Holland & Knight

50 California Street, Suite 2800 | San Francisco, CA 94111 | T 415.743.6900 | F 415.743.6910
Holland & Knight LLP | www.hklaw.com

Chelsea Maclean
+1 415-743-6979
Chelsea.Maclean@hklaw.com

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[*Sent via email*]

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

Re: Public Market Parcel B – Response to Wareham September 16, 2019 Appeal Letter

Dear Mayor Medina and City Council Members:

We represent AG-CCRP Public Market, L.P. (AG-CCRP) in its application for a Final Development Plan (FDP) for Parcel B (FDP18-001). We are in receipt of Wareham Development's (Appellant) September 16, 2019 letter regarding its appeal of the Planning Commission's May 14, 2019 approval of the Parcel B FDP. As discussed in our June 18, 2019 letter, Appellant's arguments are unfounded.

To avoid repeating previous arguments that have already been made and for the sake of brevity, we have copied the executive summary from our June 18, 2019 letter in Section I. We have also addressed the great deference that a city has in interpreting its planning documents in Section II and the absence of any new environmental impacts in Section III. Finally, we have addressed and dismissed new arguments in the Appellant's September 16, 2019 letter in Section IV. The following summarizes the points in this letter.

- (Section I) June 18, 2019 Letter Executive Summary – Parcel B is a critical element of the Marketplace development, providing much needed services for the businesses at the Public Market and offices for Emeryville's growing research and development community. Design of the Parcel B building is consistent with the governing Preliminary Development Plan (PDP), complies with all conditions of approval and mitigation measures, conforms to the City's General Plan, and does not require additional review under the California Environmental Quality Act (CEQA).
- (Section II) City Discretion and Deference – Established case law affirms that Appellant cannot substitute its own judgment for the City's own reasonable and consistent interpretation of the City's planning documents. The City has significant discretion in rendering planning determinations and has found substantial conformance with its own

longstanding understanding of the PDP/FDP process. Past precedent in connection with the 64th and Christie parcel has also reflected flexibility in substantial conformance determinations. Similarly, the Planning Commission's determination of consistency with General Plan goals is entitled to deference. Some additional detail on the Public Market Art Plan, and the $1 million dollars in art funds allocated to Parcel B, has been included in this letter as it relates to the Planning Commission's findings.

- (Section III) More CEQA Review is Not Required – The Appellant has failed to demonstrate that there is a new significant wind impact and cities results not relevant to the significance threshold; further, all mitigation measures imposed for the conceptual PDP have been implemented for the final design of the FDP. Similarly, the Appellant has failed to show a substantial increase in the severity of shadow impacts. The Appellant also relies on case law related to a draft EIR that is not applicable to the final *certified* Marketplace EIR, for which there is a presumption against subsequent review.
- Section (IV) Appellant's Other New Arguments are Unfounded – The proposed parking adequately serves new uses and existing contractual obligations. Ample evidence demonstrates how the design and retail uses will activate the streetscape as well as consistency with the Shellmound Streetscape Design Guidelines. Finally, traffic consultants at Kimley Horn have reviewed the Marketplace EIR's conservative assumptions and updated traffic counts (finding 2014 traffic counts to be below 2005 traffic projections) and concluded that no new traffic impacts are projected for the proposed FDP.

Based on the ample analysis and substantial record created during the entitlement process and through the lengthy 9+ month appeal process, we respectfully request that the City Council affirm the Planning Commission and dismiss the appeal. (Emeryville Code, § 9-7.1405).

I. June 18, 2019 Executive Summary

As noted, the following excerpts the executive summary from the June 18, 2019 letter. The complete letter is attached as Exhibit A.

> The following summarizes our responses to the Appellant's contentions, as discussed in further detail in this letter:
>
> - (Section I) Appellant's Interest – Given the continually shifting nature of the Appellant's objections and behavior throughout the appeal process, we find it hard to believe that the Appellant's interest is motivated purely by its objections to the design of Parcel B. Further, we find it telling that the alternative designs proposed by the Appellant don't address any of their complaints about the Parcel B FDP; rather, they increase the views from the Appellant's building to the Bay, indicating that Appellant's real interest may be protection of tenant views.
> - (Section II) Background – There has been remarkable continuity on this project with full fluency of the PDP's goals, intent and objectives of the original approvals, as well as the precise, technical requirements. The Appellant has been involved in the process since the PDP was adopted, and nonetheless went forward with the EmeryStation project with full and complete notice of the PDP's permitted development, but now continues to raise comments on features already approved in the context of the PDP and Marketplace Environmental Impact Report (EIR).

