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Via E-mail

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Re: Marketplace Redevelopment Project, "Parcel B" (FDP18-001)
(January 24, 2019 Planning Commission Hearing, Agenda Item 7.1)

Dear Planning Commission members, Mr. Bryant and Ms. Desai:

I am writing on behalf of the Laborers International Union of North America, Local Union 304 and its members living in and around the City of Emeryville ("LIUNA") regarding the Commission's consideration of a new Final Development Plan ("FDP") for Parcel B of the Marketplace Redevelopment Project Planned Unit Development. The new FDP would reduce the amount of retail space previously approved for this area and add 150,000 square feet of office/lab space and 565 parking spaces. Relevant to the comments below, the residential building included in the Project on Parcel A has not yet been constructed. Two other residential buildings on Parcels C2 and D are under construction and not yet completed. The Marketplace Redevelopment Project, including the FDP and the three residential buildings that have not been constructed or are under construction, are collectively referred to as the Project.

The currently proposed change to the FDP is not accompanied by any new environmental review prepared pursuant to the California Environmental Quality Act

("CEQA"). The City is relying on the environmental impact report prepared and certified for the Project in January 2008. Since that time, new information of substantial importance has come to light regarding the emission of toxic formaldehyde from interior finishes of residences and commercial buildings which emissions pose significant health risks to residents and workers in these environments. The risk posed by formaldehyde emissions in new buildings was not known and could not have been known with the exercise of reasonable diligence at the time the Project's EIR was certified in January 2008. Because this new information regarding the health threats posed by formaldehyde emissions shows that the Project may have one or more significant effects not discussed in the 2008 EIR, a supplemental EIR addressing this significant impact must be prepared before approving the FDP or proceeding with the construction of the Parcel A residential building, and in time to incorporate mitigation measures into the two other residential buildings.

When changes to a project's circumstances or new substantial information comes to light subsequent to the certification of an EIR for a project, the agency must prepare a subsequent or supplemental EIR if the changes are "[s]ubstantial" and require "major revisions" of the previous EIR. *Friends of Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist.* (2016) 1 Cal.5th 937, 943. "[W]hen there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations "turn[] on the value of the new information to the still pending decisionmaking process." *Id.*, 1 Cal.5th at 951–52. The agency must "decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects." *Id.*, 1 Cal.5th at 952. Section 21166 and CEQA Guidelines § 15162 "do[] not permit agencies to avoid their obligation to prepare subsequent or supplemental EIRs to address new, and previously unstudied, potentially significant environmental effects." *Id.*, 1 Cal.5th at 958.

Section 15162 provides, in relevant part,

(a) When an EIR has been certified or a negative declaration adopted 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, one or more of the following:

(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 as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

- (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 proponents decline 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.
- (b) If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration, the lead agency shall prepare a subsequent EIR if required under subdivision (a).

14 Cal. Admin. Code § 15162(a)-(b). New information of substantial importance regarding the carcinogenic health impacts of formaldehyde emissions from newly constructed residential units and offices, which was not known and could not have been known with the exercise of reasonable diligence at the time the 2008 EIR was certified, shows that the Marketplace Redevelopment Project may have one or more significant health effects not discussed in the previous EIR. As a result, a subsequent EIR must be prepared for the Project.

Formaldehyde is a known human carcinogen. Many composite wood products typically used in residential and office building construction contain formaldehyde-based glues which off-gas formaldehyde over a very long time period. The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particle board. These materials are commonly used in residential and office building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims. Given the prominence of materials with formaldehyde-based resins that will be used in constructing the Project and the residential buildings, there is a significant likelihood that the Project's emissions of formaldehyde to air will result in very significant cancer risks to future residents and workers in the buildings. Even if the materials used within the buildings comply with the California Air Resources Board's Airborne Toxic Control Measures, significant emissions of formaldehyde may still occur. As a result of this more recently identified significant effect to air quality and because the CEQA Analysis and prior EIR fail to address the health risks posed by these emissions, the City must prepare a subsequent or supplemental EIR "to address new, and previously unstudied, potentially significant environmental effects." *Friends of Coll. of San Mateo Gardens*, 1 Cal.5th at 958.

Both the office/lab space currently being considered as well as the three residential buildings will have significant impacts on air quality and health risks by emitting cancer-causing levels of formaldehyde into the air that will expose workers and residents to cancer risks well in excess of BAAQMD's threshold of significance. Information regarding the health risks posed by the use of formaldehyde-based products in building construction was not reasonably known in January 2008 when the

EIR for the Marketplace Redevelopment Project was certified. Likewise, CARB's Airborne Toxic Control Measures only went into effect on April 18, 2008. 17 Cal. Admin. Code § 93120. It was not until 2009 with the publication of a study known as the California New Home Study ("CNHS") that prior risks of unregulated formaldehyde-based products to residents and workers could reasonably be known. The CNHS can be found at <https://www.arb.ca.gov/research/apr/past/04-310.pdf>. Both of these key developments occurred after the certification of the EIR in January 2008. Prior to those events, it was not reasonable for people to be reasonably aware of the health risks posed by formaldehyde emissions in new buildings in order to make informed comments on that issue.

