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October 11, 2022

Via Electronic Mail Only

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E-Mail: jroberts@fontana.org

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Councilmember Phillip Cothran
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City Manager Matt Ballantyne
E-Mail: mballantyne@fontana.org

Re: October 11, 2022 City of Fontana Council agenda File #21-1743 Master Case No. 22-110 and Municipal Code Amendment No. 22-007 - Fontana Municipal Code amendment to Chapter 2 (Administration), (Chapters 9 (Environmental Protection and Resource Extraction) Chapter 25 (Streets, Sidewalk, and Other Public Ways), Chapter 26 (Subdivisions), Chapter 30 (Zoning and Development Code), and Chapter 33 (Cannabis Businesses and Activities)

Dear City Manager Ballantyne, Mayor Warren, and Honorable Councilmembers:

This Firm represents the Center for Community Action and Environmental Justice (CCAEJ) in matters related to the City of Fontana's proposed No Net Loss zoning ordinance amendment. On May 17, 2022, and again on September 20, 2022, the Fontana Planning Commission reviewed and recommended City Council approval of amendments to Chapter 26 (Subdivisions) and Chapter 30 (Zoning and Development Code) of the Municipal Code. If approved, this ordinance would codify several changes to the Municipal Code, including a "No Net Loss" program, described below. This proposed ordinance is on the City Council agenda for the second time for consideration on October 11, 2022.

We write to *again* express CCAEJ's concerns with this ordinance and our legal opinion that, far from complying with Senate Bill 330, the ordinance violates it. Specifically, the proposed "No Net Loss" provisions would allow downzoning without concurrent upzoning; instead, an applicant that wishes to downzone her residential property or rezone from residential to commercial could do so without a concurrent upzone to other property. The "lost" units would be put into a "bank," and other developers could "withdraw" them if they wanted to build more units than allowed by their current zoning. But whether and how they could do that is completely uncertain, as doing so requires City approval, and despite the additions to the draft ordinance outlining the items required to file an application for a Density Bonus Transfer Agreement, there are no objective standards for granting or denying the approval. For these reasons, the proposed ordinance is inconsistent with SB 330, which not only prohibits such downzoning but also prohibits the adoption of new development standards that are subjective rather than objective.

For these reasons, as well as those expressed by CCAEJ in a comment letter to the Planning Commission dated May 17, 2002, CCAEJ opposes the adoption of the proposed "No Net Loss" ordinance. And, even if the ordinance did comply with SB 330, the City would have to conduct environmental review prior to adopting it, as the court held in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892.

I. The proposed Chapter 30, Article XV Amendment is not in compliance with Senate Bill 330 due to lack of concurrent upzoning.

In simple terms, SB 330 prevents a jurisdiction from downzoning a parcel without concurrent upzoning of another parcel, to ensure no net loss of residential capacity within the jurisdiction. "Upzone" and "downzone" refer to development regulations that allow greater or lesser density/intensity of residential development, respectively. Specifically, SB 330 added the following provision to the Government Code (italics added for emphasis):

66300. (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.

. . .

(C) *Imposing or enforcing design standards established on or after January 1, 2020, that are not objective design standards*.

. . .

(2) Any development policy, standard, or condition enacted on or after the effective date of this section that does not comply with this section shall be deemed void.

. . .

(i) (1) This section does not prohibit an affected county or an affected city from changing a land use designation or zoning ordinance to a less intensive use *if the city or county concurrently changes the development standards, policies, and conditions applicable to other parcels within the jurisdiction to ensure that there is no net loss in residential capacity.*

The proposed Chapter 30, Article XV amendment attempts to avoid this clear mandate by allowing a developer to downzone without a concurrent upzone as long as they "bank" the lost units for potential future development at another site. However, this is not a concurrent upzone. Presumably, any future developers who wish to use these units would still have to go through the rezone/general plan amendment process at that time to avoid inconsistencies. Thus, the ordinance does not ensure "no net loss" and violates SB 330.

