Indian Wells
(760) 568-2611
Irvine
(949) 263-2600
Los Angeles
(213) 617-8100
Ontario
(909) 989-8584

BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

3390 University Avenue, 5th Floor, P.O. Box 1028, Riverside, CA 92502
Phone: (951) 686-1450 | Fax: (951) 686-3083 | www.bbklaw.com

Sacramento
(916) 325-4000
San Diego
(619) 525-1300
Walnut Creek
(925) 977-3300
Washington, DC
(202) 785-0600

Michelle Ouellette
(951) 826-8373
michelle.ouellette@bbklaw.com
File No. 30839.00001

February 16, 2017

VIA U.S. MAIL AND E-MAIL

Mayor and City Council
City of Desert Hot Springs
65-950 Pierson Boulevard
Desert Hot Springs, CA 92240

Re: **Response to Center for Biological Diversity's Opposition to Extension of Time (TTM 35009 and 35448 within Rancho Royale Specific Plan)**

Dear Mayor and Councilmembers:

On behalf of Edy P. Adkison and Judith Elizabeth Adkison, trustees of the Adkison Family Revocable Living Trust, and Marth Ruiz-Snell (collectively, "the Appellant"), we have received and reviewed the letter submitted to the City of Desert Hot Springs by the Center for Biological Diversity ("CBD"), dated February 10, 2017. CBD's letter opposes the appeal regarding the requested Extension of Time for Tentative Tract Maps 35009 and 35448 (the "time extension") based upon a misstatement of the law that preparation of a subsequent environmental impact report ("EIR") is required under the California Environmental Quality Act ("CEQA") prior to the granting of the time extension. CEQA does *not* require any additional environmental review, much less a subsequent EIR. Therefore CBD's letter and its arguments must be disregarded in the appeal process.

1. **The City cannot require a subsequent EIR.**

As detailed in other submittals to the City, the Rancho Royale Specific Plan ("RRSP") was approved, and its EIR certified, in 1993. Tentative Tract Maps 35009 and 35448 were approved in 2007, with Addendum No. 3 to the 1993 EIR. Therefore the RRSP fully complied with CEQA when approved. No legal challenges were filed at that time.

Once a project has been approved and an EIR has been certified, CEQA includes a strong presumption against requiring any further environmental review. (Pub. Resources Code, § 21166; *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1049.) This presumption implements the legislative policy favoring prompt resolution of challenges to land use decisions. (*Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 111.) Further, the intent of Public Resources Code section 21166 is to ensure finality of environmental

review so that projects can move forward. (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073-74.) As such, a lead agency may *only* undertake additional, subsequent environmental review when one of the following specific conditions occurs: (1) *substantial* project changes are proposed that will require *major* revisions of the EIR; (2) *substantial* changes in the circumstances under which the project is being undertaken have occurred that require *major* revisions of the EIR; or (3) new information of substantial importance to the project that was not known and could not have been known at the time the EIR was certified becomes available. (Pub. Resources Code, § 21166; see also State CEQA Guidelines, § 15162(a).) If none of these conditions are present, an agency *is prohibited* from requiring subsequent environmental review. (*Ibid.*)

The determination that one of these three conditions is present cannot be made arbitrarily – it must be based on "substantial evidence." (See *Melom v. City of Madera* (2010) 183 Cal.App.4th 41, 489.) "Substantial evidence" is a legal term of art that, when used in the CEQA context, means "*facts*, reasonable assumptions predicated upon *facts*, and *expert opinion* supported by facts." (State CEQA Guidelines [Cal. Code Regs., tit. 14, §§ 15000 et seq.], § 15384 [emphasis added].) "Argument, speculation, unsubstantiated opinion or narrative… does not constitute substantial evidence." (*Ibid.*)

As detailed below, CBD does not point to any substantial evidence (i.e. facts, or expert opinion supported by facts) showing that any of the three conditions allowing the City to require a subsequent EIR are present. Indeed, none exists. Therefore, a subsequent EIR cannot be required.

a. <u>There are no substantial project changes before the City Council that would result in new or substantially more severe significant environmental effects.</u>

As a threshold matter, the *only* discretionary approval before the City is an application for extensions of time on two previously approved tentative tract maps. *No changes* have been made to these two tract maps since the date that they were first approved. *No changes* are currently being sought. Therefore, there are no changes in the project, substantial or otherwise, before the City Council that could possibly trigger the need for a subsequent EIR. On this basis alone the City cannot now require subsequent environmental review.

i. City staff's proposed amendments to the Conditions of Approval cannot constitute "substantial changes" in the project.

