THIS SECTION TO BE COMPLETED BY THE CITY CLERK'S OFFICE
STAMP OF RECEIPT:

RECEIVED
CITY CLERKS OFFICE
CITY OF RICHMOND

2023 MAR 27 PM 2:33

FEE PAID: $150.00 S.Lundy
DATE: 3/27/2023

TO THE RICHMOND CITY COUNCIL:

The undersigned hereby appeals decision: By the Historic Preservation Commission ___

By the Planning Commission ✔

Denial _____ of: Approval ✔ of:

_____ Variance **(V)** ✔ Tent Subd. Or Parcel Map **(TM)**

_____ Conditional Use Permit **(CUP)** _____ Rezoning **(RZ)**

_____ Design Review Permit **(DRP)** ✔ EIR Decision **(EIR)**

✔ Other Purported CEQA Exemption, per Guidelines section 15168, and DB Waivers

DESCRIBE ITEM AS PRINTED ON THE PLANNING COMMISSION or HISTORIC PRESERVATION AGENDA:

Agenda Item #2 for the Planning Commission Meeting of March 16, 2023:
Brickyard Cove Residential Project (PLN21-444): Public hearing to consider Density Bonus Waivers, a Major Design Review, and a Vesting Tentative Map for a 94-unit residential development.

STATE REASONS FOR APPEAL:

See Attached Appeal Documents and Submittals.
Appellants reserve the right to amend or expand the bases and grounds for their Appeal, and to submit further supporting information and evidence regarding same at or prior to the close of the City Council public hearing to consider and decide this Appeal.

DELIVER OR MAIL TO:

City Clerk
450 Civic Center Plaza, 3rd Floor
Richmond, CA 94804

NAME BCARD, Jeffrey Vines, Robert Kish, et al.

ADDRESS 1400 Pinnacle Ct. #218, Richmond, CA
1400 Pinnacle Ct. #218, Richmond, CA

TELEPHONE (HOME) (415) 218-7474
(WORK) _____

GagenMcCoy

William E. Gagen, Jr.
Gregory L. McCoy
Charles A. Koss
Michael J. Markowitz
Barbara Duval Jewell
Robert M. Fanucci
Stephen T. Buehl
Sarah S. Nix
Daniel A. Muller
C. Joseph Doherty, III
Elizabeth Weiss
Aileen Mazanetz

www.gagenmccoy.com

RECEIVED
CITY CLERKS OFFICE
CITY OF RICHMOND
2023 MAR 27 PM 2:32

The Law Offices of
Gagen, McCoy, McMahon, Koss
Markowitz & Fanucci
A Professional Corporation

Danville Office
630 San Ramon Valley Blvd.
Suite 100
P.O. Box 218
Danville, California 94526-0218
Telephone: (925) 837-0585
Fax: (925) 838-5985

Napa Valley Office
The Offices At Southbridge
1030 Main Street, Suite 212
St. Helena, California 94574
Telephone: (707) 963-0909
Fax: (707) 963-5527

dam@gagenmccoy.com

March 27, 2023

City Clerk, and Members of the City Council
City of Richmond
450 Civic Center Plaza
Richmond, CA 94804

Re: Appeal of Planning Commission's March 16, 2023, Decisions regarding Brickyard Cove Residential Project (PLN21-444)

Dear City Clerk, and Members of the City Council:

Attached and enclosed please find our clients Brickyard Cove Alliance for Responsible Development's ("BCARD") and its representatives' timely Appeal of the Planning Commission's March 16th Decisions regarding the above-noted Brickyard Cove Residential Project.

Very truly yours,

GAGEN McCOY
A Professional Corporation

Daniel A. Muller

Enclosures

Appeal of the City of Richmond Planning Commission Decision on the Brickyard Cove Residential Project [Project] (PLN21-444) on March 16, 2023, Agenda item #2

The City committed prejudicial abuses of discretion by not supporting its findings, determinations or decisions by substantial evidence and/or by not proceeding in a manner required by law, in the following instances, by way of example and without limitation:

1. **Choice of Program EIR for review of the Project (CEQA Guideline 15168).** The City's decision that the Project was exempt from CEQA because the project was found to be consistent with a previously certified EIR (14 Cal Code Regs (hereinafter CEQA Guideline) 15168) is prejudicial error. The City is using the 2012 Program Environmental Impact Report (EIR) (SCH#2008022018) for the Richmond General Plan 2030 (General Plan) and the associated Mitigation Monitoring and Reporting Program (MMRP) as the basis for this finding. (Planning Department Staff Report for Planning Commission Meeting of March 16, 2023, Agenda item #2 [Staff Report], page 11).