II. The proposed ordinance includes new subjective standards for development, in violation of Senate Bill 330.

If adopted, the proposed Chapter 30, Article XV amendment would violate the SB 330 prohibition on adopting, imposing, or enforcing new design standards for

residential development that are not "objective." "Objective standards" involve "no personal or subjective judgment by a public official," and are "uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant and the public official." Government Code § 66300(a)(7). With the proposed Chapter 30, Article XV amendment, a developer is only allowed to claim and develop the banked units if the City approves a Density Bonus Housing Agreement for their project. The proposed Article XV defines a Density Bonus Housing Agreement as "A legally binding agreement between a developer of a Housing Development and the City containing such terms and conditions as determined by the City Attorney, which ensures that the requirements of this Chapter are satisfied." There are no objective standards governing this approval process. As a result, it violates SB 330.

III. In addition to the legal shortcomings of the proposed Chapter 30, Article XV amendment, the program has several practical shortcomings.

A. Potential to increase development pressure in older residential neighborhoods. CCAEJ is concerned about increasing commercial investment and development pressure on existing neighborhoods to transition to non-residential uses. This can impact the remaining neighborhood, which is not only losing the opportunity to develop more residential units to provide much-needed housing, but it is losing existing unit(s) with the rezoning to non-residential uses and redevelopment of the site. This likely exacerbates additional non-residential development pressure and decreases the ability to create affordable housing. For example, the City of Eastvale adopted a No Let Loss ordinance in October 2021. By July of this year, Eastvale already had 14 units in their Unit Bank – a result of two properties being rezoned from residential to commercial uses (for a retail center and a self-storage facility).

B. Unclear cap on unit bank. The proposed amendment includes a cap on the Unit Bank of 2,200 units. It is unclear how the number was developed or what would happen if a project proposed to exceed the unit bank maximum.

The above points serve to further illustrate why approval of the Article XV of Chapter 30 amendment is ill-advised.

IV. The City Must Analyze the Environmental Impacts of the Ordinance before Adopting It.

The staff report and proposed findings claims that the ordinance is either not a project subject to CEQA or is exempt from CEQA under the common sense exemption. However, the City has failed to provide evidence to support these claims. In fact, courts have found that similar ordinances are not exempt. See, e.g., *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892. As a result, the City must prepare an environmental analysis of the ordinance's impacts before considering its adoption.

First, the ordinance clearly is a project subject to CEQA. If the ordinance were to go into effect, it is reasonably foreseeable that up to 2,200 residential units could be developed in locations other than where the zoning and general plan have planned for them. In addition, it is reasonably foreseeable that the City would see more non-residential development than called for in the zoning code and general plan. When presented with similar facts, the court in *Terminal Plaza Corp*. found that the City was required to analyze the impacts resulting from that change in development, even if it is not known exactly where the new development would go.

For similar reasons, the City cannot rely on the common sense exemption, which only applies "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." Here, the ordinance would facilitate changes in development patters—allowing denser developments in some places and non-residential development where only residential is currently allowed. These changes could have a significant effect on the environment, such as where industrial uses are allowed near sensitive receptors.

Because the ordinance is subject to CEQA and is not exempt, the City must prepare an initial study or EIR to analyze the ordinance's potential environmental impacts.

V. The City Must Refrain from Approving the Proposed Municipal Code Amendment Ordinance.

On behalf of CCAEJ, we respectfully request that the City Council refrain from adopting an Ordinance for Municipal Code Amendment (MCA) No. 22-004 to amend Chapter 26 and Chapter 30 of the Municipal Code. Any action by the City to approve the No Net Loss Program could expose the City to litigation on the grounds that

the ordinance violates Senate Bill 330 and the goal of maintaining existing residential development capacity in the City of Fontana.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Winter King

cc: Ana Gonzalez, Executive Director, CCAEJ

1575134.1

October 11, 2022

Regarding: Notice of Opposition to Agenda A File 21-1743.
Master Case No. 22-110 and Municipal Code Amendment No. 22-007 - Fontana Municipal Code
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Extraction) Chapter 25 (Streets, Sidewalk, and Other Public Ways), Chapter 26 (Subdivisions),
Chapter 30 (Zoning and Development Code), and Chapter 33 (Cannabis Businesses and Activities).

Dear Fontana City Council,

On April 18, 2022, California Attorney General Rob Bonta announced a settlement with the City of Fontana to protect vulnerable communities, sensitive receptors, from the culminative pollution impacts. This act was to force the City of Fontana to comply with the intent of CEQA to mitigate projects that have significant effects on the community and to adhere to SB1000.