- (Section III) FDP is Consistent with the Governing PDP – The PDP conceptualized a total development envelope, allowing for flexibility in the overall project design as the parcel-specific designs are refined, with limitations considering the total scope of development and the associated environmental impacts. The Parcel B FDP adheres to the PDP. The 113 foot proposed height is less than the "not to exceed 120 feet" Parcel B standard and undimensioned PDP plans. The retail square footage is less than that identified in the PDP for Parcel B. The proposed research and development square footage is greater than that identified in the PDP for Parcel B; as discussed below, detailed environmental analysis confirmed there are no new impacts associated with the Parcel B proposal. The Parcel B FDP responds to current market conditions with a design and floorplates that will attract research and development tenants, activate the pedestrian experience and enhance the mixed use district.
- (Section IV) FDP Complies with Conditions of Approval and Mitigation Measures – There has been ample planning and analysis of the Parcel B FDP in relation to the PDP design standards, conditions of approval, and mitigation measures. This ultimately resulted in very clear and thoughtful statements by the Planning Commissioners at the four hearings to date on the Parcel B FDP. The Commissioners' statements, backed by substantial evidence, demonstrate that the FDP substantially conforms to the PDP. Specifically, the Parcel B FDP complies with the aesthetic and wind conditions of approval. The project creates a vital streetscape that enhances the pedestrian experience. A computerized wind tunnel study, the best scientific wind analysis available, finds that conditions will be *improved* by the addition of the proposed Parcel B building and, therefore, will not result in significant wind impacts.
- (Section V) FDP is Consistent with the City's General Plan – A city has broad discretion to construe its policies in light of its plan's purposes. Here, the Parcel B FDP is clearly consistent with the General Plan's urban design goals.
- (Section VI) More CEQA is Not Required – CEQA includes a strong presumption against requiring any further environmental review once an EIR has been prepared for a project. A detailed, 65-page Environmental Checklist was prepared to consider the environmental impacts associated with the Parcel B FDP in relation to the impacts identified in the prior EIR. There are no circumstances requiring further environmental review. Specifically, a traffic analysis concludes that the proposed FDP will generate fewer trips compared to the PDP. As noted, a computerized wind tunnel study shows that the Parcel B building will improve wind conditions. Notably, the Parcel B FDP qualifies for a state law (SB 743), which provides that aesthetic impacts may not be considered significant impacts. Finally, while not directly addressed in the Appellant's letter, we feel compelled to address what may be the Appellant's concern – views – and note that private views are not protected under any applicable law here.
- (Section VII) The Proposed Design Alternatives are Not Feasible – The alternatives are not feasible for a number of reasons. In short, they are cost-prohibitive and are not counterbalanced by any additional revenue generating space/use. The Appellant, itself, has recognized that underground parking is not viable in connection with its Berkeley 10th Street project. From an aesthetic perspective, the designs suffer from

the same critiques that the Appellant's architects raised in reference to the Parcel B FDP.

As noted, further detail on each of these topics is included in our June 18, 2019 letter, attached as Exhibit A.

II. Appellant's Arguments Has Not—and Can Not—Substitute Its Own Judgment for the City's Own Reasonable and Consistent Interpretation of the City's Planning Documents.

While Appellant appears to claim that the PDP is an inflexible stricture, the City's Code, case law, and City policies and precedent all indicate that the PDP is an adaptable tool designed to foster development according to its guidelines and parameters. Our June 18, 2019 letter included a detailed review of the basis for the FDP's conformance with the PDP. Rather than repeating those points again here, we wish to highlight the applicable law that grants cities deference in interpreting its planning documents.

A. *The City Has Significant Discretion in Rendering Planning Determinations and Has Found Substantial Conformance Consistent with Its Own Longstanding Understanding of the PDP/FDP Process.*

Determining substantial conformance to a PDP is fundamentally a planning determination. Such "planning or zoning determinations are reviewed with greater deference, both because the public entity is deemed best able to interpret its own rules and because it is presumed to bring local knowledge and experience to bear on such issues." (*Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal. App. 5th 358, 371; *Harrington v. City of Davis* (2017) 16 Cal. App. 5th 420, 434-35 [zoning]; *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal. App. 4th 498, 515-16 [planning].) As the court in *Harrington* explained, where the city's decisions are "the product of an agency charged with regulating zoning practices" and the city is "required to balance the requirements of the zoning and building code against the interests of the applicant and neighbors, taking into account the historical uses of the Property, . . . the character of the neighborhoods, and the evolving needs of the community," the city's views are "given great weight and respect." (16 Cal. App. 5th at 434.) ***Here, too, the City's understanding of the scope and application of the PDP is correct and entitled to great deference***.

To further highlight some of the points in our June 18, 2019 letter, the City's own code explains that PUD zones are intended to encourage the creative development of large sites so as to permit flexibility in physical design, achieve attractive designs which encourage large-scale site planning, and ensure that the applicable provisions of the General Plan are established early in the formation of such development proposals. (Emeryville Planning Code Section 9-7.1001.) A PDP is intended to establish the zoning for a site and a FDP is intended to refine a parcel-specific design over time with detailed design specifications. (Emeryville Planning Code Section 9-7.1003, 9-7.1009.)

