VIA E-MAIL AND FEDERAL EXPRESS

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

Re: Marketplace Redevelopment Project, Parcel B: Reply to Staff Report (October 1, 2019 City Council Agenda, Item No. 12.1)

Dear Mayor Medina and Members of the City Council:

On behalf of Wareham Development ("Wareham"), we write to respond to the Staff Report ("Staff Report") prepared for the Council's call for review and Wareham's appeal (the "Appeal") of the Final Development Plan for Parcel B (the "FDP" or "Project") proposed by AG-CCRP Public Market, L.P. ("Applicant"). The FDP does not conform with the Preliminary Development Plan ("PDP") or the General Plan and requires subsequent environmental review under the California Environmental Quality Act ("CEQA"). As such, Wareham respectfully urges the Council to schedule the Appeal for a noticed public hearing by adopting the draft Resolution attached as Item 12.1.2 to the Staff Report. This is the only option that comports with the facts and the law and that allows the Council to weigh in on this important policy matter.

1. Standard of Review

We first wish to clarify the standard of review applicable to the Council's consideration of the Appeal. The Staff Report states that in considering the options on the Appeal, "the Council should consider whether the Planning Commission's findings are supported by substantial evidence in light of the record as a whole." (Staff Report, p. 8 citing Code of Civil Procedure § 1094.5.)[1] In actuality, a *de novo* standard or review applies to the Appeal. (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1221, fn. 10 [court notes that unless a local code creates a different standard, a hearing on an administrative appeal is *de novo*].) The City Code here supports *de novo* review and does not specify a different standard. (Emeryville Municipal Code ["EMC"] § 9-7.1407 ["When reviewing a decision on appeal, the hearing body shall use the same standards for decision-making required for the original decision."].)

[1] Section 1094.5 of the Code of Civil Procedure is the statutory standard of review that a *court* employs when reviewing an agency's quasi-adjudicatory decision. It has no bearing on your scope of review of an administrative appeal.

Unlike a substantial evidence standard, under a *de novo* standard, the Council shows no deference to the Planning Commission decision. Instead, it reviews the matter anew, using the same standards required for approval of the FDP. While the Planning Commission decision is not entitled to deference legally, it also is not entitled to deference factually. The Planning Commission's rushed approval of the FDP here was twice questioned by the City Council, including through its most recent call for review of the FDP.

2. Consistency with the PDP

Staff contends that the plans the Council approved in connection with the PDP (the "Approved Plans") are irrelevant because they "do not include any renderings," and that only a finding of "substantial conformance" with numeric, development standards is required. (Staff Report, p. 10.) As a preliminary matter, a rendering is only a drawing of what a project may look like. The Approved Plans are far more prescriptive and objective than renderings would be.

In addition, the City Code states the decision-making authority "shall review the final development plan for substantial conformity to the preliminary development plan approved by the City Council and to determine whether changes and conditions of approval specified by the Council have been met . . .." (EMC § 9-7.1011.)[2] In approving the PDP, the City Council imposed, among other conditions, Condition 1B, which states: "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 . . .." The Approved Plans are the PDP approved by the City Council. (Ordinance No. 08-004, Section 2.) Thus, Staff is incorrect in suggesting that the PDP Plans can be ignored.[3]

As shown by the graphic attached hereto as Exhibit A, the FDP does NOT substantially comply with the Approved Plans. In his May 28, 2019 letter to you, Jeffrey Heller, who designed the PDP plans, stated "the current building design [which he refers to as a "super block"] does not substantially comply with the Original Development" and "significantly diminishes" it through its massing and lack of "any meaningful relief or articulation."

3. Compliance with Conditions of Approval

Staff again wrongly urges the Council to simply consider whether the Planning Commission's findings are supported by substantial evidence. That is ***not*** the correct standard. Even if it were, the findings are not supported by substantial evidence as demonstrated by the detailed report prepared by DGA Architects as well as the letter from Jeffrey Heller.

[2] (*See also* EMC § 9-7.211)(c) [requiring that an approved project "be constructed in conformance with the approved plans . . .."].)

