



AGENDA REPORT

TO: Edward D. Reiskin
City Administrator

FROM: William A Gilchrist
Department of Planning &
Building, Director

SUBJECT: Appeal of 1396 5th Street Project

DATE: August 23, 2021

City Administrator Approval

Date: September 7, 2021

RECOMMENDATION

Staff Recommends That The City Council Conduct A Public Hearing And Upon Conclusion Adopt A Resolution Denying The Appeal By East Bay Residents For Responsible Development And Thus Upholding The Planning Commission's Environmental Determination And Approval Of A Proposal To Construct 222 Dwelling Units On The Existing Vacant Lot Located At 1396 5th Street, Oakland CA (Project Case No. PLN20-101).

EXECUTIVE SUMMARY

On March 3, 2021, the Oakland Planning Commission approved (by a 7-0 vote) case number PLN20-101, a proposal to construct a new residential building containing 222 dwelling units (Project) on the existing vacant property at 1396 5th Street, across the street from the West Oakland Bay Area Rapid Transit (BART) station. The site had previously contained a residential building that was under construction but was lost in June 2012 due to arson and subsequently the remains were demolished. The March 3, 2021 Planning Commission staff report, which includes a link to the [California Environmental Quality Act \(CEQA\) Analysis document for the Project](#), is included as **Attachment A**.

Following the Planning Commission action, on March 12, 2021, an appeal (PLN20-101-A01) was filed by Adams Broadwell Joseph & Cardozo on behalf of East Bay Residents for Responsible Development challenging whether the Project complied with CEQA, and Tentative Parcel Map (TPM) Findings (**Attachment B**). Although the Appeal Form itself had boxes checked purportedly appealing the granting of the Conditional Use Permits (CUP) and Design Review, no arguments and/or supporting evidence was presented to the Planning Commission and/or in the Appeal itself challenging the underlying land-use permits, as required by the Oakland Planning Code. The appeal did raise issues regarding the granting of the density bonus as part of the permits, however this was focused on the findings required to deny a concession or waiver as part of a density bonus application, and no arguments were made with regard to the concession to allow a reduction of parking or the development waiver to reduce the amount of open space provided. The only mention was of a concession for the density bonus itself, which is ministerial and allowed by right under State Law. There is mention of a

waiver of height limits, but the Project is within the allowed height and no such concession or waiver request was made as part of the Project application. As such, these issues are waived and are not properly before the City Council.

Staff recommends the City Council deny the appeal, finding the CEQA analysis prepared was legally adequate, and that the project complies with the TPM Findings, and uphold the Planning Commission decision to approve the Project.

BACKGROUND / LEGISLATIVE HISTORY

A. Adoption of the West Oakland Specific Plan

On July 15, 2014, the City Council Adopted the West Oakland Specific Plan (WOSP) and certified the WOSP Environmental Impact Report (EIR) via Resolution No. 85108 CMS.

The WOSP provides the guiding framework for realizing the vision of a healthy, vibrant West Oakland. It reflects the desires and aspirations of a wide range of community members, stakeholders, steering committee participants, City staff, and the Planning Commission and City Council. The objectives of the WOSP are to bring to life the community's longstanding vision for a West Oakland that contains viable employment opportunities, provides needed goods and services, supports abundant and affordable housing resources, and facilitates sustainable development. The WOSP provides guidelines and development standards that support this vision, and includes an implementation action plan to systematically achieve its key objectives.

The WOSP EIR analyzed the environmental impacts of adoption and implementation of the WOSP and, where the level of detail available was sufficient to adequately analyze the potential environmental effects, provided a project-level CEQA review for reasonably foreseeable development. This project-level analysis allows the use of CEQA streamlining and/or tiering provisions for projects developed under the WOSP.

WOSP documents, including the Final Plan and EIR may be accessed through the following online link: <https://www.oaklandca.gov/topics/west-oakland-specific-plan>

B. Current Application for Proposed Development

On June 24, 2020 the Michaels Organization filed an application with the Bureau of Planning of the Planning & Building Department (PBD) to develop an eight-story residential building at 1396 5th Street that would include 222 dwelling units, 16 of which would be designated as affordable for very low-income households. The site is located within Opportunity Area 2 (7th Street) of the WOSP across Mandela Parkway from the West Oakland BART Station.

On October 28, 2020, the proposal appeared before the Design Review Committee, during which the Committee recommended design modifications prior to the item moving forward to the full Planning Commission for consideration. The design recommendations were incorporated into the revised project prior to proceeding to the full Planning Commission.

On March 3, 2021, the Planning Commission reviewed and unanimously approved the Project by a (+7, -0) vote.

On March 12, 2021 the law firm Adams Broadwell Joseph & Cardozo, on behalf of East Bay Residents for Responsible Development, filed an appeal (PLN20-101-A01) of the Planning Commission approval of the Project.