Master Case No. 22-110 and Municipal Code Amendment No. 22-007 would once again seek circumvent California Code § 65302(h)(1) which states

> (h)(1) An environmental justice element, or related goals, policies, and objectives integrated in other elements, that
> identifies **disadvantaged** communities within the area covered by the general plan of the city, county, or city and county, if the city, county, or city and county has a **disadvantaged** community. The environmental justice element, or related environmental justice goals, policies, and objectives integrated in other elements, shall do all of the following:
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> > (A) Identify objectives and policies to reduce the unique or ***compounded health risks*** in **disadvantaged** communities by means that include, but are not limited to, the reduction of pollution exposure, including the improvement of air quality, and the promotion of public facilities, food access, safe and sanitary homes, and physical activity.
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> > (B) Identify objectives and policies to promote civic engagement in the public decision-making process.
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> > (C) Identify objectives and policies that prioritize improvements and programs that address the needs of **disadvantaged** communities.

In accordance to CA Health and Safety Code § 42705.5 Sensitive receptors are defined as:

> (5) "Sensitive receptors" includes hospitals, schools and day care centers, and such other locations as the district or state board may determine.

Therefore, CA Health and Safety Code § 42705.5 grants the right to define sensitive receptors to the California Air Resources Board (CARB), South Coast Air Quality Management District (SCAQMD), EPA, and CEQA guidance. [1,2] The City of Fontana does not have the authority to define sensitive receptors to exclude residential homes in any fashion if it is in contradiction to California Code § 65302(h)(1), §65040.12(e), §42705.5(a)(5). California Air Resource Board has defined sensitive receptors as: [3]

> Sensitive receptors are children, elderly, asthmatics, and others whose are at a heightened risk of negative health outcomes due to exposure to air pollution. The locations where these sensitive receptors congregate are considered sensitive receptor locations. Sensitive Receptor locations may include hospitals, schools, and day care centers, and such other locations as the air district board or California Air Resources Board may determine

In order to preserve human life and to better support planners and local leaders whose actions have the potential to directly impact life, CARB created a guide. The guide "CARB's Air Quality and Land Use Handbook",[4] to highlight the potential health impacts associated with proximity to air pollution sources allowing planners to explicitly consider this issue throughout the land use and planning processes. CARB outlines that careful land use and planning such as infill development, green spaces, mixed use, higher density, transit-oriented development, and other concepts that benefit regional air quality can be compatible with protecting the health of individuals at the neighborhood level. In addition, CARB has focused on their goal that being accessible to planners and improving communication between air agencies and land use planners could go a long way to protect human health. However, the City of Fontana is refusing to adhere to this guidance. It is currently seeking to redefine sensitive receptors outside of CA Health and Safety Code § 42705.5 to exclude any residents that live on land that could be

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rezoned without their consent to into industrial, commercial, unpermitted or non-conforming use as determined of the Director of Planning.

In addition, the City seeks to remove the public's ability to be involved in the development process by removing access to the Development Advisory Board. This would allow the city to arbitrarily rezone residential land into industrial, commercial, unpermitted or non-conforming land without community input or knowledge which is a direct violation of California Code § 65302(h)(1) which requires environmental justice communities per California Code § 65040.12 (e) which requires fairness in land use:

> Fairness in the context means that the benefit of a healthy environment should be available to everyone, and the burdens of pollution should not be focused on sensitive population or on communities that are already experiencing its adverse effects.

California Code § 65040.12 (e) would qualify the residents of the City of Fontana to have a voice in matters regarding the fair use of land and its development, especially in accordance with California Code § 65302(h)(1).

The City of Fontana has already shown that it is not permitting a fair and equitable transparency required under CEQA as it continues to push forward land use and circumvent the EIR Process. A precedent that has been set with the original Southwest Industrial Park (SWIP) plan area which is divided into 55 separate parcels in size ranging from 1.25 to 21.28 acres. The average parcel size is 7.03 acres. Most of the developments are oriented towards the transportation industry. However, since the adoption there have been over 15 amendments that have rezoned residential land into industrial without recirculating the EIR (State Clearinghouse No. 2009091089) and therefore the EIR continues to be out of compliance with the because the land was engulfed into SWIP despite being residential historically. In addition, the proposed method that the City is presenting to adhere with SB330 is completely out of compliance.