[3] Since the PDP and conditions comprise the zoning for the Project site, a challenge to the City's conformance with them would be subject to *de novo* judicial review. (*Brookside Investments, Ltd. v. City of El Monte* (2016) 5 Cal.App.5th 540, 548, fn. 4; *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80, 88.)

As noted at page 16 of the July 15, 2008 Staff Report to the Council when it approved the PDP, the conditions regarding aesthetics were intended to ensure that proposed building design would include "well[-]articulated architecture with variations in building planes, colors and materials, balconies and trellises."[4] Through its box-like design, long flat walls, and lack of architectural detailing and height transitions, the FDP design violates both the letter and spirit of the PDP conditions related to aesthetics.

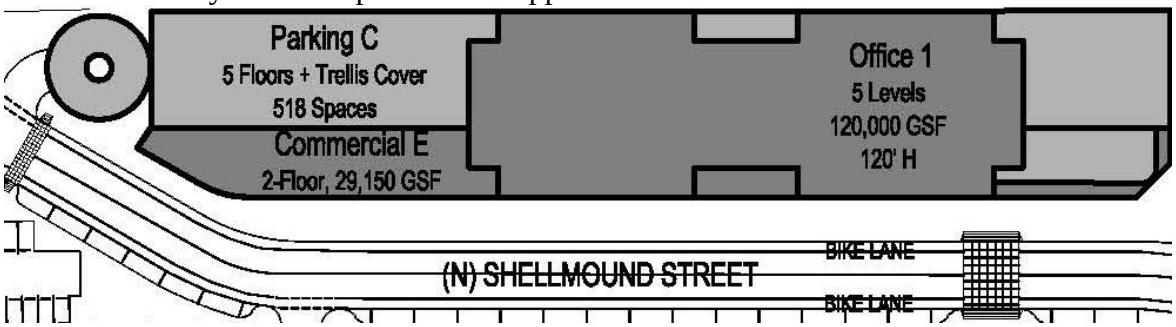
Staff claims that the conditions "only require[] that streetscape vitality and enhanced pedestrian experience be created" and do not "require stepped-back upper floors." (Staff Report, p. 11-12.) This statement is at odds with the actual text of the condition, which reads:

> 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 height transitions to adjacent buildings***, and through the use of carefully chosen building materials, texture and color.

(PDP Condition II.E.1 [emphasis added].)

Alternatively, Staff contends that there is a height transition at the street level between the buildings on Parcel A and Parcel B. But the condition plainly requires that the height transition be incorporated into the Parcel B structure itself. The significantly lower building heights on Parcel A (85 and 50 feet) only serve to underscore that an appropriate height transition is needed for the proposed 113-foot structure on Parcel B.

The proposed 8-story structure does ***not*** comport with the Approved Plans. The PDP allows up to 120 feet only in the approximate center of the site (marked Office 1 below) with major setbacks on both the north and south. But the FDP proposes a project 113 feet in height that rises straight up over ***the entire site*** with no setbacks. Staff responds that the PDP "does not prescribe what portion of the building may extend to a height of 120 feet." (Staff Report, p. 14.) This is not true as illustrated by this excerpt from the Approved Plans:



[4] Wareham hereby incorporates into the record of proceedings this staff report as well as Planning Commission Resolution Nos. FDP14-002, FDP13-001, and FDP14-003. Copies of these materials will be furnished upon request.

The FDP also violates important wind-related mitigation measures, imposed as conditions of approval on the Project. Contrary to Staff's claims, the FDP design was ***not*** assessed for wind-related impacts, as required. And compared to the PDP design, the FDP design will significantly increase ground-level winds along Shellmound Street, and create a wind tunnel between the structures on Parcels A and B.

