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October 18, 2016

VIA EMAIL AND HAND DELIVERY

City Clerk

City of Oakland

Attn: City Council Members Dan Kalb, Abel J. Guillén, Lynette Gibson McElhaney,
Annie Campbell Washington, Noel Gallo, Desley Brooks, Larry Reid, Rebecca
Kaplan, and Mayor Libby Schaaf

One Frank H. Ogawa Plaza

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Oakland Community and Economic Development Agency
Planning and Zoning Division

Attn: Peterson Vollmann, Planner III

City of Oakland

250 Frank H. Ogawa Plaza, Suite 2114

Oakland, CA 94612

Email: pvollmann@oaklandnet.com

**Re: Agenda Item No. 9.1: 226 13th Street (14th and Alice Project, PLN
15-320)**

Dear City Council Members and Honorable Mayor Libby Schaaf:

Appellant **Oakland Residents for Responsible Development** ("Residents")
submits this response to the Agenda Report regarding Agenda Item No. 9.1, 226
13th Street, Oakland CA, also known as 14th and Alice Project (PLN15-320)
("Project"), and the CEQA Analysis prepared by the City of Oakland ("City") for the
Project pursuant to the California Environmental Quality Act ("CEQA Analysis").¹

¹ Pub. Resources Code §§ 21000 et seq.

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Residents and its expert consultants from Soil / Water / Air Protection Enterprise (“SWAPE”)² have reviewed the Agenda Report for the October 18, 2016 City Council (“Council”) hearing along with the attachments, including the ICF Memorandum (Attachment D to the Agenda Report)³. All previously submitted comments⁴ and our July 1, 2016 appeal form and appeal letter, including reports from our consultants SWAPE, are incorporated by reference herein (collectively, “Residents Comments”).

Based on our review of the Agenda Report and the ICF Memorandum, it is clear the City failed to adequately respond to our appeal regarding the impropriety of an addendum for this Project, and the need for further analysis, disclosure, and mitigation of construction-related emissions at the site.

To clarify, Residents does not challenge the validity of the Lake Merritt Station Area Plan (“LMSAP”) or the LMSAP Environmental Impact Report (“EIR”). In cases where no site-specific impacts are present, the City is authorized to rely on the LMSAP EIR in project approvals. In this case, however, CEQA does not allow reliance on the LMSAP EIR in light of the substantial evidence presented by Residents of unmitigated, site-specific significant impacts.

This supplement to our appeal letter and attachments provide responses to the City on issues we previously contested and presented to the Planning Commission as required by Section 17.134.070 of the Oakland Planning Code. We previously filed comments on the Project on May 31, 2016 with the help of experts Matt Hagemann and Jessie Jaeger from SWAPE, which we incorporate herein by reference.⁵ We reviewed the June 1, 2016 letter from the City’s consultant, ICF

² See October 17, 2016 letter from SWAPE to L. Sobczynski re Supplemental Comments on the 226 13th Street Project, attached hereto as **Exhibit A** (“SWAPE Comments IIP”). The SWAPE Comments are incorporated by reference as if fully set forth herein.

³ On page 12, the Agenda Report indicates this ICF Memorandum is from August 10, 2016. However, the ICF Memorandum provides a date of August 23, 2016. Hereafter, the August 23, 2016 ICF Memorandum (Attachment D) will be referred to as the “August ICF Memorandum.” The ICF Memorandum provides responses to the Adams Broadwell Joseph & Cardozo Appeal as well as the SWAPE technical comments from May 31, 2016.

⁴ Residents alleged grounds for noncompliance with CEQA at the May 31, 2016 Planning Commission meeting. (PRC § 21177(a).) SWAPE’s May 31, 2016 technical report were incorporated in the May 31, 2016 Planning Commission Comments.

⁵ See Letter and Attachments from Laura Horton to the Oakland Planning Commission and Peterson Vollman re: Comments on the CEQA Analysis for the 226 13th Street Project (PLN15320), May 31, 2016. SWAPE’s May 31, 2016 technical report were incorporated by reference in the Letter and Attachments from Laura Horton to the Oakland Planning Commission and Peterson Vollman re:

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International (“ICF”)⁶ with the help of SWAPE. Their attached technical comments were submitted as support for our July 1, 2016 appeal letter, and SWAPE’s May 31 letter was incorporated therein by reference.⁷ We reviewed ICF’s August 23, 2016 Memorandum, which provided additional responses to our July 1, 2016 appeal as well as responses to the May 31, 2016 technical comments prepared by Matt Hagemann and Jessie Jaeger for the June 22, 2016 Planning Commission meeting.