   The 2012 EIR does not address the specific circumstances and conditions of the project site. Nor was it intended that it should. That EIR specifies that "[a]ll future development applications will be subject to project-specific CEQA review at the time a project is proposed to determine if it is within the scope of this EIR and whether new or additional mitigation would be required to reduce impacts. This process would include an opportunity for public review and comment. If additional feasible measures are available to reduce impacts, those will be imposed on the site-specific project" (emphasis added).(Program EIR 4 -3, page 48)

   The 2012 Program EIR cannot serve as a basis for the Project's EIR review because the earlier EIR did not anticipate changes in circumstances in the immediate area or the specific characteristics of the Project site. An example of the former are the cumulative impacts from the new Waterline residential project and the proposed Latitude (Terminal 1) and Quarry projects. An example of the latter is the importation of 68,100 cubic yards of fill in 5,238 truck trips and 63,700 cubic yards of cut, claimed by the developer to take something over five months. All of which must be compacted, graded, trenched, etc. over many more months. There is nothing in the prior EIR to address these situations.

   The City prepared a Program EIR per CEQA Guideline Section 15168. It is "prepared for situations where there is 'series of actions that can be characterized as one large project and are related' ". This statement is followed by criteria, none of which directly relate to this project. The cases cited in the note to the guideline are about a hotel project that was part of a city redevelopment plan, the extension of an existing water recycling program, and the halting of Los Angeles County from its continued extraction of subsurface waters in Inyo County. Clearly, this specific project is not part of some larger chain of contemplated actions or of a continuing program.

The advantage of the Program EIR for the developer is that it allows them to sidestep a full EIR. For the reasons stated above, the City cannot make the findings on the basis of substantial evidence required by CEQA Guidelines 15162 and 15163 that would allow them to avoid a subsequent full EIR or merely prepare a supplemental EIR. Consequently, the City must prepare a project EIR for the Project (CEQA Guideline 15161).

2. **The City's Environmental Checklist and its Exhibits or Appendices do not present substantial evidence for their conclusions and, therefore, do not satisfy CEQA guidelines.** The quality and correctness of the technical assessments and reports to the Environmental Checklist are not up to professional standards and the information presented in them is insufficient for proper technical review. One example are the air quality analyses contained in Exhibit A-1 and Exhibit A-2 to the Staff Report. For a critique of these reports see the attached Appendix A, an examination of them by two air quality engineers with PhDs in the field of air quality with extensive experience in air quality technical analyses (including CEQA analyses). It is dated March 21, 2023 and is addressed to Hector Rojas.

   Defective, incomplete or unprofessionally prepared technical reports backing the Environmental Checklist prepared for this Project are not substantial evidence of the findings the City is required to make. Therefore, this Project cannot be approved on the basis of the reports submitted. (CEQA Guidelines 15091 and 15121). The City must initiate a full EIR to remedy.

3. **No EIR Alternatives**. An EIR must describe a reasonable range of alternatives to the project, or to its location, that could feasibly attain the project's basic objectives while reducing or avoiding any of its significant impacts. This discussion must also include a "no-project alternative." The EIR must evaluate the comparative merits of each alternative. Public Resources Code Section 21100(b)(4); CEQA Guidelines 15126.6(a)–(e).

   There were no alternatives proposed for the Project in the Environmental Checklist CEQA review.

   Simplistically relying on the 2012 General Plan EIR also violates CEQA because that EIR lacks any remotely adequate, statutorily-required Alternatives Analysis. For example, while the Project (as currently proposed by the applicant) involves trucking-in vast amounts of imported fill, along with extensive grading and excavation, the stale 2012 General Plan EIR – by necessity and design, as it was prepared over a decade ago, *without* this particular, proposed Project in play or mind, and thus its tremendous importation of fill, etc. - contains no Alternatives Analysis remotely addressing or tailored to any such extremely high-importation of fill, grading, and excavation. Consequently, the 2012 General Plan EIR does not remotely, plausibly contain any CEQA-required analysis of the "No Project" Alternative, nor of Alternatives that (as required by law) involve or require far less, or no, importation of fill, grading, or excavation. As such the 2012 General Plan EIR fails to disclose, discuss, or analyze how such Alternatives involving or requiring less imported fill, grading, excavation, etc. would – as required by law – reduce this Project's clearly significant impacts in such regards or issues to less-than-significant levels.