C. CEQA Analysis for Current Project

A detailed CEQA Analysis document was prepared for the Project, entitled “1396 5th Street Project CEQA Analysis” dated February 2021, which evaluates the potential project-specific environmental effects of the proposed Project and whether such impacts were adequately covered by the WOSP EIR to allow the below-listed streamlining and/or tiering provisions of CEQA to apply, and found that each of the following provisions provides a separate and independent basis for CEQA compliance:

- Section 15182 – Specific Plan exemption;
- Section 15183 – Projects consistent with a community plan, general plan, or zoning;
- Section 15183.3 – Qualified In-fill projects; and
- Section 15164 – Addendum to the 2014 certified West Oakland Specific Plan EIR.

Further detail is provided later in this report under the “California Environmental Quality Act” section and the “Analysis” section of this report.

ANALYSIS AND POLICY ALTERNATIVES

The appellant raises seven (7) issues as identified and discussed below. These issues primarily relate to the Project’s compliance with CEQA and whether the analysis prepared was legally adequate. The appellant also raises issues regarding compliance with the required TPM findings to approve the lot merger for the property. As discussed above, because no arguments and/or supporting evidence was presented to the Planning Commission and/or in the Appeal itself challenging the underlying land-use permits, as required by the Oakland Planning Code, these issues are waived and are not properly before the City Council. The appellant’s full submitted arguments have been included as **Attachment B** to this report. In addition to the Bureau of Planning staff responses below, a detailed technical response to the issues raised by the appellant is contained in a memorandum prepared by the City’s CEQA consultant Urban Planning Partners (UPP) (**Attachment C**). Staff’s determinations and recommendation to uphold the Planning Commission’s denial of this appeal support the City’s goals of ensuring **housing, economic and cultural security**.

A. Appellant Claims That the City May Not Rely Upon Exemptions and an Addendum to the WOSP EIR

Appellant argument: The appellant argues the Planning Commission inappropriately relied upon three provisions in CEQA to approve the Project without a new or subsequent EIR, including the Community Plan Exemption (CEQA Guidelines Section 15183), Qualified Infill Exemption (CEQA Guidelines Section 15183.3) and an Addendum to the WOSP EIR (CEQA Guidelines Sections 15162, 15164, 15168). The appellant argues that the City’s reliance on these provisions was inappropriate because the Project would have more severe significant impacts than previously identified in the WOSP EIR.

Staff response: The 1396 5th Street CEQA Analysis relied upon the analysis previously conducted under the WOSP EIR. The WOSP EIR is a program EIR that analyzed the environmental impacts of implementation of the WOSP, including development of the Project site. The Project is located within the 7th Street Opportunity Area of the WOSP planning area. The number of units proposed by the Project is within the maximum development program analyzed by the WOSP EIR for the 7th Street Opportunity Area and is otherwise consistent with the development anticipated under the WOSP.

This consistency led the Planning Commission to determine that none of the conditions requiring a subsequent or supplemental EIR under CEQA Guidelines section 15162 were present and so an addendum to the WOSP EIR was appropriate for the Project. The WOSP EIR analyzed the environmental impacts of the adoption and implementation of the WOSP at full build out and provided project-level review for reasonably foreseeable development, such as the Project. The City Council certified the WOSP EIR in accordance with CEQA on July 15, 2014 and the analysis now is presumptively valid under California law. Since that certification, the City has created and relied upon a framework for analyzing projects within the WOSP area, as well as other specific plan areas, called "CEQA Analysis," which separately and independently provides a basis for CEQA compliance. This framework relies upon the applicable streamlining and tiering sections of CEQA: Specific Plan Exemption, Community Plan Exemption, Qualified Infill Exemption and/or Addendum, as detailed in the CEQA section of this report.

The CEQA Analysis for this Project showed that the Project did not require major revisions to the WOSP EIR because the Project did not propose any changes to the density, land use policies, or character of the WOSP land use and zoning designation. Nor did the Project result in an increase in the impacts analyzed and disclosed in the WOSP EIR. For these reasons, a subsequent EIR was not required for the Project.

The CEQA Analysis also relied on streamlining provisions available to projects that are consistent with zoning or are qualified infill projects. Under CEQA Guidelines Section 15182(b), qualifying mixed-use projects that are located within a transit priority area and are consistent with a specific plan for which an EIR was certified are exempt from CEQA. The appellant did not challenge the City's reliance on Section 15182 in its appeal letter and has therefore waived such arguments. Under CEQA Guidelines Section 15183 and 15183.3, a project that is consistent with the development density established by existing general plan and zoning policies for which an EIR was certified, and a project that qualifies as an eligible infill project, are exempt from CEQA. The CEQA Analysis document includes appendices that further address how the Project qualifies under these specific exemption provisions.

The City has relied upon the WOSP and other specific plan CEQA Analysis framework since 2014 for numerous projects. As summarized herein and outlined in exhaustive detail, the assumptions and conclusions in the Project's CEQA Analysis are supported by substantial evidence in accordance with CEQA. The appellant has provided no credible, persuasive, or substantial evidence that the Project would result in a new, peculiar, significant environmental impact or a substantial increase in the severity of a significant environmental impact than determined in the WOSP EIR (point by point responses to follow below). Significant impacts are also not "peculiar" to a project or property where uniform policies or standards apply that would mitigate the impact, such is the case with the City's Standard Conditions of Approval (SCAs).

Therefore, the conclusions in the CEQA Analysis are valid and preparation of an EIR is not warranted.

