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June 28, 2018

Via Email and Hand Delivery

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**Re: Agenda Item No. 7.3: Shellmound Way General Plan Amendment (GPA 18-001)
Agenda Item No. 8.1: 5850 Shellmound Way Mixed Use Project (UPDR17-011)**

Dear Chairperson Donaldson and Honorable Members of the Planning Commission:

These comments are submitted on behalf of **East Bay Residents for Responsible Development** (“EBRRD”) regarding two items on the Planning Commission’s (“Commission”) June 28, 2018 Agenda – Agenda Item No. 7.3: Shellmound Way General Plan Amendment (GPA 18-001) (“GP Amendment”) and Agenda Item No. 8.1: 5850 Shellmound Way Mixed Use Project (UPDR17-011) (“Project”).

The GP Amendment and Project have been agendized for separate consideration by the Commission at this evening's hearing. This approach is violates the California Environmental Quality Act¹ ("CEQA") in several ways.

First, the City has improperly piecemealed its environmental review of the GP Amendment from the rest of the 5850 Shellmound Project. The GP Amendment is identified in both Staff Reports as a fundamental component of the Project.² CEQA requires that the impacts of the GP Amendment be evaluated and reviewed under CEQA jointly with the Project's other proposed entitlements.³ The GP Amendment therefore may not be segmented from the rest of the Project or its environmental review. The City has not yet prepared a CEQA document for the 5850 Shellmound Project, and has not conducted any CEQA review for the GP Amendment. By proposing to approve the GP Amendment separately from the Project (pursuant to Staff's proposal under Agenda Item No. 7.3), and without analyzing the Project under CEQA (as explained in Agenda Item No. 8.1), the City proposes to improperly allow the GP Amendment to escape environmental review entirely. This would also improperly constrain the alternatives and mitigation measures that are subsequently considered for the Project when a CEQA document is subsequently prepared for the 5850 Shellmound development.

Second, CEQA review is required for general plan amendments.⁴ The City's reliance on the original 2009 General Plan EIR to forego conducting CEQA review for the GP Amendment is therefore misplaced.

Third, the GP Amendment may result in significant impacts which require CEQA review. The GP Amendment would result in a substantial change from the existing configuration of Shellmound Way that is depicted in the General Plan, and which was analyzed in the 2009 General Plan EIR. The GP Amendment may also result in significant traffic impacts in the immediate vicinity of Shellmound Way which did not exist, and were not analyzed, in the 2009 General Plan EIR. These impacts must be analyzed in an environmental impact report ("EIR").

¹ Pub. Resources Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR") §§ 15000 et seq.

² See GP Amendment Staff Report, pp. 1-2; Project Staff Report, p. 2.

³ See 14 Cal Code Regs § 15003(h); *Bozung v LAFCO* (1975) 13 C3d 263, 283; see also *California Unions for Reliable Energy v Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 CA 4th 1225, 1249.

⁴ *Christward Ministry v. Superior Court* (1986) 184 Cal.App.3d 180, 186-187, 186.

EBRRD urges the Planning Commission to recommend denial of the GP Amendment, and to remand the Project to Staff to prepare a legally adequate EIR which fully and accurately analyzes all components of the 5850 Shellmound Project in a single CEQA documents, including the GP Amendment. EBRRD reserves the right to submit supplemental comments at any later hearings and proceedings related to the GP Amendment and Project.⁵

I. STATEMENT OF INTEREST

EBRRD is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes Emeryville resident Rudolph Brooks, UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, their members and families, and other individuals that live and/or work in the City of Emeryville and Alameda County.

