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VIA HAND DELIVERY

Mayor Tye and Members of the City Council
City of Diamond Bar
21825 East Copley Drive
Diamond Bar, CA 91765-4178

Re: Planning and Preannexation Agreement with Aera Energy, LLC

Dear Mayor Tye and Members of the City Council:

Introduction and Summary. I write on behalf of the Hillside Open Space Education Coalition (HOSEC), an unincorporated association of your neighboring communities, to urge you not to move forward with the Planning and Preannexation Agreement with Aera Energy, LLC which appears on this evening's agenda. I do so for five reasons: (i) this Agreement is subject to review under the California Environmental Quality Act (CEQA) and no CEQA compliance has been undertaken; (ii) there should be a reasonable opportunity for public input before the City moves forward, (iii) the Agreement gives Aera too much control over the CEQA analysis of this project; (iv) this project threatens to severely degrade traffic in and around Diamond Bar and may expose the City and its taxpayers to serious economic risks; and (v) the Agreement is neither balanced nor fair. Accordingly, I urge you not to move forward with this project on these terms at this time. Each of these reasons is elaborated below.

What is HOSEC? The Hillside Open Space Education Coalition is an unincorporated association of the Cities of Brea, La Habra, La Habra Heights, and Whittier, as well as the Hacienda Heights Improvement Association and the Rowland Heights Community Coordinating Council. Your neighboring communities formed this association to provide for public education and advocacy with respect to the preservation of the hillside resources which lie between Diamond Bar and its neighbors to the south and west. HOSEC's Mission Statement provides:

"The mission of the Hillside Open Space Education Coalition is to advance the long-standing and unwavering goal of member communities to preserve and acquire open space in the hills bordering Los Angeles and Orange Counties in order to safeguard the environment, maintain high quality of life and reduce traffic congestion."

Annexation of the Aera property to Diamond Bar for development of thousands of homes and hundreds of thousands of square feet of commercial and institutional uses in an environmentally sensitive and visually prominent hillside area is of grave concern to your neighboring communities, as we are sure it must be to you and the constituents you serve.

CEQA Compliance is Required. As you know, CEQA requires analysis of the impacts on the environment of discretionary actions of your Council. Although the Agreement states that it is intended to be exempt from CEQA because it merely establishes a consultative process that will include CEQA compliance for the project, this is not so. The agreement includes provisions which tie the City's hands with respect to this project in ways which plainly go beyond a mere consultative process to actual decision-making. To provide but a few examples:

- The agreement describes the proposed project in very specific detail and does not discuss any alternatives to the project, such as a reduced density alternative, greater preservation of open space resources, etc. It calls, for example, for "not less than 2800 dwelling units."
- The agreement attempts to specify mitigation measures for the project, but does so in vague and unenforceable terms which provide a fig leaf of environmental substance without any meaningful reduction in the developer's freedom to extract value from this site. For example, the requirement in Section 4.09 that the project include "some principles of 'green' construction" is so ill-defined as to be both meaningless and misleading.
- Section 4.03 commits the City to require no mitigations beyond those stated in the EIR. Why would you surrender your authority in this way so early in this process?
- Section 4.08 appears to precommit you to waive the requirements of your grading and other ordinances. Doing so without the information an environmental review would provide is not permitted by CEQA and is completely inconsistent with the aesthetic aspirations of your General Plan and the community which produced that General Plan.

The City can avoid these CEQA problems by foregoing these agreements until an EIR is certified. It need only agree at this time that the City will prepare the EIR and Aera will pay for it. Why are these other agreements timely? Is the need to pursue them worth the legal and policy risks identified here?

More Public Input Is Needed. We understand that you will hear this evening from not only HOSEC, but the Rowland Heights Community Coordinating Council, which is considering an effort to incorporate a City of Rowland Heights in response to this project, and from Supervisor Don Knabe. We also understand that environmental interest groups also intend to

object to this proposed Agreement. Despite the facts this Agreement has not been the subject of any meaningful notice or opportunity for public input, and appears on the agenda days before the Christmas holiday and during Chanukah, a number of interested stakeholders have managed to provide input to you. This suggests that if this agreement were the subject of meaningful notice and taken up at a time when more public participation were possible, you would hear even more concern. Moreover, the exhibits to this Agreement, including the crucial time schedule for processing this project, were not made available via your website and, given the lack of notice of this evening's discussion, we have not yet been able to review them by other means. We assume your residents are similarly in the dark.

The Project Will Worsen Traffic In and Around Diamond Bar and May Force the City and its Taxpayers to Subsidize Aera Energy's Development. Building thousands of homes and hundreds of thousands of square feet of commercial space adjacent to the traffic-choked intersection of Routes 60 and 57 will undoubtedly have serious consequences for traffic in and around Diamond Bar. Your neighboring communities, as well as your own residents, already cope with aggravating traffic. Care should be taken to avoid making things worse merely to benefit a developer.

Moreover, while the Agreement proclaims the project will financially benefit Diamond Bar, this point is sure to be hotly contested and that discussion should not be foreshortened. Housing generally does not generate sufficient property tax revenue to fund the services new residents require and sales-tax-generating retail uses also generate substantial traffic and create substantial demand for police and other public services. The Agreement entitles the developer to pay 2007-levels of permitting fees, without inflation adjustment, for the next 25 years. That one provision could cost your City hundreds of thousands of dollars.

In short, the Aera proposal presents a momentous choice with irreversible consequences for all who have a stake in our region – do we preserve these precious few open spaces or do we commit this irreplaceable, natural and aesthetic resource to more urban development, more traffic, and more environmental harm. Ought Diamond Bar invite more traffic and risk its finances to pursue this project? These are not choices to be made in a hurry and without adequate input. On behalf of your neighbors, we implore you to delay this decision to allow for meaningful public input by those neighbors and your own residents.