In addition, to the jurisdiction of CARB, the SCAQMD is another agency that is responsible for implementation and governance of the QU.S. EPA's 1970 Clean Air Act. **Federal Clean Air Act (Act).** The Act requires attainment of National Ambient Air Quality Standards (NAAQS) for criteria air pollutants, i.e. pollutants causing human health impacts due to their release from numerous sources. SCAQMD has also created a "Guidance Document for Addressing Air Quality Issues in General Plans and Local Planning" that itemizes the health effects: ozone, particulate matter (PM_{10}/$PM_{2.5}$), carbon monoxide, lead, nitrogen dioxide, and sulfur dioxide.[5]

The document outlines that local jurisdictions have the responsibility for determining land use compatibility for sensitive receptors. A sensitive receptor is a person in the population who is particularly susceptible to health effects due to exposure to an air

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contaminant. The following are land uses (sensitive sites) where sensitive receptors are defined as: schools, playgrounds, childcare centers, long-term health care facilities, rehabilitation centers, convalescent centers, hospitals, retirement homes and **residences**. SCAQMD clearly defines Toxic Air Contaiminant's (TAC) and the causational relationship of exposure to TACs and the following health impacts: cancer, birth defects, reproductive damage, neurological disorders, heart damage, damage to the circulatory system, and damage to the respiratory system.[6]

In order to facilitate urban planning considerations in alignment with California's consistent action of being a leader in enacting laws specific to environmental justice, including laws directing funding to environmental justice communities (SB 535 and AB 1550), a law creating a community air quality protection program (AB 617), and another that requires environmental justice to be addressed in local government planning (SB 1000), SCAQMD created the Multiple Air Toxics Exposure Study (MATES-II). The MATES-II project represents one of the most comprehensive air toxics monitoring programs ever conducted in a major urban area in the country, and it has been recognized as a model program. It was created with the intent that planners, local leaders, would utilize this tool to understand how the General Plan is impacting their communities. The MATES-II revealed major findings from the study that can be summarized with the following:[7]

Fontana in accordance to CALENVIROSCREEN 4.0, the majority of the city is defined as a sensitive receptor already over burned with pollution and the health risks it causes. As seen in the below image.

For this reason, our family like many families stand in opposition to *Master Case No. 22-110 and Municipal Code Amendment No. 22-007 - Fontana Municipal Code amendment to Chapter 2 (Administration), (Chapters 9 (Environmental Protection and Resource Extraction) Chapter 25 (Streets, Sidewalk, and Other Public Ways), Chapter 26 (Subdivisions), Chapter 30 (Zoning and Development Code), and Chapter 33 (Cannabis Businesses and Activities).*

