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[Sent via email]

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Re: Public Market Parcel B – Response to Wareham Appeal Letter

Dear Mr. Guina, Ms. Visveshwara, Mr. Bryant and Ms. Desai:

As you know, we represent AG-CCRP Public Market, L.P. (AG-CCRP) in its application for a Final Development Plan (FDP) for Parcel B (FDP18-001). We are in receipt of the appeal of the Planning Commission’s May 14, 2019 approval of the Parcel B FDP filed by Matt Francois on behalf of Wareham Development (Appellant), dated May 29, 2019. We request that you include this response in the record provided to the City Council pursuant to Emeryville Planning Code Section 9-7.1405(a). We thank you for your assistance in doing so.

Executive Summary

As discussed in this letter, Appellant’s arguments are unfounded. Parcel B is a critical element of the Marketplace development, providing much needed services for the businesses at the Public Market and offices for Emeryville’s growing research and development community. Design of the Parcel B building is consistent with the governing PDP, complies with all conditions of approval and mitigation measures, conforms to the City’s General Plan, and does not require

additional review under the California Environmental Quality Act (CEQA). The following summarizes our responses to the Appellant's contentions, as discussed in further detail in this letter:

- (Section I) Appellant's Interest – Given the continually shifting nature of the Appellant's objections and behavior throughout the appeal process, we find it hard to believe that the Appellant's interest is motivated purely by its objections to the design of Parcel B. Further, we find it telling that the alternative designs proposed by the Appellant don't address any of their complaints about the Parcel B FDP; rather, they increase the views from the Appellant's building to the Bay, indicating that Appellant's real interest may be protection of tenant views.
- (Section II) Background – There has been remarkable continuity on this project with full fluency of the PDP's goals, intent and objectives of the original approvals, as well as the precise, technical requirements. The Appellant has been involved in the process since the PDP was adopted, and nonetheless went forward with the EmeryStation project with full and complete notice of the PDP's permitted development, but now continues to raise comments on features already approved in the context of the PDP and Marketplace Environmental Impact Report (EIR).
- (Section III) FDP is Consistent with the Governing PDP – The PDP conceptualized a total development envelope, allowing for flexibility in the overall project design as the parcel-specific designs are refined, with limitations considering the total scope of development and the associated environmental impacts. The Parcel B FDP adheres to the PDP. The 113 foot proposed height is less than the "not to exceed 120 feet" Parcel B standard and undimensioned PDP plans. The retail square footage is less than that identified in the PDP for Parcel B. The proposed research and development square footage is greater than that identified in the PDP for Parcel B; as discussed below, detailed environmental analysis confirmed there are no new impacts associated with the Parcel B proposal. The Parcel B FDP responds to current market conditions with a design and floorplates that will attract research and development tenants, activate the pedestrian experience and enhance the mixed use district.
- (Section IV) FDP Complies with Conditions of Approval and Mitigation Measures – There has been ample planning and analysis of the Parcel B FDP in relation to the PDP design standards, conditions of approval, and mitigation measures. This ultimately resulted in very clear and thoughtful statements by the Planning Commissioners at the four hearings to date on the Parcel B FDP. The Commissioners' statements, backed by substantial evidence, demonstrate that the FDP substantially conforms to the PDP. Specifically, the Parcel B FDP complies with the aesthetic and wind conditions of approval. The project creates a vital streetscape that enhances the pedestrian experience. A computerized wind tunnel study, the best scientific wind analysis available, finds that conditions will be *improved* by the addition of the proposed Parcel B building and, therefore, will not result in significant wind impacts.
- (Section V) FDP is Consistent with the City's General Plan – A city has broad discretion to construe its policies in light of its plan's purposes. Here, the Parcel B FDP is clearly consistent with the General Plan's urban design goals.
- (Section VI) More CEQA is Not Required – CEQA includes a strong presumption against requiring any further environmental review once an EIR has been prepared for a project. A detailed, 65-page Environmental Checklist was prepared to consider the environmental

impacts associated with the Parcel B FDP in relation to the impacts identified in the prior EIR. There are no circumstances requiring further environmental review. Specifically, a traffic analysis concludes that the proposed FDP will generate fewer trips compared to the PDP. As noted, a computerized wind tunnel study shows that the Parcel B building will improve wind conditions. Notably, the Parcel B FDP qualifies for a state law (SB 743), which provides that aesthetic impacts may not be considered significant impacts. Finally, while not directly addressed in the Appellant's letter, we feel compelled to address what may be the Appellant's concern – views – and note that private views are not protected under any applicable law here.

- (Section VII) The Proposed Design Alternatives are Not Feasible – The alternatives are not feasible for a number of reasons. In short, they are cost-prohibitive and are not counterbalanced by any additional revenue generating space/use. The Appellant, itself, has recognized that underground parking is not viable in connection with its Berkeley 10th Street project. From an aesthetic perspective, the designs suffer from the same critiques that the Appellant's architects raised in reference to the Parcel B FDP.

The Parcel B FDP's benefits are countless, as best described by Commissioner Keller, quoted in full below and excerpted here: "This project as before us continues the intention of the 2008 PDP, while providing our best chance in today's economy of supporting existing businesses in the Public Market; while creating the interest, draw and excitement to attract new retail and food services in the Public Market and the greater neighborhood."

Based on the ample analysis and substantial record created during the entitlement process and through the 5+ month appeal process, we respectfully request that the City Council affirm the Planning Commission May 14, 2019 unanimous vote denying the appeal and approving the Parcel B FDP. (Emeryville Code, § 9-7.1405)

I. The Appellant's Interest

At the outset, we find it hard to believe that the Appellant's interest is motivated purely by its objections to the design of Parcel B given the continually shifting nature of the Appellant's objections and behavior throughout the appeal process. Commissioner Keller expressed this sentiment at the April 25, 2019 Parcel B FDP approval hearing. He stressed that "the applicant has been more than patient on this." "The appellant keeps throwing up [issues], and each time they come to us it's something different. You know, before it was about creating a seven story canyon, now that seems to have disappeared and now it's all about wind – so I'm really upset with this..." Underlying Appellant's arguments, it seems clear that the Appellant is anti-competitive and perhaps concerned about views at its EmeryStation property, which are addressed in Section VI(D).

The Appellant's behavior evidences "gamesmanship," indicating its motivation may be anti-competitive. First, as identified to the Planning Commission, the Appellant already commented on the scope and scale of the development in 2007 before the EIR was certified. (See, e.g., Final EIR, Comment B5). Over a decade later, the Appellant continues to make many of the same comments about massing and design. These comments were, however, addressed in the Final EIR in 2007. The City Council then certified the Marketplace EIR in July 2008 and approved

the PDP in August 2008. With full and complete notice of the Marketplace project, Appellant proceeded with its development plan for the EmeryStation West office/laboratory project, which we understand was later approved in 2010. Now, Appellant continues to raise comments on features already approved in the context of the EIR and PDP to slow the processing of this office/R&D project. As represented by the Public Market Food Hall vendors at the January 24, 2019 Planning Commission hearing, the Parcel B office/R&D project will complete the vision of the Marketplace project and activate the project's mixed uses to ensure its overall success.

Second, the Appellant continues to utilize delay tactics to slow the processing of the Parcel B FDP. During the processing of the FDP, the Appellant did not attend the December Study Session. Instead, the Appellant appealed the Planning Commission's approval of the Parcel B FDP on January 24, 2019 in a 3-page letter. The Appellant then waited until 4:59 pm the night of the April 24, 2019 Parcel B appeal hearing to submit supplemental materials, including a wind study that was dated 5 days prior (on April 19, 2019). This "late hit" submittal ultimately necessitated a continuance of the appeal hearing to May 14, 2019, further delaying the processing of the FDP.¹

We note that in response to the Appellant's "late hit" submittal, we submitted a preliminary computerized wind tunnel study. This report was prepared to address the Appellant's concerns. As the most scientific form of wind analysis, it takes several weeks to prepare. It was provided by Charlie Bryant to the Appellant as soon as it was completed on May 13, 2019. With approximately 25 hours' notice, the Appellant had a full evening and business day to share the study with the Appellant's consultant and respond before the May 14th hearing.

Finally, it appears Appellant is using the planning process to exercise control over the development of the EmeryStation cluster. In the time between the original approval hearing and the continued appeal hearing, AG-CCRP representatives attempted to meet with representatives of the Appellant. Those meetings were cancelled, however, for a number of reasons. With very little notice, the Appellant requested that City officials be present at one meeting, which was not possible to coordinate. Additionally, again with very little notice, the Appellant provided alternative designs that were clearly infeasible just days before the April 25, 2019 hearing. That the Appellant "on its own initiative spent a good deal of money and time working with experienced laboratory architect DGA and other consultants to create alternative designs"² demonstrates the Appellant's intention to circumvent the Planning Commission and approval process to control design of competitors' projects.

