



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: October 1, 2019

TO: Christine Daniel, City Manager

FROM: Charles S. Bryant, Community Development Director

SUBJECT: **Appeal By Wareham Development Of Resolution No. FDP18-001R, “A Resolution Of The Planning Commission Of The City Of Emeryville Approving A Final Development Plan (FDP) For APN 49-1556-16 (“Parcel B”) Of The Marketplace Redevelopment Project Planned Unit Development (PUD04-02) For An Eight-Story Building With Approximately 15,800 Square Feet Of Rentable Retail Space, 150,000 Square Feet Of Rentable Office/Lab Space, And 560 Parking Spaces And Rescinding Resolution No. FDP15-001 Previously Adopted By The Planning Commission On June 23, 2016”**

- (1) **A Resolution Of The City Council Of The City Of Emeryville Dismissing An Appeal By Wareham Development Of Resolution No. FDP18-001R, And Affirming Resolution No. FDP18-001R, “A Resolution Of The Planning Commission Of The City Of Emeryville Approving A Final Development Plan (FDP) For APN 49-1556-16 (“Parcel B”) Of The Marketplace Redevelopment Project Planned Unit Development (PUD04-02) For An Eight-Story Building With Approximately 15,800 Square Feet Of Rentable Retail Space, 150,000 Square Feet Of Rentable Office/Lab Space, And 560 Parking Spaces And Rescinding Resolution No. FDP15-001 Previously Adopted By The Planning Commission On June 23, 2016”; CEQA Determination: Environmental Impact Report For Marketplace Redevelopment Project PUD Certified By Resolution No. 08-09 Applies**

Or

- (2) **A Resolution Of The City Council Of The City Of Emeryville Setting A Public Hearing To Consider An Appeal By Wareham Development And City Council Call For Review Of Resolution No. FDP18-001R, “A Resolution Of The Planning Commission Of The City Of Emeryville Approving A Final Development Plan (FDP) For APN 49-1556-16 (“Parcel B”) Of The Marketplace Redevelopment Project Planned Unit Development (PUD04-02) For An Eight-Story Building With Approximately 15,800 Square Feet Of Rentable Retail Space, 150,000 Square Feet Of Rentable Office/Lab Space, And 560 Parking Spaces And Rescinding Resolution No. FDP15-001 Previously Adopted By The Planning Commission On June 23, 2016”**

Or

- (3) **A Resolution Of The City Council Of The City Of Emeryville Remanding To The Planning Commission For Consideration The Appeal By Wareham Development Of Planning Commission Resolution No. FDP18-001R, “A Resolution Of The Planning Commission Of The City Of Emeryville Approving A Final Development Plan (FDP) For APN 49-1556-16 (“Parcel B”) Of The Marketplace Redevelopment Project Planned Unit Development (PUD04-02) For An Eight-Story Building With Approximately 15,800 Square Feet Of Rentable Retail Space, 150,000 Square Feet Of Rentable Office/Lab Space, And 560 Parking Spaces And Rescinding Resolution No. FDP15-001 Previously Adopted By The Planning Commission On June 23, 2016”**

I. EXECUTIVE SUMMARY

This action item relates to the Planning Commission adoption of Resolution No. FDP18-001R on May 14, 2019, which approved a final development plan for the property commonly referred to as “Parcel B”, and that is encompassed by the Marketplace Redevelopment Project Planned Unit Development/Preliminary Development Plan, approved by the City Council by Ordinance No. 08-004 on August 5, 2008. At its May 21, 2019, regular meeting, pursuant to Emeryville Municipal Code (**EMC**) § 9-7.1406, the City Council called for the review of Resolution No. FDP18-001R. Subsequently, on May 29, 2019, Wareham Development filed a timely appeal of Resolution No. FDP18-001R. As to both the City Council call for review and the appeal by Wareham Development the purpose of this action item is for the Council to determine whether it would like to:

- “(1) Affirm the decision of the Commission and dismiss the appeal based on a determination that the facts ascertainable from the record do not warrant further hearing;
- (2) Set a date for a public hearing on the appeal; or
- (3) Remand the matter to the Commission to reconsider the application, identifying the issues that the Commission is directed to consider and specifying whether or not the Commission shall hold a new public hearing.”¹

The purpose of this staff report is to provide the record and to respond to the issues raised by the appeal as required by EMC § 9-7.1405(a).² Resolution No. FDP18-001R defines the record as the “staff report and attachments thereto, all public testimony, both written and oral, the Project as set forth in this Resolution, Council Direction, the relevant portions

¹ EMC §§ 9-7.1406; 9-7.1405(b).

² As the City receives additional correspondence for the record, the correspondence will be given an “AR” page number designation, and added to the administrative record in the “Other Correspondence” section at the end of the administrative record.

of the EIR, and the applicable provisions of the Emeryville Planning Regulations”.³ However, given that the development of Parcel B occurs within the context of the Marketplace Project (defined below), and other documents from the Marketplace Project inform the Applicant’s development of Parcel B, staff’s recommendations, and the Planning Commission approval of the Project, staff has transmitted other documents from the Marketplace Project relevant to this appeal as part of the record; but by no means has City staff transmitted all documents related to Marketplace Project.

II. BACKGROUND

A. The Marketplace Project⁴

On January 15, 2008, via Resolution No. 08-09, the City Council certified the Marketplace Redevelopment Project Environmental Impact Report (**EIR**) for the Marketplace Redevelopment Project Planned Unit Development (**Marketplace Project**). Subsequently, on July 15, 2008, the Council adopted Resolution No. 08-126, which applied the EIR to the Planned Unit Development (**PUD**), adopted mitigation measures, and adopted a statement of overriding consideration for the project as considered in the EIR. On August 5, 2008, the City Council adopted Ordinance No. 08-004, approving the Marketplace Redevelopment Project Planned Unit Development/Preliminary Development Plan (**PDP**) (referred to together as the **PUD/PDP**). The **PUD/PDP** involved redevelopment of the existing Marketplace site (including the parcel now referred to as “Parcel B” or APN 49-1556-16) with a phased development consisting of 674 multi-family residential units, 180,000 square feet of retail, and 120,000 square feet of office. The PUD/PDP contemplated the 15-acre Marketplace site to be substantially redeveloped by replacement of surface level parking, realignment of Shellmound Street directly in front of the existing Marketplace Tower and Public Market buildings, addition of three new street segments with on-street parking (62nd and 63rd Streets and Market Drive), and addition of seven new buildings within the site and an enlarged City park.

