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February 18, 2020

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**Re: Agenda Item 9.2: Supplemental Response to Appeal Report and Applicant Letters re 1750 Broadway (PLN18369; Appeal No. APL19013)**

Dear Mayor Schaaf, Council President Kaplan, Council Members, Mr. Rivera, Mr. Gilchrist:

This letter is submitted on behalf of Appellants **East Bay Residents for Responsible Development** ("East Bay Residents" or "EBRRD") to provide a further response to the City of Oakland's ("City") January 17, 2020 Appeal Report regarding EBRRD's Appeal of the 1750 Broadway Project (PLN18369) ("Project") and CEQA Checklist/Exemption Report ("CEQA Analysis"), a preliminary response to the Applicant's letters to the City of Oakland dated January 28, 2020 and

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February 14, 2020,<sup>1</sup> and to provide the City Council with new evidence demonstrating that the Project may result in potentially significant impacts from contaminated soil and groundwater during Project construction that require additional environmental review under the California Environmental Quality Act ("CEQA").<sup>2</sup>

This letter attaches the comments of air quality and hazardous resources expert James J.J. Clark, PhD,<sup>3</sup> and noise consultant Derek Watry of Wilson Ihrig.<sup>4</sup> These expert reports demonstrate that neither the Appeal Report, nor the numerous subsequent submissions by the Applicant, resolve the CEQA deficiencies with this Project in three critical areas.

#### **A. Soil and Groundwater Contamination.**

Dr. Clark presents substantial evidence demonstrating that newly discovered soil and groundwater contamination at the neighboring 1900 Broadway project site may be disturbed during the 1750 Broadway Project's construction excavation and dewatering activities. This is a new, unusual, and potentially significant impact that was not disclosed in the City's CEQA Analysis, and must be fully analyzed and mitigated before the Project can be approved.

The Alameda County Department of Environmental Health ("ACDEH") released a Fact Sheet on February 14, 2020 which discloses that ACDEH is conducting ongoing investigation and corrective action at the 1900 Broadway Project site (mixed-use residential project at 1901 Franklin and 1930 Broadway), located just 260 feet from the 1750 Broadway Project site.<sup>5</sup> ACDEH has concluded that the 1900 Broadway site contains soil and groundwater that have been

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<sup>1</sup> The Appeal Report responds to EBRRD's Appeal of the Planning Commission's March 20, 2019. The January 28 Applicant Letter was submitted in support of the Project. The February 14 Applicant Letter was submitted in response to EBRRD's January 24, 2020 preliminary comments on the Appeal Report.

<sup>2</sup> The Appeal Report was released for public review on January 17, 2020. EBRRD is still in the process of reviewing the Appeal Report with our technical consultants, and reserves the right to provide supplemental comments to the City Council prior to the February 4, 2020 City Council hearing. Please include this letter and all attachments in the record of proceedings for the Project.

<sup>3</sup> Dr. Clark's technical comments and curriculum vitae are attached hereto as Exhibit A and incorporated by reference.

<sup>4</sup> Mr. Watry's comments and curriculum vitae are attached hereto as Exhibit B and incorporated by reference.

<sup>5</sup> Exhibit A, fn 17. See attached Fact Sheet.  
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impacted with metals, total petroleum hydrocarbons as diesel and motor oil, and volatile organic compounds (VOCs).<sup>6</sup> ACDEH is in the process of identifying the nature and extent of the contamination at the 1900 Broadway site.<sup>7</sup>

Dr. Clark concludes that the currently unmitigated contamination at 1900 Broadway has the potential to be drawn in and released by Project construction activities at 1750 Broadway, resulting in a potentially hazardous risk. As he explains:

Groundwater was measured at the Webster Street site at relatively shallow depths of 14 to 23 feet below ground surface. Project construction for 1750 Broadway will excavate approximately 24,500 cubic yards of material beginning in the first phase of Project construction. This excavation may reach groundwater levels. Given the close proximity of the 1900 Broadway site to the 1750 Broadway site, the substantial amount of material being excavated from the 1750 Broadway site, and the Applicant's plan to initiate excavation activities at the beginning of the Project's 2-3 year construction phase, the action of dewatering onsite for the 1750 Broadway Project could create a preferential pathway to draw contaminants from these other sites to the Project Site. If the 1750 Broadway Project were to begin dewatering and excavation activities before the ACDEH corrective action at 1900 Broadway is complete, this could, in turn, result in the release of contaminants during 1750 Broadway construction.<sup>8</sup>

The extent to which this contamination may be disturbed by the 1750 Broadway Project has not been analyzed by either the City or ACDEH. The 1900 Broadway Project was approved on a CEQA exemption,<sup>9</sup> and there was no site-specific soil and groundwater study included in the CEQA Analysis for 1750 Broadway. Therefore, these impacts have not been addressed.

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<sup>6</sup> Exhibit A, p. 9.

<sup>7</sup> See [https://geotracker.waterboards.ca.gov/profile\\_report?global\\_id=T10000014012](https://geotracker.waterboards.ca.gov/profile_report?global_id=T10000014012).

