

  
CITY ATTORNEY'S OFFICE

## OAKLAND CITY COUNCIL

RESOLUTION NO. \_\_\_\_\_ C.M.S.

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**A RESOLUTION CONTINUING THE APPEAL BY EAST BAY RESIDENTS FOR RESPONSIBLE DEVELOPMENT OF A PROPOSAL TO CONSTRUCT 222 DWELLING UNITS ON THE EXISTING VACANT LOT LOCATED AT 1396 5<sup>TH</sup> STREET, OAKLAND CA (PROJECT CASE NO. PLN20-101), AND DIRECTING THE PREPARATION OF FURTHER ENVIRONMENTAL ANALYSIS ON THE TOPIC OF HAZARDS AND HAZARDOUS MATERIALS PRIOR TO RETURN OF THE APPEAL TO CITY COUNCIL.**

**WHEREAS**, on July 15, 2014, the City Council adopted the West Oakland Specific Plan (WOSP) as a guiding framework for realizing the vision of a healthy, vibrant West Oakland, and certified the WOSP Environmental Impact Report (EIR) via Resolution Number 85108 C.M.S.; and

**WHEREAS**, the goals of the WOSP include bringing to life the community's longstanding vision of a West Oakland that contains viable employment opportunities, provides needed goods and services, supports abundant and affordable housing resources, and facilitates sustainable development; and

**WHEREAS**, the WOSP EIR analyzed the environmental impacts of adoption and implementation of the WOSP and, where the detail available was sufficient to adequately analyze the potential environmental effects, provided a project-level California Environmental Quality Act (CEQA) review for reasonably foreseeable development; and

**WHEREAS**, project applicant, the Michaels Organization (Applicant), filed an application with the Bureau of Planning on June 24, 2020, to develop an eight-story residential building that would include 222 dwelling units, 16 of which would be designated as affordable for very-low-income households, at 1396 5<sup>th</sup> Street (Project); and

**WHEREAS**, the Project site is located within Opportunity Area 2 (7<sup>th</sup> Street) of the WOSP across Mandela Parkway from the West Oakland Bay Area Rapid Transit (BART) Station; and

**WHEREAS**, the Project site, historically utilized for various food grade industries until buildings on the site were demolished in 2003 and 2004, was previously being developed as a mid-

rise residential development until the structure was destroyed by a fire in 2012, leaving only a concrete podium, which was removed in April 2016; and

**WHEREAS**, upon the closure of the industrial uses on the site and in conjunction with the previous proposal for a mid-rise residential development, environmental investigations and remedial actions were implemented at the project site under oversight by Alameda County Department of Environmental Health (ACDEH) and documented in the case files for Cleanup Program Site Case No. RO0002896 (Red Star Yeast/1396 Fifth Street LLC) located on the State Water Resources Control Board (SWRCB) GeoTracker website, with the purpose of evaluating soil and groundwater contamination associated with historic uses, previous demolition, releases from underground storage tanks, and undocumented fill; and

**WHEREAS**, in May 2017, ACDEH closed Cleanup Program Site Case No. RO0002896 based on evaluation of risk under the land use scenario as a vacant lot at the time of case closure, and with the condition that any proposed change in land use be reviewed by ACDEH for re-evaluation of human health risk from subsurface contamination at and in the vicinity of the project site to construction workers and the community during redevelopment activities and future site users once any redevelopment is complete; and

**WHEREAS**, the Design Review Committee of the Planning Commission considered the design review aspects of the Project at a duly noticed public meeting on October 28, 2020, during which the Committee recommended design modifications prior to the item moving forward to the full Planning Commission for consideration; and

**WHEREAS**, the design recommendations were incorporated into the revised Project prior to proceeding to the full Planning Commission; and

**WHEREAS**, a detailed CEQA Analysis document was prepared for the Project, entitled “1396 5th Street Project CEQA Analysis” dated February 2021 (Project CEQA Analysis), which evaluates the potential project-specific environmental effects of the proposed Project and determined that such impacts were adequately covered by the WOSP EIR to allow for streamlining and/or tiering provisions of CEQA to apply, including Sections 15162/15164 (addendum to the 2014 certified WOSP EIR), Section 15182 (specific plan exemption), Section 15183 (projects consistent with a community plan, general plan, or zoning), and Section 15183.3 (qualified in-fill projects); and

**WHEREAS**, CEQA Guidelines Section 15162 provides that when an EIR has been certified for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, that

