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May 10, 2018

Via E-Mail and Hand Delivery

**Agenda Item D.1**

Honorable Mayor Alan L. Nagy and Council Members  
Newark City Council  
37101 Newark Boulevard  
Newark, CA 94560  
City.clerk@newark.org

**Re: Design Review of four new advanced manufacturing buildings at 7380 Morton Avenue, location of the former Morton Salt Plant (DR-18-4)**

Dear Mayor Nagy and Council Members:

We are writing on behalf of **Newark Residents for Responsible Development** (“Newark Residents”) in regard to the Design Review of four new advanced manufacturing buildings proposed by Newark Industrial Partners, LLC (“Applicant”) at 7380 Morton Avenue, the location of the former Morton Salt Plant, in the City of Newark (“City”). The Project includes the demolition of approximately 160,000-square feet (“sf”) of existing structures on the 29.89-acre Project site. The Project also includes reconfiguring the Project site into four lots and the construction of four new buildings: Building 1 will be approximately 161,680 sf with 183 parking spaces; Building 2 will be approximately 141,275 sf with 159 parking spaces; Building 3 will be approximately 76,162 sf with 138 parking spaces; and Building 4 will be approximately 225,679 sf with 254 parking spaces.

Based on our review of the Project documents provided by the City, we have determined that the City’s Design Review approval for the Project is a discretionary action and is therefore subject to the requirements of the California Environmental Quality Act (“CEQA”). As explained further below, Design Review for this Project is not merely a ministerial task contingent on an assessment of the Project’s

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satisfaction of fixed, objective standards;<sup>1</sup> rather, the Newark City Zoning Ordinance affords reviewing bodies significant discretion to apply several vague and subjective criteria touching on nearly all elements of project design. This regulatory authority has enabled the City to meaningfully shape the Project design through required mitigation in response to the City's identified concerns.<sup>2</sup> Indeed, the City has clearly exercised its discretion to impose a wide variety of Project-specific conditions in response to the potential environmental impacts of the Project. Proceeding with Design Review approval before complying with CEQA and evaluating the potential environmental impacts of the Project is thus a direct violation of the statute.

### **I. Statement of Interest**

Newark Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety standards and environmental impacts associated with Project development. Newark Residents includes Jesse Chavez, Howard Neal, Robert Wetherall, **the International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 342, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483**, and their members and families; and other individuals that live and/or work in the City of Newark and Alameda County.

Individual members of Newark Residents and the affiliated labor organizations live, work, recreate and raise their families in the City of Newark and Alameda County. 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. Newark Residents have a strong interest in enforcing the State's 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.

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<sup>1</sup> See *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal. App. 4th 286, 300.

<sup>2</sup> See *Mountain Lion Foundation v. Fish & Game Comm.* (1997) 16 Cal. 4th 105, 117 ("The statutory distinction between discretionary and purely ministerial projects implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR . . . environmental review would be a meaningless exercise.").

## II. Applicable Legal Standard

The California Environmental Quality Act, Public Resources Code section 21000 *et seq.*, was enacted for two fundamental purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project.<sup>3</sup> Second, CEQA requires public agencies to avoid or reduce environmental damage when feasible by require environmentally superior alternatives and the implementation of all feasible mitigation measures.<sup>4</sup>

To ensure that environmental considerations inform public agencies' decisions, CEQA establishes a multi-tiered review process. The process begins with a determination of whether or not CEQA applies to a proposed activity.<sup>5</sup> Because CEQA requires a public agency to prepare an Environmental Impact Report whenever the agency undertakes a "discretionary" project that may have a significant impact on the environment, whether or not CEQA applies turns on whether the public agency's action is "discretionary" as opposed to merely "ministerial."<sup>6</sup>

CEQA Guidelines section 15002 explains, "CEQA applies in situations where a governmental agency can use its judgment in deciding whether and how to carry out or approve a project. A project subject to such judgmental controls is called a 'discretionary project.'"<sup>7</sup> Under CEQA Guidelines section 15357, a discretionary project is one that "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations when the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." A ministerial project, on the other hand, is "[w]here the law requires a governmental agency to act on a project in a set way without allowing the agency to use its own judgment . . ."<sup>8</sup> A ministerial action "involves only *the use of fixed standards or objective measurements, and the public official cannot use*

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<sup>3</sup> CEQA Guidelines § 15002(a)(1).

<sup>4</sup> CEQA Guidelines § 15002(a)(2)-(3); see also *Berkeley Keep Jets Over the Bay v. Bd. Of Port Comm'rs.* (2001) 91 Cal. App. 4<sup>th</sup> 1344, 1354; *Citizens of Goleta Valley v. Bd. Of Supervisors* (1990) 52 Cal. 3d 553, 564.

<sup>5</sup> *Sierra Club v. County of Sonoma* (2017) 11 Cal. App. 5<sup>th</sup> 19.