Individual members of EBRRD and its affiliated labor organizations live, work, recreate and raise their families in Alameda County, including the City of Emeryville. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. EBRRD has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

⁵ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield ("Bakersfield")* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

II. AN EIR IS REQUIRED TO ANALYZE THE ENTIRE 5850 SHELLMOUND PROJECT, INCLUDING THE GENERAL PLAN AMENDMENT

CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.⁶ “The 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.”⁷

CEQA requires lead agencies to analyze the potential environmental impacts of their proposed actions in an EIR (except in certain limited circumstances).⁸ In addition to its informational purpose, CEQA requires public agencies to avoid or reduce environmental damage whenever feasible by requiring “environmentally superior” alternatives and all feasible mitigation measures.⁹ The EIR serves to provide agencies and the public with information about the environmental impacts of a proposed project and to “identify ways that environmental damage can be avoided or significantly reduced.”¹⁰ If a project will have a significant effect on the environment, the agency may approve the project only if it finds that it has “eliminated or substantially lessened all significant effects on the environment where feasible” and that any unavoidable significant effects on the environment are “acceptable due to overriding concerns.”¹¹

Most fundamentally, the lead agency’s CEQA review must consider the “whole” of a project.¹² CEQA defines a “project” as “*the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment ...*”¹³ Before undertaking a project, the lead agency must assess the environmental

⁶ 14 CCR § 15002(a)(1).

⁷ *Comtys. for a Better Env’ v. Cal. Res. Agency* (2002) 103 Cal. App.4th 98, 109 (“*CBE v. CRA*”).

⁸ See, e.g., PRC § 21100.

⁹ 14 CCR§ 15002(a)(2) and (3); see also *Berkeley Jets*, 91 Cal.App.4th at 1354; *Citizens of Goleta Valley*, 52 Cal.3d at 564.

¹⁰ 14 CCR §15002(a)(2).

¹¹ PRC § 21081; 14 CCR § 15092(b)(2)(A) & (B).

¹² *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297.

¹³ CEQA Guidelines, § 15378(a).

impacts of all reasonably foreseeable phases of a project and a public agency may not segment a large project into two or more smaller projects in order to mask serious environmental consequences.¹⁴ Failure to include a component of the project in a project description renders the description inaccurate and inadequate under CEQA.¹⁵

A. The City May Not Piecemeal Its Analysis Of The GP Amendment From The Rest Of The 5850 Shellmound Project.

The City has improperly piecemealed the proposed GP Amendment from the rest of the 5850 Shellmound Project by presenting the GP Amendment to the Commission as a separate action for City approval apart from the rest of the Project. To date, the City has failed to perform any CEQA review for *either* the Project or the GP Amendment. Neither can be approved until a legally adequate EIR is prepared for the entire Project, including the proposed GP Amendment.

Under CEQA's definition of a project, although a project may involve multiple approvals or go through several approval stages, the environmental review accompanying the *first discretionary approval* must evaluate the impacts of the ultimate development authorized by that approval.¹⁶ CEQA prohibits a project proponent from seeking approval a large project in a piecemeal fashion in order to take advantage of environmental exemptions or lesser CEQA review for smaller projects. The process mandated by CEQA prevents agencies from chopping a large project into little ones, each with a minimal impact on the environment, to avoid full environmental disclosure.¹⁷

In particular, a general plan amendment to accommodate a development project is an initial step in the approval process. Even though further discretionary approvals may be required before a development project can occur, CEQA requires that the agency's environmental review of a general plan amendment must extend

¹⁴ *Orinda*, 182 Cal.App.3d at 1171–1172.

¹⁵ See *McQueen v. Board of Directors* (1988) 202 Cal. App. 3d 1136, 1143–1147; 14 Cal. Code Regs. § 15062(a).

¹⁶ *Arviv Enterprises, Inc.*, 101 Cal. App. 4th at 1340.

¹⁷ See 14 Cal Code Regs § 15003(h); *Bozung v LAFCO* (1975) 13 C3d 263, 283; see also *California Unions for Reliable Energy v Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 CA 4th 1225, 1249.

to the entire development envisioned by the initial approvals.¹⁸ It is irrelevant whether the underlying development project ultimately receives all necessary entitlements or is actually built. Piecemeal environmental review that ignores the environmental impacts of the end result is not permitted.¹⁹

In this case, *both* the GP Amendment Staff Report and Project Staff Report expressly acknowledge that the need for the proposed GP Amendment arose as a result of the Planning Commission's initial consideration of the 5850 Shellmound Project, and is necessary in order to facilitate development of the Project:

On September 28, 2017, the Planning Commission reviewed a proposal for a new, eight story building accommodating about 260 residential units by demolishing an existing office building at 5850 Shellmound Way. At that time, it was noted that the approval of the project would require a General Plan Amendment, as the General Plan shows the location of Shellmound Way approximately 250 feet north of its existing configuration. The parcel at 5850 Shellmound Way fronts the existing Shellmound Way and any new project proposal would trigger relocation of Shellmound Way as shown in the General Plan or the project would require a General Plan Amendment.²⁰

¹⁸ See *Christward Ministry' v Superior Court* (1986) 184 CA3d 180, 193.

¹⁹ See *Christward Ministry' v Superior Court* (1986) 184 CA3d 180, 193 (EIR should have been required for general plan amendment designating existing landfill site to permit various waste-disposal activities even though EIR would be required later if use permits were actually sought for such activities); *City of Carmel-by-the-Sea v Board of Supervisors* (1986) 183 CA3d 229, 251 (county violated CEQA by preparing negative declaration for rezoning and reserving preparation of EIR until later stage of approval); *Citizens Ass '11 for Sensible Dev. v County of Inyo* (1985) 172 CA3d 151, 167 (county improperly prepared negative declaration for general plan amendment and rezoning for proposed shopping center followed by later negative declaration for subdivision map and road abandonment for same project, because, by bifurcating review, county failed to examine potential impacts of entire development). See also *Nelson v County of Kern* (2010) 190 CA4th 252 (county's CEQA review of mining project on federal land, which was reviewed under National Environmental Policy Act of 1969 (NEPA) and approved by federal Bureau of Land Management, violated CEQA because it failed to consider impacts of mining operations and was limited to impacts of reclamation plan).

²⁰ See GP Staff Report, p. 1; Project Staff Report, pp. 1-2.

The GP Amendment is therefore a “forseeable consequence” of the proposed 5850 Shellmound Project, and must be analyzed as a component of the Project.²¹ Even if other projects at the same location could potentially require the same general plan amendments, as the Staff Reports contend, it is irrelevant to the City’s duty to analyze the GP Amendment as part of the 5850 Shellmound Project.²²

CEQA requires EIRs to discuss “any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans.”²³ A project’s inconsistencies with local plans and policies constitute significant impacts under CEQA.²⁴ If the City were to approve the GP Amendment prior to conducting CEQA review for the Project, it would artificially render the Project consistent with the General Plan, when, in fact, it is not. Such a premature GP Amendment would result in masking a significant impact of the Project that the City is required to disclose pursuant to CEQA. Moreover, as discussed below, the GP Amendment may result in additional traffic and transportation impacts that require CEQA review prior to approval.

An EIR must be prepared to include a thorough description and environmental impact analysis of all components of the 5850 Shellmound Project.

B. An EIR Is Required for the GP Amendment.

General plan amendments are “projects” within the meaning of CEQA and require CEQA review.²⁵ The courts have held that “[t]he fact that the enactment or amendment of a general plan does not directly effect a physical change in the environment does not remove it from the scope of CEQA Under current law, general plans do have an ultimate effect upon physical changes in the environment.”²⁶ The City failed to conduct any CEQA review for the GP

²¹ See *Aptos Council v County of Santa Cruz* (2017) 10 Cal. App. 5th 266, 293.

²² GP Amendment Staff Report, pp. 1-2 (assertion that “any project” along Shellmound Way would require the GP Amendment).

²³ 14 CCR § 15125(d); *City of Long Beach v. Los Angeles Unif. School Dist.* (2009) 176 Cal. App. 4th 889, 918; *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874 (EIR inadequate when Lead Agency failed to identify relationship of project to relevant local plans).

²⁴ *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4.

²⁵ 14 CCR § 15146(b); *Christward Ministry*, 184 Cal.App.3d 180, 186.

²⁶ *Id.* at 194.

Amendment, in violation of CEQA. The GP Amendment cannot be approved until a legally adequate EIR is prepared.