On October 19, 2010, the City Council adopted Resolution No. 10-175, approving a final development plan (**FDP**) for the first phase of development, which included the development of a 190 rental residential building located at the south-east corner of 64th Street and Christie Avenue. This building, the “Emme” project, has been constructed and is now occupied.⁵

On February 26, 2015, the Planning Commission adopted Resolution No. FDP14-001, approving the FDP for the redevelopment and expansion of Christie Avenue Park. The grand opening for Christie Park was held on November 29, 2018.

³ AR 2152 (Resolution No. 18-001R).

⁴ For background and informational purposes, this section describes the development history of the entire Marketplace PUD/PDP to date. Only Parcel B is the subject of the current City Council review.

⁵ On February 5, 2013, the City Council passed Ordinance No. 13-001, adopting new Planning Regulations, which took effect on March 7, 2013. Prior to that time, FDPs required City Council approval; under the new Planning Regulations, FDPs require Planning Commission approval and are not considered by the City Council unless appealed.

On May 28, 2015, the Planning Commission adopted Resolution No. FDP13-001, approving the FDP for “Parcel C”, which included development of a grocery store, with a parking garage, and 66 residential units. The construction of the grocery store with parking garage was completed in May 2018, and construction of the 66 residential units is underway. On August 22, 2019, the Planning Commission adopted Resolution No. FDP13-001 (Amendment) amending the approved FDP for Parcel C to allow other commercial uses in the space built for the grocery store.

On June 25, 2015, the Planning Commission adopted Resolution No. FDP14-003, which approved the FDP for “Parcel D”; it included the development of 223 residential units and two levels of structured parking on the site of the former United Artists Theater southwest of the intersection of 64th and Shellmound Streets. Construction of the 223 residential units and parking is currently underway. On August 9, 2019, the City issued a temporary certificate of occupancy for the first 43 units, and residents have begun to move in.

On July 23, 2015, the Planning Commission adopted Resolution No. FDP14-002, which approved the FDP for “Parcel A”, including the development of 167 residential units, 14,000 square feet of retail space and 222 parking spaces. Construction of Parcel A has not begun, and cannot begin, until Parcel B is developed for reasons discussed below.

On October 22, 2015, the Planning Commission adopted Resolution No. SUBDIV15-002, which approved a major subdivision permit for a tentative map to reconfigure the four existing parcels into eight new parcels, to realign Shellmound Street, and to create 62nd, 63rd Street, and Market Drive consistent with the PUD. The Phase I Final Map was recorded on August 23, 2016 as Tract 8327, and the Phase II Final Map was recorded on February 9, 2017, as Tract 8334.

On December 1, 2015, the City Council adopted Ordinance No. 15-010, approving a development agreement with AG-CCRP Public Market LP (**Applicant**) and AvalonBay Communities, Inc. related to the development of the Marketplace Project (**Development Agreement**). Among other matters, the Development Agreement governs the Applicant’s contribution of public art required by the Marketplace Project as set forth in EMC § 3-2.403. In particular, Section 7.2 of the Development Agreement provides that: “the treatment of the east wall of the Parcel B structure may satisfy the public art obligation applicable to Parcel B”.

On June 23, 2016, the Planning Commission adopted Resolution No. FDP15-001, approving the most recent FDP, which was for “Parcel B”, for structured parking with ground floor retail. This parking garage on Parcel B would provide parking for existing commercial uses. Previously, the existing commercial uses were served with surface parking lots on Parcel C. With the redevelopment of Parcel C, these existing commercial uses are now being served by the existing surface parking lots on Parcel A. It is for this reason that the residential building on Parcel A cannot be built until the parking garage on Parcel B has been constructed. The approved FDP for this building included 26,000 square feet of retail space and 300 parking spaces.

B. The Current Application

On November 28, 2018, the Applicant filed an application for a new FDP for Parcel B for the development of 150,000 square feet of office/lab space in addition to 15,800 square feet of ground floor retail space and 560 parking spaces (**Project**). On December 13, 2018, the Planning Commission held a study session on this new Project. On January 24, 2019, the Planning Commission adopted Resolution No. FDP18-001, approving the Project, and rescinding Resolution No. FDP15-001.

On February 8, 2019, Wareham Development (**Appellant**) timely appealed Planning Commission Resolution No. FDP18-001 to the City Council (**Appeal I**). Appellant raised five issues on appeal. The issues are quoted *in italics* from Appeal I:

Requirement AES 1 calls for the final designs to create a “vital streetscape that enhances the pedestrian experience, avoid blank walls or box-like forms.

The project’s design, extremely close to the equally tall and boxy existing Marketplace Tower to its west, will create a stark and dark cavern between them which will make the retail at their bases very uninviting public spaces. The proposed design indeed could not be more boxy, antithetical and contrary to this requirement. The original 2008 approval indeed included large buildings along the railroad tracks. However, in that original approval they have varying and modulated heights and façade, with several important openings and livable gaps between different building masses.

Requirement WIND 1 calls for a wind study to review the winds that will exist on the pedestrian bridge. No such wind study was presented.

It certainly seems that the current design, with only the narrowest of gaps between buildings, will create a wind tunnel here and that those conditions deserve extra study.

WIND-1 also specifically says that any Final Design should “avoid narrow gaps between buildings where winds could be accelerated”. The current design does exactly the opposite.

The prior approved design for Parcel B had a roughly 170 foot gap between it and the approved Parcel A building. The most recent approved design reduced the gap by almost half, to only less than 80 feet. This narrow gap eliminates any real visual connection between the eastern side of the railroad station and EmeryStation campus and the Marketplace, while increasing negative wind patterns. This is not to mention the fact that the prior wider gap was filled with a single-story retail pad building, possibly a restaurant, which would be an attractive area of activity. The current narrow gap only houses the dumpster that will serve the new building.

Requirement TRAF 1-b states that the Applicant will submit a Transportation Demand Management Plan to the City for review and approval prior to completion of the FDP. This did not occur as far as we can tell.

