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### **Via Email and US Mail**

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### **Re: Failure to Implement City Council Decision to Uphold EBRRD Appeal and Prepare Infill EIR for 1396 5<sup>th</sup> St Project**

Dear Mayor Schaaf, Council President Bas, Members Thao, Kaplan, Fife, Gallo,  
Kalb, Reid, and Taylor; City Clerk, Mr. Vollmann, Mr. Branson:

On behalf of Appellant East Bay Residents for Responsible Development  
("East Bay Residents" or "EBRRD"), we write to address the City of Oakland's  
("City") failure to uphold East Bay Resident's Appeal ("Appeal") of the 1396 5<sup>th</sup>  
Street Project (Case File No. PLN20-101; APN: 004-0069-004-00) ("Project"),  
proposed by the Michaels Organization ("Applicant") and failure to prepare an Infill  
Environmental Impact Report ("EIR") for the Project pursuant to California

Environmental Quality Act (“CEQA”) Guidelines Section 15183.3,<sup>1</sup> as required by CEQA and directed by the City Council.

EBRRD’s Appeal was filed on March 12, 2021. On September 21, 2021, the City Council voted *unanimously* to uphold EBRRD’s Appeal and directed Staff to prepare an Infill EIR for the Project to address two discrete issues: (1) soil and groundwater contamination impacts, and (2) health risk from air pollution.<sup>2</sup> To date, Staff has failed to return to Council with a simple written resolution to uphold the Appeal and failed to prepare the Infill EIR. The City’s actions have obstructed Council’s decision making authority and resulted in violations of CEQA. If the City had implemented the motion voted on by Council, the Infill EIR would have been prepared by now, circulated for public comment, and the Project could be well on its way to CEQA compliance and final approval in order to get much needed safe, clean housing.

The City is now preparing to conduct a *third hearing* on EBRRD’s Appeal on July 19, 2022, *without* preparing an Infill EIR and *without* providing the City Council with an approval resolution. Staff now proposes that the Council deny EBRRD’s Appeal based on new evidence that has not been circulated for public review or comment, in violation of CEQA.<sup>3</sup> ***The City is in ongoing violation of State law and City Planning Code requirements due to its failure to comply with CEQA and failure to implement Council direction.***

The following illegal actions are holding up the Project’s environmental review process:

- **Failure to Inform the Public about Project Impacts – Violations of CEQA:** The CEQA Analysis approved by the Planning Commission in February 2021 falsely stated that the Project site’s soil and groundwater contamination had been cleaned to residential standards, when it had not. Evidence from EBRRD’s Appeal and the Alameda County Department of Environmental Health (“ACDEH”) demonstrate that the site is under ongoing hazards investigation by ACDEH and that “residual

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<sup>1</sup> 14 Cal. Code Regs. (“CCR” or “CEQA Guidelines”) §§ 15000 et seq.; 14 CCR § 15183.3 (Streamlining for Infill Projects).

<sup>2</sup> Video Recording of the Special Concurrent Meeting of the Oakland Redevelopment Successor/City Council, September 21, 2021. Available at:

[https://oakland.granicus.com/player/clip/4442?view\\_id=2&redirect=true](https://oakland.granicus.com/player/clip/4442?view_id=2&redirect=true).

<sup>3</sup> See 7/7/22 Rules agenda:

<https://oakland.legistar.com/View.ashx?M=A&ID=984816&GUID=8D4B1523-4B78-4598-A30D-F0149CCAFDDE>

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concentrations of contaminants are present in soil, soil vapor and groundwater at the Site” which “will expose construction workers to constituents in soil via direct contact exposure pathways i.e., ingestion, inhalation or dermal contact.”<sup>4</sup> These impacts, and others identified by EBRRD, fail to meet the CEQA Appendix M performance standards for infill Projects and require an Infill EIR under CEQA Guidelines Section 15183.3.<sup>5</sup>

- **Usurping City Council Decision Making Authority:** Staff are in ongoing violation of State and local law for failing to follow the express direction of the City Council to uphold the Appeal, prepare an Infill EIR, and prepare a resolution for Council vote.
- **Obstructing Public Participation in the CEQA Process:** Between the first and second Appeal hearings, the Applicant prepared a new Phase II Subsurface Investigation Report (“Soil Report”) that was not included in the CEQA Analysis and was not circulated for public comment in an Infill EIR, as required by CEQA. The City’s decision to conduct “back-room” environmental review without circulating an Infill EIR for public comment is a violation of CEQA’s substantive requirements and public participation mandates.