B. Appellant Claims the Project Has Significant Unmitigated On-site Hazards

Appellant argument: The appellant argues that since the project site is identified as a Cleanup Program Site on the State Water Control Resources Board (SWCRB) Geotracker database and has not been previously cleaned to residential levels, that this represents a potentially significant impact peculiar to the site that has not been adequately mitigated by the City's SCAs, and thus an EIR needs to be prepared.

Staff response: The hazards and hazardous materials impacts raised by the appellant have already been fully assessed as part of the environmental review for the WOSP and have been found to have a less than significant impact when local, state and federal regulations are applied, including the City of Oakland SCAs. The WOSP EIR evaluated the potential hazards and hazardous materials impacts resulting from adoption of the WOSP. Figure 4.5-2 of the WOSP EIR identifies the 1396 5th Street Project Site as an open case in the RWQCB Geotracker Site, and Table 4.5-5 identifies the site as a site that has had chemical releases that have contaminated soil and/or groundwater, and which Alameda County Environmental Health (ACEH) provides regulatory oversight for investigation and cleanup. On page 4.5-46, the WOSP EIR provides the following full description of the potential hazardous materials impacts at the Project Site:

1396 5th Street – Red Star Yeast, Case #T06019794669 – Open, Remediation: This site was formerly occupied by the Red Star Yeast Company, but all buildings and appurtenant structures have been removed. Soil borings conducted in 2004, 2006 and 2011 encountered a layer of fill material with detected concentrations of cadmium, lead, mercury, and copper at several locations across the site. The metals appear to have been brought to the site with the fill material and do not appear to be related to site activities. The fill material is believed to have been placed at the site sometime between 1862 and 1890. Petroleum hydrocarbons were also detected in site soils and shallow groundwater. Soil excavations were conducted to remove soil with elevated concentrations of metals. Three underground storage tanks (USTs) were discovered during the investigation and soil removal process, which were either removed or closed in place. Alameda County Environmental Health staff has reviewed the Soil Closure Report (August 21, 2012), the Excavation Report (October 15, 2012) and the Underground Storage Tank Removal and Closure Report (November 13, 2012), and have identified several items that require additional information, clarification, or correction before the County is able to adequately evaluate the effectiveness of the soil excavation and UST removals before considering the case for closure.

However, the WOSP EIR found that no mitigation measures were required to address impacts pertaining to hazardous materials release sites (Impact Haz-1) because those impacts would be less than significant with implementation of the City's SCAs. The WOSP EIR recognized and evaluated the environmental impacts relating to hazardous materials release sites and found that impacts would be mitigated to less-than-significant levels through compliance with local, state, and federal regulations for treatment, remediation, and/or disposal of contaminated soil

and/or groundwater and the City's SCAs in effect at the time. These SCAs are functionally equivalent to the City's current SCAs, including SCA-HAZ-1: Hazardous Materials Related to Construction (#43), SCA-HAZ-2: Hazardous Building Materials and Site Contamination (#44), and SCA-HAZ-3: Hazardous Materials Business Plan (#45). An Errata sheet was provided to the 1396 5th Street CEQA Analysis that clarified the existing site conditions and included the entire text of the applicable SCA's HAZ-2 and HAZ-3 cited above because portions were inadvertently omitted from Attachment A of the CEQA Analysis.

The hazards and hazardous material impacts are not an impact that is peculiar to the Project site. The WOSP EIR recognized the ubiquity of hazardous materials impacts due to the historic industrial, transportation, and defense related uses throughout West Oakland. The WOSP EIR identified a total of 52 reported environmental cases within the 7th Street Opportunity Area, and 235 reported environmental cases overall throughout the WOSP planning area. Many of the identified hazardous substance sites were also identified as key Opportunity Sites proposed for redevelopment for residential uses (See WOSP, pp. 4.5-52.) The WOSP EIR recognized that the cases that remain open would require remediation efforts before new development could occur.

The WOSP EIR describes the extensive regulatory setting applicable to addressing the use, storage, and disposal of hazardous materials, including the management of contaminated soils and groundwater. The WOSP EIR recognized that in addition to compliance with the City's SCAs, any required treatment, remediation, or disposal of contaminated soil or groundwater would be required to comply with any additional local, state, and federal regulations. A condition requiring compliance with regulations is a common and reasonable mitigation measure and may be proper where it is reasonable to expect compliance (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906; *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362, 409; See also *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768 [rejecting argument that significant effect on the environment must be found when potential health risks are confined to people associated with the project]). In accordance with the SCAs, the City will not issue any demolition, grading, or building permits for the project until the applicant submits documentation to the City evidencing the approval of any proposed remedial action and the required clearance from ACEH.