The Agreement Gives the Developer Too Much Control Over the EIR. Section 3.01 of the Agreement provides that Aera will prepare the draft environmental impact report and that the City's role will be reduced to merely reviewing that work. Although CEQA allows this process, it is neither efficient nor calculated to inspire confidence in the public that the environmental consequences of development have been fairly analyzed and that the means to mitigate those impacts have been fully and fairly analyzed. While the Agreement provides for independent consultants to review the EIR on the City's behalf after the developer prepares it, this is more time-consuming than simply using an unbiased consultant not beholden to the developer in the first place. Moreover, while the City and its consultants can review what is included in the EIR,

what is crucial is most often what an EIR does not say – such as failure to mention means to mitigate environmental impacts which the developer views as too costly or undesirable. Moreover, raw data such as biological surveys should not be collected by a consultant retained by a developer who has a financial interest in not identifying rare resources on the site. We urge you to keep the fox out of the CEQA henhouse and use independent, neutral professional environmental consultants with no ties to Aera and no dependency on its money. This can ensure that you, your community, and other stakeholders are fairly and fully informed about the consequences for Diamond Bar and our region of this proposed development. Your City Attorney may recommend independent consultants to assist you in defending any challenge to the EIR, as well.

The Agreement Unfairly Favors the Developer's Interests at the Expense of Diamond Bar's. This Agreement is plainly tilted toward Aera. To identify just a few of its biased and unfair terms:

- Section 4.10.3 provides the City no right to approve assignment of this Agreement from Aera to another developer. Although another provision, confusingly, does require City consent to assignment, it provides that the City may not “unreasonably” withhold its consent and provides no standard for when refusal to consent would be reasonable as, for example, when the proposed transferee lacks the resources to fulfill the developer’s financial promises to the City. That would allow the developer to take all the benefit of this deal, transfer it to an asset-free entity, and leave Diamond Bar holding the bag.
- Section 4.10.4 provides that the developer is entitled to pay your current fees, without inflation adjustment, for twenty-five years.
- Section 4.10.5 obligates Diamond Bar to issue public debt for this project.
- Section 4.10.6 gives the developer complete control over the phasing of this project and does not allow the City to insist that crucial public infrastructure – such as road improvements to handle the tremendous traffic on Routes 60 and 57 to be generated by this project – be provided in time to meet the needs of the project. Allowing the developer to build infrastructure only after it is needed is hardly in the interest of Diamond Bar.
- Section 4.10.7 limits Diamond Bar’s power to condition build-out of the project to protect the health and safety of the community. That language is a poor

paraphrase of the Development Agreement statute and gives away City power in favor of the developer.

- Section 4.10.8 allows the City Manager and City Attorney to effectively amend the Development Agreement without public notice or hearing or consultation with your Council. I doubt your City Manager or City Attorney really want such power. Nor does the Development Agreement statute or due process permit you to delegate it to them.
- Section 5.01 prevents the City from fully recovering its costs to process this project, by requiring it to provide the City Manager's and Assistant City Manager's services for free and by excluding from the costs that can be recovered such costs as printing, postage, and other noticing expenses.
- Section 6.03 gives the developer too much control over litigation involving the project by preventing the City from settling a case that implicates both the City's interests and the developer's interest (such as a challenge to the adequacy of the City's General Plan vis-à-vis this project) without the developer's consent and requires the City to fund any appeal it takes that the developer does not wish taken. This section also bars the City from interfering with the developer's settlement efforts, but does not impose a reciprocal obligation on the developer. These provisions delegate too much power to the developer and are likely illegal as well as poor public policy.
- Section 6.03(c) also requires the City to indemnify the developer for any negligence by the City in the entitlement process. Conceivably, if the EIR is successfully challenged for reasons argued to be the City's fault, all the developer's losses – including, arguably, the temporary rental value of the project it did not build as quickly as it wished – are the City's obligations. In 18 years of public law practice, I have never seen such a term and cannot imagine why Diamond Bar would agree to it.
- Although the staff report suggests that either party can terminate this agreement without cause on short notice, that is not what the agreement states. Section 6.06 gives only the developer the right to terminate – Diamond Bar alone is committed to this relationship.

In short, your neighboring communities strongly oppose action by Diamond Bar to take on responsibility for at least 2,800 homes, 200,000 square feet of commercial development, a fire station, and an elementary school all for the mere promise of \$1 million in annual general fund revenue. This is a risky proposition both legally and financially. It is clear that this Agreement is not a balanced Agreement reflecting as much concern for Diamond Bar's institutional interests and the public interest as for the developer's financial concerns. If Diamond Bar wishes to pursue such an agreement, it must address significant financial and legal hurdles and will benefit from a collaborative and open process rather than a hasty approach which does not allow opportunity for sufficient input by your residents and other stakeholders. If you are determined to pursue this relationship with Aera, your neighboring communities urge you to give your City Attorney opportunity to revise this agreement to make it a better instrument of public policy than this current draft.

Conclusion. Your neighbors are committed to working with you in a dialog of mutual respect regarding this important project, Diamond Bar's needs, and the needs of the region. We may have our differences in that process, but we pledge to work with you meaningfully to address them. At the outset, however, we are convinced that approval of this Agreement, as now drafted, and at this time, would be a grave error. We urge you not to move forward tonight. Thank you for your consideration.

Very truly yours,

Michael G. Colantuono
Counsel
Hillside Open Space Education Coalition

MGC:mmi

cc: Jim DeStefano, City Manager
Michael Jenkins, City Attorney
Supervisor Don Knabe
Brea City Council
La Habra City Council
La Habra Heights City Council
Whittier City Council
Hacienda Heights Improvement Association
Rowland Heights Community Coordinating Council