EBRRD demands that the City comply with the law. The Council Staff Report for the proposed July 19, 2022 hearing must provide City Councilmembers with the resolution City Council directed Staff to prepare— TO UPHOLD EBRRD’S APPEAL AND PREPARE AN INFILL ENVIRONMENTAL IMPACT REPORT FOR PUBLIC REVIEW AND COMMENT ON THE PROJECT’S HAZARDOUS CONTAMINATION AND AIR QUALITY IMPACTS. The City must also immediately prepare a legally adequate Infill EIR, and circulate it for public comment, in order to comply with CEQA.

## I. BACKGROUND

The 1396 5th Street Project site is contaminated with hazardous materials from its prior use as an industrial facility, and is not cleaned to residential standards.<sup>6</sup> The soil and groundwater are contaminated with benzene, lead, diesel,

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<sup>4</sup> Available at: <http://oakland.legistar.com/gateway.aspx?M=F&ID=e5a53742-c5d8-4040-99b7-7c1c49d82f6a.pdf>.

<sup>5</sup> 14 CCR § 15183.3(d)(1), (2).

<sup>6</sup> See ACDEH 5/10/2017 Case Closure Letter, p. 1, available at [https://documents.geotracker.waterboards.ca.gov/regulators/deliverable\\_documents/3296879649/CLOS\\_L\\_2017-05-10.pdf](https://documents.geotracker.waterboards.ca.gov/regulators/deliverable_documents/3296879649/CLOS_L_2017-05-10.pdf)  
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and other hazardous materials at levels that endanger public health and safety and have not been cleaned to residential standards.<sup>7</sup> The City failed to analyze the construction emissions associated with site remediation, and the Project's existing construction-related emission calculation will exceed applicable air district thresholds, without adequate mitigation.

On March 3, 2021, the Planning Commission approved the Project in reliance on a deficient CEQA Analysis which did not disclose the site's hazardous conditions, and did not analyze or mitigate the impacts of site remediation or exposure to hazardous air pollutants.

On March 12, 2021, EBRRD appealed the Planning Commission's approval. The Appeal provided substantial evidence from qualified experts demonstrating that the Project has unmitigated contamination impacts, construction impacts, and public health impacts that were not disclosed in the CEQA Analysis, were not addressed in the West Oakland Specific Plan EIR, and do not qualify for CEQA infill streamlining.

On September 21, 2021, the City Council conducted a hearing on EBRRD's Appeal pursuant to Planning Code Section 17.134.070. At the hearing, Council voted **unanimously** to uphold the Appeal and directed staff to return to Council with a resolution to **uphold** EBRRD's Appeal of the 1396 5th Street Project and require staff to prepare an Infill Environmental Impact Report ("EIR") to address the Project's (1) soil and groundwater contamination impacts, and (2) health risk from air pollution.<sup>8</sup>

The Appeal hearing was continued, purportedly to allow Staff to draft the approval resolution voted for by Council. But at the subsequent hearing, Staff failed to produce the approval resolution, as directed by Council, and prevented the Council from voting to uphold the Appeal and prepare an Infill EIR based on the circular reasoning that the Staff Report did not contain the resolution the Council had directed Staff to prepare.<sup>9</sup>

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<sup>7</sup> See EBRRD's expert comments from SWAPE, available at <http://oakland.legistar.com/gateway.aspx?M=F&ID=b390efb8-0cc8-4661-99a8-9de652e1744d.pdf> see pdf p. 78; see State Water Resources Control Board, RED STAR YEAST / 1396 FIFTH STREET LLC (T06019794669) [https://geotracker.waterboards.ca.gov/profile\\_report?global\\_id=T06019794669](https://geotracker.waterboards.ca.gov/profile_report?global_id=T06019794669)

<sup>8</sup> Video Recording of the Special Concurrent Meeting of the Oakland Redevelopment Successor/City Council, September 21, 2021. Available at: [https://oakland.granicus.com/player/clip/4442?view\\_id=2&redirect=true](https://oakland.granicus.com/player/clip/4442?view_id=2&redirect=true).

