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March 20, 2019

Via Email and Hand Delivery

Chair Jahmese Myres
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Via Email Only

Mike Rivera (mrivera@oaklandnet.com)

Re: Agenda Item 1: 1750 Broadway (PLN18369)

Dear Chair Myres, Honorable Members of the Planning Commission, Mr. Rivera:

These comments are submitted on behalf of **East Bay Residents for Responsible Development** (“East Bay Residents”) regarding Agenda Item No. 1, 1750 Broadway (PLN18369) (“Project”), and the CEQA Checklist/Exemption Report (“CEQA Analysis”) prepared by the City of Oakland (“City”) pursuant to the California Environmental Quality Act (“CEQA”).¹ The Project to construct a 37-story building consisting of 307 market-rate residential units, approximately 5,000 square feet of retail space, and a five-level parking garage for 170 parking spaces. The Project site is located at 1750 Broadway in the City of Oakland (“City”), between 17th and 19th Streets (APN: 008 062301300), and is proposed by Applicant Rubicon Point Partners (“Applicant”). Required Project approvals include Design

¹ Pub. Resources Code (“PRC”) §§ 21000 et seq.; 14 Cal. Code Regs. (“CCR” or “CEQA Guidelines”) §§ 15000 et seq.
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Review for new building construction, a Major Conditional Use Permit for buildings containing floor area over 200,000 square feet (“Major CUP”), and approval of a CEQA document for the Project.²

The CEQA Analysis evaluates the Project’s potential environmental impacts and consistency with the City’s General Plan Land Use and Transportation Element and its EIR (“LUTE EIR”); the 2007-2014 Housing Element, 2015-2023 Housing Element and their EIRs (“Housing Element EIRs”); and the City’s 2011 Renewal Plan Amendments / Redevelopment Plan and EIR (“Redevelopment Plan”).³ The CEQA Analysis asserts that the Project is exempt from further review pursuant to a number of CEQA exemptions, including the Class 32 infill exemption under CEQA Guidelines Section 15332, the streamlining exemptions for urban infill development projects under CEQA Guidelines Sections 15183 and 15183.3. In the alternative, the CEQA Analysis asserts that it is a CEQA Addendum prepared pursuant to CEQA Guidelines Sections 15162, 15163, and 15164.⁴ However, as explained more fully below, and in the comments of other local residents and members of the public regarding the Project, the Planning Commission (“Commission”) cannot approve the Project until further environmental review is conducted pursuant to CEQA.

We reviewed the CEQA Analysis in conjunction with our technical consultants,⁵ and have identified a number of deficiencies in the City’s analysis, as well new and more severe impacts than previously analyzed in the LUTE EIR, Housing Element EIRs, and Redevelopment Plan. Furthermore, there are mitigation measures not previously analyzed that would further reduce significant impacts. Specifically, the CEQA Analysis fails to accurately analyze the Project’s public health risks to the surrounding community from exposure to toxic air contaminants (“TACs”) generated during Project construction and by other local cumulative projects, and fails to require adequate mitigation to reduce those impacts to less than significant levels. The City also failed to analyze the Project’s impacts on public transit, in violation of CEQA and local land use requirements. The CEQA Analysis also improperly relies on a mitigated categorical exemption.

² March 20, 2019 Planning Commission Staff Report (“Staff Report”), p. 1.

³ CEQA Analysis, p. 3.

⁴ CEQA Analysis, p. 3.

⁵ See Exhibit B, Comments of Daniel T. Smith, traffic engineer.
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Therefore, the City lacks substantial evidence to support the exemption conclusions in its CEQA Analysis, and an EIR is required.⁶

East Bay Residents urges the Commission to continue this hearing, and remand the Project to City Staff to prepare an EIR for the Project. The Project should not be rescheduled for a full public hearing before the Commission until these issues have been addressed. East Bay Residents reserves the right to submit supplemental comments at any later hearings and proceedings related to the Project.⁷

I. STATEMENT OF INTEREST

East Bay Residents 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 City of Oakland residents Jason Gumataotao, Kal Karn, and James O'Brien, labor organizations 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 Oakland and Alameda County.

