

May 29, 2019

**VIA E-MAIL**  
**AND HAND DELIVERY**

Honorable Ally Medina, Mayor  
and Members of the Emeryville City Council  
1333 Park Avenue  
Emeryville, CA 94608

**Re: Appeal of Planning Commission's May 14, 2019 Approval of Final  
Development Plan for the Marketplace Redevelopment Project, "Parcel B"  
(FDP 18-001)**

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Dear Mayor Medina and Members of the City Council:

On behalf of Wareham Development (Wareham) and pursuant to Municipal Code sections 9-7.202, 9-7.1012 and 9-7.1405, we hereby appeal to the City Council the May 14, 2019 decision of the Planning Commission to approve the Final Development Plan for the Marketplace Redevelopment Project, "Parcel B" (FDP18-001 or FDP). We understand that the City Council at its meeting on May 21, 2019 voted to appeal to itself the FDP approval. Wareham applauds and supports that decision. We are heartened by the City Council's decision to take a hard look at the Planning Commission's actions. We are confident that this appeal letter and accompanying documents and studies will support the City Council's appeal and hopeful it will assist the City Council in its consideration of the FDP.

Wareham requests that the City Council schedule this appeal and its own appeal for a full public hearing and that the Parcel B FDP approval be overturned based on myriad legal flaws and policy concerns, including that the FDP:

- Is inconsistent with the Marketplace Preliminary Development Plan;
- Fails to comport with aesthetics conditions of approval and mitigation measures;
- Fails to satisfy wind conditions of approval and mitigation measures;
- Is inconsistent with the City's General Plan, and
- Will generate new or more severe significant environmental impacts, thus requiring additional environmental review under CEQA.

The existence of any one of these bases is fatal to the FDP. The remainder of this letter, and the supporting documents, will elucidate these points.

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## **I. Wareham's Interest**

At the outset, we wish to address the reason that Wareham has assiduously followed the FDP for Parcel B, and allay any notion that Wareham's opposition stems from anti-competitive sentiments. Wareham is not anti-development nor against the construction of research and development space at Parcel B. As you are aware, Wareham has invested decades of effort and substantial funds into crafting an attractive, cohesive research campus near the Emeryville train station, creating a life sciences hub where important issues may be investigated and addressed. Wareham's most recent building, EmeryStation West, is adjacent to the train station and directly across the railroad tracks from Parcel B. EmeryStation West is a thoughtfully-designed, visually appealing building that blends in well with its surroundings (*see Exhibit A* for photos of EmeryStation West and other elements of the research campus). Wareham welcomes additions to the Emeryville research cluster. As its campus is fully leased, including the newest building, Wareham believes that new supply will help support the industry, which is good for everyone. However, Wareham takes serious exception to the design details of the Parcel B project as currently proposed because it fails to live up to the promises of the Preliminary Development Plan and will create visual blight on the landscape as well as new environmental impacts that the community and the City never agreed to or expected. Quite the opposite of resisting lab development of Parcel B, as discussed later in this letter, Wareham has devoted its resources to developing two options for securing the same amount of lab space on Parcel B as sought by the FDP, but doing so via a more respectful and attractive design.

## **II. Brief Background**

In 2008, a Preliminary Development Plan for the 15-acre Marketplace site (PDP) was approved. The PDP forms the zoning regulations for the Marketplace site and allows construction of numerous residential and mixed-use structures, including one at the Parcel B Shellmound Site consisting of 120,000 square feet of office use (5 floors over 5 levels of parking) with roughly 30,000 square feet of commercial retail space. A full environmental impact report (EIR) was prepared under the California Environmental Quality Act (CEQA)<sup>1</sup> to examine and ameliorate environmental effects of the PDP buildout. The EIR's mitigation measures and many other requirements were imposed as conditions of approval on the PDP.<sup>2</sup>

Wareham actively monitored the Marketplace EIR and composition of the PDP. Wareham met and negotiated elements of the plan with TMG, then-owner of the Marketplace. Changes were made and conditions were enacted to ensure that the Marketplace development would be symbiotic with its neighbors, of particular concern since only the railroad tracks separate Marketplace lands (including Parcel B) from the train station and life science campus to the east. A material

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<sup>1</sup> (Public Resources Code section 21000 *et seq.*; State CEQA Guidelines (Guidelines), 14 Cal. Code Regs. section 15000 *et seq.*)

<sup>2</sup> For ease of reference, a complete set of the PDP conditions of approval is attached as Exhibit B.