The PDP was intended to allow some flexibility so long as final development plans "substantially comply" with the spirit and intent of the Marketplace PDP to "create a vibrant, mixed use neighborhood" (PDP, §III.A.1.d., III.B.1.d, III.C.1.b.):

> The intent of the PDP is to achieve a vibrant, mixed use neighborhood. The Final Development Plan may allow any use, including multi-family residential and any use allowed on Table 1 above; provided however, that if any allowed use other than the allowed use designated on the Preliminary Development Plan, or any increase in the square footage or number of units is proposed in any building designated as residential in the Preliminary Development Plan, the Applicant shall submit a traffic study and the City shall require appropriate compliance with the California Environmental Quality Act prior to approval.

In other words, the PDP was conceptualized as a total development envelope, with limitations based on the total scope of development and the associated environmental impacts. The City confirmed this understanding in its Staff Report for the October 1, 2019 meeting, explaining that "the goal of an approved PUD/PDP is to set certain parameters namely mix of uses, height, density, and floor area ratio." (Staff Report at 10.) As exhaustively explained in our June 18, 2019 letter, the FDP is in substantial conformance with each of the parameters specified in the PDP.[1]

The PDP includes specific guidelines regarding allowable uses, maximum height, floor area ratios, and other specifications. It also includes illustrative diagrams portraying one possible development plan able to satisfy those parameters. ***While the FDP must certainly comply with those specific parameters described in the PDP, the PDP is not intended to hamper otherwise compliant development.***

The city in *Naraghi Lakes Neighborhood Preservation Association v. City of Modesto* (2016) 1 Cal. App. 5th 9 was faced with a similar question. In that case, the city had adopted a

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[1] Appellant argues that the PDP shows "clear step downs" in the "Illustrative Bird's Eye View of Site." This figure in fact shows only a single height limitation of 120 feet. Appellant asserts with no basis or authority that the five floors of parking were to extend over the length of the site and the maximum height was only to be met were the office building was depicted. Nothing in the text of the PDP supports this assertion.

Appellant also once again makes much of the distance between the developments on Parcel A and Parcel B. Again, it is noted here that at ground-level the PDP actually included no gap between Parcels A and B as the PDP indicated that ground level retail may be constructed. In the approved Parcel B FDP, the Parcel B stair tower is 58'-3" from the property line with Parcel A. ***The majority of the massing of Parcel B is an additional 11'-3" further back, for a total of 69'-6" overall.*** At the Continued May 14th Hearing, Chair Barrera stressed that "68 feet of separation between buildings is not a narrow gap . . . the separation between Parcel A and Parcel B will fit perfectly into the context of Emeryville and it's in substantial compliance with the 76 feet that was analyzed as part of the PDP." Additionally, Commissioner Keller analyzed the spacing of all of the Appellant's buildings in the EmeryStation cluster. Commissioner Keller shared a figure showing that, in fact, Parcel B "will have the greatest distance separating it from EmeryStation West than any distance within Emeryville's buildings or its neighbors." The FDP is once again in substantial conformity with the PDP.

"Neighborhood Plan Prototype" as part of its general plan which provided for neighborhood shopping centers consisting of 7-9 acres and containing 60,000 to 100,000 square feet of leasable space located at the intersection of two arterial streets. (*Id.* at 13.) The city approved one such neighborhood shopping center on 18 acres of land with over 170,000 square feet of leasable space. (*Id.* at 12.) The city found the project consistent with the Neighborhood Plan Prototype, explaining that it "understood that the depictions set forth therein were meant to provide guidance in the orderly development . . . but were not mandatory limitations on the size of shopping centers" and that such larger developments would be "more economically viable." *Id.* at 20. On appeal, the court agreed, finding that the "acreage and square footage descriptions were reasonably construed by the City as flexible guides to development, not rigid development limitations." (*Id.* at 23.) As such, this case provides precedent for a consistency determination where the shopping center was double the acreage amount and 70,000 square feet above the total leasable space contemplated in the plan.

It might also be noted that past precedent in implementing the Marketplace PDP has also reflected flexibility in substantial conformance determinations. The shape of the first parcel to be developed at 64th Street and Christie Avenue, and the surrounding streets, evolved from the PDP to the FDP. Specifically, 63rd Street moved north about 65 feet and Market Drive moved east about 20 feet. As a result, this reshaped the block geometries for Parcel C, Parcel D, and Christie Park. It also changed the street geometries and intersection design at 63rd & Christie and 63rd and Shellmound. This was a notable evolution that impacted everything following it except Parcel A.