C. Appellant Claims the Project Has Significant Unmitigated Air Quality Impacts and Health Risk from Construction and Operational Emissions

Appellant argument: The appellant argues the City's applied CEQA exemptions are not applicable since the Project CEQA Analysis concluded that Air Quality impacts related to construction and operations were less than significant with the application of SCAs, while the WOSP EIR concluded that they were significant and unavoidable, and that the exact emissions of individual projects could not be known at the time of the preparation of the WOSP EIR. Further, they argue that the Project should have incorporated all feasible mitigation to reduce health impacts to greatest extent feasible, which they argue the City's SCAs do not accomplish. The appellant included the following specific arguments related to Air Quality Impacts:

1. The appellant claims that criteria pollutants from construction and operational emissions were not adequately analyzed or mitigated, and that the technical analysis (through the California Emissions Estimator Model, or CalEEMod) prepared by the City's consultant

was flawed. The appellant claims that the Project would result in nitrogen oxide (NOx) and reactive organic gas (ROG) emissions that would exceed the Bay Area Air Quality Management District (BAAQMD) thresholds and thus an EIR must be prepared.

2. The appellant includes an argument that a Health Risk Assessment (HRA) is required pursuant to SCAs AIR-4 (Exposure to Air Pollution) and AIR-5 (Stationary Sources of Air Pollution), and that the HRA was not prepared. The appellant included its own HRA which claims that the excess cancer risk exceeds the BAAQMD thresholds and those identified in the WOSP EIR, and thus an EIR should be prepared.
3. The appellant argues that additional mitigation is required to address impacts from gaseous toxic air contaminants (TACs), which were not addressed in the WOSP EIR or the City's SCAs.
4. The appellant argues that the WOSP EIR Mitigation Measure AIR-9 requires a Health Risk Reduction Plan due to the inclusion of a backup generator on-site and that the application of the City's more recent SCA AIR-5 (Stationary Sources of Air Pollution) in the CEQA Analysis for the Project as a replacement is not sufficient. Further, they argue that SCA AIR-5 includes "if feasible" language to measures, which does not make the measures mandatory or ensure the efficacy of the SCA. Thus, the CEQA Analysis is inconsistent with the WOSP EIR and a new EIR is required.
5. The appellant argues that mitigation measures to address odor impacts should have been included for the project and the reliance on the WOSP findings of Significant and Unavoidable is not supported by substantial evidence.

Staff response: The WOSP EIR extensively analyzed both plan-level and project-level air quality impacts resulting from adoption of the WOSP EIR and construction of projects consistent with the WOSP throughout the WOSP Planning Period.

With respect to construction-related impacts, the WOSP EIR found:

- During construction, individual development projects pursuant to the WOSP will generate fugitive dust, but the fugitive dust would be effectively reduced to a level of less than significant with implementation of required City of Oakland SCAs. (Impact Air-4)
- Individual development projects pursuant to the WOSP will generate regional ozone precursor emissions and regional particulate matter emissions from construction equipment exhaust. For most individual development projects, construction emissions will be effectively reduced to a level of less than significant with implementation of required City of Oakland SCAs. However, larger individual construction projects (including mid-rise apartments of more than 240 units and high-rise apartments of more than 252 units) could generate emissions of criteria air pollutants that would exceed the City's thresholds of significance. (Impact Air-5)
- During construction, individual development project pursuant to the Specific Plan will generate construction-related TAC emissions from fuel-combusting construction equipment and mobile sources that could exceed thresholds for cancer risks, chronic

health index, acute health index, or annual average PM_{2.5}¹ concentration levels, but that these construction-related TAC emissions would be reduced to a less than significant level with implementation of required City of Oakland SCAs. (Impact Air-6)

With respect to operational-related impacts, the WOSP EIR found:

- Once buildout of the WOSP is complete and all of the expected new development is fully occupied, new development pursuant to the WOSP will generate emissions of criteria pollutants (ROG, NO_x, PM₁₀², and PM_{2.5}) as a result of increased motor vehicle traffic and area source emissions that would exceed the City's project-level thresholds of significance, and therefore would result in significant and unavoidable impacts. (Impact Air-7)
- Development pursuant to the WOSP would include new light industrial, custom manufacturing, and other similar land uses, as well as the introduction of new diesel generators that could emit toxic emissions, resulting in (a) a cancer risk level greater than 10 in one million, (b) a chronic or acute hazard index greater than 1.0, or (c) an increase of annual average PM_{2.5} concentrations of greater than 0.3 micrograms per cubic meter; or under cumulative conditions, resulting in (a) a cancer risk level greater than 100 in one million, (b) a chronic or acute hazard index greater than 10.0, or (c) annual average PM_{2.5} of greater than 0.8 micrograms per cubic meter; and therefore would result in significant and unavoidable impacts. (Impact Air-9).

The CEQA Analysis for the current Project concluded that construction- and operational-related criteria air pollutant emissions and toxic air contaminant emissions would be below the City's thresholds of significance, and therefore would not exceed the impacts identified in the WOSP EIR. The project proposes to provide 222 dwelling units in a mid-rise apartment, which is within the amount of development assumed in the WOSP EIR for the 7th Street Opportunity Area, is below the 240 units identified in the WOSP EIR as having the potential to generate emissions of criteria air pollutant during construction that would exceed the City's thresholds of significance, and is below the 494 units identified in the WOSP EIR as having the potential to generate criteria air pollutants during operation that would exceed the City's threshold of significance. As a result, the project would contribute to, but not exceed the emissions identified in the WOSP EIR.