Similarly, logically - and perhaps needless to say – given that this Project's rather extensive importation of fill, grading, and excavation were not known at the time of the now-stale General Plans EIR's preparation, said EIR's stale, proposed or adopted Mitigation Measures are clearly insufficient at *feasibly mitigating* this then-unknown, necessarily unstudied Project's significant impacts, as well.

Recent housing-oriented statutes, which the developer heavily relies upon, do not relieve the developer of compliance with CEQA. The Housing Accountability Act, California Government Code Section 65589.5(e) clearly states

> Nothing in this section shall be construed to relieve the local agency from complying with the congestion management program required by Chapter 2.6 (commencing with Section 65088) of Division 1 of Title 7 or the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code). **Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) (emphasis added).**

4. **The Nature of the Design Review Board and Planning Commission Hearings on the Project are Contrary to CEQA and Therefore Their Findings, Determinations and Decisions Are Void**. CEQA only applies to discretionary projects (Public Resources Code Section 21080(a); CEQA Guidelines 15357 and 15002(i)). As the City prepared a Program EIR for the Project, it acknowledges that it is a discretionary project.

"A discretionary project means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity . . . . The key question is whether the public agency can use its subjective judgment to decide whether and how to carry out or approve a project" (CEQA Guideline 15357).

By way of example, the Design Review Board Hearing of February 22, 2023 and the Planning Commission Hearing of March 16, 2023 were conducted as ministerial proceedings. Ministerial "describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision". (CEQA Guideline 15369). An activity is ministerial if the law governing the agency's decision whether to approve or carry it out does not give the agency authority to address environmental concerns when deciding whether to do so. If the agency does not have authority to refuse to approve the activity or to modify it in response to its environmental impacts, its action is ministerial.

In both the above instances, the members of the above bodies were told at the hearings that they had absolutely no option but to approve the Project as submitted. This was conveyed to them by Planning Department staff, the City Attorney's office and outside counsel retained by the City. Protests from members of the Board and the Commission were silenced by reference to legal cases and statutes which purportedly decided the matter.

The City did not allow evidence from the public to be considered in the above-referenced Design Review Board and the Planning Commission hearings. "The meeting lasted approximately 5.5 hours and over 50 members of the public spoke against the Project" (Staff Report, Page 10). Therefore, their decision was not based on the evidence in the record. In effect, it was the equivalent of not giving interested parties notice and an opportunity to present evidence and comments on the Project, especially on CEQA issues, at the administrative level. If consideration of public input had been allowed, it would have been evident that facts are in dispute. The hearing officers may then have decided that additional findings were needed and further conditions of approval were required. (Public Resources Code Sections 21168 and 21168.5)

5. **The City's Proposed Mitigation Measures are Inadequate for both the Project and the Project Site**. One example is the control of fugitive dust. In the Staff Report they note that the

> Design Review Board expressed significant reservations about the amount of fill being proposed. One of the reasons the Board expressed concern about the amount of fill was related to fugitive dust (PM10 and PM2.5). Fugitive dust is addressed in the Air Quality section of the Environmental Checklist. Fugitive dust would be generated during the Project's earthmoving activities but would largely remain localized near the Project Site. Additionally, any fugitive dust generated during the construction phase of the Project would not be considered a significant impact if the Project implements the Best Management Practices (BMPs) required by the Bay Area Air Quality Management District (BAAQMD). (Staff Report, Page 11)

They then list what those BMPs include. Only two even tangentially address fugitive dust. First, water down all exposed surfaces twice a day. Meanwhile, there will be 153 truckloads dumped over an 11-hour period every workday, 5,238 trips total over a five-month period, of between 13 and 16 cubic yards of imported fill, for a total of 68,100 cubic yards of fill. Then there will be 63,700 cubic yards of cut added. It batters common sense to think that watering twice a day will quell that. The second measure is to cover the truck beds. Same comment as for the first measure. There are no project-specific implementation measures on fugitive dust (See IM AIR-1). As our Appendix 1, air quality review, puts it "[t]he cumulative health impacts assessment is not a good representation of the real cumulative health impacts in the area" (Page 4).