Here, the Planning Commission has consistently understood the PDP to provide flexibility to encourage creative development of large properties. Similar to the* Naraghi Lakes *project, the FDP complies with the parameters and objectives described in the FDP—namely the mix of uses, height, density and floor area ratio. The Planning Commission has correctly determined that the FDP complies with these key parameters and this determination is entitled to great weight.

B. *The City Is Required to Balance Many Competing Goals under the General Plan. Its Consistency Determination Is Entitled to Great Deference and the Appellant May Not Substitute Its Own Judgment for the City's.*

Similarly, a city's interpretation of its own general plan and policies is entitled to "great deference." (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal. App. 4th 656, 678 ("[T]he body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity."); *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal. App. 4th 99, 142.) The city has "broad discretion to construe its policies in light of the plan's purposes." (*Id.*)

"A project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. A given project need not be in perfect conformity with each and every general plan policy. To be consistent, a [project] must be 'compatible with' the objectives, policies, general land uses and programs

specified in the general plan." (*Napa Citizens for Honest Government v. Napa County Bd. Of Supervisors* (2001) 91 Cal. App. 4th 342, 378 (citations and quotations omitted); *FUTURE v. Board of Supervisors* (1998) 62 Cal. App. 4th 1332, 1336.)

As the courts have explained, general plans ordinarily do not state specific mandates or prohibitions. *Id.* Rather, they state "policies," and set forth "goals." (*Id.*) ***"Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes."*** (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 142; *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal. App. 4th 704; *Greenebaum v. City of Los Angeles* (1984) 153 Cal. App. 3d 391, 407.)

A city's determination of consistency with the general plan only where "no reasonable person could have reached the same conclusion." (*Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal. App. 5th 161, 201.) For example, in *Clews Land & Livestock*, the court upheld the city's determination of consistency with the governing land use plan even where that plan designated the project site as open space and the development proposal would include multiple buildings for a private school. (*Id.* at 201-02.) In *Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal. App. 5th 9, 20, the city's conformity determination was upheld even where the shopping center was double the acreage amount and 70,000 square feet above the total leasable space contemplated in the plan. In that case, the court specifically found that because the city reasonably construed acreage and square footage descriptions "as flexible guides to development, not rigid development limitations," the city was justified in finding conformity for a project the plainly exceeded those metrics. (*Id.* at 23.)

As described in our June 18, 2019 letter and our prior submittals, the Project effectuates the City's General Plan goals. The Appellant has cherry-picked specific policies in an effort to undercut the City's careful balancing of its own policies. Nevertheless, we have addressed Appellant's concerns; the following demonstrates consistency with the General Plan goals:

> *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.*

The PDP building massing called for a 120 foot tall building. This approved PDP design created shadows that would fall on adjacent sidewalks. These shadow impacts were studied in the EIR and deemed acceptable. The FDP building design massing calls for a 113 foot tall building, and only 8 stories. (Additional floor-to-floor height was allocated to improve the quality of the office space.) Like the PDP, the approved FDP design creates shadows that fall on adjacent sidewalks. The FDP design is, however, more compact in its disposition than the PDP. The PDP has a much longer 5 story base element, which extends without relief from end to end of the site and has no gap at the ground level from Parcel A. The shadow studies included in the FDP submission illustrate that the shadow impacts of the FDP design are only marginally different than those of the PDP design, and do not impact primary open spaces and plazas.

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.*

The approved Parcel B design responds to and embodies General Plan Urban Design policies UD-P-33, UD-P-36, and UD-P-38. As previously discussed, the building's form, scale, massing, materials, and articulation are a direct response the surrounding industrial buildings and the vision of the original PDP. The design intention of the Parcel B building adheres to the industrial spirit of the site pursuant to AES-1, which provides that "the proposed structures shall adequately reference, and be visually compatible with and not detract from the surrounding industrial buildings." Parcel B has protruded and recessed elements to articulate the building. Stair and elevator towers, at the north and south ends, are expressed as tower elements, while the main entry is a recessed element, corresponding to the location of the main mid-block cross walk. The transitions in scale and character are carefully created at street level, where the user experience is most important and intimate.

One design aspect that has perhaps not been detailed in the appeal record as vividly as it is worthy, prominently featured art will be installed on the east and west facades of the Parcel B building, consistent with the Public Market Development Agreement and the Public Market Public Art Final Plan ("Art Plan"), as approved by the Public Art Committee. As background, the Development Agreement included a provision for aggregating public art funds throughout the project as a means to create a cohesive and impactful public art program throughout the project. The Applicant retained Keehn on Art to prepare an Art Plan that defines the art vision, goals, budget, artist selection process, among other components. The Art Plan dedicates $1 million dollars to art on the facades of the Parcel B building parking floors. The Art Plan is included in the Administrative Record Index as Item 29.