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inducement for Wareham to not legally challenge the PDP approval in 2008 was the inclusion of the very same plans and conditions of approval governing allowed square footages, design, wind and the like that the current FDP fails to meet. The PDP massing envelope featured setbacks on both the south and north sides of the Parcel B building, as indicated on the approved PDP plans attached hereto as Exhibit C. The length of the building mass at maximum height was far less than that of the current proposal, and the width between the Parcel A and B buildings was greater than the current proposal.

In June, 2016, a Final Development Plan was approved for Parcel B. It included ground floor retail uses and a parking structure. Wareham lodged no objections to the 2016 Final Development Plan, agreeing with the City that it was consistent with the PDP and satisfied pertinent conditions of approval.

The current design for Parcel B was revealed to Wareham and the rest of the public at a December 13, 2018 study session. With seemingly little scrutiny, the FDP was approved by the Planning Commission on January 24, 2019 only 5 weeks later, with those 5 weeks including the year-end holiday season. Given the radical change in height, design, density and uses that the latest proposal represented, the opportunity to review and discuss the new FDP was extremely truncated. While the net increase in square footage is relatively minimal, the new building's design is far boxier and much taller over a longer length than the approved PDP. On February 8, 2019, Wareham appealed the Planning Commission's FDP approval to the City Council on numerous grounds, including failure to conduct a required wind analysis. The City Council on March 19, 2019 remanded the appeal to the Planning Commission, directing the Commission to consider the issues raised by the appeal.

Without a quantitative wind analysis and with no comparison to the analysis of wind effects in the Marketplace EIR, the Planning Commission considered the FDP at its April 25, 2019 meeting. Prior to that hearing, Wareham submitted detailed comments and critiques, even engaging its own architect to develop alternative designs for Parcel B that would satisfy the conditions of approval and meet the City's heretofore rigorous design standards. The Planning Commission indicated its intention to approve the FDP in its original form and the public hearing was closed. On May 14, 2019, with a revised draft resolution before it that attempted (but failed successfully) to bolster the Planning Commission's bases for approval, the Commission held its final hearing on the FDP. The day before such meeting, the applicant at long last submitted a wind analysis,<sup>3</sup> yet it still failed entirely to compare the effects of the Parcel B FDP building to the EIR impact analysis or to satisfy the terms of the relevant wind mitigation measures and associated conditions. Neither City staff nor the public were given sufficient opportunity to evaluate the applicant's wind analysis. The Planning Commission reopened its public hearing for the purpose

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<sup>3</sup> We are surprised that two Planning Commission hearings were scheduled to consider the FDP after the City Council remand without any further wind analysis, despite the City Council having expressed concern over the wind issues and the need for further study.

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of receiving the late wind analysis, then several Commissioners delivered seemingly-scripted remarks concerning the relationship of the FDP to City design standards and the PDP conditions. Though at least two Commissioners appeared concerned about the FDP's consistency with pertinent design requirements, the Planning Commission—without any meaningful deliberation or discussion—adopted the proffered resolution to approve the FDP with no changes.

The City Council's appeal on May 21, 2019 and this appeal followed. For the reasons explained below, neither the law nor City policy can sustain the FDP. It should be overturned entirely or revised in the manner suggested by Wareham's thoughtful alternate designs.

### **III. The FDP Is Inconsistent With The Governing PDP And Thus May Not Be Approved.**

The fundamental requirement for FDP approval is that the FDP must comport with the approved zoning regulations effected by the PDP. Section 9-7.1004(b) of the Emeryville Planning Regulations provides as follows:

In approving a final development plan, the Planning Commission must make both of the following findings:

- (1) The final development plan substantially conforms to the preliminary development plan.
- (2) Changes and conditions of approval specified by the City Council in its approval of the preliminary development plan have been met.