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or substantial increase in the severity of previously identified significant effects; or

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to

the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified, shows that: (A) the project will have a significant environmental effect not previously discussed; or (B) a significant effect previously examined will be substantially more severe than shown in the previous EIR; or (C) mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponent declines to adopt the mitigation measure or alternative; or (D) mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative; and

**WHEREAS**, CEQA Guidelines Section 15164 provides that a city shall prepare an addendum to a previously certified EIR if some changes or additions are necessary, but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred; and

**WHEREAS**, CEQA Guidelines Section 15182 provides that where a proposed residential or mixed-use project is located within a transit priority area, is consistent with a specific plan for which an EIR has been certified, and is consistent with the general use designation, density, building intensity, and applicable policies specified for the project area in a sustainable communities strategy, additional environmental review shall not be required unless one of the events in Section 15162 occurs with respect to that project; and

**WHEREAS**, CEQA Guidelines Section 15183 provides that projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified shall not require additional environmental review, except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site, were not analyzed as significant effects in a prior EIR on the zoning action, general plan, or community plan with which the project is consistent, are potentially significant off-site impacts and cumulative impacts not discussed in the prior EIR prepared for the general plan, community plan, or zoning action, or are previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse impact than discussed in the prior EIR; and

**WHEREAS**, CEQA Guidelines Section 15183.3 provides that the effects of an eligible infill project are not subject to CEQA if the effect was addressed as a significant effect in a prior EIR for a planning level decision or if the city makes a finding that uniformly applicable development policies or standards, adopted by the city, apply to the infill project and would substantially mitigate that effect, and that an infill EIR may be prepared to analyze only those significant effects that uniformly applicable development standards do not substantially mitigate and that are either new specific effects or are more significant than a prior EIR analyzed; and

**WHEREAS**, the City Planning Commission took testimony and considered the Project at its duly noticed public meeting of March 3, 2021 and, at the conclusion of the public hearing, deliberated the matter and voted (7-0-0) to: 1) affirm staff's environmental determination and adopt CEQA findings, and 2) approve the conditional use permits, design review, and tentative parcel map for the Project; and

**WHEREAS**, on March 12, 2021, Adams Broadwell Joseph & Cardozo, on behalf of East Bay Residents for Responsible Development (Appellant), filed appeal PLN20-101-A01 of the Planning Commission's CEQA determination and approval of the Project (Appeal), which Appeal included a statement setting forth the basis of the appeal; and

**WHEREAS**, in said Appeal, Appellant set forth arguments that the Project site is identified as a Cleanup Program Site on the SWRCB GeoTracker Database due to previous groundwater contamination, that the site was cleared by regulatory agencies only for use as a vacant lot, and that additional environmental review was necessary to determine whether Project construction would result in significant impacts to the environment and whether any mitigation measures were available to reduce those impacts to a less than significant level; and

**WHEREAS**, in said Appeal, Appellant additionally set forth arguments asserting that: (1) the Project is not consistent with CEQA addendum and infill streamlining exemption requirements; (2) the Project has significant, unmitigated air quality impacts and health risks from construction and operational emissions; (3) the Project has significant, unmitigated greenhouse gas emissions impacts; (4) the CEQA Analysis fails to adequately analyze and mitigate impacts from noise and vibration; (5) the Project is inconsistent with the density established by existing zoning; (6) the Project is not consistent with substantive requirements for CEQA Guidelines Section 15183 (community plan exemption); and (7) the City cannot make findings required under the Subdivision Map Act to approve the Project's tentative or final parcel map; and

**WHEREAS**, in the Hazards and Hazardous Materials Chapter, the Project CEQA Analysis states that the Project site is identified as a Cleanup Program Site on the SWRCB GeoTracker database due to previous potential groundwater contamination and further states that the case clean-up was completed and that the case was closed as of May 10, 2017, but did not clearly identify that ACDEH cleared the site only for use as a vacant lot; and

**WHEREAS**, the Project CEQA analysis further stated that the WOSP EIR reported that hazards and hazardous materials impacts would be mitigated to less-than-significant levels with compliance with local, state, and federal regulations for treatment, remediation, and/or disposal of contaminated soil and/or groundwater and implementation of the City's uniformly applicable standard conditions of approval; and