City staff has proposed twelve extremely minor amendments to the conditions of approval for the tract maps, to be adopted by the City along with the extensions of time. CBD attempts to mislead the public and the City by painting these minor amendments as project changes (they are not, as discussed in detail below). However, even if they could be considered

changes in the project, changes in the project alone cannot trigger the need for subsequent environmental review. Under Public Resources Code section 21166, only "substantial" project changes may trigger the need for a subsequent EIR. State CEQA Guidelines section 15162(a) clarifies that a "substantial" project change is one that results in "new significant environmental effects or a substantial increase in the severity of previously identified significant effects." A review of City staff's proposed amended conditions of approval clearly show that a subsequent EIR is not required. There is not a single proposed amendment that could possibly result in new significant environmental effects.

Of the twelve proposed amended conditions, five are administrative in nature, and therefore would have no physical implications whatsoever. Proposed amended condition #2 merely grants the extension request. Proposed amended condition #38a specifies which community facilities district will be responsible for the maintenance of landscaping, medians, streetlights, and drainage basins. Proposed amended condition #39b relates to the payment of City consultant fees, and condition #127 specifies that building plan check will run concurrently with City plan check. Finally, proposed amended condition #128 merely states that the Fire Department may require the applicant to prepare a display board. None of these five proposed amendments to the conditions of approval would result in *any* physical change to the project, and therefore it can be seen with certainty that there will be no new significant environmental impacts upon which to require a subsequent EIR.

The remaining seven amended conditions are changes requested by the Fire Department to further ensure public safety. However, these amendments are so minor that it would similarly be impossible for them to result in new impacts. For example, proposed amended condition #110 requires that blue dot reflectors be placed in streets to indicate the location of fire hydrants and proposed amended condition #123 requires that development incorporate required fire protection measures from the 2013 California Fire Code and/or the Riverside County Fire Department Fire Protection Standards. Proposed amended conditions #114, #124, #125, and #126 each iterate fire department access requirements, including that dead-end streets be designed to meet Fire Department turnaround requirements, that fire apparatus access roads be designed in compliance with code requirements, that commercial use areas have appropriate access roads, and that a site plan be submitted to the Fire Department depicting required fire lanes. Again, none of these proposed amendments rise to the level of changes in the project, let alone "substantial" changes that would result in "new significant impacts" such that a subsequent EIR would be required.

ii. Changes requested, considered, and approved in 2007 cannot now be a basis for requiring a subsequent EIR.

CBD's letter cites extensively to a November 8, 2016 staff report wherein the "Background" section, City staff described changes that were requested by the applicant *in 2007*. (See August 7, 2007 Report to the City Council.) These requested changes were evaluated and addressed *in 2007*, pursuant to Addendum No. 3. As is reflected in the November 22, 2016 staff report, the applicant did not request, and the Planning Commission was not asked to approve, any changes to the project (with the exception of the proposed amendments to the conditions of approval, addressed above). The *entirety* of CBD's claims are based on these 2007 previously requested, previously considered, and previously approved changes in the project. None of these changes are at issue now, and therefore *cannot* form the basis of a finding of substantial changes in the project. Therefore the City cannot, on this ground, require a subsequent EIR or deny the appeal on similar grounds.

As discussed above, the determination that substantial changes have occurred in a project, such that major revisions of the previous EIR must be made due to new significant environmental effects or a substantial increase in the severity of previously identified significant effects, is a determination that must be supported by substantial evidence. It *cannot* be a determination based solely on erroneous facts, argument, opinion, or speculation. (State CEQA Guidelines, § 15384.) Here, there is no evidence whatsoever, much less substantial evidence, tying granting of the extensions of time to substantial changes in the project or new significant environmental impacts. Therefore, a subsequent EIR cannot be required by the City, and this cannot provide a ground upon which to deny the appeal.

b. No substantial changes have occurred with respect to the circumstances under which the project is being undertaken.