This section will address PDP consistency while the next section of this letter will explain the myriad ways in which the FDP fails to meet the PDP conditions of approval.

A PDP obviously encompasses more than merely its words and textual limitations on height, square footage, uses and the like. A PDP is required to include “[g]raphics as are necessary to establish the physical scale and character of the development and demonstrate the relationship among its constituent land uses, buildings and structures, public facilities, and open space.” (Emeryville Planning Regulations section 9-7.1006.) Notably and logically, PDP condition of approval I.B specifies that all future development must be consistent with the physical plans incorporated into and comprising the PDP:

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- B. APPROVED PLANS. The future Final Development Plans for each phase of the project, shall substantially comply with the plans PDP plans [sic] dated April 16, 2008, entitled “Marketplace Redevelopment” prepared by Heller Manus Architects, pages 1 to 15 except that the construction of the park shall be completed prior to the issuance of any temporary certificate of occupancy of any building in Phase II.

The approved plans are contained in Exhibit C hereto. The Planning Commission resolution fails entirely to address these plans, relying instead on a textual consideration of consistency with PDP overall square footage, uses and height limitations, but never addressing the physical design of the buildings allowed by the PDP. Remarkably, the resolution states, “The revised proposal is to create a slightly smaller mixed-use development that replaces the existing surface parking lots with slightly less commercial space and within a shorter time frame.” (Resolution, page 4.) The FDP structure is larger in square footage and massing than the PDP allows.

Even a cursory comparison of the plans shows that the FDP fails to comport with the PDP. The applicant submitted exhibits showing the difference between the massing of the Parcel B PDP plans and FDP plans, which are attached hereto as Exhibit D. Even an untrained eye can see that the building now proposed looms far larger than that allowed by the PDP, with the office/lab component extending a full 470 feet across the parking podium rather than the approved 270 foot long office element.<sup>4</sup> Consider the first page of Exhibit D and see how far to the north the proposed Parcel B building extends behind the Public Market building compared to the PDP plan and the fact that the setback between the Parcel B building and its neighbor on Parcel A has been reduced by 18 feet.<sup>5</sup>

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<sup>4</sup> Note that the Planning Commission staff reports and resolution appear to address consistency between the Parcel B FDP and the approved PDP based not on a straight and fair comparison of the Parcel B structures, but attempting to take credit for the Parcel A buildings being smaller than the PDP outside envelope for such structures. Consistency of the proposed Parcel B building with the physical Parcel B PDP plans must be judged alone. The applicant’s submittals appear to suggest that Wareham should consider itself lucky that a taller building was not built on Parcel A, and so should be willing to accept this new Parcel B design. Years ago, Wareham and others followed the Parcel A FDP process, and the many comments during that process yielded the approved and constructed design. The Parcel A design is not at issue here and what has been built on Parcel A is not relevant to the current inquiry of whether the proposed structure for Parcel B is consistent with the approved PDP Parcel B structure.

<sup>5</sup> The staff reports and applicant submittals indicate that the PDP setback of 76 feet has been reduced to 68 feet, but such calculation is measured from the wall of the Parcel A structure rather than from the protruding stairwell. In fact, the proposed setback between the Parcel A and Parcel B structures is only 58 feet, even more clearly inconsistent with the PDP, and exacerbating wind

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Moreover, experts have concluded that the FDP is out of compliance with and in no way substantially conforms to the PDP. Experienced laboratory architect DGA has carefully considered all of the evidence and concluded that the FDP is inconsistent with the PDP plans. (See DGA's analysis attached hereto as Exhibit E.) *Further and immensely compelling, Jeffrey Heller, the architect who prepared the PDP plans and is named in the PDP conditions of approval, has reviewed the proposed FDP plans and determined that they do not substantially comply with the PDP.* (See Mr. Heller's letter attached as Exhibit F.)