In other words, the air quality impacts resulting from the Project have already been identified and discussed in the WOSP EIR, and mitigation measures and SCAs have been identified to reduce those impacts. The appellant cannot now challenge the conclusions reached in the WOSP EIR. The CEQA exemptions relied upon in the CEQA Analysis require that subsequent analysis not be conducted where impacts have already been identified in a previously certified EIR. In particular:

- CEQA mandates that projects which are consistent with the development density established by the existing general plan and zoning 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

¹ Fine inhalable particles, with diameters that are generally 2.5 micrometers and smaller.

² Inhalable particles, with diameters that are generally 10 micrometers and smaller.

project or its site (CEQA Guidelines Section 15183). The emissions resulting from the Project are not peculiar to the Project or the parcel on which the Project is located; to the contrary, the emissions are similar to other residential developments of similar size and construction.

- Residential and mixed-use projects that are proximate to transit and are consistent with a specific plan for which an EIR was certified are exempt from CEQA (CEQA Guidelines Section 15182). Additional environmental review shall not be required for such a project unless the City finds, on the basis of substantial evidence in the record, that (1) there are substantial changes to the project which will require major revisions to the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity or previously identified significant effects; (2) there are substantial changes with respect to the circumstances under which the project is being undertaken; or (3) there is 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, and shows that the project would cause new or substantially more severe impacts or that mitigation measures would substantially reduce significant effects of the project.
- CEQA does not apply to the effects of an eligible infill project if the effect was addressed as a significant effect in a prior EIR for a planning level decision (CEQA Guidelines Section 15183.3).

Appellant claims that the conclusions of the current Project's CEQA Analysis – that the Project's construction- and operation-related air quality impacts would be less than significant – contradict the WOSP EIR's conclusion that emissions would be significant and unavoidable. Staff finds this is not so. The WOSP EIR, which looked at the potential emissions from *all* forms of development under the WOSP, found that full buildout would have significant and unavoidable impacts, including cumulative impacts. But with respect to residential developments of the size proposed by the current project, the WOSP EIR found that such projects would have less than significant impacts with implementation of the City of Oakland SCAs. The applicable SCAs are described more fully in Attachment A to the 1396 5th Street CEQA Analysis document and include SCA-AIR 1: Dust Controls – Construction Related; SCA-AIR-2: Criteria Air Pollutant Controls – Construction Related; SCA-AIR-3: Diesel Particulate Matter Controls – Construction Related; SCA-AIR-4: Exposure to Air Pollution; and SCA-AIR-5: Stationary Sources of Air Pollution (Toxic Air Contaminants).

Appellant also argues that the current Project results in significant health risk impacts which the CEQA Analysis failed to disclose and mitigate. CEQA requires the analysis of potential adverse effects of the Project on the environment. Potential effects of the existing environment on a project and its future users are not required to be analyzed or mitigated under CEQA and are described in City CEQA analysis documents as non-CEQA impacts. Nonetheless, the WOSP EIR analyzed the potential impacts of siting new sensitive receptors near existing TAC and PM_{2.5} sources in order to provide information to the public and decisionmakers. The WOSP EIR found that certain future development projects could result in new sensitive receptors being exposed to existing levels of TAC and concentrations of PM_{2.5} that could result in increased cancer risk or other health hazards, and the WOSP EIR characterized this exposure as a significant and unavoidable impact. Within the West Oakland BART Station area, the WOSP EIR found that new residential development would be subject to emissions from Interstate-880,

resulting in varying health risks depending on the distance from the freeway. Through implementation of the City's SCA-AIR-4: Exposure to Air Pollution (Toxic Air Contaminants) (#23), each site's exposure to diesel particulate matter through installation of air filtration systems or other equivalent measures would reduce indoor diesel particulate matters to acceptable levels. However, for TACs originating from gaseous sources, implementation of SCA-AIR-4 could not with certainty reduce risks to an acceptable level, and therefore impacts would be significant and unavoidable.

Next, appellant argues that the diesel-powered emergency generator included in the Project would have air quality impacts that have not been adequately addressed or mitigated. The WOSP EIR considered and analyzed the potential air quality impacts of the operation of emergency generators, and thus this issue has already been studied in the prior environmental analysis. To operate an emergency generator, the Project would be required to comply with the BAAQMD's permit requirements for a stationary source. In accordance with BAAQMD's Regulation 2-5, New Source Review of TACs, BAAQMD does not issue permits for generators that would result in an excess cancer risk greater than 10 in 1 million or a chronic hazard index (HI) greater than 1.0. Further, according to the WOSP EIR, BAAQMD regulations restrict operation of emergency generator engines to 50 hours or less per year for testing or routine maintenance. Finally, in addition to any BAAQMD permit requirements, the Project would be subject to SCA-AIR-5: Stationary Sources of Air Pollution, which require the applicant, prior to approval of a construction related permit, to either prepare a HRA in accordance with California Air Resources Board (CARB) and Office of Environmental Health and Hazard Assessment (OEHHA) requirements, or incorporate specified health risk reduction measures into the Project.