Individual members of East Bay Residents and the its affiliated labor organizations live, work, recreate and raise their families in Alameda County, including the City of Oakland. 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. East Bay Residents 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.

⁶ PRC § 21094.5(a); 14 CCR § 15164(e); see *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515.

⁷ 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.

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II. OVERVIEW OF CEQA REQUIREMENTS

CEQA has two basic purposes, neither of which is satisfied by the CEQA Analysis. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.⁸ The EIR is the “heart” of this requirement.⁹ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”¹⁰

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”¹¹ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.¹² CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.¹³

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.¹⁴ If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.¹⁵ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹⁶ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

⁸ 14 Cal. Code Regs. § 15002(a)(1) (“CEQA Guidelines”); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal.App.4th 1344, 1354 (“*Berkeley Jets*”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁹ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

¹⁰ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹¹ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹² *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

¹³ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

¹⁴ CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

¹⁵ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

¹⁶ *Id.*, §§ 21002-21002.1.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.¹⁷ A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹⁸ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹⁹

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether tiering or another appropriate process can be used for analysis of the project’s environmental effects, or determine whether a previously prepared CEQA document could be used for the project, among other purposes.²⁰ The initial study must accurately describe the project, identify the environmental setting, identify environmental effects and show “some evidence” to support those conclusions, and a discussion of ways to mitigate the significant effects of the project, if any.²¹ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.²² A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project “would not have a significant effect on the environment.”²³ If the project has potentially significant environmental effects but those effects can be reduced to a level of insignificance by mitigation measures that the project's

¹⁷ CEQA Guidelines § 15126.4(a)(2).

¹⁸ *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

¹⁹ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

²⁰ CEQA Guidelines §§ 15060, 15063(c).

²¹ CEQA Guidelines § 15063(d) (emphasis added).

²² *See, e.g.*, Pub. Resources Code § 21100.

²³ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

proponent has agreed to undertake, the lead agency may prepare a mitigated negative declaration (“MND”).²⁴

A. Subsequent CEQA Review.

When a previously approved project for which an EIR or an MND has been prepared is modified, 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.²⁵

In assessing the need for subsequent or supplemental environmental review, 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 have occurred:

- (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
- (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

²⁴ PRC § 21080 (c)(2); 14 CCR § 15064(f)(2).

²⁵ Pub. Resources Code § 21166; CEQA Guidelines § 15162.
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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.²⁶

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.²⁷ In any case, the decision must be supported by substantial evidence.²⁸ Here, the County's decision not to prepare a subsequent CEQA document for the Project is not supported by substantial evidence.

B. CEQA Infill Streamlining Exemptions

The City seeks to rely on narrow CEQA exemptions that allow approval of projects without an EIR in very narrow circumstances, CEQA Section 21094.5²⁹ and CEQA Guidelines Sections 15183 and 15183.3 (Qualified Infill)³⁰ (collectively, the

²⁶ CEQA Guidelines §§ 15162(a)(1)-(3).

²⁷ CEQA Guidelines § 15162(b).

²⁸ *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).

²⁹ Pub. Res. Code § 21094.5.

³⁰ 14 Cal. Code Regs. § 15183.3.

“Infill Exemption”). The Infill Exemption provides that, if an EIR was previously certified for a planning level decision of a city or county, subsequent CEQA review may be limited to evaluating a project’s effects on the environment that are either (A) specific to the project or to the project site and were not addressed as significant effects in the prior environmental impact report or (B) where substantial new information shows the effects will be more significant than described in the prior environmental impact report.³¹ The Infill Exemption allows a lead agency to forego preparation of an EIR if neither of these situations occur, or if the lead agency determines that uniformly applicable development policies or standards adopted by the agency will substantially mitigate the new effects. A lead agency’s determination pursuant to this section must be supported by substantial evidence.³²

C. Categorical Exemptions.

CEQA identifies certain classes of projects which are exempt from the provisions of CEQA called categorical exemptions.³³ Categorical exemptions apply to certain classes of activities that generally do not have a significant effect on the environment.³⁴ Public agencies utilizing such exemptions must support their determination with substantial evidence.³⁵ CEQA exemptions are narrowly construed and “[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language.”³⁶ Erroneous reliance by a lead agency on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA.³⁷ “[I]f the court perceives there was substantial evidence that the project might have an adverse impact, but the agency failed to secure preparation of an EIR, the agency’s action must be set aside because the agency abused its discretion by failing to follow the law.”³⁸

CEQA contains several exceptions to categorical exemptions. In particular, a categorical exemption shall not be used for an activity where there is a reasonable

³¹ Pub. Res. Code § 21094.5(a); 14 Cal. Code Regs. § 15183.3(a), (c).