Because the FDP is inconsistent with the PDP, the City cannot legally approve the FDP absent an amendment to the PDP.

#### **IV. The FDP Does Not Comply With Conditions Of Approval And Mitigation Measures And Thus Cannot Be Approved.**

As noted above, the Emeryville Planning Regulations require that an FDP satisfy the pertinent PDP conditions of approval. Absent such consistency, the FDP may not be approved even if it is consistent with the PDP. Not only is this the law, but it makes sense. The very nature of conditions of approval is that the City has found that the approved project (here, the PDP plan) is generally satisfactory but still must be altered in some meaningful ways at later phases to meet the City's goals and objectives. The PDP emphasizes the primacy of conditions of approval in condition I.F:

- F. FAILURE TO COMPLY WITH CONDITIONS OF APPROVAL. If Applicant constructs buildings or makes improvements in accordance with these approvals, but fails to comply with any of the conditions of approval or limitations set forth in these Conditions of Approval and does not cure any such failure within a reasonable time after notice from the City of Emeryville ("City"), then such failure shall be cause for nonissuance of a certificate of occupancy, revocation or modification of these approvals or any other remedies available to the City.

The FDP for Parcel B does not satisfy key conditions of approval in the areas of aesthetics and wind. Note that these conditions of approval are also mitigation measures under CEQA. Thus, as explained and evaluated in greater detail in the CEQA section of this letter below, the failure to comply with these conditions/mitigations also implicates new or more severe environmental effects that require study before the FDP may be considered for approval. Apart from the CEQA deficiencies, the FDP cannot be approved because, as detailed in the subsections below, the conditions of approval have not been met. The conditions of approval cannot be ignored or altered

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effects.

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unless the PDP is amended by City Council action following Planning Commission recommendation.

**A. Aesthetics Conditions of Approval and Mitigation Measures**

The analysis submitted here by the DGA architectural firm, attached as Exhibit E, demonstrates the many ways in which the FDP violates the aesthetic conditions of approval set forth in Section II.E of the PDP conditions. The text below quotes pertinent elements of such conditions followed by a summary of the bases of inconsistency (in italics).

E. DESIGN RELATED:

1. Each of the following . . . measures shall be incorporated into the final project design (AES-1):
  - The proposed structures shall adequately reference, and be visually compatible with and not detract from the surrounding industrial buildings.

*There is no design reference to surrounding industrial buildings, an aesthetic inextricably associated with Emeryville. The Parcel B FDP design lacks any visual interest. In both design and mass, the proposed structure would detract from the surrounding area.*

- Create streetscape vitality and enhance the pedestrian experience through detailed treatment of building facades, including entryways, fenestration, and signage, vertical walls broken up with architectural detailing, protruded and recessed tower elements, stepped-back upper floors to provide appropriate building height transitions to adjacent buildings, and through the use of carefully chosen building materials, texture and color.

*The FDP design is the antithesis of architectural detailing, protruded and recessed tower elements, and stepped-back upper floors. And particularly on the long and unbroken face of the east wall, there is no texture or color to break the monotony.*

- Design of building facades shall include sufficient articulation and detail to avoid the appearance of blank walls or box-like forms.

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*As designed, the FDP building could not be MORE boxy. The project is a rectangular box measuring 470 feet long, 122 feet wide and 113 feet high. On the north, south and east sides, there is no articulation that responds to the scale of the neighborhood.*

2. All proposed new buildings shall be shown in detail including building materials, colors, skin, and fenestration. Towers and buildings along the rail road tracks shall be articulated with treatment such as variations in building planes, colors and materials, balconies and trellises to ensure that no visual wall is created along the railroad right of way. Visible exteriors of the structures shall be designed to blend in with the urban fabric of the neighborhood.