The traffic timing and impacts of the proposed office use are very different than those of retail. Office use primarily creates heavy commute-time trips while retail trips are much more dispersed throughout the day. The fact that the staff report says that total traffic counts are slightly less than the prior approval disregards the very real timing impact of those trips. The change of use proposed with the latest Parcel B proposal deserves such detail analysis.

We have been told that the City's "tower separation ordinance", which requires certain distances between buildings over 100 feet tall, does not apply in this case because the three buildings in question all were approved prior to the ordinance. Even if that is technically correct, the ordinance was put in place as the policy of the City for important planning and aesthetic reasons that matter regardless of some technicality. Built right out to the limits of its property lines, the new project is closer to our new EmeryStation West project than the ordinance guidelines allow, and is much, much closer to the existing Marketplace Tower than the ordinance allows.

On March 19, 2019, pursuant to EMC § 9-7.1405(b), the City Council considered whether to: 1) affirm the decision of the Planning Commission and dismiss the appeal, 2) set a date for public hearing on the appeal, or 3) remand the matter back to the Planning Commission with directions. The City Council adopted Resolution No. 19-29, remanding the matter to the Planning Commission and directing the Planning Commission to consider the issues raised in Appeal I at a new public hearing.

Consistent with the direction provided by the City Council via Resolution No. 19-29, a new public hearing for the Project was placed on the Planning Commission's agenda for its regular meeting scheduled for April 25, 2019. A staff report was prepared for the item on the April 25, 2019, Planning Commission agenda. On April 25, 2019, shortly before the Planning Commission's scheduled meeting, Appellant submitted a memorandum to the Planning Commission, providing its response to the staff report for the April 25, 2019, Planning Commission meeting, and additional comments. On April 25, 2019, the Planning Commission opened a public hearing on the Project to consider the issues raised in Appeal I, consistent with the Council's direction. The Planning Commission then closed the public hearing, and moved to continue deliberation of the Project to May 14, 2019. On May 13, 2019, Applicant's counsel submitted the Emeryville Public Market Parcel B Pedestrian Wind Study prepared by RWDI. On May 14, 2019, the Planning Commission re-opened the public hearing to accept additional testimony and evidence. Appellant had the opportunity to speak during the re-opened public hearing. The Planning Commission then closed the public hearing and resumed its consideration of the Project. Thereafter the Planning Commission unanimously adopted Resolution No. FDP18-001R, approving the Project and rescinding Resolution No. FDP15-001.⁶

⁶ Appellant suggests that the Planning Commission's process of re-opening the public hearing to allow for Applicant to submit the Emeryville Public Market Parcel B Pedestrian Wind Study prepared by RWDI, and

In adopting the resolution, the Planning Commission made the findings required by EMC 9-7.1004(b), namely: 1) the Project substantially conforms to the preliminary development plan; and 2) changes and conditions of approval specified by the City Council in its approval of the preliminary development plan have been met. In making these findings, the Planning Commission articulated its reasoning and justification for making the findings based on evidence in the record before the Commission. In adopting the resolution, the Planning Commission also determined that the EIR for the Marketplace Project applied to the FDP, and that no further CEQA review was necessary.

At its May 21, 2019, regular meeting, pursuant to EMC § 9-7.1406, the Council called for the review of Resolution No. FDP18-001R. Subsequent to the Council calling for the review, on May 29, 2019, Appellant filed a timely appeal of Resolution No. FDP18-001R pursuant to EMC § 9-7.101, 9-7.1012, and 9-7.1405 (**Appeal II**). The issues raised in Appeal II are discussed in more detail below.

III. STANDARD OF REVIEW

EMC § 9-7.1405(b) outlines the parameters for City Council action on appeals and calls for review.⁷ This section states that the Council shall review the appeal, the record, and any written correspondence submitted after the appeal has been filed and can take one of the following three actions:

- “(1) Affirm the decision of the Commission and dismiss the appeal based on a determination that the facts ascertainable from the record do not warrant further hearing;
- (2) Set a date for a public hearing on the appeal; or
- (3) Remand the matter to the Commission to reconsider the application, identifying the issues that the Commission is directed to consider and specifying whether or not the Commission shall hold a new public hearing.”

In considering these options, the Council should consider whether the Planning Commission’s findings are supported by substantial evidence in light of the whole record.⁸ If the Council finds that the Planning Commission’s findings are supported by substantial evidence in light of the whole record, then the City Council may affirm the decision of the

to allow for Appellant to provide additional oral testimony deprived Appellant of notice and a reasonable opportunity to be heard, and therefore, a new public hearing should be granted. A property owner, which may be affected by a land use decision, is entitled to notice and an opportunity to be heard. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 616.) The property owner’s right includes the opportunity to advocate for their interests in front of the decisionmaker; it is *not* an opportunity to rebut all evidence received by the decisionmaker. (See e.g., *Mohilef v. Janovici* (1996) 51 Cal.App.4th 287 [holding that affected property owner was not entitled to pre-trial discovery or to cross-examine witnesses in a land use hearing].) The Planning Commission re-opened the public hearing, and Appellant provided additional testimony. Appellant had a reasonable opportunity to be heard.

⁷ See also EMC § 9-7.1406.

⁸ See Civil Procedure Code § 1094.5(b), (c).

Planning Commission and dismiss the appeal. If the Council finds that the Planning Commission's findings are not supported by substantial evidence, or the Planning Commission otherwise did not proceed in the legally required manner, it may remand the matter back to the Planning Commission for further proceedings or set a public hearing at a future City Council meeting to take additional evidence.

Even if the City Council finds that the Planning Commission's findings are supported by substantial evidence, the City Council may still set a public hearing for the Council to reconsider the Project. Due to publication requirements, the earliest regularly scheduled meeting at which the City Council could hold the public hearing would be November 5, 2019. If the Council decides to reconsider the Project at a new public hearing, then under EMC § 9-7.1407, the City Council uses the same standards as the Planning Commission when considering whether to approve, approve with modifications, or deny the Project. Accordingly, as required by EMC §§ 9-7.1011, 9-7.1004(b) to approve the Project following a new public hearing, the City Council is required make 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.”