The 2012 Program EIR did not begin to address a project that is moving around 131,800 cubic yards of dirt for the better part of a year. For their will be compacting, grading, trenching and other earth movement needed. Nor did it envision doing that at a project-site directly on the coast, where winds in excess of 20 miles per hour are common. A reasonable mitigation measure would include analysis of the wind direction, placement of upwind and downwind particulate dust monitors, recordkeeping of their results, hiring of an independent third party to conduct inspections for visible dust and keeping record of those inspections, etc. These are just some of the mitigation measures that San Francisco has embedded in its municipal ordinances. (Article 22B, Sections 1240 through 1249). See Appendix 2.

Another significant but not adequately addressed mitigation measure is for the road damage that will be caused by the construction of the project. 153 trips per day of trucks weighing up to 50 tons when laden with dirt will cause significant amounts of damage to Brickyard Cove Road. Brickyard Cove Road is a private road with a public easement.

6. **The Environmental Checklist for the Project Does Not Discuss All Required CEQA Topics**. For example, there is no discussion of cumulative impacts. An EIR must include a discussion and analysis of significant cumulative impacts. 14 Cal Code Regs §15130(a). The existing discussion of cumulative impacts is from the 2012 Program EIR and is largely irrelevant eleven years later.

   This one topic can be approached in numerous ways. By way of example, the cumulative impact of the Honda Port of Entry and existing residential developments, Brickyard Landing, SeaCliff Estates, Waterline, and proposed developments, Latitude (Terminal 1), the Quarry Project, and now the Brickyard Cove Residential Project. Or one might consider the cumulative impact of other nearby air pollution generators that emit dangerous and hazardous PM2.5 and PM10 airborne particulates. This includes but is not limited to the Richmond Municipal Sewer District (RMSD, managed by Veolia), Gold Bond Building Products, Phillips 66, and Kinder Morgan. This Project will add to that already significant air pollution by the Project's importation of 5,238 truckloads of imported fill along public and private roads, and by construction activities.

7. **The Project has not had a definite description of a fixed and static project.** Examples include design changes from various Design Review Board exchanges with the developer; inaccurate height descriptions; massing of buildings; changes in amount of fill. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (*i.e.,* the "no project" alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.

   Regarding the changes in height descriptions, the public was first notified by the developer and City Staff that the height waiver was for going from the allowed 35' to a revised height

of 38'. The community had to inform City Staff that they were not conforming with Zoning Ordinance/Richmond Municipal Code Sections: 15.04.103.050, 15.04.103.060, and 15.04.104.020. This meant that the actual height variance was 51', as the final height was determined to be 86'.

8. **The City has ignored significant features of the Project which are contrary to City ordinances or have a significant effect on the Project.** Examples: (1) The City ignored the Bay Area Air Quality Management District guideline that 10,000 cubic yards or more of dirt being dumped is a significant impact for purposes of an EIR. The City states that it will follow BAAQMD guidelines in its 2012 Final Program EIR; (2) The City did not investigate the developer's claim that they were required to use up to fifty feet of fill act as a buffer between the future residents and any residual subsurface contamination, despite the community providing both City Staff and the developer a letter from the RWQCB that clearly states they "did not require the fill or specify its thickness". The developer has consistently used this as an excuse of why then need the amount of fill they are demanding; (3) The City did not consider that the amount of imported fill proposed by the developer does not include an analysis of the actual number of cubic yards of fill based on soil type and swell factor. Ex. Typical swell factor is 20% to 30%; (4) The City has not demanded mitigation measures for the up to nine inches of hydrocompression of the fill that will occur over ten to twenty years. Ten years is the cutoff for construction liability, leaving the then owners and potentially the City to pay for the extensive damage to buildings and utility lines. (Developer's Geotech Report, Cornerstone Earth Group Geotechnical Investigation of the Project site, dated April 25, 2022, Section 6.6, Pages 24 -25, appended to Planning Department Staff Report to the Planning Commission as Attachment 3)