*The FDP structure again fails. It has a single building plane along the east that is over a football field and a half long and 113 feet high. The naked, open parking decks cannot in any reasonable way be argued as aesthetic relief to the building plane. Also, given the lack of details, it is further impossible to determine if the proposed public art along the east facade will provide any aesthetic benefit. Having commissioned public art itself, Wareham observes that the applicant's proposed \$250,000 budget seems woefully inadequate.*

5. Building heights shall not exceed the heights shown in the Preliminary Development Plan.

*While the highest level of the proposed FDP structure does not exceed the approved height for the building, a much longer portion of the FDP building (approximately 200 feet) is proposed to be constructed at a taller height compared to the approved PDP building. Thus, the building height indeed exceeds the height shown in the PDP such that this condition is not met.*

Failure to meet any one of these aesthetic conditions would disqualify the FDP from eligibility for approval. Clearly, since the FDP structure was not designed to meet any of these conditions, it cannot be approved.

## **B. Wind Conditions of Approval and Mitigation Measures**

The analysis submitted here by CPP Wind Engineering & Air Quality Consultants, attached as Exhibit G, demonstrates the many ways in which the FDP violates the pertinent wind conditions and mitigation measures. The text below quotes pertinent elements of condition III.A.3.d and Mitigation Measure WIND-1, followed by a summary of the bases of inconsistency (in italics).

Prior to the issuance of the FDP for the Shellmound building site, the applicant shall submit a review of the design by a qualified wind consultant. The design review shall evaluate the architect's

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employment of one or more of the following design guidelines to reduce wind impacts: West or southeasterly building faces shall be articulated and modulated through the use of architectural devices such as surface articulation, variation, variation of planes, wall surfaces and heights, as well as the placement of step-backs and other features. Utilize properly-located landscaping to mitigate winds. Porous materials (vegetation, hedges, screens, latticework, perforated or expanded metal) offer superior wind shelter compared to a solid surface. Avoid narrow gaps between buildings where westerly or southeasterly winds could be accelerated. Avoid “breezeways” or notches at the upwind corners of the building.

Wind tunnel or computerized computational fluid dynamics testing shall be required if a review of the final architectural design of the proposed mid-rise buildings is insufficient to determine whether the buildings would result in adverse wind impacts. Testing shall be used to determine if wind accelerations generated by the structure could reach hazardous levels and to develop design modifications that would reduce impacts to a less-than-significant level. (WIND-1, Main Street and Reduced Main Street Alternative).<sup>6</sup>

*The applicant has not submitted a review of the design of the FDP building by a qualified wind consultant. Neither the qualitative or belated quantitative wind analyses submitted by the applicant in connection with the Planning Commission’s review of the FDP constitute a design review of the structure. Contrary to the condition, the west and southeast building faces have not been articulated and modulated through the use of architectural devices such as surface articulation, variation, variation of planes, wall surfaces, and heights, and/or the placement of step-backs and other features. Even more troubling, the proposed FDP building would create a narrow gap between buildings on Parcels A and B, resulting in uncomfortable wind speeds that could render the area unsuitable for pedestrian use. (See CPP’s analysis attached as Exhibit G.) As noted by CPP, such a gap does not exist in the 2008 PDP building configuration.*

*Even had the applicant submitted a design review analysis, a wind tunnel study was required. The preliminary wind tunnel study prepared by the applicant’s consultant (RDWI) and*

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<sup>6</sup> As noted, condition III.A.3.d was based on Mitigation Measure WIND-1. The last two sentences of the first paragraph and the second paragraph are included in Mitigation Measure WIND-1 but not specifically referenced in condition III.A.3.d. As with all mitigation measures, Mitigation Measure WIND-1 was imposed on the project per condition II.B. Mitigation Measure WIND-1 was also referenced as a necessary measure to address significant environmental impacts in the City Council’s CEQA Findings Approving the PDP. (Ordinance No. 08-004, pp. 4-5, 22-23.)

