

**INFORMATIONAL ITEM NO. 8
GATEWAY PLAZA APARTMENTS
PLN2024-00129 (PLN2023-00198)
CITY COUNCIL HEARING**

04/16/2024

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**Re: Appeal to City Council of Planning Commission Approval of
Gateway Plaza Apartments Project (PLN2024-00091; PLN2023-
00198)**

Dear Mayor Mei, Vice Mayor Shao, Councilmembers Keng, Campbell, Kassin,
Salwan, Cox, Ms. Gauthier, Mr. Pullen and Mr. Hungerford:

We are writing on behalf of **East Bay Residents for Responsible Development** ("East Bay Residents" or "EBRRD") to appeal the February 22, 2024, decision by the City of Fremont ("City") Planning Commission denying EBRRD's appeal and approving the entitlements for the Gateway Plaza Apartments Project (PLN2023-00198) ("Project") proposed by Kimco Realty ("Applicant"), including the Discretionary Design Review Permit and CEQA Environmental Consistency

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Checklist (“CEQA Checklist”) prepared for the Project (collectively, “Appeal”). This Appeal is filed pursuant to City of Fremont (“City”) Municipal Code Section 18.300.020.¹

East Bay Residents appeals all actions taken by the Planning Commission on February 22, 2024, with regard to the Project, including the Planning Commission’s decision to approve the Discretionary Design Review Permit and the decision to approve the Project pursuant to CEQA exemptions.

East Bay Residents respectfully requests that the Council uphold this appeal, vacate the Planning Commission’s February 22, 2024 decision denying East Bay Residents’ appeal and approving the Project, and require Staff to withdraw the CEQA Checklist prepare a legally adequate project-level environmental impact report (“EIR”) for the Project to address all potentially significant impacts of the Project identified in Residents’ appeal that were not addressed in the prior planning-level EIRs relied upon in the CEQA Checklist.

This Appeal is timely filed within 10 calendar days of the Planning Commission’s decision, and is accompanied by the required appeal form and appeal fee of \$3,000.

I. Appellants Background

Appellants East Bay Residents is an unincorporated association of individuals and labor organizations directly affected by the Project. The association includes Fremont residents Patrick Buffy, Ray Burks, Ralph Neves, as well as the **UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483,** and their members and their families who live and/or work in the City of Fremont and Alameda County. EBRRD’s members would be directly affected by the Project’s unmitigated impacts. Individual members may also work on the Project itself. They would therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

¹ Fremont Municipal Code § 18.300.020 (“Decisions of the zoning administrator...may be appealed to the planning commission” Further, “Decisions of the planning commission... may be appealed to the City Council.”).

The organizational members of EBRRD also have an interest in enforcing the City's planning and zoning laws and 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. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Residents' members are concerned about projects that are built without providing opportunities to improve local recruitment, apprenticeship training, and retention of skilled workforces, and without providing lifesaving healthcare expenditures for the construction workforce.

II. Procedural Requirements

Municipal Code Section 18.300.030 states that “[a]ppeals may be filed by any interested party. An appeal shall be submitted in writing, on any form prescribed for that purpose by the city and accompanied by the required fee, and shall state the decision appealed from, the facts and basis for the appeal, and the relief or action sought.”² Appeals must be filed within 10 calendar days following the date of the decision being appealed.³

Pursuant to Municipal Code Section 1.25.050 subdivision (a), “Review of all appeals shall be de novo. The city council is not bound by the decision that has been appealed or limited to the issues raised on appeal.” The city council may continue the matter from time to time, and, at the conclusion of its consideration, may affirm, reverse, or modify the decision appealed and may take any action which might have been taken in the first instance by the body whose action is being appealed.⁴ If new or different evidence is presented on appeal, the city council may also refer the matter for reconsideration to the body whose action is being appealed.⁵ In ruling on the appeal, the findings and action of the city council shall be final and conclusive in the matter.⁶

² Fremont Municipal Code § 18.300.030(a).

³ Fremont Municipal Code § 18.300.030(b).

⁴ Fremont Municipal Code § 1.25.050(b).

⁵ *Id.*

⁶ *Id.*

This appeal is timely filed within 10 calendar days of the Planning Commission's February 22, 2024, decision to approve the Project. The appeal is accompanied by the required appeal form (Universal Planning Application), the appeal fee of \$3,000,⁷ and comments and evidence providing the basis for the appeal, in compliance with the City's procedural requirements.