For the reasons discussed herein, the City’s CEQA Analysis remains inadequate. Residents renews its request that the City prepare a project-level environmental impact report (“EIR”) to fully analyze and mitigate the Project’s potentially significant environmental and public health impacts.⁸

A. Project is Not Consistent with CEQA Addendum and Exemption Requirements

The City claims the Project is consistent with CEQA Guidelines Sections 15162 (Subsequent EIR and Negative Declaration), 15164 (Addendums), and 15168 (Program EIRs).⁹ In some instances, an EIR for a Specific Plan, such as the LMSAP EIR, may provide an adequate level of environmental review. However, that is not the case for this Project where there are site-specific impacts. The City’s reliance on these provisions is misplaced.

a. Improper Use of an Addendum

First, the CEQA Analysis does not simply provide “some changes or additions” to the EIR as is allowed under the Addendum provision; rather, it includes over 2,000 pages of analysis for a large development project which is

Comments on the CEQA Analysis for the 226 13th Street Project (PLN15320), May 31, 2016 (hereinafter “SWAPE Comments”).

⁶ See Letter from ICF International to Peterson Z. Vollmann re: 226 13th Street Project - Response to Comment Letter from Adams Broadwell Joseph & Cardozo, June 1, 2016, (hereinafter, “Consultant Letter”)

⁷ See Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Laura Horton re: Comments on the 14th & Alice Project (hereinafter, “SWAPE Comments”), May 31, 2016 ; *see also* Letter from Matt Hagemann and Jessie Jaeger, SWAPE, to Laura Horton re: Response to Comments on the 226 13th Street Project (PLN 15-320), July 1, 2016 (hereinafter, “SWAPE Comments II”).

⁸ Residents reserve the right to bring an action or proceeding challenging the City’s noncompliance with CEQA on any grounds for noncompliance that is presented to the City Council and Planning Commission orally or in writing by any person prior to the close of the public hearing on the project. PRC § 21177(a)-(b).

⁹ CEQA Analysis, Attachment B, p. B-1.

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different from the project analyzed in the LMSAP EIR.¹⁰ Residents have previously objected to the City's improper use of the Addendum provision in prior project approvals.¹¹ As in past cases, the use of the Addendum here would clearly violate CEQA.

For this Project, use of an Addendum is not authorized by CEQA. Rather, when an EIR (*i.e.*, LMSAP EIR) has been prepared for a project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.¹²

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, if one or more of the following events occur:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

¹⁰ *Id.*, at p. 2; CEQA Guidelines, § 15164.

¹¹ See 2400 Valdez Street Project, (PLN15-336),

<http://www2.oaklandnet.com/oakca1/groups/ceda/documents/report/oak057878.pdf>.

¹² Pub. Resources Code § 21166.

- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
- (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
 - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
 - (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.¹³

Only where *none* of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an Addendum or no further documentation.¹⁴ For Addendums specifically, which is one of several CEQA exemption/streamlining avenues that the City claims is applicable to the Project, CEQA allows Addendums to a previously certified EIR “if some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.”¹⁵

¹³ CEQA Guidelines § 15162(a)(1)-(3).

¹⁴ CEQA Guidelines § 15162(b).

¹⁵ CEQA Guidelines § 15164.

b. Reliance on other CEQA Guidelines is also Improper

The City's reliance on CEQA Guidelines Sections 15183 (Community Plan)¹⁶ and 15183.3 (Qualified Infill)¹⁷ as other exemptions is misplaced. These exemptions allow approval of projects without an EIR in narrow circumstances, which have not been satisfied here. These exemptions do not excuse it from needing to prepare a supplemental or subsequent EIR to evaluate the Project's new and significant impacts. The City's determination that these exemptions also apply is not supported by substantial evidence.