<sup>9</sup> Video Recording of the Concurrent Meeting of the Oakland Redevelopment Successor Agency / City Council / Geologic Hazard Abatement District Board, April 19, 2022. Available at: 5085-019acp

Staff does not have the authority to make a decision contrary to City Council decision, nor are Staff's statements supported by the record.<sup>10</sup> Substantial evidence supporting the Council's decision to require an Infill EIR was submitted to the City in support of the Appeal originally filed on March 12, 2021, as required by the Planning Code. The City Council duly considered this evidence and voted to uphold the Appeal and require an Infill EIR. Staff's supplantation of the City Council's decision for its own is a violation of City Planning Code requirements, which vest the authority to render a decision on EBRRD's Appeal squarely on the City Council, the City's elected decision making body, *not* on City staff.

At the continued Appeal hearing, Council again directed Staff to return with a resolution upholding the Appeal and requiring an Infill EIR for the Project, stating:

I want to make a motion for the Staff to move the process that we unanimously voted for in September '21 while they consider or conduct the infill or focused EIR. ***It wasn't done.*** The direction that we gave in September was not completed and that's what I want to see followed. If the City staff is going to do something opposite from the direction that was given from Council, I want to be clear that that does not happen again... I don't think the way this happened was appropriate.<sup>11</sup>

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<https://oakland.legistar.com/calendar.aspx#> (Councilmember Fife stated, "I made the motion, it was passed unanimously by council to...come back with a specific set of processes to move forward [with an Infill EIR] that was disregarded and the language was changed... *The direction that the council gave was not followed.*")

City Attorney Branson agreed that Staff could have offered the motion language the Council requested, but did not. City Attorney Branson stated, "If this body simply wants to adopt a resolution that says do the focused EIR, I guess we could continue it with direction to come back with a resolution that says that." It was unclear to the Council and to the public why this option was not offered at the September 21, 2021 hearing, in the first place.)

<sup>10</sup> Video Recording of the Concurrent Meeting of the Oakland Redevelopment Successor Agency / City Council / Geologic Hazard Abatement District Board, April 19, 2022. Available at:

<https://oakland.legistar.com/calendar.aspx#> (City Attorney Michael Branson stated that "The other option [Council] is asking for, is not available until there is substantial evidence to support an Infill EIR, so if you would like planning to review the record to examine whether substantial evidence supports an Infill EIR, planning needs the authority to review that additional info and incorporate it into the existing CEQA analysis and make a recommendation that there is substantial evidence to support that path.")

<sup>11</sup> Video Recording of the Concurrent Meeting of the Oakland Redevelopment Successor Agency / City Council / Geologic Hazard Abatement District Board, April 19, 2022. Available at:

<https://oakland.legistar.com/calendar.aspx#> (Councilmember Fife)

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Staff again failed to follow Council direction,<sup>12</sup> resulting in ongoing violations of the City's administrative appeal procedures, and of the City's mandatory duty to implement the decisions of the City's elected decision making body.

City Staff has advised East Bay Residents that the next hearing on this Project is scheduled for July 19, 2022. The City may seek to introduce new evidence into the record to support the approval of the Project. EBRRD maintains that any new evidence must be made available for public review and comment in an Infill EIR pursuant to CEQA Guidelines Section 15183.3(d)(2). Approving the Project without an Infill EIR would be a violation of CEQA, because the City has not adequately analyzed or mitigated the Project site's hazardous contamination, and environmental impacts associated with the cleanup and remediation of the site, including associated construction-related air quality, health risk, greenhouse gas emissions and noise impacts. East Bay Residents live, work, and raise their families in Oakland and would be directly impacted by the Project's potentially significant and hazardous environmental effects.

## II. EAST BAY RESIDENTS' BACKGROUND

Easy Bay Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes City of Oakland residents Luis Valencia, Erik Line, Jason Gumataotao, labor organizations UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and their members and their families who live and/or work in the City of Oakland and Alameda County. The individual members of EBRRD live, work, and raise their families in the City of Oakland. They would be directly affected by the Project's impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of EBRRD also have an interest in enforcing the City's planning and zoning laws and the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed,

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<sup>12</sup> *Id.* (Council President Bas quoted at 4:15:33.)  
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continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, EBRRD's members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

As discussed in detail in EBRRD's Appeal and below, union participation in the CEQA process, including that of EBRRD's member unions, is founded on the merits of challenging a project's permitting process on environmental grounds. Union participation has resulted in substantial environmental and public health improvements and additional mitigation for hundreds of projects across the State. As a former Columbia University fellow and union organizer has explained, "[m]uch of the important social legislation that has built a better society came about because of the strong political support of labor. Unions backed civil rights legislation, Social Security, Medicare, environmental laws, wage and hour laws, the ban on child labor, and much more."<sup>13</sup>