III. Basis for Appeal

The basis for this appeal is set forth in East Bay Residents' February 22, 2024, comments to the Planning Commission⁸ and East Bay Residents' December 12, 2023, comments to the Zoning Administrator, as well as any supplemental comments and evidence that will be presented to the City Council on appeal.

East Bay Residents' comments explain that the City's decision to rely on a Class 32 Infill Exemption under California Environmental Quality Act⁹ ("CEQA") Guidelines Section 15332 ("Class 32" or "Infill Exemption"), a streamlining exemption pursuant to CEQA Guidelines Section 15183 ("Community Plan Exemption"),¹⁰ and a CEQA addendum pursuant to CEQA Guidelines Sections 15162 and 15164, violated CEQA and were not supported by substantial evidence because the Project was not contemplated in the 2011 General Plan Update, and has new or more severe significant impacts than previously analyzed in the 2011 General Plan Update EIR. These impacts are peculiar to the Project site, were not known and could not have been known at the time of the EIR's certification, and are not fully mitigated by the General Plan Update EIR or the Standard Development

⁷ Fremont Municipal Code § 18.300.030(a) requires appellants to pay an appeal "fee." The City's current Fee Schedule describes an appeal "deposit" of \$3,000 required for appeals to the City Council. Appellants herein provide the appeal fee of \$3,000. As described in the City's Land Use and Development Service Deposit Policies (Resolution 2010-23), the City collects deposits "from developers in connection with land use planning applications and development services," then requires the project applicants to replenish deposits when needed to continue processing their project application. The deposit policies clarify that services related to processing development project applications are to be "paid for by those developers and not be borne by the general public." Accordingly, no additional fees, costs, or deposit replenishments may be charged against East Bay Residents related to its administrative appeal of the Zoning Administrator's decision. *California Teachers Ass'n v. State of Cal.* (1999) 20 Cal. 4th 327, 331.

⁸ See Exhibit A.

⁹ Pub. Res. Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR" or "CEQA Guidelines") §§ 15000 et seq.

¹⁰ CEQA Checklist, p. 4-5.

Requirements. These impacts include potentially significant hazardous materials impacts from soil and groundwater contamination, on air quality, noise, and from greenhouse (“GHG”) emissions, which require disclosure and mitigation in a project-level EIR.

East Bay Residents also protests the City’s illegal practice of requiring members of the public to sign a Reimbursement Agreement as a condition of filing and administrative land use appeal which purports to authorize the City the charge appellants an undefined and unlimited amount of additional money for “staff review, coordination, and processing costs based on real time expended” on the appeal.¹¹ City staff informed Appellants that the appeal filings would be rejected unless Appellants signed the Reimbursement Agreement.¹² Appellants were therefore required to sign the Reimbursement Agreement as a condition of filing the Planning Commission Appeal and the instant Appeal. The Reimbursement Agreement is an illegal contract that is void as against public policy,¹³ and an unduly burdensome requirement which violates EBRRD’s due process rights because it imposes an undue burden on Appellants’ pursuit of an administrative appeal to exhaust administrative remedies required by law.¹⁴

Pursuant to the Municipal Code, the Planning Commission’s review of all appeals “shall be de novo” and appeal review bodies are “not bound by the decision that has been appealed or limited to the issues raised on appeal.”¹⁵ Accordingly, we reserve the right to supplement this appeal with additional written comments and supporting evidence,¹⁶ including but not limited to the City’s appeal fee and deposit structure, prior to consideration by the Planning Commission.

¹¹ See City of Fremont, Universal Planning Application, Part II, *Reimbursement Agreement*.

¹² Telephone communication between C. Caro (Adams Broadwell) and M. Hungerford (Fremont planner), 12/21/23. Additionally, Appellants first attempt to file the Appeal on 12/21/23 without completing or signing the Reimbursement Agreement was rejected by planning staff at the counter.

¹³ California Civil Code §§ 1608, 1667.

¹⁴ *California Teachers Ass’n v. State of Cal.* (1999) 20 Cal. 4th 327, 331.

¹⁵ *Id.* at § 18.300.050.

¹⁶ 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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IV. Conclusion

For the reasons stated herein, and as will be presented to the City Council on appeal, East Bay Residents urges the City Council to reverse the Planning Commission's approval of the Project, and require staff to prepare a project-level EIR. Thank you for your consideration.

Sincerely,



Kelilah D. Federman

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