Moreover, the City has not demonstrated that the standard conditions of approval will be adequate mitigation measures for this Project. The exemptions relied upon by the City apply only when a Project does not have impacts peculiar to the proposed project that are new or more significant than previously analyzed, or impacts that can be substantially mitigated by uniformly applicable development policies or standards.

The Project fails to meet these requirements because the Project's health risks from diesel particulate matter ("DPM") emissions during construction are highly significant. In particular, because the LMSAP did not actually quantify project-level health risks, the absence of any previous project-specific analysis undermines the City's determination that Standard Conditions of Approval ("SCAs") would mitigate the impact. Unfortunately, the LMSAP EIR did not fully address these peculiar and more significant impacts, and mitigation measures are available that were not previously identified that would reduce such impacts below a level of significance.

B. City's Site-Specific Analysis is Flawed and Mitigation Measures are Inadequate

The Project will result in new or more severe significant impacts than analyzed in previous EIRs. Additionally, there are new mitigation measures that were not considered in the previous EIRs, but that could reduce those impacts to a less than significant level.¹⁸ In any case, the City's decision must be supported by substantial evidence.¹⁹ Therefore, the City may not rely on the CEQA Analysis for

¹⁶ CEQA Guidelines Section 15183.

¹⁷ CEQA Guidelines Section 15183.3.

¹⁸ SWAPE Comments, pp. 13-21.

¹⁹ *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).

Project approval, and must provide detailed analysis of the Project's impacts in an EIR.

The LMSAP EIR did not consider construction related emissions for this particular Project. Indeed, the LMSAP EIR provides a rationale for why it did not address construction related exposures because "[t]he specificity of detail necessary to conduct a health risk assessment is not available at the Plan stage..."²⁰ The LMSAP EIR thus deferred the assessment of health risks from construction activities to the project level stage where project-specific impacts and mitigation measures could be determined to ensure that DPM exposure would not exceed applicable thresholds.

The CEQA Analysis expressly states that the LMSAP EIR determined that sensitive receptors may be subject to an increased cancer risk due to construction activities.²¹ Therefore, CEQA mandates that the City quantify that risk in order to determine *if* the basic construction control measures and best management practices in SCA 19/ SCA-AIR-1 will reduce DPM emissions to less than significant levels. As explained in further detail below, our consultants concluded that the City failed to adequately assess the construction-related risk.

a. Infant Cancer Risk Exceeds BAAQMD Threshold

We argued in our prior Residents Comment and appeal that the City must do a Health Risk Assessment ("HRA").²² The City asked its consultants, ICF, to prepare one "in the interest of being conservative."²³ However, our air quality consultants reviewed the City's Health Risk Assessment and determined that the cancer risk calculation was incorrect. When our consultants performed the calculation using the same variables used in the City's analysis, they found that the Project's construction related emissions would clearly exceed the Air District's 10 in one million threshold for a residential cancer risk.²⁴ The risk would be 13.8 in one million.²⁵ This is particularly alarming given the proximity of several community spaces, including the American Indian Public Charter School, which is a charter middle school with predominantly low-income, minority students within two blocks

²⁰ LMSAP DEIR, p.3.3-39.

²¹ CEQA Analysis, p. 39.

²² See Residents Comments and Appeal Letter.

²³ Agenda Report, p. 7.

²⁴ SWAPE Comments III, pp. 4-5 [Exhibit A].

²⁵ *Id.*

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of the Project. Oakland Charter High School is also just a few blocks away from the Project site.

b. Speculative Feasibility of SCA-AIR-1

The City's CEQA Analysis states that although "[t]he LMSAP EIR determined that sensitive receptors in proximity to construction-related DPM emissions (generally within 200 meters) could be subject to increased cancer risk, chronic health problems, and acute health risk," all future development projects pursuant to the LMSAP would be subject to basic construction control measures and best management practices through implementation of SCA 19/ SCA-AIR-1.²⁶ The Agenda Report similarly states that the "Project sponsor would ensure that construction equipment would meet Tier 4 emissions standards in order to comply with sections (w) and (x) [of SCA-AIR-1]."²⁷ However, this conclusion is unsupported by evidence of feasibility for this Project, because neither the City nor the Applicant has demonstrated that Tier 4 equipment can be reasonably procured for this Project.