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*submitted to the Planning Commission the day before it approved the FDP identifies significant unmitigated wind impacts. The significance criterion in the EIR asks whether the exposure, orientation, and massing of a proposed structure would substantially increase ground-level winds. The RDWI report provides no analysis whatsoever of whether the proposed FDP structure would substantially increase ground-level winds compared to the approved PDP building. The CPP analysis demonstrates that it would between Parcels A and B and at other designated sensor locations.<sup>7</sup>*

The City cannot ignore conditions of approval, especially ones that were imposed to mitigate significant environmental impacts. (*See, e.g., Katzeff v. Department of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601 [overturning a project approval that eliminated a previously-imposed wind mitigation measure]; *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 529 [unanimous Supreme Court observes that if an agency approves a project without incorporating a previously identified feasible mitigation measure, such action is “an abuse of discretion, which could be corrected in a court mandamus proceeding.”].) Because the FDP fails to comply with the wind conditions of approval, it cannot be upheld.

#### **V. The FDP Is Inconsistent With The City’s General Plan And Cannot Be Approved.**

All local land use decisions, including consideration of the FDP, must be shown to be “consistent with” the City’s General Plan. (*Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 152 [invalidating project approval where not shown to be consistent with general plan]; *Families Unafraid to Uphold Rural Etc. of Placer County v. Board of Supervisors of Placer County* (1998) 62 Cal.App.4th 1332, 1336 [county abused its discretion by approving a development project inconsistent with general plan policies].)

The City’s General Plan is effectively the “constitution for all future development” in the community, and any subordinate land use action that is not shown to be consistent with the general plan is “void ab initio.” (*Leshar Communications, Inc. v City of Walnut Creek* (1990) 52 Cal.3d 531, 540, 544.) “The propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570.)

In order to be deemed “consistent,” a proposed project must actually be “compatible with the objectives, policies, general land uses, and programs specified in the General Plan.” (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342,

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<sup>7</sup> RDWI states that wind comfort speeds are provided for “informational purposes” only. Yet, the Draft EIR states that “pedestrian comfort and safety” are both relevant to the wind impact analysis and references the San Francisco standard which includes a comfort criterion. (Draft EIR, pp. 333-334.)

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378-79 [county abused its discretion in adopting a specific plan that permitted development without “definite affirmative commitments to mitigate” impacts to traffic and housing contrary to policies and objectives set forth in its general plan].) “Consistency requires more than incantation, and [an agency] cannot articulate a policy in its general plan and then approve a conflicting project.” (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 789.)

Failure to comply with even one general plan policy is enough to render a project “inconsistent” with the general plan, and any project approvals would be invalid. (*See, e.g., Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91 [invalidating city’s approval of permit for commercial development because of failure to show consistency with one general plan policy]; *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 640-642 [finding a project to be inconsistent with an agency’s general plan based on its failure to comply with a single policy requiring the agency to “coordinate” with specified resource agencies on mitigation for impacts to special-status species]; *accord, Endangered Habitats League, supra*, 131 Cal.App.4th at 789 [project’s failure to comply with a single general plan provision calling for use of a prescribed traffic study methodology].)

The General Plan’s Urban Design Element is aimed at enhancing the public realm and everyday livability through implementation of key design principles. The General Plan specifically states that its Urban Design policies should be read together with the Marketplace PDP.<sup>8</sup> Therefore, the goals and policies are relevant to the present inquiry. The Parcel B FDP is inconsistent with the Urban Design Element, which includes “the principle of ‘stepping down’ to lower-scale development in the city, as well as stepping back at upper floors from the street edge in order to transition between various heights and densities.”<sup>9</sup> The General Plan directs that “[b]uilding form should be articulated to create visual interest, prevent bulky structures, and avoid blank walls.”<sup>10</sup> As established above and in the exhibits, the FDP building fails entirely to satisfy these directives, being instead composed of extremely long, uninterrupted, blank walls that are not stepped back or articulated in any meaningful way.

A key General Plan goal urges that sky exposure be maintained for the important public space of the Amtrak Transit Center and the looming FDP structure impairs this goal:

UD-G-11- Sky Exposure. Building form and massing that furthers sky exposure for adjacent sidewalks and public spaces, especially in gathering places such as the core and neighborhood center.

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<sup>8</sup> (General Plan page 5-2.)

<sup>9</sup> (General Plan page 5-18.)

<sup>10</sup> (General Plan page 5-35.)