These findings would need to be based on substantial evidence in light of the whole record.⁹ Under EMC § 9-7.1405(d)(3), the City Council may impose additional conditions as it deems necessary in approving the Project. Alternatively, if the City Council were to disapprove the Project, the Council should articulate why it could not make such findings based on the record. If the Project was to be denied, then the Applicant would be entitled to construct the garage only on Parcel B as approved by Resolution No. FDP15-001.

IV. DISCUSSION

Appeal II has been submitted with the record.¹⁰ Appeal II has seven sections, which are as follows:

- I. Wareham's Interest
- II. Brief Background
- III. The FDP is Inconsistent With the Governing PDP and Thus May Not be Approved
- IV. The FDP Does not Comply with Conditions of Approval and Mitigation Measures and Thus Cannot be Approved
- V. The FDP is Inconsistent With the City's General Plan and Cannot be Approved
- VI. The FDP Cannot be Approved Without Further CEQA Review
- VII. Viable Design Alternatives Are Available for Parcel B

⁹ See Civil Procedure Code § 1094.5(b), (c).

¹⁰ See AR 1819-1822.

The first two sections, Wareham's Interest, and the Brief Background, are largely Appellant's provision of context for its appeal, and do not require a response from staff. To the extent that it characterizes past actions by the City, staff has provided a timeline of the Marketplace Project and key documents, which speak for themselves. With respect to the remaining five sections of the letter, the discussion below summarizes issues of each section in Appeal II and provides staff response by section.

A. Consistency with the PDP

Based on the evidence in the record before it, the Planning Commission found that the Project was consistent with the PDP because the Project is consistent with the major components of the PDP as set forth for in PUD Condition of Approval, I.A.3.¹¹ Appellant contends that the Planning Commission erred in finding that the Project is consistent with the PDP because the Project is larger in square footage and massing allowed by the PDP.¹² The PUD/PDP calls for a building up to 120,000 square feet for office, 29,150 square feet for commercial, 518 parking spaces, and height not to exceed 120 feet.¹³ There are no requirements for setbacks. However, these parameters for the building may be modified so long as the floor area ratio¹⁴ (**FAR**) does not exceed 2.0 in the aggregate, and the height and general massing does not exceed that in the approved PDP.¹⁵ The FAR, with the inclusion of the Project, is 1.84, and therefore, does not exceed 2.0.¹⁶ The Project's height is at 113 feet¹⁷, and therefore, does not exceed the height in the PDP.

With respect to the square footage of the building, the Planning Commission found, in Resolution No. FDP18-001R, that "while the proposed FDP for Parcel B would contain 30,000 square feet more office space than the PDP calls for, the overall intensity of the PUD buildout would still be less than allowed by the PDP. The total amount of commercial space in the PUD, including both office and retail space, will be 209,800 square feet under the various approved and proposed FDPs (150,000 square feet of office plus 59,800 square feet of retail), while the PDP allows for up to 300,000 square feet of commercial space (120,000 square feet of office plus 180,000 square feet of retail), so in all there will

¹¹ AR 2152-53 (Resolution No. FDP18-001R) ; see also, e.g., AR 1093-1109 (Approved PDP Plans); AR 1365 (Planning Commission Staff Report 12/13/18), AR 1372-73 (Planning Commission Staff Report 1/24/19), AR 1383 (Final Art Plan), 1391-92 (Art of Parcel B), 1815 (Planning Commission Staff Report 4/25/19); 1905-54 (Final Parcel B FDP Plans); 2037 (Staff Power Point ("**PPT**") 4/25/19), 2057 (Applicant PPT 4/25/19).

¹² AR 2220-2222 (Appeal II).

¹³ AR 1034-35 (Ord. No. 08-04, Conditions of Approval ("**COA**", I.A.3).

¹⁴ EMC § 9-8.206 defines "floor area ratio" as a measure of building intensity equal to the ratio of the total gross floor area of all buildings on a lot or building site to the area of the lot or building site. Building site is defined as "a parcel or group of contiguous parcels that is in a single ownership or under unified control and is occupied or is proposed to be occupied by development in accordance with the provisions of these planning regulations." (EMC § 9-802; 9-8.219.)

¹⁵ AR 1034-35 (Ord. No. 08-04, COA, I.A.3).

¹⁶ The FAR is based off of the total square footage of the buildings to be built as part of the PUD, divided by 15 acres.

¹⁷ AR 1372 (Planning Commission Staff Report 1/24/19); 1931-32 (Final Parcel B FDP Plans, Sheets A3.01-A3.02).

be 90,200 square feet less total commercial space (office and retail) than allowed by the PDP.”¹⁸

With respect to analyzing the massing of the Project, Appellant argues the Planning Commission erred because it did not compare the Project to the renderings attached as Exhibit C to Appeal II and because it did consider the Parcel A design.¹⁹ As an initial matter, staff is not able to verify whether the plans submitted as Exhibit C by the Appellant are the approved PDP plans. The plans submitted as Exhibit C to Appeal II²⁰ are missing headers and footers that would indicate whether they were from the set of the final approved plans. Thus, staff recommends that the Council review the approved PDP in the record submitted by staff.²¹ As it relates to considering the Parcel A design, the Planning Commission did so in response to Appeal I raising issues regarding the buildings along the railroad tracks, and Parcel A and B are the parcels along the railroad tracks.²²

In reviewing the approved PDP plans, those plans do not include any renderings and, instead, consist of site plans for different phases, axonometric figures showing massing of various buildings, a shadow study, a parking table and a plan for pedestrian, transit and bicycle improvements at completion.²³ There are no physical designs of buildings in the approved plans because the designs of the buildings are determined through the FDP process and not the PUD/PDP process.²⁴ The reason that the City includes Planned Unit Developments in its Planning Regulations is provide opportunities for developers and designers to develop a master plan for large parcels that would then be built over a long period of time. The goal of an approved PUD/PDP is to set certain parameters namely mix of uses, height, density and floor area ratio. The idea is to allow flexibility in a setting where key parameters have been approved. Therefore, the finding to be made is that of “substantial conformance”. It is in this context that the Planning Commission found that the Project was consistent with the PDP based on the evidence in the record.