¹ The gamesmanship of such "late hit" submittals ultimately frustrates the purpose of CEQA review. As the court acknowledged in *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal. App. 4th 515, 527, voluminous submittals made on the day of the hearing were clearly intended only to preserve an appeal, did not offer the agency "the opportunity to evaluate and respond to them," and were insufficient to exhaust administrative remedies.

² Wareham Development Appeal of the Planning Commission's May 14, 2019 Approval of Final Development Plan for the Marketplace Redevelopment Project, "Parcel B" (FDP 18-001) at p. 14 (May 29, 2019) [Hereinafter "Appeal"].

With this background, it came as little surprise that the Appellant would now submit an approximately 150 page appeal letter more than 5 months into an elongated appeal process.³ None of this behavior seems to reflect an Appellant that merely wants to helpfully suggest design modifications. Rather, this behavior reflects the behavior of an Appellant⁴ seeking to slow and stop a project in an anti-competitive manner.⁵

II. Background

There has been careful consideration of development on Parcel B for over a decade. The following is a brief history of the Parcel B Project, including all approvals and the Appellant's objections. The Appellant first commented on the Project's massing and design in 2007 in connection with the Marketplace PDP and EIR to which the City responded. The City then certified the Project's EIR and approved the PDP in 2008. The Marketplace Final EIR, certified on July 15, 2008, included analysis of the "Reduced Main Street Alternative." The Reduced Main Street Alternative included the realignment of Shellmound St. to allow the construction of 120,000 GSF office, 29,150 GSF commercial and parking on Parcel B. Mitigation measures were further modified to address the Reduced Main Street Alternative. Two years later, in 2010, the Appellant's EmeryStation West project was approved.

In 2016, the City approved Parcel B's FDP. A modified plan was proposed at a 2018 study session and the Planning Commission approved the Parcel B FDP on January 24, 2019. The Appellant then appealed the decision on February 8, 2019. On March 19, 2019, the City Council remanded the appeal to the Planning Commission to address the concerns raised in the

³ The new, 150-page letter calls into question the propriety and legality of doing so, given that the City Council's direction that the remand to the Planning Commission was limited to the "issues raised in the appeal letter from Wareham dated February 8, 2019." (Resolution FDP18-001R). Following the Planning Commission's January 24, 2019 approval of the FDP, AG-CCRP has now spent more than 5 months addressing this appeal. The Appellant's tactic of continually delaying the process, and now flooding the record at such a late stage, sets a bad precedent.

⁴ We note that the Appellant has previously challenged the Parcel A FDP. According to the Wareham Development website, the company has eleven properties in Emeryville. All but two of which are within the EmeryStation cluster. Of those nine EmeryStation properties, seven are listed for laboratory use with the remaining two properties being the Amtrak Station and the Terraces. Notably, the EmeryStation listings tout Wareham Development's strong relationship with the R&D community and emphasize the properties' state-of-the-art R&D facilities. This saturated concentration of properties in the EmeryStation cluster indicates Wareham's intention to control the cluster and monopolize Emeryville's research and development facilities. *See generally*, Properties: Emeryville, California, WAREHAM PROPERTIES (last accessed June 7, 2019), <http://www.warehamdevelopment.com/prop-emeryville.html>.

⁵ We note that a comprehensive study of all CEQA lawsuits filed between 2010-2012 reveals systematic abuse of CEQA litigation that undermines the state's environmental, social equity, and economic priorities. The study revealed that while only 8% of lawsuits are officially brought by business groups and competitors, 64% of those filing CEQA lawsuits are individuals or 'local groups,' the vast majority of which have no prior track record of environmental advocacy – and CEQA litigation abuse is significantly the domain of special interests such as competitors and labor unions seeking non-environmental outcomes. Hiring a law firm to predict dire environmental consequences of a development project and even eventually sue the project is a common and well-documented CEQA abuse tactic employed by competitors. Jennifer Hernandez, David Friedman, and Stephanie DeHerrera. 2015. *In the Name of the Environment: How Litigation Abuse Under the California Environmental Quality Act Undermines California's Environmental, Social Equity, and Economic Priorities – and Proposed Reforms to Protect the Environment from CEQA Litigation Abuse*. Available at: <https://www.hklaw.com/publications/in-the-name-of-the-environment-litigation-abuse-under-ceqa-august-2015/>, last accessed June 3, 2019.

Appellant's appeal. AG-CCRP made repeated attempts to meet with the Appellant prior to the April 25, 2019 Parcel B FDP appeal hearing. As a result of the Appellant's late hit submittal, the hearing was postponed until May 14th, 2019, when the Planning Commission voted unanimously to re-approve the Parcel B FDP.

Notwithstanding the Appellant's objections, there has been remarkable continuity on this project. Charlie Bryant and Miroo Desai led the planning process when the PDP was processed and continue to provide invaluable insight on the project processing. For what it's worth, our firm has represented AG-CCRP as well as its predecessor, TMG Partners, on the Marketplace project, now commonly referred to as the Public Market project, for more than 13 years in entitlement processing, regulatory permitting, due diligence and transactional support. This is not a project where there has been turn-over resulting in unfamiliarity with the original approvals. To the contrary, this project has been processed with full fluency of the goals, intent and objectives of the original approvals, as well as the precise, technical requirements. Adherence to the spirit of the PDP, as well as its technical requirements, is discussed and demonstrated in the following discussion.

III. FDP is Consistent with the Governing PDP

The Appellant cites the legal standard for approving an FDP (Emeryville Planning Code Section 9-7.1004(b)):

In approving a final development plan, the Planning Commission must make both of the following findings:

- (1) The final development plan substantially conforms to the preliminary development plan.
- (2) Changes and conditions of approval specified by the City Council in its approval of the preliminary development plan have been met.

The Appellant does not, however, capture the overarching principle behind the Planned Unit Development (PUD) District, the PDP/FDP process or the PDP substantial conformance determination.

The Emeryville Code explains that PUD zones are intended to "encourage the creative development of large sites so as to permit flexibility in physical design, achieve attractive designs which encourage large-scale site planning, and ensure that the applicable provisions of the General Plan are established early in the formation of such development proposals. (Emeryville Planning Code Section 9-7.1001) A PDP is intended to establish the zoning for a site and a FDP is intended to refine a parcel-specific design over time with detailed design specifications. (Emeryville Planning Code Section 9-7.1003, 9-7.1009)

Accordingly, the Marketplace PDP and EIR establish a development envelope, with numeric standards. The standards for Parcel B are copied below (PDP, Section I(A)(3)):

Shellmound Site: Construction of:
Office 1: 120,000 sq. ft. (5 floors over 5 floors of parking)
Commercial E: 29,150 sq. ft. (2 floors)
Parking C: 518 spaces (5 floors)
Height: Maximum height not to exceed 120 feet

Importantly, the numeric standards identified for the Parcel B building did NOT specify the length of the building or differentiate between the height of the building on the northern or southern end; rather, the height standard is “not to exceed 120 feet.” In contrast, the PDP did distinguish height standards within parcels for other parcels. See, for example, the varying height standards for the site now known as Parcel A (PDP, Section I(A)(3)):

(2) Shellmound site: Construction of:

Northern Portion:

Residential 3: 196 units

Retail C: 6,200 sq. ft.

Parking B: 127 spaces

Height: 14-level tower with a maximum height of 175 feet

Southern Portion:

Residential 2: 10 townhouses

Retail B: 8,525 sq. ft.

Parking A: 541 spaces

Height: 4.5 levels with maximum height of 50 feet

As shown, the numeric standards for Parcel B did not create a shorter height standard for either portion of the parcel allowing for the reasonable interpretation that the 120 foot height standard applies to the entire parcel. Further, the approved plans, those dated April 16, 2008, consisting of pages 1 to 15 and copied below, did NOT include dimensions for the length of the buildings nor for the height of the northern end of the parcel.

It should be noted that the renderings the Appellant’s attorney attached as Exhibit C (pages 84 – 104) include colored renderings of the block level massing that were not part of the legally binding approved plans. The legally binding approved plans are attached as Exhibit A. As the date or source of these renderings is not known, they should not be considered in determining PDP conformance. These irrelevant drawings are attached as Exhibit B.