<sup>8</sup> Exhibit A, p. 10.

<sup>9</sup> See

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwi8qtjWttznAhUYv54KHQm6ALgQFjAAegQIBRAB&url=http%3A%2F%2Fwww2.oaklandnet.com%2Foakca1%2Fgroups%2Fcda%2Fdocuments%2Fagenda%2Foak070743.pdf&usg=AOvVaw0G1f8ZZ6Ff-fHPsrc-cvRu>.

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An EIR is required prior to Project approval to evaluate the potential impacts from disturbing hazardous contaminants during Project construction, including a site-specific soil and groundwater contamination study for 1750 Broadway, and awaiting the results of ACDEH's investigation of the 1900 Broadway site.

**B. The City Still Fails to Provide Binding Mitigation for Toxic Air Contaminants.**

**1. SCA AIR-3 Does Not Require "Tier 4 Final" Equipment Absent Additional Mitigation.**

As we have previously explained, the City's health risk assessment ("HRA") found that the Project's unmitigated TAC emissions over the Project's 28-month construction period will be both individually and cumulatively significant:

- **23 in one million for CHILDREN; and**
- **114 in one million for INFANTS.<sup>10</sup>**

The CEQA Analysis admits that this "*cancer risk from uncontrolled Project construction emissions to infant and child receptors at the MEIR would exceed the City's CEQA significance thresholds.*"<sup>11</sup> An impact which exceeds an adopted significance threshold is a "significant impact" within the meaning of CEQA.<sup>12</sup>

We previously commented that SCA AIR-3 does not adequately mitigate this risk because "Tier 4 Final" engines are not required by SCA AIR-3. The February 14 Applicant Letter states that, because the Applicant prepared a health risk assessment pursuant to SCA AIR-3(a)(i), the Applicant will not follow SCA AIR-3(a)(ii), and will instead follow SCA AIR-3(b), resulting in the application of "Tier 4 Final" equipment. This is incorrect. Compliance with AIR-3(b) does not expressly

<sup>10</sup> CEQA Analysis, p. 55.

<sup>11</sup> CEQA Analysis, p. 55 (emphasis added).

<sup>12</sup> 14 CCR § 15064.7(a) ("A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency."; *CBIA v. BAAQMD*, 2013 Cal. App. LEXIS 644, \*18. When an impact exceeds a CEQA significance threshold, the agency must disclose in the EIR that the impact is significant. *CBE v. CRA*, 103 Cal.App.4th at 110-111; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"); *CBE v. SCAQMD*, 48 Cal.4th at 327 (impact is significant because exceeds "established significance threshold for NOx ... constitute[ing] substantial evidence supporting a fair argument for a significant adverse impact"). 4218-009acp

require “Tier 4 Final” construction equipment absent additional conditions added by the City, and therefore does not remedy the City’s failure to implement a Project-specific mitigation measure to require it.

SCA AIR-3(b) is set forth below:

**b. Construction Emissions Minimization Plan []**

Requirement: The project applicant shall prepare a Construction Emissions Minimization Plan (Emissions Plan) for all identified DPM reduction measures (if any). The Emissions Plan shall be submitted to the City (and the Bay Area Air Quality District if specifically requested) for review and approval prior to the issuance of building permits. The Emissions Plan shall include the following:

- i. An equipment inventory summarizing the type of off-road equipment required for each phase of construction, including the equipment manufacturer, equipment identification number, engine model year, engine certification (tier rating), horsepower, and engine serial number. For all VDECS, the equipment inventory shall also include the technology type, serial number, make, model, manufacturer, CARB verification number level, and installation date.
- ii. A Certification Statement that the Contractor agrees to comply fully with the Emissions Plan and acknowledges that a significant violation of the Emissions Plan shall constitute a material breach of contract.<sup>13</sup>

SCA AIR-3(b) does not say “Tier 4 Final” equipment. Rather, it refers to the same range of “VDECS” discussed above. Nor does SCA AIR-3(b) state that “the Project must be consistent with the DPM reduction measures that were “assumed” in the HRA,” as the Applicant’s letter claims. SCA AIR-3(b) requires the Applicant to provide an “equipment inventory” which lists the type of DPM-reduction equipment it proposes to use from the range of VDECS. Similarly, SCA AIR-3(a)(i) requires the Applicant to “identify” DPM-reduction measures to reduce health risk to acceptable levels and present them to the City for review and approval.<sup>14</sup> Even assuming the Applicant proposes the use of Tier 4 Final equipment, as the Applicant claims to have done here, “Tier 4 Final” would not be required unless the City adds a binding condition to the Project which requires it. Neither the CEQA Analysis nor the Appeal Report include any binding condition or mitigation

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<sup>13</sup> CEQA Checklist, Appendix A, p. A-7 (emphasis added).

<sup>14</sup> *Id.*, p. A-6.

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measure which requires "Tier 4 Final" equipment. Our conclusion therefore remains the same, and the City has not presented substantial evidence demonstrating that Tier 4 Final equipment will be required for the Project.

2. The Agreement Between the Applicant and the 1770 Broadway Building Owner to Provide "Air Purifiers" Does Not Adequately Mitigate Cancer Risk.