B. Compliance with Conditions of Approval

Appellant also contends that the Project does not comply with certain aesthetics and wind conditions of approval as required by the PUD. Below the PUD Conditions of Approval that are at issue are quoted in *italics*, with staff’s analysis following. Overall, the Planning Commission’s finding that the Project complies with the PUD’s conditions of approval is supported by the Project’s plans approved by the Planning Commission.

1. Aesthetics

As an initial matter, Appellant’s contention that the Project does not satisfy the aesthetic conditions of approval of the PUD is mostly based on a written statement from Scott

¹⁸ AR 2152-53.

¹⁹ AR 2221 (Appeal II).

²⁰ See AR 2299-2320.

²¹ AR 1093-1109 (Approved PDP Plans).

²² AR 1814-15 (4/25/19 Planning Commission Staff Report).

²³ AR 1093-1109 (Approved PDP Plans).

²⁴ AR 1093-1109 (Approved PDP Plans).

Williams of DGA, who opines that the Project does not meet the design-related conditions.²⁵ Design related conditions are not discrete and compliance with them is not a “yes” or “no” answer. It is up to the decision-making body to make findings of compliance. The Planning Commission, based on the record, which includes a staff recommendation, has exercised judgement and experience to find that the Project provides a modern design that speaks to the industrial vernacular and that employs high quality materials and makes use of public art to provide additional interest and articulation. The letter by Jeffrey Heller focuses on the building not having a base, middle and top and that parking is not completely screened from the street²⁶, but these design elements are not required by the PUD/PDP. As discussed above, the issue for the City Council to consider is whether the Planning Commission’s actions are supported by its findings, and whether those findings are supported by substantial evidence in the record.

PUD Condition of Approval, II.E.1: “Proposed structures shall adequately reference and be visually compatible with and not detract from the surrounding industrial buildings”

Appellant contends that this condition is not met, presumably relying upon Mr. Williams’ statement that “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.”²⁷ The buildings on Parcels A, C and D are not industrial buildings, and therefore, are not relevant to this condition. The only existing surrounding industrial building is the Public Market building, Parcel G.²⁸ The Public Market is a 1-2 story masonry industrial adaptive re-use project that succeeds and sets a precedent for the type of reference that is appropriate for the area.²⁹ The lack of masonry in the final design of the Project does not controvert or outweigh the substantial evidence that supports the Planning Commission’s findings. The Project’s “smoke stack” features and undivided glass and metal window system are signature industrial type design that reference the surrounding industrial buildings.³⁰

PUD Condition of Approval II.E.1, “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 height transitions to adjacent buildings, and through the use of carefully chosen building material, texture and color”

Appellant contends that the Project is the “antithesis of architectural detailing”, and takes issue with the rectangular nature of the building, suggesting that more stepped massing should be utilized.³¹ However, the above-quoted condition of approval only requires that streetscape vitality and enhanced pedestrian experience be created. It does not require

²⁵ AR 2223 (Appeal II); 2324-2332 (Appeal II, Exh. E (Williams)).

²⁶ AR 2333-2335 (Appeal II, Exh. F (Heller).)

²⁷ AR 2327 (Appeal II, Exh. E (Williams)).

²⁸ AR 1910 (Final Parcel B FDP Plans, Sheet A1.01); AR 1263-67 (Staff PPT 12/13/18), 1643, 1671-73 (Staff PPT 1/24/19), 2054 (Applicant PPT 4/25/19).

²⁹ AR 1910 (Final Parcel B FDP Plans, Sheet A1.01).

³⁰ AR 1931-22, 1943, 1945 (Final Parcel B FDP Plans, A3.01-A3.03, A6.02, A6.04).

³¹ AR 2223 (Appeal II); see also AR 2328, 2334-5 (Appeal II, Exh. E (Williams)).

stepped-back upper floors. As shown in the Final Parcel B FDP Plans, there is substantial evidence in the record to support the Planning Commission's finding that this condition has been satisfied.³² In addition, "tower elements" referenced in the condition are not applicable as the tower refers to a 175-foot tall residential building on Parcel A. The FDP-approved height of the entitled (not built) Parcel A building is 86 feet and 50 feet.³³ However, when Parcel B and Parcel A heights are viewed from the street, there is a height transition from the proposed height of 113 feet for Parcel B, transitioning to the approved 85 feet for the north end of Parcel A and 50 feet of the south end of Parcel A.³⁴ In addition, proposed materials of stone and metal for Parcel B provide appropriate transition from the brick base for retail uses on the ground level of Parcel A and fiber cement panels for upper residential units.³⁵ The Project is a rectangular building, utilizing both material and texture with a glass curtain wall entry in the middle to break up the frontage.³⁶ In addition, a 17-foot first floor ceiling clearance is maintained to accommodate retail storefronts.³⁷ The building base and storefront design provides a coherent, consistent framework with a reasonable and refined typical front wall onto the street. It is anticipated that a variety of tenants will occur thereby providing additional unique signage and potentially revised storefront wall designs.³⁸ All these features create a vital streetscape that enhances the pedestrian experience.³⁹

PUD Condition of Approval, II.E.1 "Design of building facades shall include sufficient articulation and detail to avoid appearance of blank walls and box-like forms"

Appellant contends that this condition cannot be satisfied because of the rectangular nature of the building, and specifically contends "on the north, south and east sides, there is no articulation that responds to the scale of the neighborhood."⁴⁰ As discussed above (see Sections IV.B.1.), the Project's building base and storefront design provides articulation with the use of stone, metal, and glass at the ground level. The Project's approved plans demonstrate the architectural details of the building façade, which include accent stone, metal trims, metal faced beam, stone column and tile surfaces, glass window and doors, blade signs and mounted lighting at the first level.⁴¹ The rendering on Sheet A6.03 illustrates the additional articulation that is created with storefronts.⁴² The Project's four levels of concrete parking structure will each be 12 feet in height and are articulated by art panels on the east and west elevations.⁴³ Sheet A7.00 shows work examples of seven artists that have been short listed to do this work.⁴⁴ The top four levels of office/laboratory will each be 16 feet in height, and are articulated using an industrial

³² See, e.g., AR 1939-41, 1943-45 (Final Parcel B FDP Plans, Sheets A3.09-A3.11, A6.02-A6.04).

³³ AR 1098-99 (PDP Plans, pp. 5-6).