East Bay Residents' members have a direct interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members, and have the same rights to raise their concerns about the Project's environmental and public health impacts as any other Oakland resident. The union members have long understood that community and worker safety and environmental protection are both essential to long-term sustainable development and a healthy construction economy. For these reasons, and for more than 30 years, the union members of East Bay Residents have participated in federal, state and local environmental permitting and regulatory proceedings to advocate for responsible and sustainable development that will protect their members and the communities where they live. This advocacy has produced stronger environmental protections in East Bay environmental regulatory programs, lessened the adverse impacts of individual projects, resulted in greater community benefits and led to more informed decision-making in their communities – a fundamental goal of citizen participation in the CEQA process.

Union participation in environmental permitting has also resulted in Statewide benefits. For example, unions have participated in the permitting of new energy generation facilities by the California Energy Commission over many decades, demanding stronger air quality, water conservation and toxic material

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<sup>13</sup> Stern, Unions & Civic Engagement: How the Assault on Labor Endangers Civil Society (2013), available at <https://www.amacad.org/publication/unions-civic-engagement-how-assault-labor-endangers-civil-society> (last visited 7/6/22).

controls on new energy generation facilities. The specific measures advocated by unions have been adopted by the Commission and are now applied to all new projects and have made California energy facilities the cleanest and safest in the nation. The Commissioners have complimented the unions on the record for their contributions to Commission's decision-making process.

California unions have also long participated in proceedings at the California Building Standards Commission and the California Public Utilities Commission to ensure that new building materials and methods of construction are safe and effective and contribute to the state's energy efficiency goals. This participation has resulted in plumbing pipe manufacturers changing pipe formulations to remove chloroform and eliminate chloroform leaching into drinking water. It has resulted in the adoption of measures to protect workers from the high-levels of exposure to toxic solvents that had been occurring at the time of installation. Union participation led to regulation of pipe cements to reduce VOC emissions in order to meet air quality goals. It has resulted in new worker training and installation standards to ensure that consumers and utility ratepayers receive the energy savings they are paying for.

Unions have also participated in the public review of industrial, commercial, residential and mixed-use projects at least since the early 1980s. That participation has resulted in the imposition of thousands of additional mitigation measures, changes in project design, additional analysis and study and other actions that have substantially lessened project impacts and increased public disclosure and improved public decision-making. This has been achieved either directly through the incorporation of additional mitigation measures or conditions of approval by lead agencies at labor's behest, through the hundreds of environmental settlement agreements that unions have entered into with Project applicants, and when necessary, through litigation.

The courts have recognized the benefits of union participation in environmental challenges,<sup>14</sup> and the unions are proud of what they have achieved in

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<sup>14</sup> See *Bakersfield Citizens for Local Ctrl. v. Bakersfield* (2004) 124 Cal.App.4th 1184, 1198 (“unions have standing to litigate environmental claims.”); *Int'l Longshoremen's & Warehousemen's Union v. Bd. of Supervisors* (1981) 116 Cal.App.3d 265 (successful union suit under CEQA to challenge plant's change from clean to dirty fuel). In *Meridian Ocean v. State Lands Comm'n* (1990) 222 Cal.App.3d 153, a coalition of fishermen brought a CEQA challenge to stop sonic testing of the ocean floor, contending the testing harmed fish populations. The court stated, “[w]hile those whose livelihood depends upon being able to catch fish may have pecuniary motivations to bring the matter to public attention, the fact marine and fish life is being threatened is surely a legitimate environmental concern.” *Id.* at 170-71.



reducing project impacts and improving public and worker safety through participation in the public review process. CEQA was designed to ensure that projects thoroughly mitigate their environmental impacts through transparent public processes in order to “inform the public and [] responsible officials of the environmental consequences of their decisions before they are made.”<sup>15</sup> For this reason, the Legislature has clearly explained that “public participation is an essential part of the CEQA process.”<sup>16</sup> Precisely as intended by the statute, union participation in CEQA review like this one has not only led to reduced environmental harm, it has led to greater public disclosure and more informed decision-making.