Several Planning Commissioners expressed enthusiasm for the public art proposal and commented that the art adds articulation and interest to the building. Notably, Chair Barrera concluded that "although the overall building design is rectangular or box-like in form, it definitely has enough . . . architectural detail both on the pedestrian level and throughout the

entire building . . . and [that] coupled with the art that's proposed . . . this design meets not just this condition of approval, but the rest of the conditions of approval related to design in the original PDP."

The Appellant may not substitute its own judgment for that of the City, particularly not where the City is charged with weighing and balancing the multitude of goals and policies contained in the General Plan. The Planning Commission's determination of consistency is supported by ample evidence in the record.

III. More CEQA Review is Not Required.

The Appellant wrongly contends that the FDP triggers additional CEQA review and now appears to assert that, due to the flexibility of the PDP, the Marketplace EIR lacks a stable and finite project description. These arguments are unavailing.

A. *Once an EIR Has Been Certified, There Is a Strong Presumption Against Further Environmental Review. Appellant Is Required to Demonstrate that Either (1) a **New** Significant Impact or (2) a **Substantial Increase** in the Severity of a Significant Impact.*

As we have explained, CEQA includes a strong presumption against requiring any further environmental review once an EIR has been prepared for a project. (Pub Res Code §21166; *San Diego Navy Broadway Complex Coalition v City of San Diego* (2010) 185 Cal. App. 4th 924.) Once an EIR has been completed, the lead agency or a responsible agency may not require a subsequent or supplemental EIR unless:

- Substantial changes are proposed in the project that will require major revisions of the EIR;
- Substantial changes occur in the circumstances under which the project is being undertaken that will require major revisions in the EIR; or
- New information of substantial importance to the project that was not known and could not have been known at the time the EIR was certified as complete becomes available.

In general, a subsequent or supplemental EIR will not be required as long as there are no new significant or substantially more severe impacts. (14 Cal. Code Regs. §15162(a)(1).) Minor modifications to a project are not sufficient to trigger the provisions for subsequent or supplemental EIRs under Guideline section 15162. If the proposed changes are within the scope of the previously approved project, no subsequent or supplemental EIR can be required. So long as there is substantial evidence to support an agency's determination of whether a modification has resulted in a "substantial change," that determination will not be overturned.

Agencies, therefore, have broad latitude in determining whether supplemental review is required. For example, in *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal. App. 4th 788, 802, the court approved of the city's reliance on an addendum to an EIR finalized in 1997. The eighth addendum to the EIR addressed extension of the plan horizon by over a decade and

several modifications to projects and facilities within the Master Plan area. Nevertheless, the court concluded that because the impacts of the modifications were not significantly different from those analyzed in 1997, there was no need for supplemental or subsequent review pursuant to Guidelines section 15162. (*Id.*) Similarly, the court in *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal. App. 4th 689, 704-05, found that only an addendum was needed when the City selected an entirely new alignment for its recycled water pipes because the new alignment and its impacts were "not significantly different" from what the City had previously evaluated. (*See also Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal. App. 4th 1301, 1318 (holding that no substantial change to the project when residential units were reallocated within areas of the specific plan).) This is even further illustrated in *The Committee for Re-evaluation of the T-Line Loop et al. v. San Francisco Municipal Transportation Agency* (2016) 6 Cal. App. 5th 1237. In that case, the court upheld the agency's determination that no further CEQA analysis was required after a 1998 EIS/EIR because there had been no substantial changes in the project or the area.

Here, no changes have been proposed that will result in new or worsened impact.

B. *Appellant Has Not Demonstrated that the FDP Will Lead to a New Significant Wind Impact.*

The Appellant argues that the Project fails to comply with required mitigation measures addressing potential wind impacts. In the first place, the Applicant has explained that it is not clear that the provision in question—MM WIND-1 (Reduced Main Street Alternative)—even applies to Parcel B. Nevertheless, the Applicant has complied with the requirements. MM WIND-1 requires that a qualified wind consultant review the final design to evaluate the use of certain design guidelines to "reduce wind impacts to a less-than-significant-level." Wind tunnel or computerized computational fluid dynamics testing is only required if the review is insufficient to determine whether there would be impacts.

As explained in our June 18, 2019 letter, the Applicant worked with a qualified wind consultant who determined that "the project does not have the potential to adversely affect wind." Under MM WIND-1, no further evaluation is needed. Nevertheless, the Applicant solicited a computerized wind tunnel study from RWDI to determine whether any impacts would be created. The computerized, scientific methods and results were definitive. ***Not only would the Parcel B FDP not have impacts, it would improve wind conditions. We have therefore gone above and beyond the efforts required by MM WIND-1 and demonstrated that there is no new significant impact under the FDP.***

Appellant now claims that this analysis was faulty because it did not evaluate the FDP wind effects against the PDP, but rather against the existing condition baseline. As we have explained above, no further environmental review is needed unless there will be a new significant or substantially more severe impact. The City adopted the following threshold for determining a significant wind impact in 2008:

> The exposure, orientation and massing of a proposed structure can be expected to substantially increase ground-level winds in pedestrian corridors or public spaces

> near the project site. Since the ambient wind (undisturbed by buildings) in Emeryville seldom exceeds 36 mph, ***a project must substantially increase winds for this threshold to be exceeded***.