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Several General Plan Urban Design policies deserve consideration here:

UD-P-33: Bulky and monolithic buildings shall be prevented through:

- Vertical articulation, such as step backs at higher floors, and less floor area as heights increase to reduce the apparent bulk of buildings.
- Horizontal articulation, such as varied setbacks, recessions/projections, change in materials, and building transparency, especially in Pedestrian Priority Zones.

UD-P-36: Where large floorplates are permitted, buildings shall be required to adhere to height, setback, and stepback standards, as required for view and sun access, but less stringent bulk standards shall be permitted.

UD-P-38: New development should employ changes in height, massing, and/or design character to create careful transitions in scale and density.

Again, as explained above and in the exhibits hereto, the FDP proposal fails to meet each of these policies. The FDP is inconsistent with the City's General Plan. As such, approval of it would be void ab initio.

## **VI. The FDP Cannot Be Approved Without Further CEQA Review.**

The proposed FDP building represents a change to the approved Parcel B project by including additional square footage, specifically 30,000 more square feet of office/laboratory space than originally approved and 42 additional parking spaces. Although the amount of proposed retail is less than the PDP maximum, the envelope space where such retail was intended to be has been consumed by extra parking spaces. In addition, the design of the building—being so much longer and of box-like form—is a major departure from the PDP building and must be examined. CEQA dictates that such project changes be evaluated to determine whether they would generate significant environmental impacts that were not analyzed in the EIR. This issue is not adequately addressed in the December 2018 Environmental Checklist that was attached to the January 24, 2019 Planning Commission staff report. The EIR found that the aesthetic and wind mitigation measures were needed even without the added space and changed design for Parcel B, so they are even more important now. The change in building design (which clearly affects wind and aesthetics), as well as the failure fully to implement the adopted mitigation measures,

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implicates new or substantially more severe environmental effects that must be addressed under CEQA before the FDP approval can be considered.

It is well settled under CEQA that if a later-approved project will generate new or substantially more severe significant environmental impacts than were accounted for in the EIR, a supplemental or subsequent EIR must be prepared before the City may act on the later approval. (Public Resources Code section 21166; CEQA Guidelines section 15162.) As to both aesthetics and wind effects, this trigger has been met. Thus, the City Council must direct that further CEQA review be undertaken prior to any further consideration of the FDP.

The Environmental Checklist purportedly evaluates the aesthetics effects of the FDP structure and states as follows on page 13:

EIR Mitigation Measures: See Appendix A for the mitigation measures for this impact area: AES-1, AES-2a, AES-2b, WIND-1a, WIND-1b, WIND-1 (Main Street and Reduced Main Street alternatives), SHADE-A (Main Street and Reduced Main Street alternatives). Each of these mitigation measures will be incorporated into the Parcel B FDP Project.

Contrary to this key representation, the referenced mitigation measures have been ignored and have NOT been incorporated into the Parcel B FDP. As a result, the significant impacts designed to be alleviated or reduced by such measures remain significant and unavoidable. The resulting substantially more severe impacts must be analyzed under CEQA. (*Katzeff, supra*, 181 Cal.App.4th at 614 [court observes that “where a public agency has adopted a mitigation measure for a project, it may not authorize destruction or cancellation of the mitigation . . . without reviewing the continuing need for the mitigation, stating a reason for its actions, and supporting it with substantial evidence.”].)

Perhaps even more remarkably, the text that follows that quoted above says:

Discussion of the Parcel B FDP: Compared to the PDP Project, the Parcel B FDP Project is smaller. The PDP Project approved building on Parcel B [sic] at 120 feet. The Parcel B Project is proposed to be 113 feet. Accordingly, impacts would be similar to those analyzed in the EIR.

While perhaps unintentionally, this text appears disingenuous and indicates a fatal flaw. The FDP building is anything but smaller than that allowed by the PDP. The building has more square footage, and it is 113 feet high over a span of 470 feet instead of being 120 feet high over just a span of 270 feet.