³² Pub. Res. Code § 21094.5(a).

³³ PRC § 21084(a); 14 CCR §§ 15300, 15354.

³⁴ *Id.*

³⁵ PRC § 21168.5.

³⁶ *Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125; *McQueen*, 2 Cal.App.3d at 1148.

³⁷ *Azusa*, 52 Cal.App.4th at 1192.

³⁸ *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644, 656).
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possibility that the activity will have a significant effect on the environment due to “unusual circumstances,”³⁹ or where there is a reasonable possibility that the activity will have a significant effect on the environment, including (1) when “the cumulative impact of successive projects of the same type in the same place, over time is significant.”⁴⁰ An agency may not rely on a categorical exemption if to do so would require the imposition of mitigation measures to reduce potentially significant effects.⁴¹

III. THE CITY MAY NOT RELY ON PREVIOUS ENVIRONMENTAL ANALYSIS FOR PROJECT APPROVAL

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

The City’s reliance on CEQA Addendum and Infill Streamlining Exemptions to approve the Project without preparing an EIR is misplaced for several reasons. First, the CEQA Analysis does not simply provide “minor changes or additions are necessary” to the EIR as is allowed under the Addendum provision. Rather, it includes an entirely new substantive analysis for a large development project which was not specifically analyzed in the LUTE EIR, Housing Element EIR, or Redevelopment Plan. The City must discontinue this practice, which clearly violates CEQA. Moreover, as explained further below, the Project will result in new or more severe significant impacts than analyzed in the previous EIRs that require mitigation that is not included in the CEQA Analysis or Standard Conditions of Approval (“SCAs”). CEQA requires that the City’s decision to forego preparation of an EIR, and reliance on an Addendum, must be supported by substantial evidence.⁴² In this case, the City’s decision not to prepare a subsequent or supplemental EIR for the Project is not supported by substantial evidence because of these unanalyzed and/or unmitigated impacts.

The City also relies on narrow CEQA exemptions that are inapplicable or not supported by substantial evidence. Specifically, the City relies on CEQA Guidelines

³⁹ 14 CCR § 15300.2(c).

⁴⁰ 14 CCR § 15300.2(b).

⁴¹ *Salmon Pro. & Watershed Network v. County of Marin* (“SPAWN”) (2004) 125 Cal.App.4th 1098, 1198-1201.

⁴² *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).
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Sections 15183 (Community Plan)⁴³ and 15183.3 (Qualified Infill)⁴⁴ for Project approval. The exemptions apply only when a Project does not have impacts peculiar to the proposed project that are new or more significant than previously analyzed or can be substantially mitigated by uniformly applicable development policies or standards. The Project fails to meet these requirements because the Project’s health risks to local sensitive receptors from exposure to diesel particulate matter (“DPM”) emissions, a toxic air contaminant (“TAC”), during construction may be highly significant. The City also failed to analyze the Project’s impacts on public transit, in violation of CEQA and local land use requirements.

For these reasons, the City may not rely on the CEQA Analysis for Project approval, and must provide detailed analysis of the Project’s impacts in a subsequent or supplemental EIR.

A. The Project Has Significant, Unmitigated Health Risks from Construction Emissions.

The CEQA Analysis includes a health risk assessment (“HRA”) which admits that the Project will have potentially significant individual and cumulative impacts during Project construction from cancer risk to nearby sensitive receptors, as follows:⁴⁵

MAXIMUM HEALTH RISKS FROM PROJECT CONSTRUCTION

Health Risk at MEIR	Maximum Cancer Risk (in a million)	Chronic Risk (Hazard Index)	Maximum PM _{2.5} concentration
Uncontrolled Scenario			
Residential Receptor - Infant	114	0.073	0.337
Residential Receptor - Child	23	0.073	0.337
Residential Receptor - Adult	3	0.073	0.337
With Tier 4 Equipment			
Residential Receptor - Infant	4.5	0.003	0.014
Residential Receptor - Child	0.9	0.003	0.014
Residential Receptor - Adult	0.13	0.003	0.014

⁴³ CEQA Guidelines Section 15183.