³⁴ AR 1942 (Final Parcel B FDP Plans, Sheet A6.01).

³⁵ AR 2846.

³⁶ AR 1372 (Planning Commission Staff Report 1/24/19), 1948 (Final Parcel B FDP Plans, Sheet A8.01).

³⁷ AR 1372 (Planning Commission Staff Report 1/24/19).

³⁸ AR 1944 (Final Parcel B FDP Plans, Sheet A6.03).

³⁹ AR 1939-41, 1943-45 (Final Parcel B FDP Plans, Sheets A3.09-A3.11, A6.02-A6.04).

⁴⁰ AR 2223-24 (Appeal II).

⁴¹ AR 1939-41 (Final Parcel B FDP Plans, Sheet A3.09-A3.11).

⁴² AR 1944.

⁴³ AR 1372 (Planning Commission Staff Report 1/24/19).

⁴⁴ AR 1947.

type window grid system.⁴⁵ Design details of elevations are shown on Sheets A3.07 and A3.08 that illustrate the glass curtain wall entryway that extends from the ground to the top floor and divided glass industrial type window system for the top levels of office.⁴⁶

PUD Condition of Approval, II.E.1, "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."

Appellant contends that the building's dark gray color is not compatible with surrounding buildings and that the painted metal panels will not be durable.⁴⁷ The dark gray is consistent with the dark brick base of the adjacent Parcel A building that has been entitled but not yet constructed.⁴⁸ In addition, the dark gray of Parcel B provides an appropriate contrast to the red brick of the original Marketplace buildings across Shellmound Street.⁴⁹ With respect to painted materials not being durable, Appellant has not provided any evidence to support this contention. Staff's research indicates that painted metal (aluminum) panels are naturally resistant to rusting or blistering, making it one of the most commonly used contemporary materials. These panels are often backed with a 30-year warranty by manufacturers.⁵⁰

PUD Condition of Approval, II.E. 2, "All proposed new buildings shall be shown in detail including building materials, colors, skin, and fenestration. Towers and buildings along the railroad 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":

Appellant takes issue with the overall massing of the building, and specifically contends that the proposed public art along the east façade will not provide aesthetic benefit.⁵¹ As discussed above (Section IV.B.1.), the Project's plans approved by the Planning Commission include specific sheets showing architectural details for each elevation as well details for ground floor retail.⁵² Sheet A8.01 provides for building materials and colors. In addition, Sheet A.7.0 provides articulation in the form of art panels that will be installed along the railroad right of way.⁵³ Balconies and trellises are typically used for residential type buildings and therefore are not applicable here. Sheets A6.01 and A6.02

⁴⁵ AR 1372 (Planning Commission Staff Report 1/24/19).

⁴⁶ AR 1937-38.

⁴⁷ AR 2330 (Appeal II, Exh. E (Williams)).

⁴⁸ AR 2831, 2846

⁴⁹ AR 1943 (Final Parcel B FDP Plans, Sheet A6.02).

⁵⁰ <https://wadearch.com/blog/architectural-metal-panels-balance/> (last visited on 9/6/19);
<https://architizer.com/blog/practice/details/behind-the-design-metal-cladding/> (last visited on 9/6/19).

⁵¹ AR 2224 (Appeal II).

⁵² AR 1931-33, 1939-41, 1943, 1945 (Final Parcel B FDP Plans, Sheets A3.01-A3.03, A3.09-A3.11, A6.02, A6.04).

⁵³ AR 1948.

provide good illustrations of how the building fits and blends with the surrounding urban fabric.⁵⁴

PUD Condition of Approval, II.E. 5 “Building heights shall not exceed the heights shown in the Preliminary Development Plan.”

Appellant concedes that the Project is within the height limits approved by the PUD/PDP.⁵⁵ The PUD/PDP calls for a height of 120 feet for this building. The overall building height is 113 feet from grade to the roof.⁵⁶ However, the Appellant contends that a much larger portion of the FDP building is proposed to be constructed at a taller height as compared to the PDP building, and therefore, the FDP exceeds the height shown in the PDP. Staff’s response to this assertion is that the PDP does not prescribe what proportion of the building may extend to a height of 120 feet, and therefore the proposed building height (113 feet) conforms with the height shown in PDP (120 feet).

2. Wind

PUD Condition of Approval III.A.3.d: Prior to the issuance of the FDP for the Shellmound building site, the applicant shall submit a review of the design [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: 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.

The purpose of the foregoing condition of approval was to mitigate a potentially significant impact identified by the EIR.⁵⁷ The EIR considered wind to have a potentially significant 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 (undistributed by buildings) in Emeryville seldom exceeds 36 mph, a project must substantially increase winds for this threshold to be exceeded.⁵⁸

In other words, if the Project creates ground-level winds that exceed 36 mph, then the Project has a significant impact. The EIR identified mitigation measures, WIND-1a and

⁵⁴ AR 1943-1944.

⁵⁵ AR 2224 (Appeal II, (“While the highest level of the proposed FDP structure does not exceed the approved height for the building...”) (emphasis in original)).

⁵⁶ AR 1372 (Planning Commission Staff Report 1/24/19, 1931-32 (Final Parcel B FDP Plans, Sheets A3.01-A3.02)).

⁵⁷ AR 0347 (EIR).

⁵⁸ AR 0345 (EIR (emphasis in original)).