A. Intent of the PDP

Notably, the PDP describes the intent of the PDP in three instances. The PDP was intended to allow some flexibility so long as final development plans "substantially comply" with the spirit and intent of the Marketplace PDP to "create a vibrant, mixed use neighborhood" (PDP, §III.A.1.d., III.B.1.d, III.C.1.b.):

The intent of the PDP is to achieve a vibrant, mixed use neighborhood. The Final Development Plan may allow any use, including multi-family residential and any use allowed on Table 1 above; provided however, that if any allowed use other than the allowed use designated on the Preliminary Development Plan, or any increase in the square footage or number of units is proposed in any building designated as residential in the Preliminary Development Plan, the Applicant shall submit a traffic study and the City shall require appropriate compliance with the California Environmental Quality Act prior to approval.

In other words, the PDP was conceptualized as a total development envelope, with limitations based on the total scope of development and the associated environmental impacts.

B. FDP Conformance to PDP

The Parcel B FDP adheres to the spirit outlined in the above PDP language. Parcel B consists of 14,000 square feet of retail space, 150,000 square feet of office/lab space and 565 parking spaces. The proposed height is 113 feet. Although the research and development square footage of office is greater than identified in the PDP for Parcel B, the retail square footage is less than that identified in the PDP for Parcel B. While the northern portion of the building extends taller than the diagrams in the PDP plans, as discussed above, it's a more than reasonable interpretation that the height is consistent with the numeric standards that identify 120 feet as the height standard for the entire parcel.

Even acknowledging that the northern end of the building extends higher than the diagrams in the PDP plans, there are no environmental impacts associated with that increase, as addressed in Section VI below. Moreover, the applicable conditions have been satisfied. In particular, a traffic study prepared by Kimley Horn and submitted to the Planning Commission demonstrates that the proposed Parcel B FDP project would generate fewer trips when compared to the PDP.

The Appellant notes that Jeffrey Heller finds the FDP does not conform with the PDP. In contrast with the City staff and AG-CCRP's consultants, who have been involved in design and entitlement processing since the PDP was approved, Mr. Heller has not been involved in the project in the intervening decade since the PDP was approved. With this context, Mr. Heller's letter mischaracterizes the Parcel B building and the overall urban design implementation as a whole.

The Public Market architects from Hart Howerton have explained that the current master plan for the overall site, and for Parcel B in particular, is a real-world, practical evolution of the PDP that can be implemented in today's market. Hart Howerton is confident that the same sort of design refinement and minor variations would occur if Heller Manus had been commissioned to execute the work. Mr. Heller states that "the length of the proposed building is unprecedented."⁶ In fact, the Bay Street and the Appellant's Emerytech buildings are both longer than the Parcel B building. Mr. Heller's concerns about a super block, excessive shadows, unscreened parking and wind exceedances are equally misinformed. For example, wind analysis indicates that placement of the open-air parking levels will help mitigate wind speeds. Further, the building's variation

⁶ Appeal (Exhibit F) at p. 1.

and articulation are incorporated into the facade design, rather than changes in height and massing. Contrary to Mr. Heller's contention that "the proposed project does not expand the pedestrian network," the overall project has built a more comprehensive pedestrian and multi-modal network than envisioned in the PDP. A more careful review of the final building design and overall project design would likely lead Mr. Heller to a different set of observations.

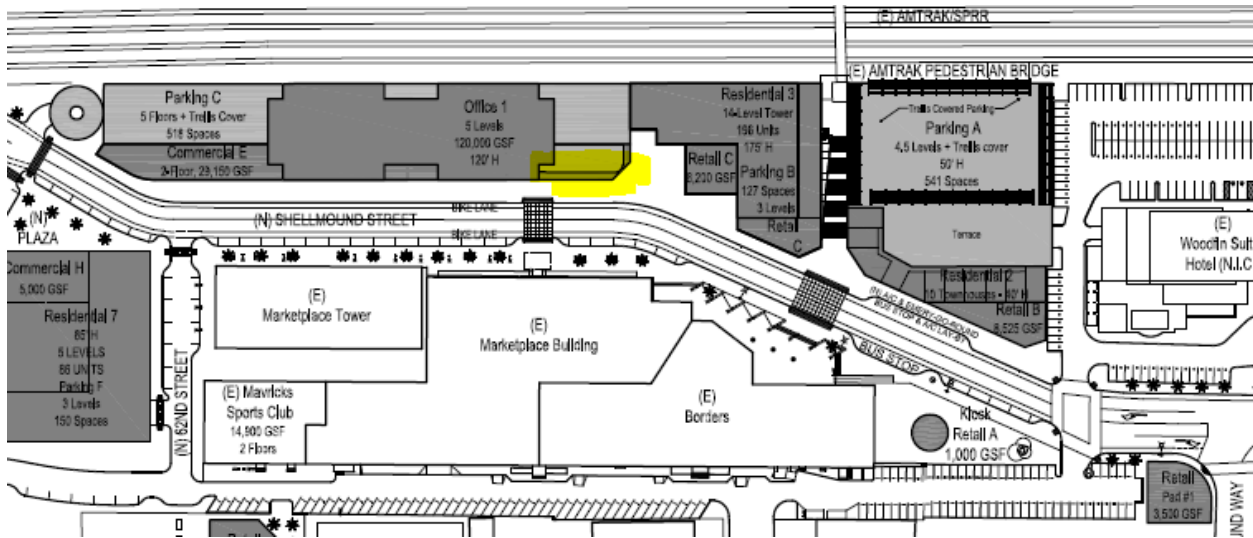
Finally, it is noted that at the May 14 continuation of the April 25th, 2019 Planning Commission hearing (Continued May 14th Hearing) Chair Barrera concluded that "in reading all the material and going back to the conditions of approval and the PDP, I find that this project is in substantial compliance with the . . . previously approved PDP." Agreeing, Commissioner Keller noted that because the "proposal is not substantially or significantly different than the . . . approved PDP . . . it does not require council approval or an amendment of the EIR."

C. Relevance of Parcel A

We disagree with the Appellant's argument in footnote 4 that the development on Parcel A is not relevant to the proposal on Parcel B. This comment is raised in relation to the discussion in the Planning Commission staff reports noting that Parcel A was approved at a lower height than as permitted in the PDP. As described above, the PDP was approved to achieve a "vibrant mixed use neighborhood." For anyone that does not recall, the project was the first neighborhood development in the nation to achieve LEED Platinum certification by the U.S. Green Building Council and has been designated by the California Department of Housing and Community Development as a Gold Catalyst Project as a critical Transit Oriented Development housing project. These awards were based on the project's critical mix of high density uses near transit. Contrary to the Appellant's intimation, the awards celebrate the project's development of a green neighborhood and mix of uses and not the exact height dimensions listed in a PDP.

Notably, the Appellant also challenged the original Parcel A FDP using many of the same tactics that the Appellant is using now, resulting in a shorter building on Parcel A. As discussed, the PDP was conceptualized as a total development envelope, with limitations based on considering the total scope of development and the associated environmental impacts. In that case, with a substantially shorter building on Parcel A (86 feet on the northern end and 50 feet on the southern end) rather than the 175 feet approved in the PDP, it can be argued that doing so created more project-wide capacity in comparison to the approved PDP.

In footnote 5, the Appellant disputes the distance between Parcels A and B, claiming that a reduction of 8 feet in the FDP from the PDP is significant. First, it is noted here that at ground-level the PDP actually included *no* gap between Parcels A and B as the PDP indicated that ground level retail may be constructed. **In that sense, the proposed Parcel B FDP creates a greater ground-level gap than the PDP, which thereby results in a better pedestrian experience, with more activated open space for community gathering, along Shellmound Street.**



Hart Howerton explains that because the Parcel A building is set back from the property line in some instances and encroaches the line in others, Parcel A is usually within 1' to 2' of the property subdivision line. Therefore, Hart Howerton utilized the property subdivision line for measuring purposes. In the approved Parcel B FDP, the Parcel B stair tower is 58'-3" from the property line with Parcel A. The majority of the massing of Parcel B is an additional 11'-3" further back, for a total of 69'-6" overall. At the Continued May 14th Hearing, Chair Barrera stressed that "68 feet of separation between buildings is not a narrow gap . . . the separation between Parcel A and Parcel B will fit perfectly into the context of Emeryville and it's in substantial compliance with the 76 feet that was analyzed as part of the PDP." Additionally, Commissioner Keller analyzed the spacing of all of the Appellant's buildings in the EmeryStation cluster. Commissioner Keller shared a figure showing that, in fact, Parcel B "will have the greatest distance separating it from EmeryStation West than any distance within Emeryville's buildings or its neighbors."

IV. FDP Complies with Conditions of Approval and Mitigation Measures

The Parcel B FDP complies with the Conditions of Approval and Mitigation Measures as discussed below. Given that AG-CCRP has processed and received approvals from the Planning Commission for five FDPs for parcels in the Marketplace project, AG-CRRP and its consultants are intimately aware of the Conditions of Approval and Mitigation Measures.

