



T 510.836.4200
F 510.836.4205

410 12th Street, Suite 250
Oakland, Ca 94607

www.lozeaudrury.com
richard@lozeaudrury.com

E-Mail and Hand Delivery

May 10, 2018

Mayor Alan L. Nagy
City of Newark
37101 Newark Blvd.
Newark, CA 94560
city.council@newark.org
City.Clerk@newark.org

RE: Design Review of Four New Advanced Manufacturing Buildings at 7380 Morton Avenue (DR-18-4; City Council Agenda Item D.1): Request for CEQA Review and Opposition to CEQA Exemption

Dear Mayor Nagy and Honorable Members of the Newark City Council:

Lozeau Drury LLP and the Law Office of Jonathan Weissglass are writing on behalf of Laborers International Union of North America, Local Union 304 ("LIUNA") and its members living in and around the City of Newark regarding the Design Review of Four New Advanced Manufacturing Buildings at 7380 Morton Avenue ("Project"). Staff have taken the position that Design Review is ministerial and therefore exempt under the California Environmental Quality Act ("CEQA"), and the Planning Commission reviewed and recommended approval of Design Review on that basis. Given the nature of the Project, LIUNA disagrees and requests that the City Council deny approval and direct staff to conduct the environmental analysis CEQA requires.

In brief, the CEQA ministerial exemption does not apply to project sites that, like this one, are potentially contaminated properties on the State's "Cortese List." In addition, the proceedings that have taken place so far demonstrate that staff and the Planning Commission are bringing their judgment to bear on the Project, rather than simply acting in a ministerial manner. Finally, the Project is a major development that would increase the square footage of the structures on the site by almost a factor of four, and experts believe that there is at least a possibility of significant environmental effects, which independently precludes a CEQA exemption.

I. PROJECT BACKGROUND

Newark Industrial Partners proposes to construct four new advanced manufacturing buildings located at 7380 Morton Avenue, which was formerly the location of the Morton Salt Plant. The Project would demolish approximately 160,000 square feet of existing structures and replace them with more than 600,000 square feet of new buildings. The Assessor's Parcel Numbers ("APNs") are 537075100603, 537075100604, 092021300201, 092021300300, 092021200201, 092021100201, and 092021000201.

II. LEGAL STANDARD

CEQA mandates that "the long-term protection of the environment ... shall be the guiding criterion in public decisions" throughout California. Pub. Res. Code ("PRC") § 21001(d). CEQA applies to "discretionary projects" unless they are specifically exempted. See PRC § 21080(a). A "project" is "the whole of an action" directly undertaken or supported by a public agency "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." PRC § 21065; CEQA Guidelines, 14 CCR § 15378(a). CEQA requires environmental factors to be considered at the "earliest stage . . . before [the project] gains irreversible momentum," *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 284 n.28, "at a point in the planning process where genuine flexibility remains." *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307 (internal quotation marks and citation omitted).

CEQA has a three-tiered structure for protecting the environment. 14 CCR § 15002(k); *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1185-86 ("*Hollywoodland*"). First, if a project is exempt under CEQA or if it is certain that the project "will not have a significant effect on the environment," there need be no further agency evaluation. *Id.* at 1185. But "where there is any reasonable possibility that a project or activity may have a significant impact on the environment, an exemption would be improper." *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 206. Second, "if there is a possibility the project will have a significant effect on the environment, the agency must perform an initial threshold study." *Hollywoodland*, 161 Cal.App.4th at 1185-86. If the study indicates that there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment, the agency may issue a negative declaration. *Id.* at 1185-86; 14 CCR §§ 15063(b)(2), 15070. Third, an environmental impact report ("EIR") is required if "there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment." PRC § 21080(d); see also *Communities for a Better Env't v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

“Significant environmental effect” as used in this three-tiered test is defined very broadly as “a substantial or potentially substantial adverse change in the environment.” PRC § 21068; *see also* 14 CCR § 15382. An effect on the environment need not be “momentous” to meet the CEQA test for significance; it is enough that the impacts are “not trivial.” *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 83 n.16. “[T]he ‘foremost principle’ in interpreting CEQA is that the Legislature intended the act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Communities for a Better Env’t v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109.

Here, because Design Review was exempted from CEQA entirely, the first step of the CEQA process is at issue.

III. ANALYSIS

There are several reasons that Design Review for this project is not exempt from CEQA.