1. *The GP Amendment Will Have Potentially Significant Impacts that Must Be Analyzed in an EIR.*

An EIR is required for the GP Amendment to address the substantial changes proposed to the 2009 General Plan land use maps, and to address changed circumstances related to traffic conditions and substantial increases in the severity of previously analyzed traffic and transit impacts.

The GP Amendment would result in a substantial change from the existing configuration of Shellmound Way that is depicted in the General Plan, and which was analyzed in the 2009 General Plan EIR. If adopted, the GP Amendment would require fundamental changes to almost every General Plan map, including “all figures in the General Plan that use the street base map.”²⁷ These include:

- Figure 1-2 City Districts
- Figure 1-3 Existing Plans in Emeryville
- Figure 1-4 Redevelopment Project Areas
- Figure 2-1 Areas of Change and Stability - 2009
- Figure 2-2 Land Use Diagram
- Figure 2-3 Maximum Floor Area Ratios
- Figure 2-4 Maximum Building Heights
- Figure 2-6 Maximum Residential Densities
- Figure 3-1 Circulation
- Figure 3-2 Street System
- Figure 3-3 Regional Retail Access
- Figure 3-4 Pedestrian System
- Figure 3-5 Bay Trail
- Figure 3-6 Bicycle System
- Figure 3-7 Transit System
- Figure 3-8 Truck Routes
- Figure 4-1 Parks, Open Space, and Public Services

²⁷ See GP Amendment Staff Report, pp. 2-3.

Figure 5-1 City Structure
Figure 5-2 Areas and Districts
Figure 5-3 Bicycle and Pedestrian Connectivity
Figure 5-7 Utility Undergrounding Progress
Figure 5-10 Neighborhood Centers
Figure 6-1 Historic Resources
Figure 6-2 Geology and Earthquake Shaking Potential
Figure 6-4 Liquefaction Susceptibility
Figure 6-6 Water Features in Emeryville
Figure 6-7 Coastal Flood Zone and Dam Failure Inundation Hazard Area
Figure 6-8 Areas Vulnerable to a 16-Inch Sea Level Rise by Mid-Century
Figure 6-9 Existing Noise Contours
Figure 6-10 Projected Noise Contours.²⁸

Nevertheless, the Staff Report incorrectly states that the GP Amendment would not invoke any major changes to the existing General Plan, and therefore does not trigger the need for any new CEQA review. These changes to the General Plan were not analyzed in the 2009 General Plan EIR and must be analyzed in a new EIR before the GP Amendment can be approved.

The GP Amendment may also result in potentially significant traffic impacts that have not been analyzed in any CEQA document. The Staff Report acknowledges that the 2009 General Plan adopted the original configuration for Shellmound Way, which would have located it 250 north of its present location. This original configuration was analyzed in the 2009 EIR – not the existing street location that is proposed by the GP Amendment.

To remedy this omission, the Staff Report attempts to rely on a 2007 traffic study that was prepared for a different project to contend that the GP Amendment would not have any significant traffic impacts, and that the benefits of street relocation are less than its costs.²⁹ The Staff Report acknowledges that no traffic study was prepared for the current GP Amendment. The 2007 traffic study does not provide substantial evidence to support the City's assertion that the GP Amendment will not result in significant impacts. First, the 2007 study is

²⁸ GP Amendment Staff Report, p. 3.

²⁹ Staff Report, p. 2-3.

completely outdated, and fails to analyze the current traffic conditions along Shellmound Way and its tributaries resulting from increased East Bay traffic in the last 11 years, and the recent installation of at least 2 new large mixed-use residential projects within ¼ mile of the Project site.

An updated traffic analysis of the GP Amendment must be conducted and included in an EIR for the Project before the City can proceed with any Project approvals.

III. CONCLUSION

For the reasons set forth above, we urge the Planning Commission to deny approval of the GP Amendment, and direct Staff to prepare a legally adequate EIR for the entire 5850 Shellmound Project.

Sincerely,



Christina M. Caro

CMC:acp