A. Aesthetic Conditions of Approval and Mitigation Measures

The aesthetic conditions raised by the Appellant have already been addressed thoroughly throughout the Planning Commission proceedings. They are addressed here once again. We have identified the findings of the Planning Commission as we believe the Commissioners took the time to address their comments in a manner that would leave no question about the satisfaction of the findings.⁷

⁷ The Appellant complains that at the Continued May 14th Hearing, members of the Planning Commission "delivered seemingly-scripted remarks concerning the relationship of the FDP to City design standards and the PDP conditions" and approved the FDP with no changes without "meaningful deliberation or discussion." (Appeal at p.

E. DESIGN RELATED

1. Each of the following . . . measures shall be incorporated into the final project design (AES-1):

- The proposed structures shall adequately reference, and be visually compatible with and not detract from the surrounding industrial buildings.*

The Parcel B design makes every attempt to adequately reference and be visually compatible with neighboring structures. The Planning Commissioners complimented that fact at the December 2018 study session. Like the surrounding industrial buildings, Parcel B's design starts with a simple form and massing, making a modest expression of its structural frame. The building employs big windows to provide as much daylight to working floor areas as possible in harmony with neighboring industrial buildings. Further, the design avoids the use of historicist forms or literal use of materials that would imply masonry construction or load-bearing walls as well as unintentional stepbacks and superfluous articulations that wouldn't be typical of building type, so as not to detract from the authenticity and spirit of the surrounding industrial edifices.

Acknowledging the intention behind Parcel B's design, Commissioner Keller emphasized at the Continued May 14th Hearing that the building fits well within Emeryville's architectural vernacular. As "detailed in [the] previous commission meeting, I clearly illustrated how this particular architectural style echoes the established architectural vernacular of Emeryville in the EmeryTech building on 65th street" as well as "the Besler building on 40th street and the original Sherwin Williams building on Horton."

- Create streetscape vitality and enhance the pedestrian experience through detailed treatment of building facades, including entryways, fenestration, and signage, vertical walls broken up with architectural detailing, protruded and recessed tower elements, stepped-back upper floors to provide appropriate building height transitions to adjacent buildings, and through the use of carefully chosen building materials, texture and color.*

Streetscape vitality has always been the primary goal of the Public Market master plan, as it fosters every desired outcome, for the project team and the City. This drove the separation of Parcels A and B into separate buildings, where in the PDP there was a single uninterrupted façade for the entire length. The following is an overview by Hart Howerton regarding Parcel B's design details that foster a vibrant streetscape:

Active uses line the buildings' street frontages, which require an appropriate architectural expression. The detailed treatment of building facades, especially at the ground floor

4). Wareham's comments fail to acknowledge that any scripted remarks are likely a result of their own late hit submittal of materials at the April 25th, 2019 hearing, which provided the Planning Commission three weeks to review Staff reports for the proposed FDP and consider the Appellant's concerns.

level, enhance the pedestrian experience. The base of the building is carefully designed and detailed with tenant- and project-specific storefront window systems and proportions. Anticipated signage and awnings provide color and variety within a stable rhythm of structural piers. The base utilizes a base-middle-top expression to further reinforce the pedestrian scale, employing a string course and material change to mark these transitions.

Parcel B has protruded and recessed elements to articulate the building. Stair and elevator towers, at the north and south ends, are expressed as tower elements, while the main entry is a recessed element, corresponding to the location of the main mid-block cross walk. Each of these expressions reinforce a plaza or pedestrian gathering space and correspond to cross walks at intersections and mid-block. Building materials, textures and colors were carefully chosen to enhance the Public Market District's visual character, while not mimicking the surrounding industrial buildings or repeating the mistakes of the corporate modernist-style buildings in the area.

At the Continued May 14th Hearing, Commissioner Guerrero stated that he did not “believe that this proposed design negatively impacts the neighborhood pedestrian experience.” In fact, he underscored “that it will improve our experience as a neighborhood” and that he is “excited to see [the project] move forward.” Further, Commissioner Donaldson noted that the Commission had looked at the building carefully and that “the building was generally received well.” Further, she highlighted that she hopes the planned artwork will make the building “more exciting and more interesting” and a contribution to the neighborhood in the way that the artwork on buildings in the Arts District of Los Angeles has made the area a “pleasure to wander around . . . and discover things.”

Chair Barrera then stated that she thinks that “the pedestrian experience is very rich and very interesting and satisfies this condition.” “The reason I believe this project meets this requirement is because there are varied building materials at the ground floor commercial level, including the bulk head width, the type of siding that is different from the materials on the rest of the wall. There is articulation on the ground floor with the storefront window systems that are recessed from the vertical columns that separate the spaces. The window storefront systems provide a deep reveal and the . . . transoms above the storefront system add interest . . . [and] the linear elevations of the building, although it is very large, as you pointed out in your letter that it is approximately five hundred feet, is broken up by the prominent entrance in the middle . . .”

- *Design of building facades shall include sufficient articulation and detail to avoid the appearance of blank walls or box-like forms.*

Hart Howerton emphasizes that the Parcel B design includes generously scaled windows set within and an expressed structural framework that covers the upper floors of the building, providing both articulation and the avoidance of blank walls. Additionally, articulation is incorporated into the ground floor, which is lined with retail and active uses. While for acoustic, functional and safety reasons, the bottom 20 feet of the building directly adjacent the train tracks does have a blank wall, the majority of the building does not. The building's massing is simple, but not box-like. Projecting towers, a recessed entry notch, and a set-back roof line provide

urban scale articulation without resorting to the gratuitous formal moves to avoid box-like design, such as the horizontal and vertical curves, that other buildings in the area employ. As referenced throughout, consistent with the Public Market Development Agreement, the Public Art Committee recommended approval of the Public Market Public Art Final Plan, which has planned for prominently featured art on the east and west facades of the Parcel B building. (Exhibit C)

Commissioner Keller, Commissioner Guerrero, Commissioner Young and Chair Barrera refuted the contention that the project will have blank walls or a box-like form at the Continued May 14th hearing. Commissioner Keller stated that he could “say with conviction that storefronts with large swaths of dimensional artwork do not create such a feared experience or environment.” Commissioner Guerrero commented that the commission had given “thorough feedback about the design and were able to see some elements that would be applied to the building that [they] are really excited about.” He also noted that “in fact, the Planning Commission on multiple occasions recommended that the building facing the Wareham building actually be adjusted so that it did look visually appealing” and that these factors were “definitely something [the commission] considered early on.” Commissioner Young was “taken” with the comment that the project was a box. He stated that he remembered that when the project was approved he “was extremely ecstatic about the design” and he thinks that “design really means Emeryville.” Chair Barrera concluded that “although the overall building design is rectangular or box-like in form, it definitely has enough . . . architectural detail both on the pedestrian level and throughout the entire building . . . and [that] coupled with the art that’s proposed . . . this design meets not just this condition of approval, but the rest of the conditions of approval related to design in the original PDP.”

2. *All proposed new buildings shall be shown in detail including building materials, colors, skin, and fenestration. Towers and buildings along the rail road tracks shall be articulated with treatment such as variations in building planes, colors and materials, balconies and trellises to ensure that no visual wall is created along the railroad right of way. Visible exteriors of the structures shall be designed to blend in with the urban fabric of the neighborhood.*

Hart Howerton designed Parcel B building to be experienced in the round, in spaces and on all four sides; from up close along Shellmound street, from down the street, and from across the tracks. As noted in their presentation to the Planning Commission in January, the Parcel B design has no “back.” The façade design includes the same strategy of facade design for office and parking levels along the railroad tracks as it does facing Shellmound street, including the same materials, massing, articulation, window patterns, structural bay dimension and expression. Significantly, site-specific artwork features prominently on both facades as well.

As noted above, Chair Barrera addressed this condition at the Continued May 14th Hearing. She stated that she thinks that “the pedestrian experience is very rich and very interesting and satisfies this condition.” “The reason I believe this project meets this requirement is because

there are varied building materials at the ground floor commercial level, including the bulk head width, the type of siding that is different from the materials on the rest of the wall. There is articulation on the ground floor with the storefront window systems that are recessed from the vertical columns that separate the spaces. The window storefront systems provide a deep reveal and the . . . transoms above the storefront system add interest . . . [and] the linear elevations of the building, although it is very large, as you pointed out in your letter that it is approximately five hundred feet, is broken up by the prominent entrance in the middle . . .”