<sup>6</sup> Pub. Resources Code § 21080; See *Sierra Club* 11 Cal. App. at 19-20.

<sup>7</sup> CEQA Guidelines § 15002(i).

<sup>8</sup> CEQA Guidelines § 15002(i)(1).

*personal, subjective judgment in deciding whether or how the project should be carried out.*”<sup>9</sup> The CEQA Guidelines explain that “[w]hether an agency has discretionary or ministerial control over a project depends on the authority granted by the law providing the controls over the activity.”<sup>10</sup> In fact, [s]imilar projects may be subject to discretionary controls in one city or county and only ministerial controls in another.”<sup>11</sup> The courts have elaborated on the distinction between discretionary and ministerial acts, explaining that for purposes of CEQA, the crux of the inquiry “is whether the agency would be able to meaningfully address the environmental concerns that might be indentified in an EIR.”<sup>12</sup> Stated differently, an approval is discretionary, and therefore subject to CEQA, if the agency has the ability and authority to condition approval in environmentally significant ways.

Finally, “[i]f a project approval features both ministerial and discretionary elements, the project is deemed discretionary and subject to CEQA review.”<sup>13</sup>

### **III. The City Is Exercising Discretion In Approving the Project**

As applied here, the City’s Design Review approval process, at minimum, includes both ministerial and discretionary considerations. First, the Design Review Criteria set forth in the City’s Zoning Ordinance include a number of vague, subjective standards conferring broad discretion on the decision-making authority to meaningfully shape the Project in response to impact concerns. Second, the Conditions of Design Review Approval included in the draft resolution plainly demonstrate that the City has interpreted its authority such that it may condition approval to address the potential environmental impacts. Third, the consideration of the Project and its design by the Planning Commission and now the City Council – as the City’s legislative body and final decision making body – is evidence of the fact that the approval “requires the exercise of judgment or deliberation.”<sup>14</sup> For each of these reasons, Design Review triggers the requirement to comply with CEQA.

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<sup>9</sup> CEQA Guidelines § 15369 (italics added).

<sup>10</sup> CEQA Guidelines § 15002(i)(2).

<sup>11</sup> *Id.*

<sup>12</sup> *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal. App. 3d 259, 266; *Mountain Lion Foundation* 16 Cal. 4<sup>th</sup> at 117; *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal. App. 4<sup>th</sup> 924, 928.

<sup>13</sup> *Sierra Club* 11 Cal. App. At 20 (citing CEQA Guidelines § 15268(d)).

<sup>14</sup> CEQA Guidelines § 15357.

**1. The Scope and Criteria for Design Review Granted Under the Zoning Ordinance Confer Broad Discretion to the Reviewing Authority When Considering Approval**

The City of Newark Zoning Ordinance sets forth the scope of design review and the criteria upon which design review approval is based. Section 17.34.050 explains that Design Review applies to “the design of the site plan, structures, landscaping, and other physical features of the project[.]” The list of “physical features” within the scope of design review includes virtually every element of project design, including building proportions, site design, parking and paved areas, landscaping, lighting, and signage, among others. The City thus has the authority to shape each of these elements of a project during its consideration of a design review application, so long as it exercises that authority in accordance with the design review criteria.

In reviewing the physical elements of the Project, the design review authority is charged with the broad mandate of “evaluat[ing] applications to ensure that they satisfy the . . . [design review] criteria, conform to the policies of the General Plan and any applicable specific plan, any adopted guidelines, and are consistent with any other policies or guidelines that City Council may adopt for this purpose.”<sup>15</sup> Additionally, to obtain design review approval, projects must satisfy the following criteria:

- A. The *overall design* of the project including its scale, massing, site plan, exterior design, and landscaping *will enhance the appearance and features of the project site and surrounding natural and built environment.*
- B. The project design is *appropriate to the function of the project* and will provide *an attractive and comfortable environment* for occupants, visitors, and the general community.
- C. Project details, materials, signage and landscaping, are internally consistent, fully integrated with one another, and used in a manner that is *visually consistent* with the proposed architectural design.

