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December 26, 2019

**Via Email and U.S. Mail**

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Pete Vollmann, Planner, [PVollmann@oaklandca.gov](mailto:PVollmann@oaklandca.gov),  
David Guillory, Records Coordinator, [DGuillory@oaklandca.gov](mailto:DGuillory@oaklandca.gov)

**Re: Failure to Provide Timely Access to Public Records Related to  
88 Grand Avenue Project (PLN18406) and Request for  
Extension of the Public Comment Period**

Dear Mr. Gilchrist, Mr. Vollmann, Mr. Guillory, and Ms. Simmons:

We are writing on behalf of **Oakland Residents for Responsible Development** ("Oakland Residents")<sup>1</sup> concerning the 88 Grand Avenue Project (PLN18406), including the proposed Regular Design Review for New Construction, Minor Conditional Use Permit for Transfer of Development Rights, and Tentative Parcel

<sup>1</sup>Oakland Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public impacts associated with Project development. Oakland Residents includes City of Oakland residents, the **International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 342, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483**, their members and their families, and other individuals that live and/or work in the City of Oakland and Alameda County.

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Map (collectively, "Project") proposed by KTG Architecture/88 Grand MC, LLC/Seagate Properties ("Applicant") before the City of Oakland ("City"). We respectfully request that the City:

1. Provide *immediate access* to all outstanding Project records and Project-related correspondence requested in our December 6, 2019 Public Records Act request, which documents have been improperly withheld from timely production under the Public Records Act;<sup>2</sup>
2. Provide *immediate access* to all public records requested in our December 20, 2019 Public Records Act request, including but not limited to all documents referenced, incorporated by reference, and relied upon in the City's December 2019 CEQA Analysis for the Project; and
3. Extend the public comment period for the Project, which currently closes on December 30, 2019, by *at least 17 additional days from the date that it makes all outstanding public records available to Oakland Residents.*
4. Given the short time remaining before the current December 30, 2019 comment deadline, we request a response to this letter by the close of business on December 27, 2019.

The City has failed to provide timely access to duly requested public records related to the Project, and has failed to identify any statutory basis for an extension of time to respond. The City has advised us that it will not respond to outstanding record requests until December 30, 2019 – the same date that the City's public comment period on the Project closes.<sup>3</sup> Oakland Residents intends to file comments with the Planning Department related to the Project and the City's CEQA Analysis for the Project. The City's failure to provide access to documents in its own record for the Project makes it impossible for Oakland Residents to meaningfully comment on the Project and the CEQA Analysis prior to the close of the current public deadline of December 30, 2019. Accordingly, as described in detail below, we ask that the City provide immediate access to all outstanding Project-related public

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<sup>2</sup> Gov. Code, §§ 6250, et seq.

<sup>3</sup> See Zoning Manager Public Notice for 88 Grand Project, attached hereto as **Exhibit A**.

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records, and extend the public comment period by at least 17 days from the date on which we are provided access to the outstanding records.

On December 6, 2019 Oakland Residents submitted a request for access to “any and all public records referring or related to the 88 Grand Avenue Project since the date of our last request on July 19, 2019 (“December 6 PRA Request”).<sup>4</sup> The December 6 PRA Request was assigned PRA Request No. 19-6001 by the City’s public records department.<sup>5</sup> The City’s initial response to the December 6 PRA Request stated that documents would be provided on December 16, 2019.<sup>6</sup>

On December 10, 2019, our office emailed Mr. Vollman to inquire when the documents responsive to the December 6 PRA Request would be provided by the City.<sup>7</sup> On December 11, 2019, Mr. Vollman advised our office that “I am going to my e-mail archives to get everything ready to be forwarded.”<sup>8</sup> On or about December 11, 2019, the City provided some of the requested records, but responded that emails relative to our December 6 PRA Request required further review.<sup>9</sup> The City’s public records database stated that outstanding responsive records would be made available by December 16, 2019.<sup>10</sup>

On December 13, 2019, the City released the Zoning Manager Public Notice, notifying the public of the availability of a CEQA Analysis for the Project. The comment period for the Project currently ends on December 30, 2019.<sup>11</sup>

The City did not mail or email Oakland Residents a copy of the public notice, as required by our January 28, 2019 *Request for Mailed Notice of CEQA Actions and Hearings – 88 Grand Avenue, (PLN18406)*, and Oakland Residents was unable to

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<sup>4</sup> See December 6, 2019 Public Records Act request, attached hereto as Exhibit B.

<sup>5</sup> See December 2019 Oakland CA Public Records correspondence attached hereto as Exhibit C, p. 1 (“Re: Public Records Act Request – 88 Grand Avenue Project Received: December 6, 2019”).

<sup>6</sup> *Id.*, (“Re: Public Records Act Request – 88 Grand Avenue Project Due: December 16, 2019”).

<sup>7</sup> See December 2019 Email correspondence between ABJC and P. Vollman, attached hereto as Exhibit D.

<sup>8</sup> *Id.*

<sup>9</sup> See Exhibit C.

<sup>10</sup> *Id.*

<sup>11</sup> See Exhibit A.

