred during both litigation and during the administrative process. (See *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312, 1315.)

Although the precise amount of any awarded attorneys' fees and costs depends on the number of issues litigated, fees recovered under the statute are often substantial. (See *Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg* (2012) 206 Cal.App.4th 988, 991 [award of more than $380,000 in attorneys' fees]; *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852 [award of $313,000 in attorneys' fees]; *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 880 [award of $265,715.55 in fees].)

Requiring an indemnity agreement from IOV was therefore prudent. If it has not already, LAFCO should also require IOV to provide a letter of credit or other financial assurances should LAFCO decide to move forward with a limited form of environmental review. This is because, if IOV were to dissolve, LAFCO could also be required to pay any fees or costs awarded to prevailing petitioners. In our view, potential liability of a fee award should be borne by IOV, not by LAFCO. That is because LAFCO's involvement is entirely a function of the process launched by IOV.

Thank you for your consideration of our comments. We look forward to continuing to participate in Placer County LAFCO's consideration of the IOV Proposal. Please contact me if you have any questions.

Very truly yours,

Whit Manley

Whitman F. Manley