A. The Project Site is on the Cortese List and Cannot be Exempted

No project may be exempted from CEQA review if the project site includes potentially contaminated properties listed on the State’s Cortese List. “A categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code.” 14 CCR § 15300.2(e) (emphasis added); *accord* PRC § 21084(d) (“A project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code shall be exempted from this division [CEQA] pursuant to subdivision (a) [categorical exemptions].”). That list is known as the “Cortese List,” and includes “underground storage tanks for which an unauthorized release report is filed pursuant to Section 25295 of the Health and Safety Code.” Govt. Code § 65962.5(c)(1). *The Project site is on the Cortese List.* Expert Comments of SWAPE, at 1-2 (attached as Exhibit A). For this reason alone, the CEQA exemption is improper. Proceeding any further without a proper environmental review would violate CEQA.

CEQA review is required for Cortese List sites to determine how to properly clean up hazardous waste without exposing workers (such as LIUNA members) and members of the public. *See McQueen v. Bd. of Directors* (1988) 202 Cal.App.3d 1136; *Citizens for Responsible Equitable Env’t Dev. v. City of Chula Vista* (2011) 197 Cal.App.4th 327.

B. Design Review is Discretionary and Cannot be Exempted

Even were the Project site not on the Cortese List, staff’s conclusion that Design Review is ministerial is incorrect, and the ministerial exemption should be rejected. To be subject to CEQA, a project must be “discretionary” as opposed to “ministerial.” PRC

§ 21080(a), (b)(1). CEQA Guidelines provide: "Whether an agency has discretionary or ministerial control over a project depends on the authority granted by the law providing the controls over the activity." 14 CCR § 15002(i)(2). The Guidelines define discretionary projects as "a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity" 14 CCR § 15357. "Ministerial," on the other hand, means:

a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The *public official merely applies the law to the facts* as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. *Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses.* A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee.

14 CCR § 15369 (emphases added). If there is any doubt about whether a project is ministerial or discretionary, it is discretionary. *Natural Resources Defense Council v. Arcata National Corporation* (1976) 59 Cal.App.3d 959, 970.

Here, there can be no question that approval is discretionary. First, as discussed in Item D.1 of the May 10, 2018 City Council Agenda, staff accepted mitigation measures for traffic recommended in a traffic study conducted by Fehr and Peers. The March 13, 2018 Fehr and Peers Report, which is included in the City Council's May 10, 2018 Agenda Packet and is incorporated by reference, contains mitigation measures, including optimizing signal timing and installing actuated-uncoordinated signals. Acceptance of these mitigation measures is fatal to the argument that approval is ministerial. Discretion necessarily exists where the approving agency can impose "reasonable conditions" based on "professional judgment." *Arcata National Corporation*, 59 Cal.App.3d at 971; see also *Salmon Protection and Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1107-08 (rejecting reliance on mitigation measures to justify CEQA exemption).

Second, it likewise appears that staff accepted "recommendations for avoidance and minimization of potential impacts to resources" identified in a Biological Resource Due Diligence assessment prepared by Helix Environmental Planning. May 10, 2018 City Council Agenda, Item D.1. This acceptance similarly shows the approval is discretionary.

Third, the City of Newark Zoning Code affords discretion, in particular by providing for industrial uses:

No use shall be permitted which, *in the opinion of the planning commission*, creates any emission which endangers human health, can cause damage to animals, vegetation or other property, or which can cause soiling beyond the site boundaries, except that such emission within the jurisdictions of the San Francisco Bay Area Air Pollution Control District and the San Francisco Bay Regional Water Quality Board shall be regulated by subsection B of this section.

Zoning Code § 17.24.120(c) (emphasis added). This is not a ministerial decision like a dog license. Because the Planning Commission necessarily uses its judgment in forming an opinion, the approval is discretionary under the CEQA Guidelines discussed above. The ability to reject a project entirely because it “endangers human health” is the hallmark of a discretionary action.

C. The Possibility of Significant Environmental Effects Precludes a CEQA Exemption

In addition to the reasons above why Design Review is not exempt from CEQA, experts have found that it is possible there will be significant environmental effects. This constitutes a separate reason why the exemption is improper because a mere “reasonable possibility” that a project may have a significant environmental effect precludes an exemption. *Wildlife Alive*, 18 Cal.3d at 206.

First, the City’s own traffic study acknowledges that the Project will have significant traffic impacts. As a result, the City imposed several traffic mitigation measures. Page 29 of the March 13, 2018 study by Fehr and Peers concludes that the Project will have significant traffic impacts on five separate intersections. Because the City’s own study shows that the Project will have significant adverse traffic impacts, the Project may not be exempted from CEQA review.