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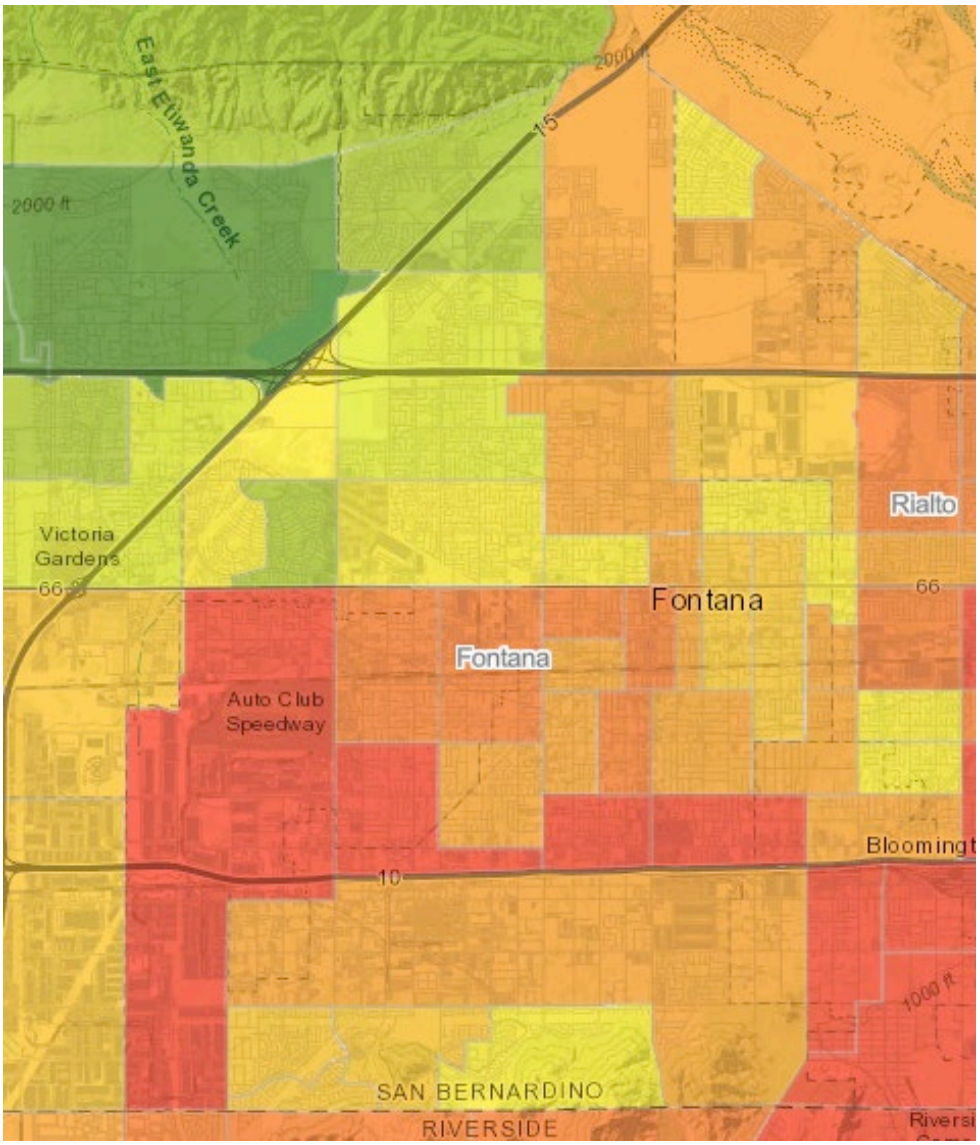

Image 1. CalEnviroscreen 4.0 Fontana

Sincerely,
Dana Cunningham 6133 Knox Ave

October 11, 2022

Regarding: Notice of Opposition to Agenda A File 21-1743.
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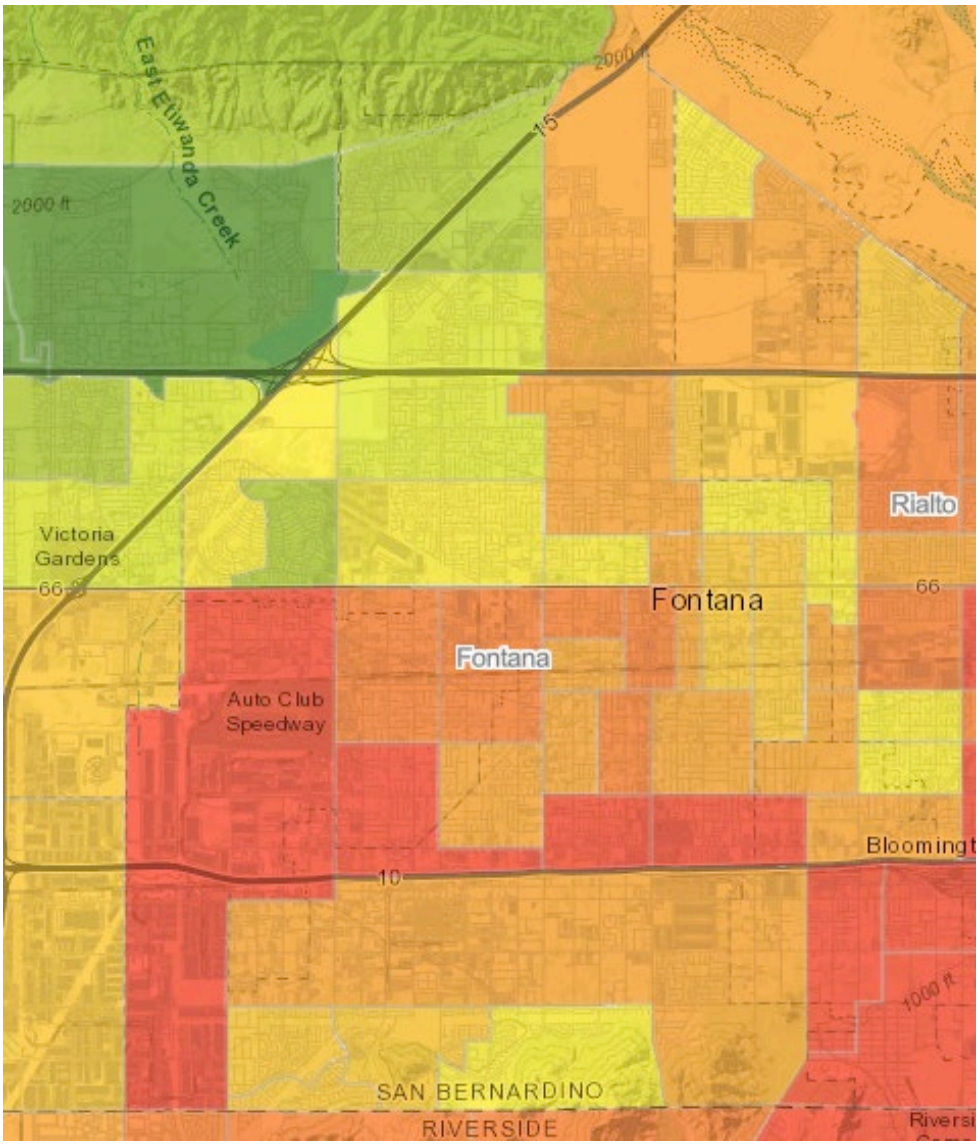