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Moreover, the belated wind analysis prepared by the applicant's consultant compares the proposed FDP building to existing conditions as opposed to properly comparing the impacts of the FDP building to the approved PDP structure analyzed in the EIR in order to gauge whether new or more severe impacts will result. (Public Resources Code section 21166 and CEQA Guidelines section 15162.) In properly comparing the FDP building to the approved PDP structure, CPP identifies new and/or substantially more severe wind impacts. (See Exhibit G.) Further, since the applicant's wind analysis was only provided the day before the Planning Commission hearing, there was insufficient time for it to be peer reviewed by a City consultant or staff so as to reflect the City's independent judgment and analysis, as required. (CEQA Guidelines section 15090.) The Planning Commission's approval of the FDP must be set aside on these grounds alone.

Particularly given the two independent architectural analyses submitted with this letter, as well as the wind effects analysis, substantial evidence cannot support anything but a conclusion that further CEQA review is warranted. Indeed, the applicant's own wind study identifies significant, unmitigated wind impacts.

#### **VII. Viable Design Alternatives Are Available For Parcel B.**

As noted at the outset, Wareham is not at all opposed to development of Parcel B consistent with the PDP and applicable conditions of approval and mitigation measures. Wareham has attempted to engage in meaningful conversations with the applicant about the issues raised herein, but its overtures and efforts to date have been rebuffed. Since the applicant was not receptive to exploring alternatives to address Wareham's concerns, Wareham on its own initiative spent a good deal of money and time working with experienced laboratory architect DGA and other consultants to create alternative designs whose massing reduces significantly the negative impacts on the Wareham campus and on the public Amtrak transit center. These alternatives are attached as Exhibit H.<sup>11</sup>

Option 1 would yield a project with the same rentable area as the FDP building, with tall and large floorplates that lab users seek and parking that meets Emeryville code requirements. Given the project's central location and proximity to transit, and the City's stated goal of trying to limit creation of parking and use of cars, it seems that a code-level of parking is the best path forward. If the applicant and the City on some basis believe it is essential to maintain the above-code parking ratio of the FDP proposal, Option 1A accomplishes that by adding one below-grade parking level. Wareham has developed below-grade parking on several occasions in its campus buildings. These are not "pie-in-the-sky" options, but were developed by an experienced research and development/lab architect working in tandem with a proven lab/life science campus developer steeped in knowledge about the pertinent market demands and economic realities.

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<sup>11</sup> Note that the options presented are massing drawings showing building envelopes, and the design details, incorporating all of the conditions of approval discussed above, would need to be developed before any final design of these options could be approved.

Honorable Ally Medina, Mayor  
and Members of the Emeryville City Council  
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These viable options strengthen the City's discretion not to merely embrace the FDP, but to take a hard look at and to overrule the Planning Commission's FDP approval, signaling that the applicant should consider options such as those presented by Wareham that honor the integrity of City's zoning process and the neighborhood of Parcel B.

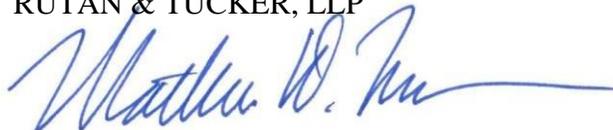
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In closing, Wareham requests that the Planning Commission's approval of the Parcel B FDP be overturned based on myriad legal flaws and policy concerns, including that the FDP: (1) is inconsistent with the Marketplace PDP, (2) fails to comport with aesthetics conditions of approval and mitigation measures, (3) fails to satisfy wind conditions of approval and mitigation measures, (4) is inconsistent with the City's General Plan, and (5) will generate new or more severe significant environmental impacts, thus requiring additional environmental review under CEQA.

Thank you for your consideration of Wareham's views on this matter. Please do not hesitate to contact me, Rich Robbins, or Geoff Sears with any questions regarding the correspondence.

Very truly yours,

RUTAN & TUCKER, LLP



Matthew D. Francois

MDF:cm

cc: Charlie Bryant  
Christine Daniel  
Michael Guina  
Sheri Hartz  
Rich Robbins, *via email only*  
Geoff Sears, *via email only*  
John Gooding, *via email only*