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<sup>15</sup> Ordinance No. 503, City of Newark New Zoning Ordinance, § 17.34.060 (adopted Jan. 25, 2018)

- D. The design of streetscapes, including street trees, lighting, and pedestrian furniture, is consistent with the intended character of the area.
- E. Parking areas are designed and developed to buffer surrounding land uses; compliment pedestrian-oriented development; *enhance the environmental quality of the site*, including minimizing stormwater run-off and the heat-island effect; and achieve a safe, efficient, and harmonious development.
- F. Lighting and lighting fixtures are designed to complement buildings, be of *appropriate* scale, provide adequate light over walkways and parking areas to create a sense of pedestrian safety, and avoid creating glare.
- G. Landscaping is designed to be compatible with and *enhance the architectural character* and features of the buildings on site, and help relate the building to the surrounding landscape.<sup>16</sup>

As the italicized sections highlight, the City’s design review criteria is replete with criteria requiring the exercise of “personal, subjective judgment in deciding whether or how the project should be carried out.”<sup>17</sup> While criteria such as whether or not the parking areas are designed to buffer surrounding land uses may involve an objective determination, criteria such as whether the overall design of a project “enhances” the surrounding natural and built environment or environmental quality of the site are inherently subjective. The Ordinance offers no guidance or objective standards by which to judge whether the project enhances the surrounding environment or provides an “attractive and comfortable” environment. These are precisely the sort of judgments that the courts have determined are discretionary, as they allow the City to shape the project design and respond to public concerns.<sup>18</sup> They are not the “finely detail and very specific regulations” that the courts have determined are ministerial.<sup>19</sup>

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<sup>16</sup> *Id.* (italics added)

<sup>17</sup> CEQA Guidelines § 15369.

<sup>18</sup> *See Friends of Westwood*, 191 Cal. App. 3d at 273-278.

<sup>19</sup> *Sierra Club*, 11 Cal. App. 5<sup>th</sup> at 340-341.

## **2. The City Is Exercising Discretion by Imposing Conditions of Design Review Approval in Response to Project-Specific Impacts**

In the present case, the fact that the City has exercised its discretion with respect to the Project is demonstrated by a review of the proposed Conditions of Design Review Approval. The proposed resolution confusingly states that “[t]he following regulations are reiterated from Newark Municipal Code and Newark Zoning Ordinance for clarity” before listing some 70 conditions. However, the precise basis for these conditions is unclear as no Code sections are cited.

Furthermore, some of conditions are clearly unique to the Project and not merely recitations of the code “for clarity,” as they include Project-specific requirements. For example, condition “s” requires the applicant to hire a qualified biologist to determine whether Burrowing Owl exist on the site and to implement a plan to protect the owls and habitat. This condition is presumably based on the Biological Resource Due Diligence Assessment conducted by Helix Environmental, which identified burrowing owl as a special-status wildlife species reported in the vicinity of the Project site.<sup>20</sup> Similarly, condition “kk” requires the applicant to guarantee and implement all mitigation measures in the approved Transportation Impact Assessment Report prepared for the Project. This includes intersection-specific measures based on the Traffic Impact Assessment that concluded the Project would have significant impacts in the absence of mitigation.<sup>21</sup>

Notwithstanding the City’s attempt to characterize the above conditions of approval as mere recitations from the City Code, these conditions of approval, among others, demonstrate that the City has exercised its discretion to fashion unique conditions to reduce environmental impacts of the Project. On the basis of its design review authority, the City has incorporated a host of requirements on the Design Review for the Project to address plant and animal species, traffic impacts, water pollution, air pollution, and seismic risks. In some instances, these conditions include the development and incorporation of future measures to be devised by qualified professionals with no performance standards for the City’s future

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<sup>20</sup> Letter from Helix Environmental Planning, Inc. to Michal Johnson, Overton Moore Properties, regarding Biological Resources Due Diligence Assessment for Morton Salt Newark Facility Pond Site “Phase 2”, City of Newark, Alameda County, Ca (Oct. 12, 2017) at p. 4.

<sup>21</sup> 7380 Morton Avenue Transportation Impact Assessment Report, Fehr & Peers (Mar. 13, 2018) at p. 4.

compliance review.<sup>22</sup> The requirement to implement project features in the future, subject to City review and approval, is further evidence of the discretionary nature of the action. It also deprives the public and decision makers from reviewing the Project and mitigation requirements as a whole by chopping approvals such as biological resource mitigation plans, demolition permits, and construction requirements into independent approvals without public review.

#### **IV. Conclusion**

Taken together, the Zoning Ordinance's broad, subjective criteria for design review consideration, coupled with the draft resolution's unique conditions imposed to shape the design of Project demonstrate that the City's design review approval for the Project is a discretionary action subject to environmental review pursuant to CEQA. The City has shaped elements of the Project through several layers of review and proposed unique conditions of approval. This shows that the City has interpreted its design review authority in such a way that it is not merely reviewing the Project for conformance with fixed standards.

The City is required to comply with CEQA before further considering Design Review approval for this Project.

Sincerely,



Collin S. McCarthy

CSM:ljl

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<sup>22</sup> See, e.g., Draft Resolution No. \_\_\_\_, Resolution of the City Council of the City of Newark Approving DR-18-4, A Design Review For 4 New Advanced Manufacturing Buildings Located At 730 Morton Avenue, Location of Former Morton Salt Pond Site, Design Review Conditions of Approval zz and aaa (requiring submission of detailed soils and geotechnical reports).