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In accordance to CA Health and Safety Code § 42705.5 Sensitive receptors are defined as:

> (5) "Sensitive receptors" includes hospitals, schools and day care centers, and such other locations as the district or state board may determine.

Therefore, CA Health and Safety Code § 42705.5 grants the right to define sensitive receptors to the California Air Resources Board (CARB), South Coast Air Quality Management District (SCAQMD), EPA, and CEQA guidance. [1,2] The City of Fontana does not have the authority to define sensitive receptors to exclude residential homes in any fashion if it is in contradiction to California Code § 65302(h)(1), §65040.12(e), §42705.5(a)(5). California Air Resource Board has defined sensitive receptors as: [3]

> Sensitive receptors are children, elderly, asthmatics, and others whose are at a heightened risk of negative health outcomes due to exposure to air pollution. The locations where these sensitive receptors congregate are considered sensitive receptor locations. Sensitive Receptor locations may include hospitals, schools, and day care centers, and such other locations as the air district board or California Air Resources Board may determine

In order to preserve human life and to better support planners and local leaders whose actions have the potential to directly impact life, CARB created a guide. The guide "CARB's Air Quality and Land Use Handbook",[4] to highlight the potential health impacts associated with proximity to air pollution sources allowing planners to explicitly consider this issue throughout the land use and planning processes. CARB outlines that careful land use and planning such as infill development, green spaces, mixed use, higher density, transit-oriented development, and other concepts that benefit regional air quality can be compatible with protecting the health of individuals at the neighborhood level. In addition, CARB has focused on their goal that being accessible to planners and improving communication between air agencies and land use planners could go a long way to protect human health. However, the City of Fontana is refusing to adhere to this guidance. It is currently seeking to redefine sensitive receptors outside of CA Health and Safety Code § 42705.5 to exclude any residents that live on land that could be

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[1] Briscoe, Tony Fontana settles with California AG over alleged environmental violations. Apr 19, 2022 Los Angeles Times https://www.latimes.com/california/story/2022-04-19/fontana-settles-with-state-over-environmental-violations

[2] Solis, Monserrat Attorney General joins environmental lawsuit against Moreno Valley. Jly 1, 2022 The Press Enterprise https://www.pe.com/2022/07/01/attorney-general-joins-environmental-lawsuit-against-moreno-valley/

[3] CARB https://ww2.arb.ca.gov/capp-resource-center/community-assessment/sensitive-receptor-assessment#:~:text=Sensitive%20receptors%20are%20children%2C%20elderly,are%20considered%20sensitive%20receptor%20locations.