9. **The City has failed to provide the public with critical, detailed information on the Project, despite a Public Records Request, Government Code Section 6250 et seq., made on March 3.** Richmond Municipal Code Section 15.04.803.020 B. 4. requires that the City make available for public inspection all forms, information and materials submitted in support of an application. As of this date almost all that has been provided are documents released to the public as part of the Design Review Board and Planning Commission hearings on the Project. Writings between the developer and the City and the City and its consultants on this Project, as one example, have almost entirely been withheld. Without them, opponents of this project cannot mount effective arguments regarding it, including at any appeal hearing on the Project to the Richmond City Council.

10. **Significant Changes Not Reflected in The Planning Commission's adoption of Resolution Number 23-04 on the Project at its March 16, 2023 hearing.** This included approval for importing 68,100 cubic yards of fill to the site in 5,238 truckloads. At that meeting the developer stated that after consultation with their experts, they were going to lower the imported fill to approximately 48,000 cubic feet. This, as far as the public knows, has not been reflected in the resolution. This deprives the public of some measure of moderation of the health and safety effects of the Project.

11. **Incomplete Application**. Richmond Municipal Code Section 15.04.803.040 C. 1. requires an application to be complete before review of the application begins. The City reviewed the application in 2022. Yet, by way of example, the Geotechnical Investigation by Cornerstone Earth Group, appended to the Planning Department Staff Report to the Planning Commission as Attachment 3 was dated April 25, 2022, but Appendix D. Slope Stability Analysis, a necessary part of the Geotechnical Investigation, was not generated until February 8, 2023.

Appendix 1 to Appeal of the Planning Commission Decision on the Brickyard Cove Residential Project (PLN21-444) on March 16, 2023

Comments to Exhibits A-1 Environmental Checklist and Exhibit A-2 Checklist Appendices Air Quality Analysis of the Planning Department's Staff Report to the Planning Commission

March 21, 2023

Hector Rojas, Planning Manager

hector_rojas@ci.richmond.ca.us

(510) 620-1220

Dear Mr. Rojas,

We send this letter with regards to the development of the Brickyard Cove Residential Project. We are both air quality engineers with PhDs in the field of air quality and extensive experience in air quality technical analyses (including CEQA analyses). We are concerned about the quality and correctness of the air quality technical assessment and find the information presented to be insufficient for proper technical review. Our concerns are as follows and are further described below:

1. The air quality analysis (contained in Exhibit A-1 and Appendix A) is missing information for transparency, quality assurance, and full record of the analyses undertaken.
2. The documentation lacks clarity and proper labeling to understand assumptions made in the analysis.
3. The MIR (maximally impacted sensitive receptor) presented in the report does not align with common sense quality assurance checks but sufficient data inputs are not provided to check the analysis.
4. There is not enough modeling input information provided to check the quality of assumptions on mitigation measures implemented to reduce the cancer risk from 91.21 cancer risk in a million at the MIR in the unmitigated scenario to 1.31 cancer risk in a million in the mitigated scenario.
5. Mitigation measures must include more robust commitments to ensure the modeled "less than significant" impact is truly met in practice.
6. The cumulative health impacts assessment is not a good representation of the real cumulative health impacts in the area