Finally, appellant argues that the CEQA Analysis failed to implement all feasible mitigation to reduce odor impacts. Again, CEQA requires the analysis of potential adverse effects of a project on the environment. Potential effects of the environment on a project are not legally required to be mitigated or analyzed under CEQA. The Project is not anticipated to produce any odors that would adversely affect a substantial number of people. The proposed Project is not required to mitigate the impacts of odors generated by nearby odor generators, such as the East Bay Municipal Utility District Main Wastewater Treatment Plan.

Further technical analysis responding to the air quality issues raised by appellant is provided by the City's CEQA consultant, UPP (**Attachment C**).

D. Appellant Claims the Project Has Significant Unmitigated Impacts from Greenhouse Gas Emissions

Appellant argument: The appellant argues the Greenhouse Gas (GHG) emissions analysis by the City's CEQA consultant were underestimated and that the Project is not consistent with the City's Equitable Climate Action Plan (ECAP). They provided an analysis that they prepared which indicated that the ROG and NO_x exceed BAAQMD thresholds for TACs. They argue that the analysis provided by the CEQA consultant to demonstrate that a GHG Reduction plan is not required for the project is not based on substantial evidence, thus an EIR should be prepared to provide adequate evaluation and mitigation.

Staff response: The CEQA Analysis for the Project relied upon the analysis prepared for the WOSP, which identified GHG impacts as Less Than Significant, and applied the City's SCA

related to GHGs in place at the time. The SCA required individual projects to complete an analysis to determine if they are below the City's project level threshold of 1,100 metric tons of carbon dioxide equivalent (CO₂e) annually AND more than 4.6 metric tons of CO₂e annually per service population. Under the SCA, if both of these thresholds are exceeded then the project must include a GHG reduction plan to reduce project emissions below the threshold. The CEQA Analysis for the proposed Project included the required GHG analysis and concluded that the emissions generated by the Project would not exceed the requirement to prepare a GHG Reduction plan since it did not exceed the 4.6 metric tons of CO₂e per service population on an annual basis. The appellant relies upon the Soil/Water/Air Protection Enterprise (SWAPE) letter attached to their appeal submittal to claim that GHG emissions estimated in the CEQA Analysis using CalEEMod were incorrect and unsubstantiated, and the GHG threshold used was outdated. However, the GHG emissions estimated in the CEQA analysis were based on conservative and accurate parameters as further described in the written response from UPP (**Attachment C**).

In addition to the Project being below the SCA threshold requiring a GHG Reduction Plan, the City recently adopted the updated ECAP in July 2020 (Resolution No. 88267 CMS), which included recommendations for analysis of development proposals going forward in the form of an ECAP Consistency Checklist. The format of the ECAP Checklist was approved and put into use for the review of development proposals in December 2020 and is now a submittal requirement for development projects requiring environmental review. The ECAP Consistency Checklist replaced the prior City Threshold and SCA and no longer requires a GHG analysis of every project, but rather only in the event that a project is determined to be inconsistent with the Checklist. Given that the Project was filed and under review prior to the adoption of the ECAP Consistency Checklist, the Project applicant completed the previously required project level GHG analysis as well as submitting the ECAP Consistency Checklist after its adoption. The project demonstrated consistency with the ECAP, and no additional GHG reductions are required. For the reasons stated above, a GHG Reduction Plan is not required by the project as claimed by the appellant.

E. Appellant Claims the Project Fails to Adequately Analyze and Mitigate Noise and Vibration Impacts

Appellant argument: The appellant argues that the application of the City's SCAs to address noise and vibration issues by requiring approval of a vibration reduction plan prior to permit issuance and requiring compliance with operational noise performance standards is inadequate since the efficacy of those measures is unknown at this time. Thus, an EIR must be prepared to provide enforceable mitigations with support of evidence as to the noise reduction that would be achieved.

Staff response: The City of Oakland applies a SCA that requires a vibration reduction plan in circumstances where a proposed project is located within close proximity to an active rail line. In the case of the subject property, it is located directly adjacent to the BART tracks, and as a result, this SCA was applied to the Project. The appellant argues that this SCA is inadequate under CEQA because it is not known if such measures would effectively address the impacts from vibration. In this case, this SCA is not applied for CEQA purposes, as CEQA is required to analyze the impacts of a project on the environment, and not the impact of the existing surrounding environment on the proposed Project. Nonetheless, this condition is applied so that

analysis can be prepared to determine if additional vibration reduction measures should be incorporated into the structural design of the building to limit the vibration impacts felt by future residents of the development. It would be unnecessary and inappropriate to require such analysis up-front in the entitlement process as these measures are best deferred to when the structural design of the building is being prepared in anticipation of submittal of the required building permits to construct the building.

The appellant also argues that the application of the City's SCA regarding operational noise is inadequate since it relies upon the City's performance standards, and the efficacy of those standards cannot be known unless a full analysis is prepared and mitigation incorporated as part of an EIR. In this circumstance, the proposal is for a residential development in a dense urban area directly adjacent to public transit, and such residential use would not be expected to generate noise levels in excess of the City's standards. Only certain mechanical equipment may exceed the maximum receiving levels for nearby receptors. The City's SCA is sufficient since equipment is typically located on rooftops of residential buildings, and during the building permit review the individual equipment is reviewed to ensure that adequate noise dampening or distance is provided to reduce the noise levels at nearby property lines, and this Project does not create any unusual circumstance that would require additional analysis. Furthermore, the subject project site does not share any abutting property lines other than the northern property line that is adjacent to the BART tracks, and the closest nearby receptor is more than 300 feet away.

