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December 15, 2009

David Landry, Senior Planner  
Environmental Review Services  
Tahoe Regional Planning Agency  
P.O. Box 5310  
Stateline, NV 89449

RE: Boulder Bay Draft Environmental Impact Statement

Dear Mr. Landry:

Thank you for this opportunity to comment on the November 4, 2009, Boulder Bay Draft Environmental Impact Statement ("DEIS"). We are still reviewing the document, and may provide additional input in the future. At this point, however, we have a number of concerns, especially involving the traffic analysis. Please note that, in submitting these comments, we are not taking a position regarding the project itself. Rather, we are seeking an accurate environmental review so that Tahoe Regional Planning Agency Governing Board members, as well as our office and the public, can properly evaluate the Proposed Project and its alternatives.

**1. Inappropriate Traffic Baseline.** To understand a proposed project's impacts, those impacts must be compared to existing conditions. The DEIS, however, significantly downplays the car trips that the Proposed Project would generate by ignoring the actual existing conditions that the consultants observed in their traffic study. Instead, it uses a hypothetical "full capacity and operating conditions" baseline. This use of a hypothetical baseline instead of actual observed conditions is neither supported by case law nor by logic.

Although the Tahoe Regional Planning Agency's bi-state Compact does not contain any guidelines concerning the creation of a baseline, many cases under the California Environmental Quality Act directly address this issue. They explain that "the impacts of the project must be measured against the real conditions on the ground." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 121, citations and internal quotation marks omitted.) Real conditions can be based upon estimates "where no documentation is available to verify actual use." (*Ibid.*) But estimates must be based upon substantial evidence. (*Ibid.*) Moreover, estimates cannot be based upon "hypothetical situations."

(*Ibid.*, citation omitted.) A subsequent decision thus explains that a city used “a legally incorrect baseline” when it “measured the project's impacts by comparing it to a massive hypothetical office park [that could be built consistent with existing zoning and plan designations], instead of comparing it to the vacant land that actually exists at the project site.” (*Woodward Park Homeowners Association v. City of Fresno* (2007) 150 Cal. App. 4th 683, 691, 693.)

As will be seen, however, the Boulder Bay DEIS uses a hypothetical baseline, rather than existing conditions. By doing so, it more than triples the number of baseline trips.

Specifically, the DEIS explains that consultants conducted traffic studies earlier this year, and found that the Biltmore currently generates 1,835 daily trips. (DEIS, p. 4.8-8.) The DEIS, however, does not use that figure. Rather, it explains that “[b]aseline existing traffic conditions were developed by generating vehicle trips for the existing land uses assuming full capacity and optimum operations conditions . . .” (*Ibid.*, emphasis added.) By using those hypothetical assumptions, the DEIS increases “existing” trips to 5,581 daily trips. (*Ibid.*) The Draft then estimates that the Proposed Project would generate 3,415 daily trips. (DEIS, p. 4.8-31.) Compared to the hypothetical baseline of 5,581, that would be a significant decrease and a major environmental benefit. Compared to the actual existing figure of 1,835 daily trips, however, this aspect of the project would have a significant negative impact.

Moreover, if anything the DEIS indicates that gambling at the Biltmore and neighboring casinos is in a long term decline, which would suggest that even the existing figure of 1,835 daily trips may be too high. (See DEIS, p. 4.8-11, suggesting that gaming is steadily declining at North Stateline, presumably reflecting the impact of California’s Indian Casinos, such as the Thunder Valley Casino outside of Sacramento near Route 50.)<sup>1</sup> That trend is likely to continue, as Indian Gaming further expands in California, diverting still additional gaming customers from Lake Tahoe casinos.

The use of a hypothetical baseline, rather than observed existing conditions, likewise distorts the Draft’s Vehicle Miles Traveled (VMT) analysis. The DEIS compares the Proposed Project’s estimated VMT of 23,185 to the hypothetical baseline of 33,140. (DEIS, p. 4.8-39.) The DEIS, however, never computes the VMT generated by the existing Tahoe Biltmore. Given that the Proposed Project would generate significantly more daily trips than the existing facility currently generates, the Proposed Project would also presumably generate significantly more VMT than the Tahoe Biltmore currently generates. This needs to be calculated and disclosed in the DEIS.