CBD alleges that the dedication of the Sand to Snow National Monument, and the adoption of the Coachella Valley Multiple Species Habitat Conservation Plan (CVMSHCP) trigger the need for a subsequent EIR. However, as with changes in the project, the trigger for subsequent environmental review is not merely a change in circumstances. Instead, any change in circumstance must be directly tied to new significant environmental effects or a substantial increase in the severity of previously identified significant effects. (State CEQA Guidelines, § 15162(a)(2).) The CBD letter reads, "These new designations create new ecological, aesthetic, traffic, noise, and recreational impacts which were not, and could not have been, analyzed" in the previously certified EIR.

However, the designations do not change the physical conditions on the ground. The Sand to Snow National Monument was previously designated open space, and biological, aesthetics, and other resource impacts were considered in 2007 as part of Addendum No. 3. The City's adoption of the CVMSHCP was to protect open space and biological resources that were similarly in existence in 2007. Therefore, impacts on these resources were considered in 2007.

CBD's unsupported conclusions that the dedication of the monument and the adoption of the CVMSHCP somehow result in new significant impacts are unsupported by substantial evidence. Unsubstantiated conclusions, argument, and speculation do not constitute substantial evidence. The City therefore cannot require a subsequent EIR on this ground.

Finally, CBD also claims that CEQA now requires the analysis of greenhouse gas emissions and climate change, and alleges this was not adequately addressed in prior environmental review. However, the tentative tract maps were adopted in 2007, when the impacts of greenhouse gas emissions and the effects of climate change were well known. In fact, information on the effect of greenhouse gas emissions on climate was known long before even the 1993 EIR was certified. (See *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 531.) CBD or others could have raised the issue of GHGs in 2007, or in 1993. Greenhouse gas emissions cannot now be the basis of requiring a subsequent EIR. (*Id.* at p. 532.)

Because there is no substantial evidence in the record identifying a new significant project impact as a result of a changed circumstance, this cannot provide a ground upon which the City can require a subsequent EIR. Therefore, failure to complete a subsequent EIR cannot provide a basis upon which to deny the appeal.

2. <u>There is no deferral of project approvals or environmental review.</u>

As described in detail above, the *only* discretionary approval before the City is an application for extensions of time on two previously approved tentative tract maps. CBD alleges that because the entitlement process requires site plan, design, and engineering review at a later date, the City is improperly deferring "certain changes in the project design and aesthetics to a later phase." However, this is patently false. The Applicant is at this time seeking extensions of time for the previously approved tentative maps. The Applicant has provided submittals to the City identifying how each of the required findings for approval of the extensions of time can be made. No other approvals are before the City at this time. Neither site plan review nor design review is at issue, and these reviews are not required before the extensions of time are granted. Therefore, there is no deferral of these approvals and any CEQA review (if necessary under the law) that may be required at that time.

For the forgoing reasons, we urge the City Council to disregard the unsubstantiated arguments and false allegations of the CBD letter, which mistakenly claim that changes addressed in 2007 or extremely minor conditions of approval should <u>*now*</u> require a subsequent EIR. As such, the City Council must grant the appeal, reverse the Planning Commission decision, and approve the requested extensions of time.

Sincerely,

Michelle Ouellette
of BEST BEST & KRIEGER LLP

Cc: Scott Matas, Mayor [smatas@cityofdhs.org]
Joe McKee, Mayor Pro Tem [joemckeedhs@yahoo.com]
Russell Betts, Council Member [rbetts@cityofdhs.org]
Anayeli Zavala, Council Member [azavala@cityofdhs.org]
Yvonne Parks, Council Member [parks_yvonne@hotmail.com]
Chuck Maynard, City Manager [cmaynard@cityofdhs.org]
Charles Rangel, Community Development Director [crangel@cityofdhs.org]