F. Appellant Claims the Project Is Inconsistent with the Density Established by Existing Zoning and Doesn't Qualify for Infill Streamlining Exemptions

Appellant argument: The appellant argues that by being granted a density bonus through the affordable housing density bonus process, the Project no longer complies with the underlying zoning, general plan or WOSP densities. As such, the Project cannot be considered as consistent with the WOSP, and City may not use the Qualified Infill Exemption under CEQA.

Staff response: The proposed Project is consistent with the applicable general plan and zoning densities, and therefore the City appropriately applied the CEQA exemptions provided in CEQA Guidelines Sections 15182 (projects pursuant to a specific plan), 15183 (projects consistent with a community plan, general plan, or zoning) and 15183.3 (streamlining for infill projects). Each of these exemptions requires that the Project be consistent with applicable development density standards.

The Project proposes 222 units on an approximately 38,394 square-foot site located in the S-15W, 160-foot-height zoning district and in the "Community Commercial" General Plan land use designation area. The zoning designation permits a maximum residential density of one dwelling unit per 225 square feet of lot area, or 193.6 dwelling units per acre. Therefore, the maximum base residential density for the site is 171 dwelling units. By reserving 16 units (9 percent) of the base units as affordable for very low-income households³, the project is entitled to an additional 30 percent density increase over the maximum allowable residential density for a total of 223 dwelling units. Section III of the CEQA Analysis (Project Consistency Assessment) shows that

³ Very low-income households are defined as those households that earn below 50 percent of the area median income.

beyond this proposal being consistent with the applicable general plan and zoning, the number of dwelling units proposed is also within the development buildout assumptions for the applicable 7th Street Opportunity Area previously studied in the WOSP EIR.

The Oakland density bonus regulations, Planning Code Chapter 17.107, are a component of Oakland's zoning regulations; therefore, a project that receives a density bonus and otherwise complies with the applicable zoning requirements is consistent with the density provided in the applicable zoning designation. The density bonus regulations state that the granting of a density bonus shall not be interpreted in and of itself to require a General Plan amendment, zoning change, or other discretionary approval (Planning Code Section 17.107.040.F). This is consistent with the State density bonus law, which states that the granting of a density bonus "shall not require, or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval" (Gov. Code Sec 65915(f)(5)). Further, the State Housing Accountability Act, Government Code Section 65589.5, clearly states that a city cannot use the receipt of a density bonus as a basis on which to find that a proposed housing development project is inconsistent with an applicable development standard. In other words, a project that is otherwise consistent with the applicable general plan and zoning requirements is eligible to receive a qualifying density bonus without also seeking a general plan amendment or rezoning.

Similarly, a project that provides affordable housing and receives a density bonus is consistent with the goals of the General Plan. The City's Housing Element, a component of the Oakland General Plan, acknowledges that the City will implement the density bonus program to permit projects to exceed the maximum allowable density set by zoning if the project includes units set aside for occupancy by very low-, low-, and moderate-income households (see Housing Element, Policy 2.3- <https://www.oaklandca.gov/resources/read-the-2015-2023-housing-element>). This program serves as a means for the City to achieve its below market rate affordable housing construction goals.

Finally, appellant describes the density bonus approval as an "anticipated" action that would require a future approval. This is incorrect. The City of Oakland reviews density bonus requests as part of the land use entitlement package. The approval by the Planning Commission included approval of the requested density bonus and also included as a condition of approval that the project set aside 16 units for very low-income households.

G. Appellant Claims the City Cannot Make the Required Findings Under the Subdivision Map Act to Approve the Project's Tentative Parcel Map

Appellant argument: The appellant argues the City cannot make the required TPM findings related to impacts on public health due to the impacts to public health identified in their appeal including air quality, hazardous material exposure, and GHGs. Additionally, the appellant claims that the City cannot make the TPM findings related to consistency with a specific plan given their claim that the density bonus makes the project inconsistent with the WOSP.

Staff response: The required TPM findings are included in the March 3, 2021 Planning Commission staff report included as **Attachment A** to this report. The appellant claims that these findings could not have been met due to impacts on public health due to air quality, hazardous materials and GHGs, which have all been responded to in this report to demonstrate

that no such conditions exist that have not already been addressed in prior CEQA documents. The appellant's claim that the findings for General Plan consistency in the TPM findings cannot be made due to the use of the affordable housing density bonus is also incorrect as described above in Section F of this report. As such, the findings adopted by the Planning Commission approval on March 3, 2021 are adequate and should be upheld.

FISCAL IMPACT

The Project involves a private development and does not request or require public funds and has no direct fiscal impact on the City of Oakland. If constructed, the Project would provide a positive fiscal impact for the City through increased property taxes, sales taxes, utility user taxes, and business license taxes, while at the same time increasing the level of municipal services that must be provided.