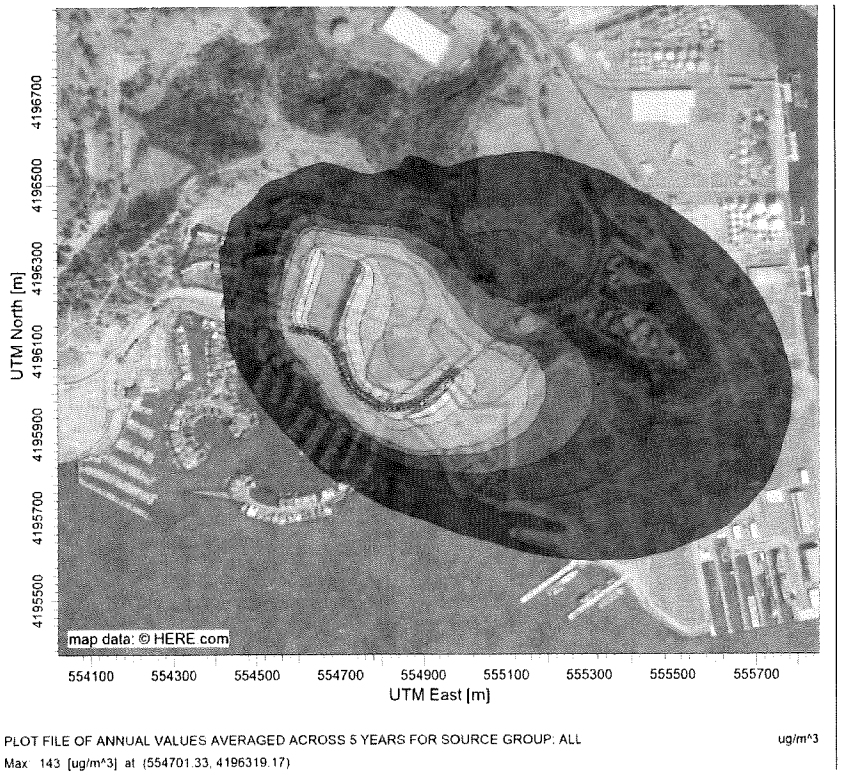
---

1. **The air quality analysis (contained in Exhibit A-1 and Appendix A) is missing information for transparency, quality assurance, and full record of the analyses undertaken**

A full record of the analyses undertaken is missing from the document. Appendix A: "Air Quality, Greenhouse Gas Emissions, and Energy Supporting Information and Modeling Results" includes CalEEMod Notes, Air Quality Workbook Pages, Project CalEEMod Model Output Files, Health Risk Assessment Emission Rates, AERMOD Output Files, ITE 11th Edition Trip Rates, City of Richmond Odor Complaint History, Project Energy Calculation, Typical Construction Trailer CalEEMod Output Files. This file is missing AERMOD Input Files and HARP2 Input Files. Input data and assumptions are critical to understanding assumptions made and checking that the results presented are a proper reflection of how the project would be implemented.

2. **The documentation lacks clarity and proper labeling to understand assumptions made in the analysis**

The isopleth figures starting on page 178 of Appendix A lack clarity. These figures do not have a title or description so it is not clear if these are mitigated or unmitigated scenarios being modeled. The figure does not include a legend so it is not clear what the markers along the roadway indicate. The MEIR location is not clearly indicated or labeled on the figure. Same comments apply for the next figure on page 179.



3. **The MEIR (maximally exposed individual receptor) presented in the report does not align with common sense quality assurance checks but sufficient data inputs are not provided to check the analysis**

This project's unmitigated scenario assumes 11,000 truck trips to import fill for the project. Those trucks would be traveling along Sea Cliff Drive on the south side of the site. With the construction occurring on site (modeled as an area source within the project boundary clearly seen in orange in the figure above) and the addition of 11,000 truck trips along the road to the south – a common sense analysis would be that the cumulatively highest impact is at a location where both sources overlap – meaning the southern side of the project site. However, the analysis indicates that the MEIR is located on the northeast corner of the site, far away from all the trucks traveling to the site. We would like to double check this analysis but sufficient input files and figures of sources modeled are not available in the records (see points #1 and #2 above).

4. **There is not enough modeling input information provided to check the quality of assumptions on mitigation measures implemented to reduce the cancer risk from 91.21 cancer risk in a million in the unmitigated scenario to 1.31 cancer risk in a million in the mitigated scenario.**

Diesel particulate matter (DPM) is a harmful toxic air contaminant. It is estimated that about 70% of total known cancer risk related to air toxics in California is attributable to DPM. The majority of cancer risk from this project is driven by DPM from construction equipment and 11,000 truck trips to the site. The mitigation measure reducing this project's large unmitigated DPM emissions (IM AIR-1) assumes the use of construction equipment greater than 100 horsepower that meets the EPA and ARB's **Tier IV Final standards** and electric equipment for those that are equal to or less than 100 horsepower. See this excerpt from page 71 of Exhibit A-1:

"Construction emissions were calculated for each construction activity, as displayed in Table 5. On-site and off-site emissions generated during project construction were modeled with a working schedule of 8 hours per day, 5 days per week. As described above, the number of truck trips required for construction and delivery vehicles travelling to the site was conservatively estimated at 11,00 truck trips over the 5-month construction period.