**WHEREAS**, on May 25, 2021, subsequent to the Planning Commission hearing, an errata sheet was provided to the Project CEQA Analysis that clarified the existing site conditions, included the entire text of applicable standard conditions of approval, portions of which were inadvertently omitted from Attachment A of the Project CEQA Analysis, and

described Applicant's ongoing consultation with ACDEH on corrective action steps necessary to receive clearance from ACDEH for residential use on the site; and

**WHEREAS**, after giving due notice to the Appellant, the Applicant, all interested parties and the public, the Appeal came before the City Council for a public hearing on September 21, 2021; and

**WHEREAS**, at said hearing, the Appellant, the Applicant, supporters of the application, those opposed to the application and interested neutral parties were given ample opportunity to participate in the public hearing by submittal of oral and/or written comments; and

**WHEREAS**, at said hearing, the City Council voted to direct staff to prepare a resolution for future City Council consideration that would allow for additional time for further consideration of the environmental impacts to the residents with focus on hazards and hazardous materials on the basis that the CEQA Analysis prepared for the Project inadequately described the current status of soil and groundwater hazards conditions, did not adequately compare the current status with the analysis conducted under the West Oakland Specific Plan Environmental Impact Report (WOSP EIR), and did not address whether any additional mitigation measures beyond those identified in the WOSP EIR were necessary;

**WHEREAS**, after giving due notice to the Appellant, the Applicant, all interested parties and the public, the City Council held a public hearing on April 19, 2022; and

**WHEREAS**, at said hearing, the Appellant, the Applicant, supporters of the application, those opposed to the application and interested neutral parties were given ample opportunity to participate in the public hearing by submittal of oral and/or written comments; now, therefore, be it

**RESOLVED:** That the City Council finds that while the certified 2014 WOSP EIR provided analysis of the site-specific hazards at the Project site at the time of its certification, changes have occurred with respect to the circumstances under which the proposed Project is undertaken in that subsequent to a fire on the Project site, ACDEH cleared the Project site for use as a vacant lot only, and this evidence was not provided to the Planning Commission prior to its certification of the Project CEQA Analysis; and be it

**FURTHER RESOLVED:** That accordingly, the City Council directs Oakland Planning Bureau staff, through the City Administrator, to prepare further environmental analysis of Project impacts pertaining to potential existing soil and groundwater hazards conditions and community outreach; and be it

**FURTHER RESOLVED:** That staff shall return to City Council with the additional analysis and a recommendation as to whether the Project will have one or more significant effects not described in the WOSP EIR such that an additional EIR, such as a supplemental EIR under CEQA Guidelines Sections 15163, 15182, and 15183, and/or an

infill EIR under CEQA Guidelines Section 15183.3, as determined appropriate based on the additional information reviewed and analyzed, be prepared; and be it

**FURTHER RESOLVED:** That the record before this Council relating to this application and appeal includes, without limitation, the following:

1. The application, including all accompanying maps and papers;
2. All plans submitted by the Applicant and representatives;
3. The notice of appeal and all accompanying statements and materials;
4. All final staff reports, final decision letters and other final documentation and information produced by or on behalf of the City, including without limitation all related/supporting final materials including the CEQA Analysis prepared for the Project and attached to the staff reports, and all final notices relating to the application and attendant hearings;
5. All oral and written evidence received by the City Planning Commission and City Council during the public hearings on the appeal; and all written evidence received by relevant City staff before and during the public hearings on the application and appeal;
6. All matters of common knowledge and all official enactments and acts of the City, including, without limitation (a) the General Plan; (b) Oakland Municipal Code (c) Oakland Planning Code; (d) other applicable City policies and regulations; and, (e) all applicable state and federal laws, rules and regulations; and be it

**FURTHER RESOLVED:** That the custodians and locations of the documents or other materials which constitute the record of proceedings upon which the City Council's decision is based are respectively: (a) Department of Planning & Building, Bureau of Planning, 250 Frank H. Ogawa Plaza, 2114, Oakland CA.; and (b) Office of the City Clerk, 1 Frank H. Ogawa Plaza, 1<sup>st</sup> floor, Oakland, CA; and be it

**FURTHER RESOLVED:** That the recitals contained in this Resolution are true and correct and are an integral part of the City Council’s decision.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - FIFE, GALLO, KALB, KAPLAN, REID, TAYLOR, THAO AND  
PRESIDENT FORTUNATO BAS

NOES –

ABSENT –

ABSTENTION –

ATTEST: \_\_\_\_\_

ASHA REED  
City Clerk and Clerk of the Council of the  
City of Oakland, California