[4] California Environmental Protection Agency California Air Resource Board Air Quality and Land Use Handbook a Community Health Perspective April 2005

rezoned without their consent to into industrial, commercial, unpermitted or non-conforming use as determined of the Director of Planning.

In addition, the City seeks to remove the public's ability to be involved in the development process by removing access to the Development Advisory Board. This would allow the city to arbitrarily rezone residential land into industrial, commercial, unpermitted or non-conforming land without community input or knowledge which is a direct violation of California Code § 65302(h)(1) which requires environmental justice communities per California Code § 65040.12 (e) which requires fairness in land use:

> Fairness in the context means that the benefit of a healthy environment should be available to everyone, and the burdens of pollution should not be focused on sensitive population or on communities that are already experiencing its adverse effects.

California Code § 65040.12 (e) would qualify the residents of the City of Fontana to have a voice in matters regarding the fair use of land and its development, especially in accordance with California Code § 65302(h)(1).

The City of Fontana has already shown that it is not permitting a fair and equitable transparency required under CEQA as it continues to push forward land use and circumvent the EIR Process. A precedent that has been set with the original Southwest Industrial Park (SWIP) plan area which is divided into 55 separate parcels in size ranging from 1.25 to 21.28 acres. The average parcel size is 7.03 acres. Most of the developments are oriented towards the transportation industry. However, since the adoption there have been over 15 amendments that have rezoned residential land into industrial without recirculating the EIR (State Clearinghouse No. 2009091089) and therefore the EIR continues to be out of compliance with the because the land was engulfed into SWIP despite being residential historically. In addition, the proposed method that the City is presenting to adhere with SB330 is completely out of compliance.

In addition, to the jurisdiction of CARB, the SCAQMD is another agency that is responsible for implementation and governance of the QU.S. EPA's 1970 Clean Air Act. **Federal Clean Air Act (Act).** The Act requires attainment of National Ambient Air Quality Standards (NAAQS) for criteria air pollutants, i.e. pollutants causing human health impacts due to their release from numerous sources. SCAQMD has also created a "Guidance Document for Addressing Air Quality Issues in General Plans and Local Planning" that itemizes the health effects: ozone, particulate matter (PM_{10}/$PM_{2.5}$), carbon monoxide, lead, nitrogen dioxide, and sulfur dioxide.[5]

The document outlines that local jurisdictions have the responsibility for determining land use compatibility for sensitive receptors. A sensitive receptor is a person in the population who is particularly susceptible to health effects due to exposure to an air

[5] South Coast Air Quality Management District http://www.aqmd.gov/nav/about/authority

contaminant. The following are land uses (sensitive sites) where sensitive receptors are defined as: schools, playgrounds, childcare centers, long-term health care facilities, rehabilitation centers, convalescent centers, hospitals, retirement homes and **residences**. SCAQMD clearly defines Toxic Air Contaiminant's (TAC) and the causational relationship of exposure to TACs and the following health impacts: cancer, birth defects, reproductive damage, neurological disorders, heart damage, damage to the circulatory system, and damage to the respiratory system.[6]

In order to facilitate urban planning considerations in alignment with California's consistent action of being a leader in enacting laws specific to environmental justice, including laws directing funding to environmental justice communities (SB 535 and AB 1550), a law creating a community air quality protection program (AB 617), and another that requires environmental justice to be addressed in local government planning (SB 1000), SCAQMD created the Multiple Air Toxics Exposure Study (MATES-II). The MATES-II project represents one of the most comprehensive air toxics monitoring programs ever conducted in a major urban area in the country, and it has been recognized as a model program. It was created with the intent that planners, local leaders, would utilize this tool to understand how the General Plan is impacting their communities. The MATES-II revealed major findings from the study that can be summarized with the following:[7]

Fontana in accordance to CALENVIROSCREEN 4.0, the majority of the city is defined as a sensitive receptor already over burned with pollution and the health risks it causes. As seen in the below image.