Based on the analysis presented in this section, emissions were estimated for an unmitigated scenario and a mitigated scenario demonstrating implementation of adopted General Plan EIR MM 3.3-3d through the requirement of Implementing Measure (IM) AIR-1, which would include the use of construction equipment greater than 100 horsepower that meets the EPA and ARB's Tier IV Final standards and electric equipment for those that are equal to or less than 100 horsepower...

Table 7 summarizes the emission rates of unmitigated and mitigated DPM during construction of the proposed project, as analyzed for construction of the proposed project. Note that the "unmitigated" DPM emissions shown below incorporate implementation of construction BMPs as required under adopted General Plan EIR MM 3.3-2a, which affect fugitive dust emissions and not PM2.5 exhaust."

Table 7: Project DPM Construction Emissions

	Maximum Annual Construction Emissions	
Scenario	On-site DPM (pounds/year)	Off-site DPM[1] (pounds/year)
Unmitigated	172.56	5.20
Mitigated[2]	2.46	5.20

Notes:
DPM = diesel particulate matter
[1] The off-site emissions are estimated over all anticipated construction vehicle travel routes from within approximately 1,000 feet of the project site.
[2] Mitigated DPM estimates shown above consider the use of Tier IV Final engines for construction equipment greater than 100 horsepower and electric equipment for those that are equal to or less than 100 horsepower.
Source: CalEEMod Output and Construction Health Risk Assessment Calculations (Appendix A).

Does this mitigation include all the trucks traveling to the site? The Tier 4 final emissions standard in IM AIR-1 applies to nonroad diesel engines (onsite construction equipment), not on-road diesel engines. What mitigation is being applied to the 11,000 onroad heavy duty diesel trips? Is there a

mitigation measure ensuring low emissions or zero emission heavy duty onroad engines? Is this being modeled? There is no other mitigation measure referenced besides IM AIR-1 so there is no evidence to mitigations being applied to the 11,000 truck trips.

We lack information on these assumptions due to an incomplete record from missing data input files (see comments #1 and #2 above) and are concerned that mitigations may have been improperly modeled to achieve such low DPM emissions from an extremely high number of onroad truck trips.

5. **Mitigation measures must include more robust commitments to ensure the modeled "less than significant" impact is truly met in practice**

This project assumes that mitigated DPM emissions are achieved using Tier 4 Final engines for onsite construction equipment. This is an extremely important assumption – if at the time of project commencement, what assurances are in place to enforce the Tier 4 Final or equivalent engine requirements? If the contractor cannot locate the appropriate equipment, can dirtier engines be used? It is imperative that the document include stringent language to ensure that the mitigated modeled scenario occurs in practice. One way to achieve this is to include contractual language in contractor agreements that requires Tier 4 Final or equivalent engines. There should also be systems in place to audit and enforce that these measures are being properly implemented.

6. **The cumulative health impacts assessment is not a good representation of the real cumulative health impacts in the area**

Although the BAAQMD recommends assessing the potential cumulative impacts from sources of TACs within 1,000 feet of a project, we believe that limiting the analysis to 1,000 feet does not represent the real health impacts cumulatively affecting people residing in this area. Not only is this area located in a BAAQMD Community Air Risk Evaluation (CARE) Program area, it is also part of the BAAQMD AB 617 Community Air Protection Program area due to the disproportionate air pollution impacts affecting this area. Within an approximate 1.5-mile radius, the following large sources are present that were not included in the cumulative health impacts assessment: the largest refinery in the bay area, a deep-water channel and port that includes large tanker vessels and RoRos making calls, a ferry terminal, numerous rail corridors and a railyard, and a wastewater treatment plant. Based on existing effort and plans that BAAQMD are actively engaged in to reduce emission in this area, it is worthwhile taking a wider radius approach when assessing cumulative impacts from this project.

Please make corrections to the documents by including sufficient information for a technical review and ensure that the appropriate mitigations are applied to realize a "less than significant" impact in practice. My family (including two children under 3 years old) regularly walk past the proposed site and play at a playground next to the site and we want to be sure that they are being sufficiently protected from the emissions and health impacts of this project.