WIND-1b, and the foregoing condition of approval was to implement those two mitigation measures.⁵⁹

The Planning Commission's finding that this condition was satisfied was based on a Wind Analysis Study by Consulting Meteorologist Donald Ballanti dated March 22, 2019, and the Preliminary Results of the Emeryville Public Market Parcel B Pedestrian Wind Study, which included a wind tunnel analysis, prepared by RWDI and dated May 13, 2019, submitted by the Applicant.⁶⁰ Mr. Ballanti's analysis concludes: "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 spaces 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."⁶¹ Mr. Ballanti also concluded that a computerized wind tunnel study was not necessary.⁶²

Appellant claims that the wind analysis for the Project submitted by the Applicant is not adequate based on a study done by CPP Wind Engineering and Air Quality Consultants (henceforth referred to as CPP), a consultant retained by Appellant.⁶³ The CPP Wind Study summarizes that the FDP will result in "uncomfortable" wind conditions in the corridor between Parcels A and B, whereas the original PDP building configuration will not.⁶⁴ However, at no time, does the CPP Wind Study conclude that the Project will cause wind levels to exceed 36 mph. The Applicant has submitted a response letter that includes a review of CPP's study by RWDI.⁶⁵ RWDI review of the CPP study first highlights that CPP's considers only the wind results at a few locations between Parcels A and B and does not compare to baseline conditions.⁶⁶

Thus, the distinction between the two experts is that the Applicant's expert compares the Project's impacts to *baseline* conditions, whereas the Appellant's expert compares the Project's impacts to the PDP design.⁶⁷ Since the condition of approval is to implement a mitigation measure, and the California Environmental Quality Act (CEQA) requires the analysis of the Project's impacts to be analyzed against wind conditions that exist before that building is constructed, the issue to consider is whether the Project creates a significant wind impact when compared to baseline conditions.⁶⁸ In taking the baseline conditions into account and analyzing the wind configurations as a result of the Project,

⁵⁹ AR 0347 (EIR); AR 0975-76 (Findings of Fact).

⁶⁰ AR 1780-83 (3/25/19 Letter from C. Maclean, Attachment D (Wind Analysis Report), 2074-96 (5/13/19 Email from C. Maclean, Attachment).

⁶¹ AR 1783 (3/25/19 Letter from C. Maclean, Attachment D (Wind Analysis Report)).

⁶² AR 1783 (3/25/19 Letter from C. Maclean, Attachment D (Wind Analysis Report)).

⁶³ AR 2224-26 (Appeal II).

⁶⁴ AR 2338 (Appeal II, Exh. G (Cochran)).

⁶⁵ AR 2445-78 (6/18/19 Letter from C. Maclean, Exh. F (RWDI)).

⁶⁶ AR 2446.

⁶⁷ See e.g., AR 2343 (Appeal II, Exh. G (Cochran)) ("Two different building configurations are evaluated in this assessment: 1) the 2008 Preliminary Development Plan (PDP); and 2) the Final Development Plan (FDP) City Center Version."); 2346 (*id.*), 2347 (*id.*) ("Significantly increased ground-level wind speeds are expected between Parcel A and Parcel B compared to the PDP.")

⁶⁸ CEQA Guideline 15125(a); see, e.g., *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 321-22 [holding environmental baseline was the actual operational levels, not the permitted operational levels].)

RWDI concludes that the addition of the Project reduces the impacts from the existing wind across the site.⁶⁹ If a project reduces average wind speeds when compared to the baseline conditions, then it cannot be considered a significant impact under CEQA. Thus, Appellant's analysis of whether the Project will result in increase in wind speeds compared to the PDP, and the criteria the Appellant utilizes, is not relevant.

C. Consistency with General Plan

Appellant contends that the Project is inconsistent with several General Plan policies.⁷⁰ However, whether the Project is consistent with the current General Plan policies is irrelevant. As discussed above, in approving a FDP, pursuant to EMC § 9-7.1004(b), the Planning Commission is only required to make findings as it relates to consistency with the PDP and satisfaction of conditions of approval imposed on the PDP. If the Planning Commission's findings required by EMC § 9-7.1004(b) are based on substantial evidence, then the Project is presumed to be consistent with the General Plan in effect at the time the PUD/PDP was approved. In approving the PUD/PDP, the City Council found that the PUD was consistent with the General Plan that was in effect at the time.⁷¹ The General Plan policies cited in Appellant's letter are from the current General Plan, which was adopted via City Council Resolution No. 09-208 on October 9, 2013, which was *after* the City Council adopted Ordinance No. 08-09, approving the PUD/PDP.

Nonetheless, the staff report for the Project does reference the current General Plan.⁷² Appellant contends⁷³ that the Project does not meet several General Plan goals and policies, particularly UD-G-11, because it would impair sky exposure for the Amtrak Station. General Plan goals and policies cited by the Appellant are as follows:

(1) 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.

(2) 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.

(3) UD-P-36: Where large floorplates are permitted, buildings shall be required to adhere to height, setback, and stepback standards, as required

⁶⁹ See e.g., AR 2449 (6/18/19 Letter from C. Maclean, Exh. F (RWDI); see also 2074-96 (5/13/19 Email from C. Maclean, Attachment).

⁷⁰ AR 2226-28 (Appeal II).

⁷¹ AR 1028-29 (Ord. No. 08-004).

⁷² AR 1373 (Staff Report for 1/24/19 Planning Commission).

⁷³ AR 2227-28 (Appeal II).

for view and sun access, but less stringent bulk standards shall be permitted.

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

However, staff contends that the Project is consistent with the current General Plan goals and policies, even if they are inapplicable to the Project. The approved PUD/PDP plans include shadow studies that show that the PDP shadow impacts are minimal on the Amtrak Station for most of the day and during most of the year except for the winter solstice.⁷⁴ The PDP does cast shadows during certain times of the day and year on sidewalks, but this was deemed acceptable by the City Council in approving the PUD/PDP.⁷⁵ Further, the shadow study done for the Project illustrates that the shadow impacts of the Project are only marginally different than those of the PDP design, and do not impact primary open spaces and plazas, including the Amtrak station.⁷⁶ Therefore, the Project complies with the General Plan Goal UD-G-11.

With respect to consistency with General Plan policies UD-P-33, UD-P-36 and UD-P-38, as discussed above, the design of the Project accommodates ground floor retail, three levels of parking and four levels of office and research and development space, and has been developed in response to the surrounding industrial buildings as well as the industrial legacy of the City. The transitions in scale and character at the street level are created with an attractive storefront system on the ground level so as to also enhance the pedestrian experience.

D. Further CEQA Review

CEQA Section 21166 and its corresponding CEQA Guideline Section 15162 provide that once an EIR has been prepared, no subsequent or supplemental EIR shall be required by the lead agency unless: (1) substantial changes are proposed in the project which will require major revisions to the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; (2) substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or (3) new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:

- (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

⁷⁴ AR 1920 (Final Parcel B FDP Plans, Sheet A2.10).

⁷⁵ AR 1920 (Final Parcel B FDP Plans, Sheets A2.10); AR 1016 (Statement of Overriding Considerations).