5. *Building heights shall not exceed the heights shown in the Preliminary Development Plan.*

Section III above includes a long discussion of the interpretation of the PDP, including the numeric height standard in the PDP “not to exceed 120 feet.” This standard did not distinguish between the northern and southern end of the parcel, allowing for the reasonable interpretation that the 120 foot height standard applies to the entire Parcel B. Moreover, the proposed 113 foot tall building is shorter than the 120 feet allowed under the PDP. Significantly, at the Continued May 14th hearing, Chair Barrera underscored that “in reading all the material and going back to the conditions of approval and the PDP, I find that this project is in substantial compliance with the . . . previously approved PDP.”

The Appellant also submitted opinions by the DGA Architectural firm regarding this measure. Scott Williams of DGA asserts that an individual FDP design is more important than the overall PDP. Respectfully, the Hart Howerton team, City staff and the Planning Commission have disagreed. Likewise, his assertions based on UD-P-33, UD-P-36, and UD-P-38 are misplaced. The building’s form, scale, massing, materials, and articulation are a direct response to the surrounding industrial buildings and to the vision of the original PDP created by Heller Manus. Of relevance, the original PDP included buildings that were taller and bulkier on almost every block than what CCRP and Avalon Bay have proposed. At each turn, AG-CCRP and Avalon Bay have proposed a more fine-grained, human-scaled, walkable neighborhood than the original PDP. Mr. Williams’s letter articulates a misinformed critique of the project following the Conditions of Approval listed above. As with Mr. Heller’s letter, Hart Howerton believes that with a more careful review of the building design, drawing upon a better understanding of Emeryville and the overall urban design of the place, would lead Mr. Williams to a different set of conclusions.

B. *Wind Conditions of Approval and Mitigation Measures*

The wind analysis conducted to date has been more than adequate and shows that the proposed design would not negatively impact wind conditions.

While not mentioned by the Appellant, we first note that it is not clear that WIND 1 (Reduced Main Street) was intended to apply to Parcel B. It says that the construction of the “Shellmound mixed use and high rise tower buildings and UA Cinema building sites” shall be subject to review by qualified wind consultants. This may have been intended to refer only to the 175-foot Shellmound mixed use high rise tower on what is now known as Parcel A and the 150-foot tall building on the UA Cinema site, which is now known as Parcel D. Specifically, the Final EIR

states that the “shape and massing for the 150-foot and 175-foot tall towers would not be broken-up or articulated, particularly for the UA Cinema site and north office, which could contain flat, extended wall surfaces.” (Final EIR, p. 131). The Final EIR then imposed the mitigation measure requiring final design review by a qualified wind consultant.⁸ In any event, substantial wind analysis has been conducted.

1. Qualified Wind Consultant Review

First, a wind analysis was conducted of the proposed Parcel B design (March 22, 2019). Donald Ballanti, a certified meteorologist, who previously prepared a Wind Analysis Memorandum evaluating the PDP (see Draft EIR, Appendix F) prepared a report evaluating the current Parcel B FDP. The analysis (attached as Exhibit D) concludes the following:

In summary, the proposed Parcel B building is somewhat exposed to prevailing wind directions and is aligned across the important west wind direction. However, the presence of naturally-ventilated parking garage space in the bottom half of the structure means that any upwind and downwind pressure differences generated at the top floors of the building would result in airflow through the parking garage floors and not wind accelerations at ground level. Based on the exposure, massing and orientation of the proposed building it would not have the potential to adversely affect ground-level winds near its base, at proposed landscaped open space areas at the north and south ends of the site, within adjacent Parcel A to the south, or at properties east of the site on the far side of the UPRR train tracks.

Mr. Ballanti further concluded, “[s]ince the project does not have the potential to adversely affect wind, wind tunnel or computerized fluid dynamics testing would not be recommended for this project.”

2. Computerized Wind Tunnel Study

Even though Mr. Ballanti concluded that more wind analysis was not necessary, RWDI conducted a computerized wind tunnel study. A preliminary report (RWDI Preliminary Report) was previously submitted on May 13, 2019. The RWDI Preliminary Report was based on the construction of a scale replica of the Parcel B site and surroundings, which were tested in a wind tunnel to simulate the winds approaching and interacting with the project site. This is the most advanced and accurate means of predicting wind speeds around buildings and structures. The report shows that “[i]n general, the addition of the proposed building has a *positive* effect on the wind conditions.” (RWDI Preliminary Report, Executive Summary, *emphasis added*, Exhibit E).

The RWDI Preliminary Report first considered Wind Hazards Conditions, which considers whether a project would “create winds exceeding 36 mph for more than one hour during daylight hours of the year.” Under existing conditions, it found a wind hazard on the east side of the train tracks, next to the Appellant’s building, at the foot of the pedestrian bridge tower. The wind

⁸ In the Final EIR, the mitigation measure was referred to as Mitigation Measure WIND-2 (Reduced Main Street alternative). The numbering of the mitigation measures in the final approval documents was changed to be WIND-1 (Reduced Man Street alternative).

hazard was actually eliminated once the proposed Parcel B project was added to the model and under the cumulative conditions.

The RWDI Preliminary Report also considered Wind Comfort for informational purposes. Although not applicable towards determining whether a project creates a significant impact, the comfort criteria consider wind speeds comfortable for pedestrian use and public seating areas. The RWDI Preliminary Report found that under existing conditions some locations are expected to exceed the comfort criterion. With the addition of the proposed building to the site, wind conditions are expected to be moderated. Significantly, the number of locations where wind speeds exceed the comfort criterion decrease from 24, under existing conditions, to 15 locations, when the Parcel B project is added to the model. (RWDI Preliminary Report, Executive Summary). The computerized, scientific methods and results were definitive. Not only would the Parcel B FDP not have impacts, it would improve wind conditions.

3. CPP “Experience-Based” Assessment

The Appellant’s letter includes a letter from CPP, who conducted an “experienced-based” analysis. This qualitative assessment does not stand up to a computerized wind tunnel test.

CPP’s letter uses the San Francisco Planning Code “pedestrian comfort” criteria, but CPP’s letter focuses only a few locations “without considering the existing wind conditions or the future wind conditions at all pedestrian areas around the development, therefore [RWDI doesn’t] believe the [CPP] report to give the full picture.” (RWDI Response Letter, p. 1). CCP also purports to identify locations where the hazard level is “nearly” met, without actually identifying any locations where a hazard level is exceeded. As discussed, both with respect to pedestrian comfort and wind hazards, the Parcel B FDP improves conditions.

Further, in evaluating significance, what is most relevant here is the significance criteria used in the Marketplace EIR. It is excerpted here (Marketplace DEIR, p. 334, **bold** emphasis added):

The *CEQA Guidelines* did not include any specific criterion for the evaluation of a project’s wind effects, and neither the State of California or the City of Emeryville have established criteria or standards for judging the effects of development projects on wind. The cities of Oakland and San Francisco have, however, established criteria for the evaluation of wind impacts. The City of Oakland considers a project to have significant wind impacts if it would result in *one hour of winds exceeding 36 mph*. San Francisco considers a project to have significant wind impacts if it would result in *one occurrence per year of winds greater than 36 mph*. The wind criteria developed for Oakland and San Francisco are based on research conducted in several locations and would be appropriate for a project located in Emeryville due to similar geographic proximity to the San Francisco Bay and adjacent of the communities to Emeryville. For this analysis, the project is considered to have a potentially significant wind impact if:

- The *exposure, orientation and massing* of a proposed structure can be expected to substantially increase ground-level winds in pedestrian corridors or public spaces near the project site. **Since the ambient wind (undisturbed by buildings) in Emeryville**

seldom exceeds 36 mph, a project must *substantially increase winds* for this threshold to be exceeded.

Accordingly, the Marketplace EIR considered the CEQA Guidelines as well as the San Francisco and Oakland thresholds and ultimately determined that a project would be considered significant if would substantial increase ground-level winds in pedestrian corridors or public spaces near the project site and that a project must substantially increase winds to be considered significant.

CPP relies on the San Francisco criteria, but that criteria has not been adopted by the City of Emeryville. Rather, Emeryville exercised its discretion in selecting the significance criteria for the Marketplace EIR, quoted above. (*San Francisco Baykeeper, Inc. v State Lands Comm'n* (2015) 242 CA4th 202, 227; *North Coast Rivers Alliance v Marin Mun. Water Dist.* (2013) 216 CA4th 614, 625).

4. RWDI Response

RWDI reviewed the CPP report and provided a response letter (RWDI Response Letter), attached here as Exhibit F. It notes that CPP's considers only the wind results at a few locations between Parcels A and B. Further, CPP's analysis doesn't compare to existing conditions, which is certainly a relevant exercise when determining whether a project would substantially increase winds.