To determine whether there is a new significant or substantially more severe significant impact, the agency's review is limited to new effects not previously considered. The FDP will not result in significant wind impact. The qualified wind consultant review and wind tunnel study have both confirmed that the Project will not substantially increase winds and will in fact reduce the average wind speeds.

As stated in the staff report for the October 1, 2019 hearing, if the Project creates ground-level winds that exceeds 36 mph, then the project has a significant impact. The Marketplace EIR did not articulate a numeric significance threshold with respect to increases in wind or wind comfort. (It is noted that other jurisdictions have identified more specific thresholds, but Emeryville has not, as in within its discretion.) With respect to the locations where wind speeds will be increased by 4-5 mph, those do not create significant impacts because they do not exceed the actual stated significance threshold. It may be noted that instances where wind is increased by 4-5 mph are in relation to wind comfort and are primarily under the cumulative conditions and not Project-specific. Similarly, the locations where wind exceeds 26 mph do not exceed the stated significance threshold. The Appellant has not carried its burden to demonstrate how these results cause a new significant impact.

In response to the argument that the FDP results should have been compared to the PDP, the Final EIR identified potentially significant wind impacts for the conceptual Reduced Main Street Alternative that was ultimately approved in the PDP. The Marketplace EIR then included measures to mitigate wind impacts from the final designs of the buildings. These mitigation measures have been implemented with the qualified wind consultant review and computerized wind tunnel study, both of which found no new significant impacts as detailed in our June 18, 2019 letter (see pages 14-18).

As the courts have repeatedly determined, even major changes to a project are not sufficient to trigger further environmental review if they do not result in new significant impacts or a substantial increase in the severity of previously identified significant impacts. (*City of Lomita v. City of Torrance* (1983) 148 Cal. App. 3d 1062, 1069; *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal. App. 4th 788 (proposed changes to airport master plan would not result in new significant impacts or impacts substantially different from those described in prior EIRs); *Melom v. City of Madera* (2010) 183 Cal. App. 4th 41 (upholding city's determination that changing site plan for shopping center to reduce size of some retail spaces in order to expand the largest retail space to allow development of supercenter store would not result in any new significant effects that would require revisions to EIR it had previously certified for project); *Fund for Envt'l Defense v. County of Orange* (1988) 204 Cal. App. 3d 1538, 1544 (because no new significant impacts would result, subsequent EIR not required despite changes to proposed medical research and laboratory complex calling for 30 percent increase in building space, increased parking, redesign of location of proposed buildings, additional grading, additional impermeable surfaces, and new water provider).) ***The Appellant has a heavy burden to trigger***

further environmental review and has been unable to carry it since it has not demonstrated that there will be any new significant impact.

C. *Appellant Has Not Demonstrated that the FDP Will Result in a* ***Substantial Increase*** *in the Severity of Shade/Shadow Impacts.*

Appellant mounts a similar argument regarding the alleged increased shadow impacts from the FDP. Again, to require further environmental review, the Appellant must demonstrate either that there will be a new significant impact or that there will be a ***substantial increase*** in a previously identified significant impact.

The City adopted the following thresholds for determining whether there is a significant impact due to shade in the Marketplace EIR:

- Cast shadow that substantially impairs the beneficial use of any public or quasi-public park, lawn, garden, or open space.
- Introduce landscape that would now or in the future cast shadow on existing solar collectors in conflict with California Public Resource Code Section 25980-25986.
- Cast shadow that substantially impairs the function of a building using passive solar heat collection, solar collectors for hot water heating, or photovoltaic solar collectors.

The PDP building massing called for a 120 foot tall building. This approved PDP design created shadows that would fall on adjacent sidewalks. ***These shadow impacts were studied in the EIR and, while the City determined the effects would significant, were deemed acceptable.*** The FDP building design massing calls for a 113 foot tall building, and only 8 stories. (Additional floor-to-floor height was allocated to improve the quality of the office space.) Like the PDP, the approved FDP design creates shadows that fall on adjacent sidewalks. The FDP design is, however, more compact in its disposition than the PDP. The PDP has a much longer 5 story base element, which extends without relief from end to end of the site and has no gap at the ground level from Parcel A. ***The shadow studies included in the FDP submission illustrate that the shadow impacts of the FDP design are only marginally different than those of the PDP design, and do not impact primary open spaces and plazas.*** Because the shadow effects are only marginally different from the PDP to FDP, there is no new or substantially worsened significant effect triggering further environmental review.