For this reason, our family like many families stand in opposition to *Master Case No. 22-110 and Municipal Code Amendment No. 22-007 - Fontana Municipal Code amendment to Chapter 2 (Administration), (Chapters 9 (Environmental Protection and Resource Extraction) Chapter 25 (Streets, Sidewalk, and Other Public Ways), Chapter 26 (Subdivisions), Chapter 30 (Zoning and Development Code), and Chapter 33 (Cannabis Businesses and Activities).*

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[6] South Coast Air Quality Management District Guidance Document for Addressing Air Quality Issues in General Plans and Local Planning https://www.aqmd.gov/docs/default-source/planning/air-quality-guidance/complete-guidance-document.pdf?sfvrsn=4

[7] South Coast Air Quality Management District Guidance Document for Addressing Air Quality Issues in General Plans and Local Planning https://www.aqmd.gov/docs/default-source/planning/air-quality-guidance/complete-guidance-document.pdf?sfvrsn=4

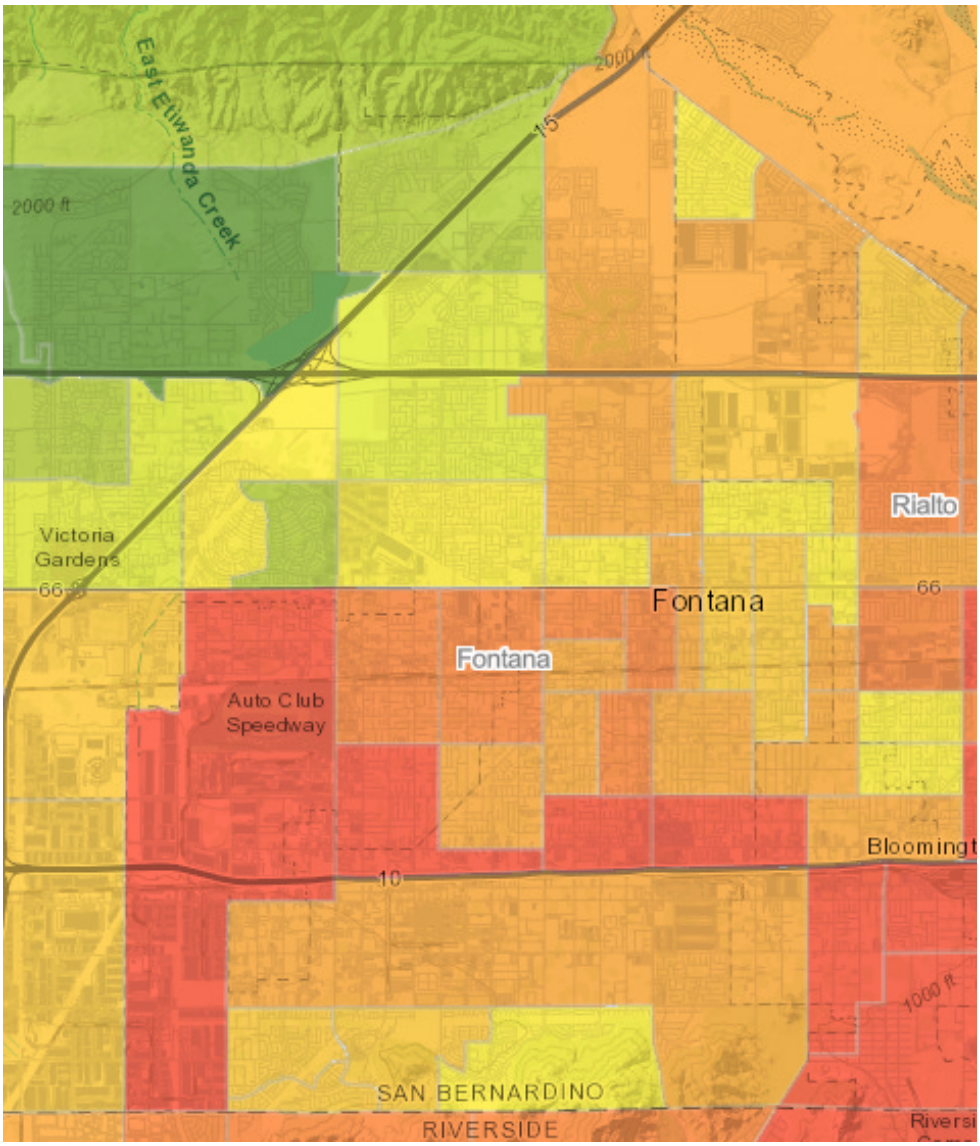

Image 1. CalEnviroscreen 4.0 Fontana

Sincerely,

Amparo Munoz Miramontes
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