PUBLIC OUTREACH / INTEREST

This item has appeared before community meetings and public hearings on two prior occasions. The Project appeared before the City Planning Commission's Design Review Committee on October 28, 2020, and the full Planning Commission for decision on the development application on March 3, 2021.

COORDINATION

This report and legislation were prepared in coordination with the City Attorney's Office and the Budget Bureau.

SUSTAINABLE OPPORTUNITIES

Economic: Allowing the Project to proceed would establish a new multi-family development on an existing vacant property within the 7th Street development opportunity area as identified in the WOSP and would increase property taxes to the City.

Environmental: Developing in already urbanized environments reduces pressure to build on agricultural and other undeveloped land. Sites near mass transit enable residents to reduce dependency on automobiles and further reduce adverse environmental impacts.

Race & Equity: The Project benefits the community by adding increased housing opportunities, including affordable housing units, in the city of Oakland, as well as temporary jobs during the construction of the Project.

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The WOSP EIR analyzed the environmental impacts of adoption and implementation of the WOSP and, where the level of detail available was sufficient to adequately analyze the potential environmental effects, provided a project-level CEQA review for reasonably foreseeable development. This project-level analysis allows the use of CEQA streamlining and/or tiering provisions for projects developed under the WOSP.

A detailed CEQA Analysis document was prepared, entitled “1396 5th Street Project CEQA Analysis” dated February 2021, which evaluates the potential project-specific environmental effects of the proposed Project and whether such impacts were adequately covered by the WOSP EIR to allow the below-listed streamlining and/or tiering provisions of CEQA to apply. The document is available on the City website at the following links:

CEQA Analysis: <https://cao-94612.s3.amazonaws.com/documents/1396-5th-Street-CEQA-Analysis.pdf>

Errata: <https://cao-94612.s3.amazonaws.com/documents/1396-5th-Street-Errata-Memorandum.pdf>

Applicable CEQA streamlining and/or tiering code sections are described below, each of which, separately and independently, provide a basis for CEQA compliance:

- A. Addendum.** The WOSP EIR analyzed the impacts of development within the WOSP. The Project would not result in substantial changes or involve new information not already analyzed in the WOSP EIR because the level of development now proposed for the site is within the broader development assumptions analyzed in the WOSP EIR. The Project would not cause new significant impacts not previously identified in the WOSP EIR nor result in a substantial increase in the severity of previously identified significant impacts. No new mitigation measures would be necessary to reduce significant impacts. No changes have occurred with respect to circumstances surrounding the WOSP that would cause significant environmental impacts to which the Project would contribute considerably, and no new information has been put forward that shows that the Project would cause significant environmental impacts. Therefore, no supplemental environmental review is required in accordance with Public Resources Code Section 21166, and CEQA Guidelines Sections 15162 through 15164.
- B. Specific Plan Exemption.** The Project meets the eligibility guidelines and is a qualifying mixed-use project located within a priority transit area and is consistent with the development density established by the WOSP and analyzed in the certified WOSP EIR. As such, no further analysis of the environmental effects of the Project is required in accordance with Public Resources Code Section 21155.4 and CEQA Guidelines Section 15182.
- C. Community Plan Exemption.** The Project would not result in significant impacts that (1) are peculiar to the Project or project site; (2) were not previously identified as significant Project level, cumulative, or offsite effects in the WOSP EIR; or (3) were previously identified as significant effects, but as a result of substantial new information not known

at the time the WOSP EIR was prepared, would increase in severity beyond that described in the EIR. Therefore, the Project would meet the criteria to be exempt from further environmental review in accordance with Public Resources Code Section 21083.3 and CEQA Guidelines Section 15183.

- D. Qualified In-fill Exemption.** Attachment D of the CEQA Analysis contains a written analysis consistent with Appendix M to the CEQA Guidelines examining whether the Project will cause any effects that require additional review under CEQA. The Project would not result in significant impacts that (1) are peculiar to the Project or project site; (2) were not previously identified as significant Project level, cumulative, or offsite effects in the WOSP EIR; or (3) were previously identified as significant effects, but as a result of substantial new information not known at the time the WOSP EIR was prepared, would increase in severity beyond that described in the EIR. Therefore, the Project would meet the criteria to be exempt from further environmental review in accordance with Public Resources Code Section 21094.5 and CEQA Guidelines Section 15183.3.

ACTION REQUESTED OF THE CITY COUNCIL

Staff Recommends That the City Council conduct a public hearing and, upon conclusion, adopt A Resolution denying the appeal by East Bay Residents for Responsible Development and upholding the Planning Commission's environmental determination and approval of a proposal to construct 222 dwelling units located at 1396 5th Street, Oakland CA (Project Case No. PLN20-101), based on the findings contained in the City Council agenda report, the CEQA Analysis prepared for the project, and record before the City of Oakland Planning Commission.

For questions regarding this report, please contact Peterson Vollmann, Planner IV, at (510) 238-6167.

Respectfully submitted,



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Attachments (3):

- A. [March 3, 2021 Planning Commission Staff Report](#)
- B. March 12, 2021 Appeal by East Bay Residents for Responsible Development
- C. May 25, 2021 Memo from Urban Planning Partners