ICF's August Memorandum provides historical sales trends of Tier 4 equipment, but these trends do not demonstrate that the Applicant will be able to procure this equipment.²⁸ As SWAPE explains, although off-road Tier 4 equipment is available for purchase, it is new technology that may not yet be readily available at all construction equipment vendors, may require special procurement by the Applicant, and is more costly than lower tier equipment.²⁹ It is therefore unreasonable to presume, prior to procurement, that all construction equipment that will be used for the Project will automatically have Tier 4 engines simply because SCA-AIR-1 calls for it.

Furthermore, SCA-AIR-1 does not require the Applicant to show compliance *prior to construction*. Therefore, SCA-AIR-1 is also unenforceable and would not ensure that impacts would be reduced to less than significant prior to the impact occurring.

The City cannot simply rely on compliance with SCA-AIR-1 alone to reduce the Project's admittedly significant construction emissions below levels of

²⁶ CEQA Analysis, p. 39.

²⁷ Agenda Report, pp. 7-8.

²⁸ Agenda Report, Attachment D, pp. 5-13 [August ICF Memorandum]

²⁹ See SWAPE Comments II, p. 2-3.

significance. Rather, the City must either require the Applicant to show that it has procured exclusively Tier 4 equipment for the Project, or require demonstration of procurement prior to construction and include alternative feasible mitigation in the event Tier 4 equipment cannot be procured at that later date. Our consultants suggested other feasible mitigation measures.³⁰ ICF did not provide evidence that such measures were infeasible, but simply determined SCA-AIR-1 would be sufficient. As set forth above, SCA-AIR-1 remains speculative and unenforceable.

c. Substantial Risk Even Assuming SCA-AIR-1 Compliance

The City's CEQA Analysis for this project incorporates some mitigation measures. However, they are not enough to mitigate the new and severe site-specific impacts. ICF's HRA assumes that mitigation will occur. Our consultants found that even assuming mitigation, the construction will pose a significant health risk.³¹ The ICF consultants based their assumption on the purported future compliance with SCA-AIR-1. Even after implementation of SCA-AIR-1, significant and unacceptable health risks to residents will remain and will exceed the Project's residential health risk impact of 13.8 in one million.³²

C. Conclusion

If the Council upholds the Planning Commission's approval of the Project, that decision will not be supported by evidence in the record. There are several deficiencies in the City's analysis, as well as new information regarding new or more severe impacts than previously analyzed in the LMSAP EIR, which were not adequately considered by the Commission and now the Council. Furthermore, we identified several mitigation measures not previously analyzed that would reduce significant impacts. The City's CEQA Analysis fails to analyze and mitigate the Project's construction health risks to the surrounding community, which are new or more severe than previously analyzed. Therefore, the City lacks substantial evidence to support the conclusions in its CEQA Analysis and an EIR is required.

Although the CEQA Analysis incorporates SCAs from the LMSAP, the City is not absolved of CEQA's requirement that agencies disclose significant environmental impacts to the public and mitigate those impacts.³³ The City failed to demonstrate that the Project can be lawfully approved based on the CEQA

³⁰ *Id.*, pp. 5-6; SWAPE Comments, pp. 13-21; SWAPE Comments II, pp. 3-4.

³¹ *See* SWAPE Comments III, p. 5 [Exhibit A].

³² *Id.*

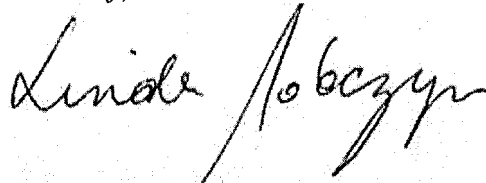
³³ CEQA Guidelines §§ 15126.2, 15126.4.

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Analysis provided. Indeed, as already explained in our appeal letter, the City must disclose, analyze, and mitigate the Project's significant impacts in an EIR. Otherwise, the City's approval of the Project would violate CEQA.

Here, and as already explained in our prior comments and appeal letter, the Project will have new or more severe significant impacts than previously analyzed in the LMSAP EIR that are not adequately mitigated, therefore disqualifying the project from any CEQA exemptions and requiring a subsequent or supplemental EIR.

Sincerely,

A handwritten signature in black ink that reads "Linda Sobczynski". The signature is written in a cursive, flowing style.

Linda Sobczynski
Associate

Attachments

LTS:ljl