⁴⁴ CEQA Guidelines Section 15183.3.

⁴⁵ CEQA Analysis, HRA, p. C-7.

Project-level Threshold	10	1.0	0.3
Significant?	No	No	No

The CEQA Analysis demonstrates that the Project’s unmitigated TAC emissions will exceed BAAQMD’s CEQA significance threshold of 10 in one million for Project impacts for both children (23 in one million) and infants (114 in one million). The impact on infants also exceeds BAAQMD’s cumulative cancer risk threshold of 100 in one million. These are significant impacts which require mitigation under CEQA.

The CEQA Analysis fails to adequately mitigate these cancer risks because the City’s reliance on Tier 4 construction equipment to mitigate these impacts to less than significant levels is not expressly required by either SCA AIR-3 or Conditions of Approval No. 13, the Construction Mitigation Plan (“CMP”). SCA AIR-3 requires *either* an HRA or a Construction Emissions Minimization Plan. However, the CMP does not expressly require Tier 4. It just vaguely says that the City and Applicant will agree to effective mitigation later. Condition of Approval No. 3 requires a CMP to address construction emissions, but does not require Tier 4 equipment. This is not adequate to support CEQA Analysis’ conclusions that cancer risk will be mitigated by use of Tier 4. Therefore, there is no binding mitigation required for the Project that will effectively mitigate its significant cancer risks to less than significant levels, and the City’s significance conclusions regarding health risk are unsupported.

B. The CEQA Analysis Lacks Substantial Evidence to Demonstrate that the Project Will Not Have Significant Impacts on Public Transit.

The CEQA Analysis concludes that the Project will be adequately served by public transit, but fails to include an analysis of the Project’s impacts on public transit that identifies current levels of impacted use of local public transit.⁴⁶ The City cannot rely on its prior EIRs to provide this missing analysis because the prior EIRs on which the CEQA Analysis purports to tier failed to address current overburdened Bay Area transit conditions. For example, the 1998 LUTE EIR, on which the CEQA Analysis relies, concluded that infill projects like the Project would

⁴⁶ See Exhibit A, Smith Comments, pp. 1-2.
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less than significant land use and transportation impacts due to proximity to public transit.⁴⁷

There is abundant evidence demonstrating that public transit in the City of Oakland, including in the transit corridors surrounding the Project site, are already at or above existing capacity.⁴⁸ Thus, it is unsupported for the City to conclude that the Project will not cause any new or more severe impacts on transit, or that the Project will be adequately served by existing transit. The City cannot rely on CEQA exemptions or a CEQA Addendum in the absence of this evidence. It is incumbent on the City to analyze, mitigate, or provide feasible alternatives for the Project's potentially significant impacts on public transit.

IV. THE CITY MAY NOT RELY ON A CATEGORICAL EXEMPTION BECAUSE THE PROJECT HAS SIGNIFICANT IMPACTS THAT REQUIRE MITIGATION

Mitigated categorical exemptions are prohibited under CEQA. An agency may not rely on a categorical exemption if to do so would require the imposition of mitigation measures to reduce potentially significant effects to less than significant levels.⁴⁹ As discussed above, there is substantial evidence in the City's own HRA and CEQA Analysis demonstrating that, prior to mitigation, the Project will have a significant individual and cumulative cancer risk from exposure of sensitive receptors to TAC emissions during Project construction.⁵⁰ This renders the City's reliance on the Class 32 Infill Exemption improper for three reasons.

⁴⁷ CEQA Analysis, p. 5.