### **III. THE CITY’S FAILURE TO UPHOLD EBRRD’S APPEAL HAS RESULTED IN VIOLATIONS OF EXISTING STATE AND LOCAL LAW**

#### **A. Staff’s Failure to Uphold the City Council’s Decision on EBRRD’s Appeal Resulted in Violations of the City’s Mandatory Duties**

Staff violated their duty to the City Council to faithfully execute Council direction. City Staff are required to faithfully carry out the direction of the City Council, regardless of if they did or did not recommend it.<sup>17</sup> It is Staff’s job, without question, to implement the policies adopted by the governing body.<sup>18</sup> Staff has only limited discretion to diverge from Council direction where the policy direction falls outside the bounds of the law and public service ethics – neither of which exists here.<sup>19</sup> In all other cases, Staff is to carry out council policy as voted on by a majority of its members, as is the case here.

City staff’s rights, powers, and duties are derived from the constitution, statutes, City charter, and City ordinances *or* by “implication necessary to enable them to perform some duty cast upon them by express language.”<sup>20</sup> When city

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<sup>15</sup> *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal. 4th 1112, 1123.

<sup>16</sup> 14 CCR § 15201.

<sup>17</sup> League of California Cities, Kevin C. Duggan, Relationship Between City Council and City Manager Staff, p. 11. Available at: [https://www.calcities.org/docs/default-source/new-mayors-and-council-members-academy-session-materials/06-relationship-between-city-council-and-city-manager-staff.pdf?sfvrsn=1e3b2563\\_3](https://www.calcities.org/docs/default-source/new-mayors-and-council-members-academy-session-materials/06-relationship-between-city-council-and-city-manager-staff.pdf?sfvrsn=1e3b2563_3).

<sup>18</sup> *Id.*

<sup>19</sup> League of California Cities, New Mayors and Council Members Resource Guide (January 22, 2014) p. 403. Available at: <https://www.cacities.org/UploadedFiles/LeagueInternet/2f/2f1970d6-7653-4d5f-94f7-f32105328cc9.pdf>.

<sup>20</sup> 56 Am. Jur. 2d, Municipal Corporations, sec. 233.  
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officials attempt an act which is beyond the limit of their power, the act has no official sanction, and is no more effectual than if performed by nonofficial persons, and as a municipal act it is wholly void, and, being void, nothing of substance may flow from it.<sup>21</sup> The courts have determined that local officials lack authority to disregard a statute or other legislative determination based on the official's belief that it is unconstitutional.<sup>22</sup> City staff is barred from disregarding Council's direction even where staff believes it may be unconstitutional. Here, City Staff is not permitted to replace the City Council's decision directing Staff to prepare an Infill EIR with their opinion regarding whether or not an Infill EIR is necessary.

By failing to provide Council with a resolution to uphold EBRRD's appeal upon the unanimous vote of Council to do so, City Staff violated their duty to faithfully implement Council direction. Staff's violation of a mandatory duty to execute Council direction exposes the City to potential liability under California Code of Civil Procedure Section 1085 for failure to execute "a duty resulting from an office."<sup>23</sup> Staff's ongoing disregard of Council direction is an ongoing failure to perform a mandatory duty, actionable under Section 1085.

California Code of Civil Procedure section 1085 writ of mandate is used as a remedy to compel a city or city council to perform mandatory duties resulting from office.<sup>24</sup> It will not compel performance of duties in a particular way, and the discretion on the part of decisionmakers will not be interfered with in mandamus proceedings, except for arbitrary disregard of the law or for flagrant abuses of discretion.<sup>25</sup> Here, the City has a mandatory duty under the Planning Code to decide on the Appeal of the Major Conditional Use Permit.<sup>26</sup>

To be enforceable by writ of mandate under California law, a statutory duty must be obligatory, rather than merely discretionary or permissive, in its directions to the public entity, that is, it must require, rather than merely authorize or permit, that a particular action be taken or not taken.<sup>27</sup> The Planning Code's appeal provisions are mandatory.

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<sup>21</sup> *Id.*; *Gaslight & Coke Co. of New Albany v. City of New Albany* 156 Ind. 406, 59 N.E. 176 (1901).

<sup>22</sup> *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068, 17 Cal.Rptr.3d 225, 95 P.3d 459; *Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1116.

<sup>23</sup> Cal. Civ. Proc. Code, 1085(a).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Oakland Planning Code § 17.134.070.

<sup>27</sup> *Pich v. Lightbourne* (2013) 221 Cal.App.4th 480, 490.