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locate the public notice on the City's website.<sup>12</sup> On December 18, 2019, counsel for Oakland Residents emailed Mr. Vollman, asking for confirmation as to whether the City had issued a public notice for the comment period. In response, Mr. Vollman provided an electronic copy of the public notice on December 18, 2019.<sup>13</sup>

On or about December 18, 2019, we received a further update from the City, stating that our December 6 PRA Request had been assigned a new number, PRA Request No. 19-6177.<sup>14</sup> The December 18 correspondence stated that responsive documents would not be provided until **December 30, 2019** (the same date on which the Project's public comment period ends).<sup>15</sup> The December 18, 2019 response did not identify any "unusual circumstances" supporting a further extension of time to respond to our December 6 PRA Request, as required by the Public Records Act.<sup>16</sup>

On December 20, 2019, Oakland Residents submitted a second Public Records Act request to the City seeking an update to our December 6 PRA Request, as well as a access to all documents relied upon in the CEQA Analysis ("December 20 PRA Request").<sup>17</sup> To date, the City has not responded or assigned a PRA Request number to the December 20 PRA Request.<sup>18</sup>

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<sup>12</sup> The January 28, 2019 Request for Mailed Notice was filed pursuant to Public Resources Code Sections 21092.2, 21080.4, 21083.9, 21092, 21108 and 21152 and Government Code Section 65092, which require local agencies to mail such notices to any person who has filed a written request for them with the clerk of the agency's governing body.

<sup>13</sup> See December 18, 2019 C. Caro email correspondence with P. Vollman, attached hereto as Exhibit D.

<sup>14</sup> Review of the City's NextRequest system records indicates that December 6, 2019 request was entered twice. See <https://oaklandca.nextrequest.com/requests/19-6177> and <https://oaklandca.nextrequest.com/requests/19-6001>.

<sup>15</sup> See Exhibit C, p. 2, Exhibit E.

<sup>16</sup> Govt. Code § 6253(c).

<sup>17</sup> See Exhibit F.

<sup>18</sup> On December 18, 2018, in response to direct email requests from our office, Mr. Vollman provided five documents cited in the CEQA Analysis, including traffic exhibits, CalEEMod air emissions modeling, and the Phase I and Phase II Environmental Site Assessments. No other documents cited, referenced, incorporated by reference, or relied upon in the CEQA Analysis have been provided in response to our December 20 PRA Request as of the date of this letter.

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The City's response to both the December 6 PRA Request and December 20 PRA Request therefore remain late and incomplete, in violation of the Public Records Act and Oakland Residents' due process right to comment on the Project during the City's public comment period. The Public Records Act requires public records to be "open to inspection at all times during the office hours of the state or local agency" and provides that "every person has a right to inspect any public record."<sup>19</sup> The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the public review period invalidates the public review process, and that such a failure must be remedied by permitting additional public comment.<sup>20</sup> It is also well settled that CEQA documents may not rely on hidden studies or documents that are not provided to the public.<sup>21</sup>

In this case, Oakland Residents requested relevant records related to the Project before the City's public comment period on the Project had begun, and during the course of the public comment period. Yet, the City states that it will not provide access to the requested records until after the close of the comment period. The records requested by Oakland Residents related directly to the City's permitting and CEQA review process for the Project, and include reference materials that are vitally important to the public's evaluation of the adequacy of the City's analysis of the Project's environmental and health risk impacts to workers, future residents, and the surrounding community, and to the Project's consistency with City plans and City permitting procedures.

By failing to make public records related to the Project available during the City's public comment period, the City is violating Oakland Residents' due process rights to comment on the Project, including, in particular, Oakland Residents' right to present all necessary issues and evidence to the Planning Department prior to filing an appeal to the Planning Commission.<sup>22</sup> Pursuant to the Oakland Municipal Code ("OMC"), should a member of the public wish to appeal the Zoning Manager's decision, the appeal "must raise every issue that is contested along with all the arguments and evidence previously entered into the record during the previously

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<sup>19</sup> Gov. Code § 6253(a).

<sup>20</sup> *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

<sup>21</sup> *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3rd 818, 831 ("Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.").

<sup>22</sup> See e.g. Oakland Municipal Code ("OMC") secs. 17.136.040(C)(4), 17.134.040(B)(1).

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mentioned ten (10) day comment period.”<sup>23</sup> The OMC also states that an appeal of a Regular Design Review decision is “limited to issues and/or evidence presented to the Director prior to the close of the written comment period”<sup>24</sup> Therefore, in order to protect the Oakland Residents’ right to appeal the Planning Director’s decision, Oakland Residents must have access to all facts and evidence in the City’s Project record prior to the close of the comment period.

Accordingly, we respectfully request that the City extend the public review and comment period for the CEQA Analysis by ***at least 17 additional days from the date on which it makes all outstanding responsive public records available for our review.***

Thank you for your consideration of our requests. Please contact me if you have any questions.

Sincerely,



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Sara Dudley

SFD:lj1

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<sup>23</sup> Zoning Manager Public Notice. We note that the Notice states that the comment period is 10 days, but that the City provides a 17-day comment period.

<sup>24</sup> See OMC §§ 17.136.040(C)(4), 17.136.080.