⁴⁸ See e.g. Train strain: BART working on capacity issues as ridership rises to record levels, available at <https://www.bart.gov/news/articles/2013/news20130117>; January 2018, THE TRANSBAY CORRIDOR CORE CAPACITY PROGRAM, available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKEwiOktKQ95HhAhVRHTQIHSAKCVcQFjABegQICBAC&url=https%3A%2F%2Fwww.bart.gov%2Fsites%2Fdefault%2Ffiles%2Fdocs%2FBART%2520Core%2520Capacity_2018%2520TIRCP%2520App.pdf&usg=AOvVaw2_kPRW6dowt2i6FqKohQ01.

⁴⁹ *SPAWN*, 125 Cal.App.4th at 1102; *Azusa Land Recl. Co. v. Main San Gabriel Basin Watermaster* (“Azusa”) (1997) 52 Cal. App.4th 1165, 1198-1201.

⁵⁰ CEQA Analysis, p. 55; Appendix A, HRA, p. C-7.
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First, the City's reliance on the Class 32 Infill Exemption is unsupported because the Exemption only applies to projects that "would not result in any significant effects relating to traffic, noise, air quality, or water quality."⁵¹ The CEQA Analysis admits that the Project will have a significant, unmitigated cancer risk on infants that requires the use of Tier 4 mitigation to reduce to less than significant levels.⁵² Thus, the Class 32 Infill Exemption is facially inapplicable.

Second, the Project's significant cancer risk is an exception to the Class 32 Exemption. CEQA Guidelines Section 15300.2 prohibits categorical exemptions for projects with significant cumulative impacts or significant impacts due to unusual circumstances.⁵³ The CEQA Analysis admits that the Project will have a significant, unmitigated cancer risk on infants that requires the use of Tier 4 mitigation to reduce to less than significant levels. The concurrent current construction of two 35+ story buildings within a block of each other may also be considered an unusual circumstance resulting in a significant cumulative cancer risk to local sensitive receptors. These exceptions to the Class 32 Infill Exemption render it inapplicable to the Project.

Finally, the Project's CEQA Analysis and Conditions of Approval apply over 40 mitigation measures to the Project in order to reduce impacts to less than significant levels.⁵⁴ The CEQA Analysis explains that these Standard Conditions of Approval and Mitigation Monitoring and Reporting Program ("SCA/MMRP") are applied to the Project pursuant to Section 15097 of the CEQA Guidelines, which requires that the Lead Agency "adopt a program for monitoring or reporting on the revisions which it has required in the project and the measures it has imposed to mitigate or avoid significant environmental effects."⁵⁵ The CEQA Analysis further explains that "[t]he SCAs are **measures that would minimize potential adverse effects** that could result from implementation of the Proposed Project."⁵⁶ Proposed Condition of Approval No. 14 applies all mitigation measures identified in the SCA/MMRP to the Project. Condition of Approval No. 13 applies SCA AIR-3 to the

⁵¹ 14 CCR § 15332(d).

⁵² CEQA Analysis, p. 55; Appendix A, HRA, p. C-7.

⁵³ 14 CCR § 15300.2(b), (c).

⁵⁴ See CEQA Analysis, Attachment A, *Standard Conditions of Approval and Mitigation Monitoring and Reporting Program*; Staff Report, Attachment B, *Conditions of Approval*, e.g. Nos. 13 and 14.

⁵⁵ CEQA Analysis, p. A-1.

⁵⁶ *Id.* (emphasis added).

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Project. These are mitigation measures designed to reduce the Project's potentially significant environmental impacts and impacts on public health that will otherwise result from the Project without mitigation. Therefore, the City may not rely on a categorical exemption to approve the Project. The City's improper attempt to include mitigation measures in a categorical exemption is contrary to law, and deprives the public of its statutory rights to participate and comment on the sufficiency of the mitigation measures proposed to be applied to the Project.

V. CONCLUSION

For the reasons stated above, and in the comments of other members of the public, the City must prepare and circulate a legally adequate EIR for the Project which fully discloses and mitigates the Project's potentially significant impacts that are specific to the Project and which were not addressed in the LUTE EIR, Housing Element EIR, and Redevelopment Plan before the Project can be approved. East Bay Residents urges the Planning Commission to remand the Project to Staff to prepare an EIR before the Project is presented for further public hearing.

Thank you for your consideration of these comments.

Sincerely,



Christina M. Caro

CMC:acp

Attachments

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