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The Oakland Planning Code specifically vests the power to determine EBRRD's appeal with the Council.<sup>28</sup> The Planning Code provides that, upon receipt of the appeal, the Council *shall* set a date for consideration of the appeal.<sup>29</sup> In considering an appeal of a Major Conditional Use Permit, the Council *shall* determine whether the proposed use conforms to the applicable use permit criteria, and may grant or deny a permit or require such changes in the proposed use or impose such reasonable conditions of approval as are, in its judgment, necessary to ensure conformity to said criteria.<sup>30</sup> The Council may choose to refer the matter back to the Planning Commission for further consideration and advice,<sup>31</sup> but may not defer to decisions of Staff. In all cases, the Council retains jurisdiction of the appeal.<sup>32</sup>

City Staff have usurped the Council's decision making role and inputted their opinions, and the Applicant's consultants' opinions, in place of the Council's.<sup>33</sup> The Council determined that substantial evidence already exists in the record to support preparation of an Infill EIR. It is a violation of the City's Planning Code and CEQA for Staff to override the Council's decision with Staff's own opinions. Council concluded that substantial evidence exists in the record such that an Infill EIR must be prepared. Therefore, Staff must act reasonably to conduct a hearing to grant the Appeal and prepare an Infill EIR, per Council direction.

CEQA's Infill Streamlining Guideline states:

[The] lead agency must examine an eligible infill project in light of the prior EIR to determine whether the infill project will cause any effects that require additional review under CEQA. Determinations pursuant to this section are questions of fact to be resolved by the lead agency. Such determinations must be supported with enough relevant information and reasonable

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<sup>28</sup> Oakland Planning Code § 17.134.070.

<sup>29</sup> Oakland Planning Code § 17.134.070 (emphasis added).

<sup>30</sup> *Id.* (emphasis added).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Video Recording of the Concurrent Meeting of the Oakland Redevelopment Successor Agency / City Council / Geologic Hazard Abatement District Board, April 19, 2022. Available at: <https://oakland.legistar.com/calendar.aspx#> (City Attorney Michael Branson stated that the timeline for implementing Council direction depends on "our consultant for them to gather information and turn around and see if there's a path forward on something that's triggering the requirement for an infill EIR.")

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inferences from this information to support a conclusion, even though other conclusions might also be reached.<sup>34</sup>

Consistent with CEQA's requirements, the City Council determined that the Project would result in new specific effects or more significant effects, and uniformly applicable development policies or standards would not substantially mitigate such effects and thus directed Staff to prepare an Infill EIR.<sup>35</sup> Staff must faithfully execute Council direction, where, as here, it is based on substantial evidence in the record.

The recent excuse raised by Staff that they are not certain whether an Infill EIR is necessary is not supported by the law or the evidence in the record.<sup>36</sup> Council reviewed evidence in the record as required by CEQA and Planning Code Section 17.134.070, and decided, based on substantial evidence in record, to uphold appeal and require Infill EIR, and specifically directed staff to prepare a resolution on these two issues. Staff has no discretion to deviate from that decision.

### **B. Council's Decision to Direct Preparation of Infill EIR Was Supported by Substantial Evidence in the Record**

Staff had substantial evidence in the record to support the preparation of an Infill EIR as of the September 21, 2021 hearing. EBRRD's Appeal provided substantial evidence to the City demonstrating that the Project site is currently contaminated with chemicals and heavy metals that exceed residential screening levels and require mitigation, including: 1) polycyclic aromatic hydrocarbons ("PAHs") which, at existing levels found in the soil may cause cancer, lung, or eye issues, as well as blood and liver ailments; 2) total petroleum hydrocarbons ("TPH") compounds which, at existing levels found in the soil, may affect the central nervous system or cause adverse effects on the blood, immune system, lungs, skin, and eyes; 3) groundwater contaminated with benzene, toluene, ethylbenzene, xylene (BTEX) and TBA [tert butyl alcohol]; 4) contamination from underground storage tanks

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<sup>34</sup> 14 CCR § 15183.3(d).

<sup>35</sup> 14 CCR § 15183.3(d)(2)(C).

<sup>36</sup> Video Recording of the Concurrent Meeting of the Oakland Redevelopment Successor Agency / City Council / Geologic Hazard Abatement District Board, April 19, 2022. Available at: <https://oakland.legistar.com/calendar.aspx#> (City Attorney Michael Branson stated that "The other option [Council] is asking for, is not available until there is substantial evidence to support an Infill EIR, so if you would like planning to review the record to examine whether substantial evidence supports an Infill EIR, planning needs the authority to review that additional info and incorporate it into the existing CEQA analysis and make a recommendation that there is substantial evidence to support that path.")