Even assuming people were reasonably aware of the formaldehyde emissions in new buildings in January 2018 as well as possible health risks associated with those emissions, people would not have been reasonably aware that buildings using materials that comply with CARB's ATCM would still pose significant health risks. Most people would assume that the emissions of formaldehyde from newly constructed buildings would not pose significant health risks if they were to comply with CARB's ATCM going forward. However, last year a follow-up study by Chan et. al., 2018 (attached as Exhibit A) measured formaldehyde levels in new structures constructed after the 2009 CARB rules went into effect. Although that study showed that, when compared to residences addressed in the earlier CNHS, the median level of formaldehyde in new homes after the CARB rules went into effect was reduced by about 30 percent, the levels of formaldehyde still result in cancer risks greater than 100 in a million, well above the 10 in a million significance threshold established by the Bay Area Air Quality District. This is significant new information that requires the EIR to be substantially revised in order to address this newly identified health risk to residents and workers.

Based on expert comments submitted on other similar projects and assuming all the Project's and the residential buildings' materials are compliant with the California Air Resources Board's formaldehyde airborne toxics control measure, future residents and employees using the Project will be exposed to a cancer risk from formaldehyde greater than the BAAQMD's CEQA significance threshold for airborne cancer risk of 10 per million. Currently, the City does not have any idea what risk will be posed by formaldehyde emissions from the Project or the residences. As a result, the Commission should deny the Project and remand its review back to staff in order to investigate this issue and prepare an analysis supported by appropriate expertise calculating the health risks that the Project's office and residential building's formaldehyde emissions may have on future residents and workers and present that analysis in a subsequent or supplemental EIR along with necessary mitigation measures.

The concern of unhealthy levels of formaldehyde in the Project is heightened by its proximity to the Amtrak station and the Union Pacific railroad tracks abutting the Project to the east. Because of train and traffic noise, the buildings' interiors will exceed applicable noise standards when the windows are open. See 2007 DEIR, p. 230. As a

result, it is expected that residents and office workers will have closed windows for long periods of time and mechanical ventilation will be the sole method of circulating indoor air for the Project. *Id.* The fact that windows will be closed will tend to exacerbate the levels of formaldehyde emitted into the Project's interior spaces.

A number of feasible mitigation measures are available to reduce formaldehyde emissions from the Project, including a condition that the Project only use no-added-formaldehyde or ultra-low emitting formaldehyde composite wood products, which are readily available. See https://www.arb.ca.gov/toxics/compwood/naf_ulef/naf_ulef.htm. See also https://www.arb.ca.gov/toxics/compwood/naf_ulef/listofnaf_ulef.htm. The City also could require the Project to add filters to the Project's air ventilation systems capable of removing air-borne formaldehyde. Since the City's prior EIR does not analyze this impact at all, none of these or other mitigation measures have been considered.

Any decision not to supplement the 2008 EIR to address the Project's formaldehyde emissions also would be contrary to the California Supreme Court decision in *California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 386 ("*CBIA*"). In that case, the Supreme Court expressly holds that potential adverse impacts to future users and residents from pollution generated by a proposed project **must be addressed** under CEQA. At issue in *CBIA* was whether the Air District could enact CEQA guidelines that advised lead agencies that they must analyze the impacts of adjacent environmental conditions on a project. The Supreme Court held that CEQA does not generally require lead agencies to consider the environment's effects on a project. *CBIA*, 62 Cal.4th at 800-801. However, to the extent a project may exacerbate existing environmental conditions at or near a project site, those would still have to be considered pursuant to CEQA. *Id.* at 801. In so holding, the Court expressly held that CEQA's statutory language required lead agencies to disclose and analyze "impacts on **a project's users or residents** that arise **from the project's effects** on the environment." (*Id.* at 800 (emphasis added).)

Carcinogenic formaldehyde emissions from the Project are not an existing environmental condition. Those emissions to the air will be from the Project. People will be working in, residing in, and using the Project once it is built and begins emitting formaldehyde. Once built, the Project likely will emit formaldehyde at levels that pose significant health risks. The Supreme Court in *CBIA* expressly finds that this type of air emission and health impact by the project on the environment and a "project's users and residents" must be addressed in the CEQA process.

The Supreme Court's reasoning is well-grounded in CEQA's statutory language. CEQA expressly includes a project's effects on human beings as an effect on the environment that must be addressed in an environmental review. "Section 21083(b)(3)'s express language, for example, requires a finding of a 'significant effect on the environment' (§ 21083(b)) whenever the 'environmental effects of a project will cause substantial adverse effects *on human beings*, either directly or indirectly.'" (*CBIA*, 62

Cal.4th at 800 (emphasis in original.) Likewise, “the Legislature has made clear—in declarations accompanying CEQA’s enactment—that public health and safety are of great importance in the statutory scheme.” (*Id.*, citing e.g., §§ 21000, subds. (b), (c), (d), (g), 21001, subds. (b), (d).) It goes without saying that the hundreds of future workers and residents at the Project are human beings and the health and safety of those workers is as important to CEQA’s safeguards as other people near the Project site.

For the above reasons, the City’s proposed finding that the 2008 EIR need not be supplemented is incorrect. A subsequent or supplemental EIR must be prepared for the Project which includes an investigation and analysis of the Project’s formaldehyde emissions and consideration of appropriate mitigation measures to address all significant health risks posed by the Project.

Thank you for considering these comments.

Sincerely,

A handwritten signature in blue ink that reads "Michael R. Lozeau". The signature is written in a cursive style.

Michael R. Lozeau
Lozeau | Drury LLP