Second, the Project site was used for 90 years as a salt plant. SWAPE Expert Comments (Exhibit A) at 1. Yet the City has not evaluated the hazards and hazardous waste impacts that salt production poses by analyzing a Phase I Environmental Site Assessment, which would typically be done. *Id.* As discussed above, the Project site is on the State’s Cortese List. Because the site is “under active regulatory oversight,” it “will likely require cleanup of soil and groundwater contamination.” *Id.* Put another way: “Projects that are included on the Cortese List may result in significant impacts from hazardous materials unless remediated.” *Id.* Indeed, “diesel contamination has been detected in soil and groundwater at concentrations that are above a construction worker exposure scenario,” and diesel contamination has also affected groundwater. *Id.* at 2. Given all of this, experts believe that a “thorough assessment of the site to determine

the full extent of contamination in soil and groundwater should be conducted” under CEQA. *Id.*

Third, wildlife biologist Dr. Shawn Smallwood concludes that the Project would or may have significant impacts. Accordingly, a CEQA exemption is inappropriate. Rather, an Environmental Impact Report (“EIR”) is required to analyze and mitigate these impacts. Dr. Smallwood’s expert comments and cv are attached as Exhibit B.

Dr. Smallwood concludes that Helix Environmental’s biological analysis is woefully incomplete and inadequate. In just one hour at the Project site, Dr. Smallwood detected *21 species of bird wildlife*, in contrast to Helix’s claim that only two were observed. Smallwood Expert Comments at 2, 7. Dr. Smallwood notes: “It was impossible to miss the high bird species richness and their incessant activity on and above the project site.” *Id.* at 2. Helix’s survey results “were not credible,” as “the site is much richer in bird species” than Helix claims. *Id.* at 2, 7.

Helix and Dr. Smallwood concur that the Project could disturb nesting birds if they are on the site. *Id.* at 7. In contrast to Helix, however, Dr. Smallwood found: “Nesting by multiple species is taking place all over the site.” *Id.* at 2. Given that “the site is intensively used by nesting birds,” Dr. Smallwood concludes that the Project “would cause significant impacts.” *Id.* at 7. This requires an EIR and mitigation measures.

Moreover, according to postings on eBird (<https://eBird.org>), seven “special-status species of bird were seen on the project site.” *Id.* Dr. Smallwood himself saw two of the seven during a brief site visit. “Any one of these species having been seen on site warrants a CEQA review, but there have been 7 of them.” *Id.*

Further, Helix did not assess the effects of additional traffic due to the Project on special-status species of wildlife. *Id.* at 10. Given the thousands of additional daily trips the Project would cause, such an assessment is required. As Dr. Smallwood opines: “A CEQA review is needed to assess wildlife mortality that will be caused by increased traffic on existing roadways, and it should provide mitigation measures.” *Id.*

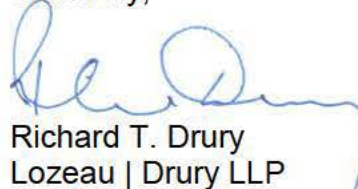
Dr. Smallwood identified several other reasons the Project requires CEQA review: The extensive use of glass at a site with many birds “would result in numerous collisions of birds with the windows throughout the life of the project,” Helix did not analyze the likely significant impacts on wildlife movement in the region, there is no cumulative effects analysis, and mitigation measures should be formulated. *Id.* at 11-13.

Any one of the issues identified above would be enough to require a CEQA analysis. Together, they demonstrate that the CEQA exemption is preposterous.

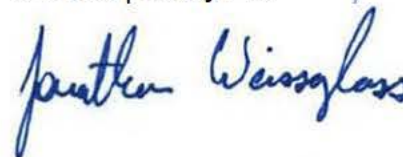
IV. CONCLUSION

For the foregoing reasons, the City Council should deny approval of Design Review of the 7380 Morton Avenue Project and direct staff to conduct the environmental analysis CEQA requires. Thank you for considering our comments and the attached expert comments, which are incorporated by reference.

Sincerely,

A handwritten signature in blue ink, appearing to read "Richard T. Drury".

Richard T. Drury
Lozeau | Drury LLP

A handwritten signature in blue ink, appearing to read "Jonathan Weissglass".

Jonathan Weissglass

Jonathan Weissglass
Law Office of Jonathan Weissglass