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leaking benzene, diesel, lead, and other hazardous materials into the soil and groundwater.<sup>37</sup> The City knew that this substantial evidence existed as of the September 21, 2021 hearing, and could have drafted motion language to effectuate the Infill EIR process at that point.

It was clear after the City approved the WOSP EIR, that the site was still not cleaned to residential levels, and that there was insufficient site-specific information available to analyze the significance of that effect.<sup>38</sup> The site still contained mercury, lead, PCBs, PAHs, TPH-g, TPH-d, BTEX, and TBA in soil and groundwater samples respectively.<sup>39</sup> The Project's hazardous material impacts are new specific effects which require an Infill EIR because the WOSP EIR was published absent sufficient site-specific information for the City to make the determination that the impact was less than significant with implementation of the SCAs. The Project's hazardous materials impacts are more severe than were analyzed in the prior EIR, because the information provided after the WOSP EIR was published which clarifies the Project site's continued contamination, constitutes a change in circumstances or changes in the development assumptions underlying the prior EIR's analysis. Moreover, by failing to address the site's contamination impacts, the CEQA Analysis also failed to analyze the impacts associated with the remediation phase of Project construction – including the associated air quality, noise, transportation, and hazardous materials impacts that would occur during the remediation process.

Additionally, the Applicant has prepared a new Phase II subsurface soil investigation which confirms that the Project site has significant levels of contamination which are peculiar to the Project site, and require remediation and a soil vapor barrier in order to prevent future Project residents from being exposed to hazardous levels of toxic chemical vapors.<sup>40</sup> This is precisely the information that is required by CEQA to be included in the Infill EIR.

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<sup>37</sup> State Water Resources Control Board GeoTracker, Red Star Yeast / 1396 Fifth Street LLC (T06019794669), (Sept. 19, 2021),

[https://geotracker.waterboards.ca.gov/profile\\_report.asp?global\\_id=T06019794669](https://geotracker.waterboards.ca.gov/profile_report.asp?global_id=T06019794669).

<sup>38</sup> Alameda County Department of Environmental Health Local Oversight Program, Case Closure for Site Cleanup Program Case No. R00002896 and GeoTracker Global ID T06019794669, Red Star Yeast/1395 Fifth Street LLC, 1396 5th Street Oakland, CA 94607 (May 10, 2017)

[https://geotracker.waterboards.ca.gov/view\\_documents?global\\_id=T06019794669&enforcement\\_id=6341682](https://geotracker.waterboards.ca.gov/view_documents?global_id=T06019794669&enforcement_id=6341682).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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Further, EBRRD's comments provided expert evidence constituting substantial evidence showing that the Project construction emissions from PM<sub>10</sub>, PM<sub>2.5</sub>, SO<sub>x</sub>, CO, and NO<sub>x</sub>, exceed applicable BAAQMD significance thresholds. EBRRD's air quality and health risk expert SWAPE prepared an updated CalEEMod model which determined that the Project's construction-related emissions would exceed applicable BAAQMD thresholds.<sup>41</sup> SWAPE's analysis constitutes substantial evidence that the Project would exacerbate existing air quality and health risks to the surrounding community, "by bringing development and people into the area affected"<sup>42</sup> This exacerbation of air quality and health risk constitutes a significant impact that was not analyzed in the prior EIR. EBRRD's comments ahead of the September 21, 2021 hearing showed that the City had substantial evidence to prepare an Infill EIR in order to adequately analyze and mitigate the air quality and health risks that Project construction exacerbates.

#### IV. CONCLUSION

The City must prepare a resolution to uphold EBRRD's Appeal and require the preparation of an Infill EIR, per Council direction. The Council must make certain that their directions are being effectuated, as required by law. The City must also ensure that the Project complies with CEQA, in order to fully mitigate the Project's contamination and air quality impacts and ensure that Oakland housing is built safely.

Thank you for your consideration of these comments.

Sincerely,



Christina Caro  
Kelilah D. Federman

KDF:acp

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<sup>41</sup> Exhibit A, SWAPE Comments, p. 13.

<sup>42</sup> CEQA Guidelines § 15162.2(a).