4. Consistency with General Plan

Staff makes the somewhat remarkable assertion that consistency with the General Plan "is irrelevant" and that the General Plan goals and policies "are inapplicable to the Project." (Staff Report, pp. 16-17.) It is extremely well settled that ***every*** subordinate land use decision must be consistent with the General Plan.[5] The City made General Plan consistency findings when approving final development plans for Parcels A, C, and D. (*See* Planning Commission Resolution Nos. FDP14-002, FDP13-001, and FDP14-003.) The Project is not vested against the prior General Plan (the January 2016 Marketplace Development Agreement only took effect *after* adoption of the 2013 General Plan).

The FDP design is inconsistent with Urban Design Element goals and policies requiring new development to step down and back from lower-scale development and the street edge, to avoid bulk and blank walls through vertical and horizontal articulation, and to employ changes in height, massing, and/or design character. The Project provides 560 parking spaces, hundreds more than required under current City Code, thereby also conflicting with Transportation Element goals and policies as well as the City's pending proposal to eliminate minimum parking requirements.[6]

5. Further CEQA Review

Staff purports to rely on the Marketplace EIR but then persists in claiming that there is no need to compare the wind impacts of the FDP design to the wind impacts of the PDP design. In a subsequent review context, an agency MUST compare the impacts of the modified project to the "previously identified" impacts of the original project to determine whether "major revisions" of

[5] (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 570 ["The propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements"] and *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183 [noting that the general plan is "atop the hierarchy of local government law regulating land use" and that zoning laws are "[s]ubordinate to the general plan"].)

[6] (*See* *https://www.eastbaytimes.com/2019/09/20/emeryville-may-scrap-parking-requirements-for-all-new-buildings-to-discourage-car-use/*)

the previously certified EIR are needed.[7] In effect, "the baseline for purposes of CEQA is adjusted such that the originally approved project is assumed to exist." (Kostka & Zischke, Practice Under the California Environmental Quality Act § 12.23 citing Remy, Thomas, Moose & Manley, Guide to CEQA, p. 207.)

With the notable exception of wind, the Environmental Checklist ("EC") does, in fact, compare the impacts of the proposed FDP plan to the approved PDP. For instance, the traffic section relies on a comparative trip generation evaluation in concluding that the "Parcel B FDP Project's potential impacts are the same or less than those analyzed in the EIR." (EC, p. 39.) But for wind, RWDI compares the FDP's wind impacts to existing conditions. This is misleading and underreports impacts as shown by CPP's wind study. CPP's report—the ***only*** wind study prepared that appropriately compares the FDP impacts to the PDP impacts—concludes that the FDP will result in new or more severe wind impacts than previously identified. These impacts (and others) must be studied in a subsequent EIR.

6. Viable Design Alternatives

Staff contends that the two alternative designs proposed by DGA Architects "could be problematic" due to parking-related concerns. (Staff Report, p. 21.) The FDP provides hundreds more spaces than required by current Code, including 60 more spaces than are needed for the laboratory component alone. (FDP Plans, p. A0.02.) Moreover, underground parking has been successfully implemented on a number of projects in Emeryville and in neighboring cities, including on sites with high water tables. Also, despite Staff's assertions to the contrary, the 15 foot floor heights are not problematic as evidenced by Wareham's development of several successful lab projects with such heights.

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In closing, Wareham requests that the City Council schedule a public hearing on the Appeal. As the Council itself found when calling the Parcel B FDP approval up for review on May 21, 2019, it merits further scrutiny, which can only be attained through a full public hearing. A summary dismissal of the Appeal, as urged by the Applicant and offered by Staff as an option, would be anathema to the myriad legal flaws and policy concerns with the FDP.[8]

[7] (CEQA Guidelines § 15162; *see also Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 542 [project impacts reviewed in a prior EIR were properly treated as part of the environmental baseline in a subsequent review context]; and *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 326 [existing conditions baseline does not apply to situations in which the agency action involves modification of a project previously evaluated under CEQA].)

[8] There is also no substantial evidence in the record to support the findings for such an action.

Thank you for your consideration of Wareham's views on this matter. Representatives of Wareham, including the undersigned, will be in attendance at your October 1st meeting. In the meantime, please do not hesitate to contact me, Rich Robbins, or Geoff Sears with any questions regarding the correspondence.

Very truly yours,

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