⁷⁶ AR 1920 (Final Parcel B FDP Plans, Sheets A2.10).

- (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
- (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
- (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

CEQA Guideline Section 15164(e) provides that a brief explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162 should be included in an addendum to an EIR, the lead agency's findings on the project, or elsewhere in the record.

The Planning Commission found that the EIR applies to the Project. In making such a finding, the Planning Commission relied upon the Environmental Checklist Public Market Proposed Final Development Plan Project ("**Marketplace Checklist**") which more particularly discusses whether there have been substantial changes in the Project or to the circumstances under which the Project will be undertaken, or whether new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the EIR was certified as complete, exists and thus preparation of a subsequent EIR is required pursuant to CEQA Guidelines Section 15162. As detailed in the Marketplace Checklist, and the accompanying Kimley Horn Trip Generation Evaluation Memo, there have been no substantial changes in the proposed project, or to the circumstances under which the project will be undertaken, and no new information of substantial importance exists which would require preparation of a subsequent EIR.

Appellant contends that the Marketplace Checklist is inadequate as it relates to its consideration of the following mitigation measures: AES-1, AES-2a, AES-2b, WIND-1a, WIND 1b, WIND-1, and SHADE-A. Below, each of the foregoing mitigation measures is quoted in italics, and is followed by staff's analysis.

AES-1: Each of the following five 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 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.

PUD Condition of Approval II.E.1 incorporates Mitigation Measure AES-1, and discussion of how there is substantial evidence in the record to support the Planning Commission's finding is included in Sections IV.B.1 above. With respect to the remainder of the condition related to public plazas, this portion of AES-1 is not applicable to the Project because the Project does not include a public plaza.

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 use of reflective exterior materials is minimized in the design of the Parcel B building. The building's primary finish materials are metal panels, concrete, concrete block, plaster, and glass.⁷⁷ The metal surfaces have a non-reflective matte finish. Concrete, concrete block, and plaster have rough surfaces that are generally non-reflective. Glass covers only 20 to 30 per cent of the exterior surface area, and is composed of "divided light" window units, at upper office/lab floors and at ground floor mixed use areas, to break up the size of glass surfaces to avoid creating additional daytime or nighttime glare. And at the parking levels, light fixtures are "full cut-off", to avoid creating additional daytime or nighttime glare visible to surrounding neighbors.

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.

Both the Project's plans and the Resolution No. FDP18-001R, Conditions of Approval, V.A.7, VI.A.3, VII.A.1, VII.A.8 and VII.C.5 ensure that the City will be reviewing the proposed lighting.⁷⁸

⁷⁷ AR 1372 (Planning Commission Staff Report 1/24/19), 1948 (Final Parcel B FDP Plans, Sheet A8.01).

⁷⁸ AR 2167, 2169, 2171, 2174, 2177.

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 weighted or attached to the deck.

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.

As discussed in Section IV.B.2, above, PUD Condition of Approval III.A.3.d implemented Mitigation Measures WIND-1a and WIND-1b, and therefore, there is substantial evidence in the record to support the Planning Commission's finding of compliance. Furthermore, "Shellmound Building", as used in the PUD/PDP, refers to Parcel A, not Parcel B.

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.

As discussed in Section IV.B.2, above, the EIR identified winds in excess of 36 mph at the ground level as the threshold to determine whether the Project would have a significant impact on the existing environment.⁷⁹ Accordingly, the Project has been designed consistent with this mitigation measure because the evidence shows that the

⁷⁹ AR 0345 (EIR).

Project does not create winds in excess of 36 mph and therefore, has less than a significant impact as it relates to wind.

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

Finally, as it relates to the “SHADE-A” mitigation measure referenced by the Appellant, there is no SHADE-A mitigation measure. Instead, there is the SHADE-1 impact, quoted in italics above, which was identified as a significant impact that could not be mitigated.⁸⁰ However, the Council found that there were overriding considerations to allow the Marketplace Project to go forward, despite the SHADE-1 impact, among other impacts.⁸¹

E. Viable Design Alternatives Are Available for Parcel B

Appellant proposes two alternative designs for the Project that allegedly provide the same rentable area as the current Project. The first option has less parking than the current Project, which could be problematic because the Project’s parking serves not only the uses on Parcel B, but also the existing commercial uses in the PUD, and the retail uses on the ground floor to be built on Parcel A. The second option includes underground parking. Constructing underground parking west of the railroad is particularly challenging because of the high water table, which often substantially drives up the costs for waterproofing. In addition, both options have lower ceiling heights for the office/lab space than the FDP building, which could be problematic.

V. FISCAL IMPACT

As the Project is funded by a private developer, it will have no fiscal impact on the City budget.

VI. STAFF COMMUNICATION WITH PUBLIC

Written notifications of each Planning Commission study session and public hearing for the Marketplace Parcel B FDP project were sent to both owners and tenants of buildings within 300 feet of the project site, and notices were also published in the Oakland Tribune. In addition, staff has communicated with both the Applicant and the Appellant on this appeal.

⁸⁰ AR 0419 (EIR).

⁸¹ AR 1016-17 (Statement of Overriding Considerations).

VII. CONCLUSION

The City Council should consider this staff report, the appeal, the record, any written correspondence submitted after the appeal is filed, any oral and written testimony, and then adopt one of the three proposed resolutions to either:

- (1) Affirm the decision of the Commission and dismiss the appeal based on a determination that the facts ascertainable from the record do not warrant further hearing;
- (2) Set a date for a public hearing on the appeal; or
- (3) Remand the matter to the Commission to reconsider the application, identifying the issues that the Commission is directed to consider and specifying whether or not the Commission shall hold a new public hearing.

PREPARED BY: Miroo Desai, Senior Planner
Andrea Visveshwara, Assistant City Attorney

**APPROVED AND FORWARDED TO THE
CITY COUNCIL OF THE CITY OF EMERYVILLE:**



Christine Daniel, City Manager

ATTACHMENTS

1. Draft Resolution Dismissing the Appeal and Upholding Resolution No. FDP18-001R
2. Draft Resolution Setting a Public Hearing to Consider the Appeal
3. Draft Resolution Remanding the Appeal to the Planning Commission for Further Consideration
4. Administrative Record