D. *Appellant Relies on Inapplicable Case Law to Argue for Further Review.*

Appellant instead relies on *stopthemilleniumhollywood.com v. City of Los Angeles* (2019) 39 Cal. App. 5th 1 to argue that modifications from the PDP to FDP result in an unstable project description. This case is simply inapplicable—it concerned the project description provided in a draft EIR, rather than a final *certified* EIR (as is the Marketplace EIR) for which there is a presumption against subsequent environmental review.

Second, the case concerned a project description in which "future developers are to create a mixed-use development, eliminate the visual impact of current on-site parking, establish, where feasible, pedestrian linkages to existing public transit, and 'provide designs that address, respect

and complement the existing context, including standards for ground-level open space, podium heights and massing setbacks,'" but "no particular structure or structures are required to be built." (*Id.* at 309 (emphasis added).) That is a far cry from the development parameters provided in the PDP with which the FDP clearly conforms.

CEQA includes a strong presumption against requiring any further environmental review once an EIR has been prepared for a project. A detailed, 65-page Environmental Checklist was prepared to consider the environmental impacts associated with the Parcel B FDP in relation to the impacts identified in the prior EIR. There are no circumstances requiring further environmental review.

IV. Appellant's Other New Arguments are Unfounded.

A. *Proposed Parking Adequately Serves New Uses and Existing Contractual Obligations.*

In the January 24, 2019 staff report and accompanying Resolution FDP18-001, the City concluded that the FDP proposal of 560 spaces "substantially conformed" with the approved PUD/PDP requirement of 518 spaces. As the Appellant is aware, the development on Parcel B is subject to business-to-business agreements identifying parking provided on site. Parcel B is a critical piece of the overall puzzle for the PUD and must provide parking not only for the uses on Parcel B, but also for the approved housing on Parcel A and the Food Hall customers. ***Reducing the amount of provided parking would violate leases of the existing Public Market and Marketplace Office tenants.***

Despite the City's consistency determination and the complex interconnected development plan, the Appellant now argues that the amount of parking on Parcel B violates General Plan goals and policies for reducing automobile dependence and requires a use permit for the "excess" spaces. As discussed above, the City's determination regarding consistency with the General Plan is entitled to great deference. ***The development on Parcel B continues to foster reliance on multi-modal transportation through proximity to transit, bicycling facilities, car share vehicle hubs, and area-wide parking facilities. The City is entitled and indeed is required to balance its competing policies in determining consistency and has done so here.***

The Appellant's latest contention that the "excess" parking requires a use permit is also without merit. The proposed parking substantially conforms with the PDP. The Zoning Code recognizes the Marketplace PDP and provides that uses and development regulations shall be governed by the PDP and not later enacted regulations in the Zoning Code. Zoning Code § 9-3.310. ***A use permit is not required under Section 9-4.040(h)(2) as the proposal is governed by the PDP.***

B. *Ample Evidence Has Been Provided Supporting the FDP's Activation of the Streetscape.*

The Appellant now argues that the FDP fails to comply with Condition II.E.1, which requires:

> "The proposed structures shall adequately reference, and be visually compatible with and not detract from the surrounding industrial buildings."
>
> "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 Appellant claims that the FDP design violates this condition because it includes above-ground parking and maximizes rentable square footage. The Appellant disregards our explanation that, "The building employs big windows to provide as much daylight to working floor areas as possible in harmony with neighboring industrial buildings. Further, the design avoids the use of historicist forms or literal use of materials that would imply masonry construction or load-bearing walls as well as unintentional stepbacks and superfluous articulations that wouldn't be typical of building type, so as not to detract from the authenticity and spirit of the surrounding industrial edifices."

Instead, the Appellant resorts to claims that Parcel B fails to foster a vibrant streetscape because "nothing in Applicant's response nor in the FDP Plans demonstrates that the design of street-level retail uses is intended to ensure that it is active." ***As we have already explained, "Streetscape vitality has always been the primary goal of the Public Market master plan, as it fosters every desired outcome, for the project team and the City. This drove the separation of Parcels A and B into separate buildings, where in the PDP there was a single uninterrupted façade for the entire length."*** As Chair Barrera explained at the Continued May 14th Hearing, "there are varied building materials at the ground floor commercial level, including the bulk head width, the type of siding that is different from the materials on the rest of the wall. There is articulation on the ground floor with the storefront window systems that are recessed from the vertical columns that separate the spaces. The window storefront systems provide a deep reveal and the . . . transoms above the storefront system add interest . . . [and] the linear elevations of the building, although it is very large, as you pointed out in your letter that it is approximately five hundred feet, is broken up by the prominent entrance in the middle . . . ."