The Applicant's January 28 Letter includes a Memorandum of Agreement ("MOA") between the Project Applicant and the owners of 1770 Broadway. The recitals indicate that "the developer and neighbor are concerned regarding the potential disruption that construction of the Project may have on Neighboring Building residents." In Section 3.3, entitled Air Condition Units and Air Purifiers, the MOA states:

During construction, Tenants may wish to keep their windows closed. Because Neighboring Building does not have air conditioning, Developer shall provide Tenants with portable air conditioning units. If windows are open, Project construction may generate increased dust. To address this potential concern, Developer shall provide Tenants with air purifiers. Specifically, Neighbor and Developer agree to the following:

3.3.1. Developer shall purchase portable air conditioners and air purifiers for each unit in Neighboring Building. Developer shall notify Neighbor when these items have been purchased and arrange with Neighbor to have them delivered to Neighboring Building.

3.3.2. Neighbor shall provide Tenants with notice that portable air conditioners and air purifiers are available and work with each Tenant to install them into their units. If a portable air conditioner or air purifier provided breaks or needs repair, Neighbor shall notify Developer and Developer shall replace or repair the damaged unit.<sup>15</sup>

However, the MOA fails to define what constitutes an "air purifier." As Dr. Clark explains, the type of "air purifier" is a critical consideration in addressing the impacts from diesel particulate matter ("DPM") and other toxic air contaminants that will be released during the construction phase of the 1750 Broadway Project.

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<sup>15</sup> Applicant Jan 29 Letter, MOA.  
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As Dr. Clark explains, only high level MERV-13 or higher air filtration devices are capable of filtering the fine toxic particulates contained in the Project's DPM emissions.<sup>16</sup> The MOA fails to require this type of air filtration. Therefore, its purported requirement to provide "air purifiers" to residents of 1770 Broadway will not reduce cancer risk below thresholds.<sup>17</sup>

### **C. Construction Noise Impacts Remain Significant and Unmitigated.**

The Appeal Report contains a new noise study which is intended to support the noise conclusions in the CEQA Analysis ("Noise Report").<sup>18</sup> However, the Noise Report acknowledges that the Project will have significant construction noise impacts that require mitigation:

***We expect that noise levels could temporarily exceed the ordinance criteria without noise reduction measures at the nearest properties when construction is occurring close to the properties.***<sup>19</sup>

The Noise Report presents an improperly deferred analysis of the Project's construction noise impacts disguised as a mitigation plan. This approach violates CEQA.<sup>20</sup>

The Applicant's February 14 letter claims that Noise Report does not admit a significant noise impact because the Noise Report will add additional mitigation to reduce impacts below levels of significance. This claim is also contrary to CEQA, which requires the severity of the impact to be disclosed prior to mitigation.<sup>21</sup>

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<sup>16</sup> Exhibit A, pp. 5-7.

<sup>17</sup> The MOA is also an improper attempt by the Applicant to disguise mitigation measures in an unenforceable private contract, rather than as legally binding mitigation measures or conditions of approval by the City, as required by CEQA.

<sup>18</sup> Appeal Report, Attachment F, Construction Noise Management Plan (10/22/2019).

<sup>19</sup> *Id.*, p. 2.

<sup>20</sup> CEQA requires that an EIR disclose the severity of a project's impacts and the probability of their occurrence *before* a project can be approved. 14 CCR §§ 15143, 15162.2(a); *Cal. Build. Indust. Ass'n v. BAAQMD* (2015) 62 Cal.4th 369, 388-90 ("*CBIA v. BAAQMD*") (disturbance of toxic soil contamination at project site is potentially significant impact requiring CEQA review and mitigation); *Madera Oversight Coalition*, 199 Cal.App.4th at 82; *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs. ("Berkeley Jets")* (2001) 91 Cal.App.4th 1344, 1370-71; CEQA Guidelines, Appendix G.

<sup>21</sup> *Lotus v. Dept. of Transportation* (2013) 223 Cal.App.4th 650 (CEQA document may not compress the analysis of impacts and mitigation measures into a single issue, and must incorporate all 4218-009acp

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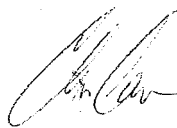
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Finally, as Mr. Watry explains, the City's reliance on the MOA and the Noise Report to effectively reduce construction noise impacts is unsupported because neither of these documents presents binding or enforceable mitigation measures or conditions of approval, as required by CEQA.

#### **D. Conclusion**

**EBRRD respectfully requests that the City Council continue this hearing** in order to address the new evidence of toxic soil and groundwater contamination, and to correct the deficiencies in the City's existing CEQA Analysis by requiring an EIR for the Project.<sup>22</sup>

Sincerely,



Christina M. Caro

CMC:acp

Attachment

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measures designed to reduce potentially significant project impacts into a legally binding mitigation plan).

<sup>22</sup> We reserve the right to supplement these comments at future proceedings. We incorporate by reference the Appeal and supporting comments of the 1770 Broadway neighbors. Please incorporate these comments into the Project's record of proceedings.

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