The RWDI Response Letter further explains:

When compared to the existing conditions, the addition of the study building reduces winds across the site (Table 2, Pedestrian Wind Study RWDI # 1902969, May 13, 2019 [(Pedestrian Wind Study)]). On average, without the study building in place, the average wind speed for the comfort criteria is 12 mph for an average of 15% of the time with a total of 24 of the 45 tested locations exceeding the 11 mph comfort criteria. Once the study building is in place, the average wind speed for the comfort criteria is reduced to 11 mph for an average of 12% of the time with the total number of exceedances reducing to 15 of the 45 tested locations.

For arguments sake, to focus on just the area that CPP focuses on in their report, the area between Parcels A and B ...the average wind speed without the study building in place is 14.6 mph With the addition of the study building the average wind speed in this area is reduced to 14.0 mph. The difference is marginal but does show a decrease in wind speeds, once the study building is in place.

Of more importance than the comfort conditions are the Hazard conditions, which show the same trend when the conditions for the site with the study building in place is compared to the conditions for the existing site. Across the entire site, the average wind speed that is exceeded for 1 hr/year on the existing site is 28 mph. This speed decreases to 26 mph with the study building in place. The total number of locations that exceeds the hazard criterion is also reduced from 1 to 0 with the addition of the study building (Table 1 of the [Pedestrian Wind Study]).

In the same area...as discussed previously [between Parcels A and B], there are no exceedances in any of these locations with or without the study building, and the average wind speed that is exceeded for 1 hr/year is decreased from 31.0 mph in the existing condition to 30.4 mph once the study building is in place.

In simple terms, given that the Project *reduces* average wind speeds as compared to existing conditions, it cannot be considered to create a significant impact under the Marketplace EIR significance threshold (which asks whether a project would substantially increase winds) or WIND 1 (Reduced Main Street Alternative) (which asks whether winds generated by the structure could reach hazardous levels). Accordingly, there is no new significant impact.

Finally, Appellant's argument that the wind analysis should compare the FDP to the approved PDP structure analyzed in the EIR is not germane. The significance threshold used to determine if mitigation measures are necessary refer to final designs. Therefore, the relevant consideration is whether the final designs would substantially increase winds or generate winds that reach hazardous levels. Since the Pedestrian Wind Study found that the Parcel B project would not result in any hazardous wind impacts and, in fact, would eliminate one hazardous wind locations under existing conditions and generally decrease winds, an analysis of the difference in wind between the PDP and Parcel B FDP is not relevant or necessary. (Pub Res Code §21166; *San Diego Navy Broadway Complex Coalition v City of San Diego* (2010) 185 Cal.App.4th 924).

5. Planning Commission Wind Findings

A majority of the Planning Commission members specifically addressed the Appellant's wind arguments at the Continued May 14th Hearing, finding that the RWDI Preliminary Report was definitive. Commissioner Keller stated that he felt "the issue has been fully addressed in the report study," agreeing "that the wind will not be an issue." He emphasized that "contrary to Wareham's assertion, the proposed buildings will not adversely affect the area by greatly increasing wind." Commissioner Hidalgo noted that the wind data provided met the "substantial evidence argument." Commissioner Guerrero underscored that "we have a study that shows that the wind is not impacted heavily through this design." Adding to the sentiments of her fellow commissioners, Commissioner Thomson found that the evidence prepared regarding wind is "sufficient" and that she does not feel as though there is "an amplification of the wind characteristics that would make this project infeasible."

V. **The FDP Is Consistent with the City's General Plan**

A city's interpretation of its own general plan and policies is entitled to "great deference." (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal. App. 4th 656, 678 ("[T]he body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity."); *Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal. App. 4th 99, 142). The city has "broad discretion to construe its

policies in light of the plan’s purposes.” (*Id.*) The following demonstrates consistency with the General Plan goals.

UD-G-11- Sky Exposure. Building form and massing that furthers sky exposure for adjacent sidewalks and public spaces, especially in gathering places such as the core and neighborhood center.

The PDP building massing called for a 120 foot tall building. This approved PDP design created shadows that would fall on adjacent sidewalks. These shadow impacts were studied in the EIR and deemed acceptable. The FDP building design massing calls for a 113 foot tall building, and only 8 stories. (Additional floor-to-floor height was allocated to improve the quality of the office space.) Like the PDP, the approved FDP design creates shadows that fall on adjacent sidewalks. The FDP design is, however, more compact in its disposition than the PDP. The PDP has a much longer 5 story base element, which extends without relief from end to end of the site and has no gap at the ground level from Parcel A. The shadow studies included in the FDP submission illustrate that the shadow impacts of the FDP design are only marginally different than those of the PDP design, and do not impact primary open spaces and plazas.

Furthermore, at the Continued May 14th Hearing, Commissioner Donaldson said: “Comparing the TMG massing in 2008 to the City Center version, it looks to me like the . . . 2008 PDP has a big wall towering over the transit center building and significantly blocking light and air to the public space on the South side of the building. Whereas, the City Center leaves the public space on the South side of the Wareham building much more open and does have a gap and obstructs less of the view than the . . . Wareham building has so I would be in favor of approving, re-approving, this.”

Several General Plan Urban Design policies deserve consideration here:

UD-P-33: Bulky and monolithic buildings shall be prevented through:

- *Vertical articulation, such as step backs at higher floors, and less floor area as heights increase to reduce the apparent bulk of buildings.*
- *Horizontal articulation, such as varied setbacks, recessions/projections, change in materials, and building transparency, especially in Pedestrian Priority Zones.*

UD-P-36: Where large floorplates are permitted, buildings shall be required to adhere to height, setback, and stepback standards, as required for view and sun access, but less stringent bulk standards shall be permitted.

UD-P-38: New development should employ changes in height, massing, and/or design character to create careful transitions in scale and density.

The approved Parcel B design responds to and embodies General Plan Urban Design policies UD-P-33, UD-P-36, and UD-P-38. As previously discussed, the building’s form, scale, massing, materials, and articulation are a direct response the surrounding industrial buildings and the

vision of the original PDP. The design intention of the Parcel B building adheres to the industrial spirit of the site pursuant to AES-1, which provides that “the proposed structures shall adequately reference, and be visually compatible with and not detract from the surrounding industrial buildings.” Parcel B has protruded and recessed elements to articulate the building. Stair and elevator towers, at the north and south ends, are expressed as tower elements, while the main entry is a recessed element, corresponding to the location of the main mid-block cross walk. The transitions in scale and character are carefully created at street level, where the user experience is most important and intimate.

VI. More CEQA Review is Not Required

The Appellant wrongly contends that the FDP triggers additional CEQA review.

A. Post-EIR Presumption

At the outset, it is noted that CEQA includes a strong presumption against requiring any further environmental review once an EIR has been prepared for a project. (Pub Res Code §21166; *San Diego Navy Broadway Complex Coalition v City of San Diego* (2010) 185 Cal.App.4th 924). Once an EIR has been completed, the lead agency or a responsible agency may not require a subsequent or supplemental EIR unless:

- Substantial changes are proposed in the project that will require major revisions of the EIR;
- Substantial changes occur in the circumstances under which the project is being undertaken that will require major revisions in the EIR; or
- New information of substantial importance to the project that was not known and could not have been known at the time the EIR was certified as complete becomes available.

In general, a subsequent or supplemental EIR will not be required as long as there are no new significant or substantially more severe impacts. (14 Cal. Code Regs. §15162(a)(1)). Minor modifications to a project are not sufficient to trigger the provisions for subsequent or supplemental EIRs under Guideline § 15162. If the proposed changes are within the scope of the previously approved project, no subsequent or supplemental EIR can be required. So long as there is substantial evidence to support an agency’s determination of whether a modification has resulted in a “substantial change,” that determination will not be overturned.

Agencies, therefore, have broad latitude in determining whether supplemental review is required. For example, in *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal. App. 4th 788, 802, the court approved of the city’s reliance on an addendum to an EIR finalized in 1997. The eighth addendum to the EIR addressed extension of the plan horizon by over a decade and several modifications to projects and facilities within the Master Plan area. Nevertheless, the court concluded that because the impacts of the modifications were not significantly different from those analyzed in 1997, there was no need for supplemental or subsequent review pursuant to Guideline § 15162. *Id.* Similarly, the court in *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal. App. 4th 689, 704-05, found that only an addendum was needed when the City selected an entirely new alignment for its recycled water pipes because the new

alignment and its impacts were “not significantly different” from what the City had previously evaluated. *See also Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal. App. 4th 1301, 1318 (holding that no substantial change to the project when residential units were reallocated within areas of the specific plan).

B. Detailed Environmental Review of Parcel B FDP

As discussed herein, a detailed, 65-page Environmental Checklist was prepared to consider the environmental impacts associated with the Parcel B FDP in relation to the impacts identified in the prior EIR. There are no circumstances requiring further environmental review.