Appellants also erroneously claim that the Applicant has not demonstrated compliance with the Shellmound Streetscape Design Guidelines. ***The Planning Commission in fact found that the sidewalk widths, paving materials, pedestrian amenities, streetscape furniture, landscaping and design of multi-modal facilities for the Project was consistent with the Shellmound Streetscape Design Guidelines during the approval of the Tentative Map in October 2015***.[2]

Finally, the project architects have explained that the design intent for the street-level retail uses is to ensure maximum active use potential. The rhythm of the façade matches

[2] Planning Commission Staff Report at 5 (Jan. 24, 2019).

the optimum store with desired by retailers. The storefront design is a modern interpretation of a classic shopfront, with bigger windows, visibility directly into the premises, and a secondary level of articulation and detail. The design includes the integrated opportunities for signage, awnings and canopies that retailers seek. On the inside, high ceilings and servicing from the back ensure flexibility for a wide variety of tenants, and that the stores' front areas are dominated by pedestrian and retail activity.

C. The Marketplace EIR Used Very Conservative Traffic Baseline Assumptions; Kimley Horn Has Found No New Traffic Impacts

The Appellant argues that the recent Kimley Horn trip generation study comparing the proposed FDP to the PDP relied on a 2015 memorandum from Fehr & Peers and that the Fehr & Peers memorandum needs to be updated. Kimley Horn has reviewed this comments and prepared the response included as Exhibit B, excerpted below (with emphasis):

> The original Environmental Impact Report (EIR) for the Marketplace Redevelopment Project dated June 2007 analyzed multiple scenarios including Existing Conditions (2005 and 2006), Future Year 2010, and Future Year 2030. The Future Year 2030 conditions were analyzed based on a list of approved, planned, and potential developments for the City of Emeryville, in addition to estimates of vehicle trips traveling through the City of Emeryville based on the Alameda County Congestion Management Agency (ACCMA) travel demand forecast model. Therefore, the EIR traffic analysis accounts for future volume growth at the study intersections.
>
> The Fehr and Peers memorandum dated May 18, 2015 compared the existing counts at the time in 2014 with the estimated Future Year 2010 and Future Year 2030 volumes to determine if the traffic volumes in the study area have grown at a faster rate than projected in the original EIR. At most of the study intersections reviewed, the 2014 counts were not only less than the Future Year 2010 and Future Year 2030 volumes, but were also less than the 2005 counts in the EIR.
>
> It is our understanding that there has not been any major development in the study area between 2014 and 2019 (the City of Emeryville can confirm this) to warrant a concern that the 2019 volumes have increased significantly since 2014. Therefore, the conclusions from the Fehr and Peers memorandum would still hold true. In addition, even of volumes from 2014 have grown, these volumes were less than the 2005 counts, and therefore would likely still be less than the Future 2030 traffic forecasts. With this understanding, ***Kimley-Horn estimates that the current traffic is less than the Future Year scenario analyzed in the original EIR, the project is generating fewer trips than analyzed in the EIR, and therefore no new traffic impacts are projected based on the new development plan for Parcel B.***

It may also be noted that courts have upheld the reliance on EIRs certified many years prior. In *The Committee For Re-evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal. App. 5th 1237, a court upheld reliance on an EIR prepared in 1998, finding that substantial evidence nevertheless supported the agency's determination that

there were no significant changes to the project or the area in the intervening 16 years. In reaching this conclusion, the court explained that the plaintiff bears the burden of demonstrating that no substantial evidence can support the agency's determination. Here too the Appellant has not demonstrated with substantial evidence that there the prior EIR and on-going traffic reports cannot be relied upon.

Conclusion

Based on the ample analysis and substantial record created during the entitlement process and through the lengthy appeal process, we respectfully request that the City Council affirm the Planning Commission and dismiss the appeal. (Emeryville Code, § 9-7.1405).

Sincerely yours,

HOLLAND & KNIGHT LLP

Chelsea Maclean

Cc: Michael Guina, City Attorney (mguina@emeryville.org)
Andrew Visveshwara, Deputy City Attorney (avisveshwara@emeryville.org)
Charlie Bryant, Community Development Director (cbryant@emeryville.org)
Miroo Desai, Senior Planner (mdesai@emeryville.org)
Mark Stefan, AG-CCRP Public Market, LP (Mark@ccrpllc.com)
Sig Anderson, AG-CCRP Public Market, LP (Sig@ccrpllc.com)
Eron Ashley, Hart Howerton (EAshley@harthowerton.com)
Christopher Pizzi, Hart Howerton (cpizzi@harthowerton.com)

Exhibits

Exhibit A – Holland & Knight Response Letter on Behalf of AG-CCRP, dated June 18, 2019
Exhibit B – Kimley Horn Response Letter, dated September 27, 2019