The DEIS’s understatement of vehicle trips and VMT masks a number of environmental harms. Most notably, vehicular use is the largest source of nitrogen that gets deposited into the Lake and causes algae to grow. That growth is a significant cause of the Lake’s declining water clarity. Vehicular use also generates road dust, which gets deposited into the Lake and is another cause of its decline. Finally, vehicle trips contribute to Lake Tahoe air pollution as well as to

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<sup>1</sup> It is our understanding that the Tahoe Biltmore only utilizes a portion of its allowable gaming floor area. That presumably further reflects the depressed gaming market at North Stateline caused by California Indian Gaming.

global warming. The DEIS, however, does not analyze or disclose any of these environmental harms.

**2. Underestimating External Trips for the Proposed Project.** In addition to understating the number of baseline trips, the DEIS appears to underestimate the number of external trips that the Proposed Project would generate. Specifically, it seems to understate likely trips by non-guests to the project, as well as likely trips by guests away from the project.

**a. Trips to the Project.** The DEIS appears to assume that only people staying in the Proposed Project's hotel, condominium and housing units will use the almost 30,000 square feet of planned wellness and fitness facilities. (See DEIS, p. S-4, listing 19,089 square feet for a health and wellness center, and 9,860 square feet for a fitness center.) A facility of that size, however, will presumably attract patrons from other communities. There is no discussion or analysis, however, of that impact. Instead, the DEIS implicitly deems the traffic impact of that new space to be zero, based on the DEIS's classification of the space as an "Accessory Use to Hotel." (DEIS, p. 4.8-31.)

This lack of discussion contrasts with the DEIS's express discussion and analysis of "meeting space" on pages 4.8-24 to 25, where the document reviews whether it is appropriate to consider that space an accessory use.<sup>2</sup> The Draft explains that the consultants studied the amount of meeting space per hotel room in local hotels in the Reno-Lake Tahoe area, and found that the space in the Proposed Project is consistent with that amount. The DEIS also notes more conventional uses that it studied and analyzed as accessory uses ("service retail, bar/lounge, and convenience dining.") (DEIS, p. 4.8-25.) The wellness and fitness facilities, however, are not listed. Given their size and potential to generate trips, they need to be studied and analyzed. This should include a discussion of whether non-Boulder Bay residents and lodging guests will be barred from the facilities, or whether, conversely, they may have access through various means such as day passes or exchange agreements with hotels, hospitals or other facilities.

**b. Trips Away From the Project.** The Proposed Project is located miles away from likely destinations for its guests and residents. Tourists generally come to Lake Tahoe to enjoy its recreational facilities, such as downhill and cross country skiing, hiking, boating and strolling along the Lake. None of those activities, however, are within walking distance of the project site. The DEIS does not appear to include any discussion or analysis of those trips.

**3. Reviving Expired Coverage, Commercial Floor Area and Tourist Accommodation Units.** Finally, it appears that the Proposed Project plans to use coverage, commercial floor area and tourist accommodation units from the old Tahoe Mariner site. An amended settlement agreement that our office, the prior owners of the Tahoe Mariner site and others entered in 1996 allowed the owners to preserve (bank) those commodities under certain conditions. Specifically, the amended agreement allowed, subject to two deadlines, the banking of 12,000 square feet of commercial floor area, 113,000 square feet of land coverage, and 32 tourist accommodation units. The first deadline required that the property owner demolish unsafe

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<sup>2</sup> The Proposed Project would use 21,253 square feet for its convention and meeting space. (See DEIS, p. S-4.)

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structures on that site no later than October 15, 1997. The second deadline required that any banking occur on or before October 15, 1999. The purpose of those deadlines was to ensure that the owner made the property safe and installed needed Best Management Practices in a timely manner. Although we are still in the process of learning the facts, there are indications that neither condition was met. If so, those commodities expired and could not be banked.

The Proposed Project seeks to use at least some of those potentially expired commodities. (See DEIS, Appendix M – Sierra Park Amendment Memo; see also DEIS, p. 4.1-1, stating that the project area’s “land coverage includes 70,229 square feet of banked land coverage on the former Tahoe Mariner site,” and p. 4.1-2, suggesting that the project intends to use 18 banked tourist accommodation units.) Although using any expired commodities would presumably have various environmental impacts, none are addressed in the DEIS. As one example, adding around 70,000 square feet of land coverage would likely have negative water quality impacts.

The DEIS needs to discuss and analyze the potential impacts that we have noted so that the Governing Board, and interested parties, can understand the Proposed Project’s positive and negative impacts. Thank you very much for considering our comments as you review this environmental document.

Sincerely,



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Supervising Deputy Attorney General

For EDMUND G. BROWN JR.  
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