Additionally, with respect to aesthetics, the State Legislature has specified pursuant to SB 743 that “aesthetic impacts of...[an] employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment” under CEQA. (Pub. Res. Code §21099(d)(1)). “Transit priority area” means an area within one-half mile of a major transit stop. (Pub. Res. Code §21099(a)(7)). An “employment center project” means a project located on property “zoned for commercial uses with a floor area ratio of no less than 0.75 and that is located within a transit priority area.” (Pub. Res. Code §21099(a)(1)). The project is, in fact, in a transit priority area as it is adjacent to the Emeryville Amtrak station. The Marketplace PDP zoning allows commercial uses. (See PDP, §III(A)(1)(c)). The FAR is 2.84. (See plans attached to January 25, 2019 Planning Commission materials). Accordingly, aesthetic impacts may not be considered significant impacts for this project under CEQA. However, the Environmental Checklist did evaluate size, massing and design in comparison to that analyzed in the PDP and found no new impacts. (Environmental Checklist, see p. 39).

C. Compliance with Mitigation Measures

It is noted that SB 743 was adopted in 2013 (added by Stats. 2013, Ch. 386, Sec. 5) and became effective on January 1, 2014. This state law went into effect after the Marketplace EIR was certified. This more recent directive in the form of state law arguably means that mitigation measures imposed in the EIR are not even required for the Parcel B project since state law says that there can’t be significant impacts for a qualifying project. Nonetheless, the following analysis demonstrates compliance with the referenced mitigation measures.

AES-1: Each of the following 5 measures shall be incorporated into the final project design:

- *The proposed structures shall adequately reference, and be visually compatible with and not detract from the surrounding industrial buildings.*
- *Create streetscape vitality and enhance the pedestrian experience through detailed treatment of building facades, including entryways, fenestration, and signage, vertical walls broken up with architectural detailing, protruded and recessed tower elements, stepped-back upper floors to provide appropriate building height transitions to adjacent buildings, and through the use of carefully chosen building materials, texture, and color.*
- *Design of building facades shall include sufficient articulation and detail to avoid the appearance of blank walls or box-like forms.*

- *Exterior materials utilized in construction of new buildings, as well as site and landscape improvements, shall be high quality and shall be selected for both their enduring aesthetic quality and for their long term durability, and their compatibility with the design motif of surrounding buildings.*
- *Detailed designs for the public plazas shall be developed. The plaza designs shall emphasize the public nature of the space and pedestrian comfort and sun/shade patterns during mid-day hours throughout the year. The plaza designs shall be sensitively integrated with the streetscape.*

As discussed, the Planning Commission found that the proposed FDP references the architectural vernacular of Emeryville, enhances the pedestrian experience and includes sufficient articulation and detail to avoid the appearance of blank walls or box-like forms. Furthermore, the above mentioned awards highlight the Project design's attention to quality of materials and emphasize the public nature of the space. In addition, the wind study provides evidence that the design facilitates pedestrian comfort throughout the year.

AES-2a: The specific reflective properties of project building materials shall be assessed by the City during review of the Final Development Plans for the proposed project. Final Development Plan review shall ensure that the use of reflective exterior materials is minimized and that proposed reflective material would not create additional daytime or nighttime glare.

The Parcel B building's approach to reflective materials is consistent with AES-2a. While the project includes generous amounts of windows, the windows are comprised of smaller windows grouped together to minimize the visual and reflective impact of large areas of glass. The design of the remainder of the building includes metal panels and painted stucco, which are not reflective. Furthermore, configurations and application of the project's exterior materials do not create additional daytime or nighttime glare.

AES-2b: Specific lighting proposals shall be submitted and reviewed as part of each Final Development Plan for each new building on the project site and approved by the City prior to issuance of building permit. This review shall ensure that any outdoor night lighting for the project is downward facing and shielded so as not to create additional nighttime glare and shall conform with light and glare performance standards established by Zoning Ordinance Article 59 and the Maximum Intensity of Light Sources table.

The Public Market Tentative Map (approved by the Planning Commission by resolution No. SUBDIV 15-002 on October 22, 2015) included detailed lighting design for public spaces and streets, including drawings, specifications, and calculations. The City's permit documentation set and review process is parcel specific, ensuring that lighting details are properly assessed and evaluated with more particularity than available at the FDP/Entitlements stage of design.

WIND-1a: Final design of the roof deck open space terraces on the Shellmound building shall be heavily landscaped to reduce wind and improve usability and shall incorporate porous materials or structures (e.g., vegetation, hedges, screens, latticework, perforated

or expanded metal) which offer superior wind shelter compared to solid surfaces. Outdoor furnishings, such as tables shall either be either weighted or attached to the deck.

This mitigation measure does not apply to Parcel B, since it does not include roof deck open spaces. Section IV(B) above includes a thorough discussion of the ample wind impact analysis that has been conducted.

WIND-1b: Scale model wind tunnel or computerized computational fluid dynamics testing shall be conducted to determine how strong winds will be through the fourth floor breezeway between the Amtrak pedestrian bridge to the west side of the building. If winds through the breezeway exceed 36 mph, the breezeways design shall be altered to reduce wind speeds below this threshold. Alternatively, to avoid testing, the design of the breezeway could be altered with the addition of glazing at the west side opening. Testing or design modifications would reduce this impact to a less-than-significant level.

This mitigation measure does not apply to Parcel B, since it refers to the breezeway between the Amtrak pedestrian bridge and the west side of the building, which relates to the Parcel A building. Section IV(B) above includes a thorough discussion of the ample wind impact analysis that has been conducted. In fact, the RWDI computerized wind tunnel testing shows that when the project is modeled there were no locations around the vicinity of the Project site that exceed 36 mph. (RWDI Pedestrian Wind Study, Table 1). The Project actually eliminates one exceedance that occurs under existing conditions. (*Id.*)

WIND-1: (Main Street and Reduced Main Street alternatives): Final design of the buildings constructed on the Shellmound and UA Cinema building sites shall be subject to review by a qualified wind consultant. The design review shall evaluate the architect's employment of one or more of the following design guidelines to reduce wind impacts to a less-than-significant level:

- West or southeasterly building faces shall be articulated and modulated through the use of architectural devices such as surface articulation, variation, variation of planes, wall surfaces and heights, as well as the placement of step-backs and other features.*
- Utilize properly-located landscaping to mitigate winds. Porous materials (vegetation, hedges, screens, latticework, perforated or expanded metal) offer superior wind shelter compared to a solid surface.*
- Avoid narrow gaps between buildings where westerly or southeasterly winds could be accelerated.*
- Avoid "breezeways" or notches at the upwind corners of the building.*

Wind tunnel or computerized computational fluid dynamics testing shall be required if a review of the final architectural design of the proposed mid-rise buildings is insufficient to determine whether the buildings would result in adverse wind impacts. Testing shall be used to determine if wind accelerations generated by the structure could reach hazardous levels and to develop design modifications that would reduce impacts to a less-than-significant level.

The discussion in Section IV(B) above explains how the wind mitigation measures and conditions of approval have been satisfied with the qualified wind consultant review of the Project as well as the computerized wind tunnel testing. That discussion, and supporting technical analysis, demonstrates that the Project structure would not result in hazardous wind levels.

SHADE-1: (Main Street and Reduced Main Street Alternatives): No mitigation measure is available to reduce this impact to a less-than-significant level.

As described in the Environmental Checklist, the Final EIR concluded that the Final EIR project would result in a potentially significant impact to shade and shadow on public places throughout the Project site as a result of the sizeable increase in development. (Marketplace Final EIR, pp. 132-133). This impact was found to be significant and unavoidable because reducing the impact would involve undertaking a major reconfiguration of the project. (Marketplace Final EIR, p. 133). The Marketplace EIR did not find any feasible ways to mitigate impacts and, therefore, a Statement of Overriding Considerations was adopted acknowledging the significant and unavoidable shade impact. (See Ordinance 08-044, Exhibit D). Nonetheless, shadow studies were conducted as part of the Parcel B FDP process. (See January 25, 2019 Planning Commission FDP hearing materials, Sheet A2.10).

All of the reasons discussed above, therefore, support the environmental analysis conducted to date. In response to the Appellant's comment that there is a fatal flaw in the environmental analysis, that is simply not true. Appellant references the text of the Environmental Checklist that says the proposed Parcel B FDP Project is smaller than the PDP Project, noting that the PDP allowed development up to 120 feet, that the Parcel B is proposed at 113 feet and that aesthetic impacts would be similar. Section III above includes a long discussion of the interpretation of the PDP, including the numeric height standard in the PDP "not to exceed 120 feet." As the PDP did not distinguish between the northern and southern end of the parcel it is a reasonable interpretation that the 120 foot height standard applies to the entire Parcel B and that the proposed 113 foot tall building is shorter than the allowed 120 feet allowed under the PDP without additional environmental analysis

Even acknowledging that the northern portion of the proposed Parcel B FDP extends higher than as shown in the undimensioned PDP plans, this does not result in any new significant impacts. First, the Kimley Horn traffic analysis considered the total square footage of the proposed Parcel B FDP and found no new significant impacts. (See Exhibit F).

As identified above, state law provides that aesthetic impacts may not be considered significant impacts for this project under CEQA. Thorough design analysis, including ample findings by the Planning Commission, has found no impacts. Computerized wind tunnel testing has found no significant impacts will result from the current proposal. Shade impacts were already identified as significant and unavoidable in the Marketplace EIR. Therefore, the Appellant's contention that more CEQA analysis is required is incorrect.

D. Private Views are Not Legally Protected Here

Finally, while not directly addressed in the Appellant’s letter, we feel compelled to address what may be the Appellant’s concern – views. What is telling about the Appellant’s proposed alternatives is that both alternatives provide a better sightline from the Appellant’s building to the San Francisco Bay. Private views are not protected under CEQA. *Bowman v. City of Berkeley* (2004) 122 Cal. App. 4th 572, 586 (“obstruction of a few private views in a project’s immediate vicinity is not generally regarded as a significant environmental impact”); *Ocean View Estates Homeowners Assn. v. Montecito Water District* (2004) 116 Cal. App. 4th 396, 401; *Mira Mar Mobile Community v. City of Oceanside* (2004) 191 Cal. App. 4th 477, 492-93. Pursuant to CEQA Appendix G, in urbanized areas, compliance with zoning regulations regarding scenic quality is the only relevant question.

The CEQA Guidelines (specifically Appendix G) were recently amended to limit the review of aesthetics because, as the Natural Resources Agency explained, “[b]oth federal and state courts have struggled with the issue of precisely what questions related to aesthetics are relevant to an analysis of environmental impact.” (Natural Resources Agency, Final Statement of Reasons for Amendments to the State CEQA Guidelines (Nov. 2018) at 66). As the court in *Bowman* noted, “Virtually every city in this state has enacted zoning ordinances for the purpose of improving the appearance of the urban environment. . . . While those local laws obviously do not preempt CEQA, . . . [aesthetic issues such as private views] are ordinarily the province of design review, not CEQA.” (*Bowman*, 122 Cal. App. 4th at 593). To that end, CEQA analysis of environmental impacts pursuant to CEQA Guidelines Appendix G is now limited to assessing compliance with zoning regulations.

The Emeryville Planning Regulations do not have a view or light protection ordinance as is the case in some other cities. Rather, conformance with the PDP is the relevant issue under the Emeryville Planning Regulations. (Zoning Code 9-7.1004(b)). As discussed throughout, the project is consistent with the PDP. Additionally, there is no common law right to views, air or light. (*Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 127 (California courts’ rejection of an implied or inherent right to a view or to light and air across another’s property is based on a public policy that favors using real property over keeping it vacant for the sake of another’s view).) And finally, Appellant has no contractual private right to views. Specifically, the Appellant has no view or solar easement and no CC&Rs.

VII. The Proposed Design Alternatives are Not Feasible

The Appellant’s alternatives are problematic for a number of reasons.

A. Financial Infeasibility

Primarily, the alternatives are cost-prohibitive and are not counterbalanced by any additional revenue generating space/use.

At the Continued May 14th Hearing, Commissioner Young stated he looked at the proposal “pretty deeply” and found that the cost to regain the space would be “intense.” He “can’t

imagine it going another direction unless there's somehow a huge amount of funds that are going to be able to pull this off to make the underground parking work [and] lower the building a couple of layers into the soil.”

Option 1 reduces parking from 565 spaces to 460 spaces. This option is not feasible since the Parcel B parking is a critical piece of the overall project puzzle and must provide parking not only for the research & development uses and retail uses on Parcel B, but also the approved housing on Parcel A and the Food Hall customers. Reducing the parking so drastically would threaten the viability of the entire mixed use project. Again, since the Appellant has not taken issue with the amount of parking in the FDP proposal, it is not clear what this alternative accomplishes, other than perhaps better preserving views, which is not a protected right.

Option 1A relies on below-grade parking. As the Appellant well knows, underground parking is typically cost-prohibitive. In fact, when the Berkeley City Council recently suggested that Wareham provide underground parking for its medical office project located at 621 10th St., so as to not displace existing businesses at the project site, Wareham responded that doing so would be too costly and would delay the project. Wareham estimated that moving parking underground would cost approximately \$55,000 to \$65,000 per space. According to Wareham, underground parking, while feasible, was not a viable option.⁹

Furthermore, the design concepts proposed by DGA would result in significantly higher costs and lower revenue potential for the following reasons:

- Below-grade parking is infeasible or extremely cost prohibitive given the soil characteristics and adjacency to railroad tracks.
- Reducing parking below the proposed amount would violate leases of the existing Public Market and Marketplace Office tenants. (Note that the overall parking counts for the Marketplace Project fall within Emeryville Planning Code and well below the national or regional average for a mixed-use project of this type.)
- The shorter building podium reduces the length of ground floor retail and results in a longer “gap” between buildings which would discourage continuous shopping. (Note that the approved PDP had no gap between buildings.)
- The reduced office floorplates would not garner the same appeal in the market as the proposed office plates, which at est. 50,000 sq. ft. are very in demand by tech and research firms across the Bay Area.
- The reduced office plates result in a higher exterior facade to floor ratio, further driving up costs.

B. Design Critiques

From an aesthetic perspective, Hart Howerton’s review of both options found that the glass boxes, which have no relation to their parking garage bases, could not sustain the same level of design critique that Mr. Heller and DGA applied to the approved Parcel B building. Both options would also fail to meet the General Plan’s Urban Design Policies and the design related

⁹ Emilie Raguso, *Berkeley Kaiser Permanente Offices Could Open by 2021 After Council Vote Tuesday*, BERKELEYSIDE (May 1, 2019, 6:25 A.M.), <https://www.berkeleyside.com/2019/05/01/kaiser-permanente-could-open-by-2021-after-berkeley-council-vote-tuesday>.

conditions of approval. In fact, Hart Howerton finds that Mr. William’s own critique perfectly describes the Appellant’s proposed alternative design:

- “The proposed structure does not adequately reference and is not visually compatible with surrounding existing industrial buildings, or approved mixed use buildings on Parcels A, C and D.”
- “Parcel B does not take any cues from industrial buildings in Emeryville.”
- “This project lacks vitality, variety and architectural detail. The retail is nominally differentiated from levels above but the lack of variety in massing, and the relentless repetition of same size structural bays creates a monotonous pedestrian experience.”
- “The primary form of this design is a box; . . .”
- “The overall length and height of this design visually segregates the Emeryville Public Market from the Amtrak Station and all development east of the railroad tracks.”
- “The design lacks articulation that diminishes or modulates the massive scale of the East and west Facades.”

C. Parcel B Benefits in Comparison

In contrast, at the Continued May 14th Hearing, Commissioner Keller detailed the ways in which the Parcel B FDP adds value to Emeryville. “This project as before us continues the intention of the 2008 PDP, while providing our best chance in today’s economy of supporting existing businesses in the Public Market; while creating the interest, draw and excitement to attract new retail and food services in the Public Market and the greater neighborhood. Everything about the Public Market, including Parcel B project, improves the pedestrian experience and the aesthetics of Emeryville. I’m astonished that Wareham, being the developer that they are, somehow missed the new benefits, so I’ll list them. On the subject of transit, we have new bus stops with shelters [and] new AC transit routes, such as the 29 and the 36. For cycling, there are new green bike lanes, new bike racks and the addition of bike share. In open space, we have added nearly a half-acre to Christie Park and for the pedestrians, sidewalk stop signs to slow traffic and several new cross-walks all which greatly, greatly, contribute to the improved quality of life [of Emeryville].”

Conclusion

Based on the ample analysis and substantial record created during the entitlement process and through the 5 month appeal process, we respectfully request that the City Council affirm the Planning Commission and dismiss the appeal. (Emeryville Code, § 9-7.1405).

Sincerely yours,

HOLLAND & KNIGHT LLP



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Exhibits

Exhibit A – Approved PDP Plans

Exhibit B – Examples of images provide by Appellant that were not part of legally binding approved plans

Exhibit C – Parcel B Artwork

Exhibit D – Qualified Wind Consultant Review

Exhibit E – RWDI Preliminary Report

Exhibit F – RWDI Response Letter and Pedestrian Wind Study

Exhibit G – Kimley Horn Analysis