Sincerely,

Julia Luongo, PhD

Sharon Shearer, PhD

Appendix 2 to Appeal of the Planning Commission Decision on the Brickyard Cove Residential Project (PLN21-444) on March 16, 2023

San Francisco Municipal Code Article 22B: Construction Dust Control Requirements, Sections 1240 through 1249

ARTICLE 22B:

CONSTRUCTION DUST CONTROL REQUIREMENTS

Sec. 1240.	Definitions.
Sec. 1241.	Applicability of Article.
Sec. 1242.	Site-Specific Dust Control Plan.
Sec. 1243.	Exemption for Interior Only Tenant Improvement Projects.
Sec. 1244.	Waiver of Requirements for Compliance: Rescission of Waiver.
Sec. 1245.	Director's Approval of Dust Control Plan and Notification to the Director of Building Inspection.
Sec. 1246.	Rules and Regulations.
Sec. 1247.	Construction on City Property.
Sec. 1248.	No Assumption of Liability.
Sec. 1249.	Fees.

SEC. 1240. DEFINITIONS.

In addition to the general definitions applicable to this Code, whenever used in this Article, the following terms shall have the meanings set forth below:

(a) "Applicant" means a person applying for any permit specified in Section 106.3.2.6 of the San Francisco Building Code or, if a permit for the work is not required from the Department of Building Inspection, the owner of the property where the activities will take place.

(b) "Director" means the Director of the San Francisco Department of Public Health or the Director's designee.

(c) "Director of Building Inspection " means the Director of the Department of Building Inspection of the City and County of San Francisco.

(d) "Owner" means the owner or owners of the property that is the site of the construction activities.

(e) "Sensitive Receptor" means residence, school, childcare center, hospital or other health-care facility or group living quarters.

(Added by 176-08, File No. 071009, App. 7/30/2008)

SEC. 1241. APPLICABILITY OF ARTICLE.

This Article shall apply to any site preparation or construction activities taking place within the City and County of San Francisco that has the potential to create dust or that will expose or disturb soil.

(Added by 176-08, File No. 071009, App. 7/30/2008)

SEC. 1242. SITE-SPECIFIC DUST CONTROL PLAN.

(a) Applicants for projects over a half acre in size shall submit a map showing the location of the project and clearly identifying all surrounding sensitive receptors and particularly noting those within 1,000 feet of the project. The Director of Health shall review this map and any other information available to the Director to verify compliance with this submittal requirement. If no sensitive receptors are determined to be within 1,000 feet of the project, then the Director of Health may issue a waiver to the Applicant that specifies that the project is not required to have a site-specific dust control plan.

(b) For projects determined by the Director to be within 1,000 feet of sensitive receptors, the Applicant will submit a site-specific dust control plan to the Director for approval.

(c) The site-specific dust control plan shall contain all provisions of Section 106.3.2.6.3 of the Building Code and enhanced site-specific dust monitoring and control measures that will apply to the project. These site-specific measures may include the following or equivalent measures, which accomplish the goal of minimizing visible dust:

(1) wetting down areas around soil improvement operations, visibly dry disturbed soil surface areas, and visibly dry disturbed unpaved driveways at least three times per shift per day.

(2) analysis of the wind direction,

(3) placement of upwind and downwind particulate dust monitors,

(4) recordkeeping for particulate monitoring results,

(5) hiring of an independent third party to conduct inspections for visible dust and keeping records of those inspections,

(6) requirements for when dust generating operations have to be shut down due to dust crossing the property boundary or if dust is contained within the property boundary but not controlled after a specified number of minutes,

(7) establishing a hotline for surrounding community members to call and report visible dust problems so that the Applicant can promptly fix those problem; posting signs around the site with the hotline number and making sure that the number is given to adjacent residents, schools and businesses.

(8) limiting the area subject to excavation, grading, and other demolition or construction activities at any one time,

(9) minimizing the amount of excavated material or waste materials stored at the site,

(10) installing dust curtains, plastic tarps or windbreaks, or planting tree windbreaks on the property line on windward and down windward sides of construction areas, as necessary,

(11) paving, applying water three times daily, or applying non-toxic soil stabilizers on all unpaved access roads, parking areas and staging areas at the construction site. Reclaimed water must be used if required by Article 21, Section 1100 et seq. of the San Francisco Public Works Code, Article 22. If not required, reclaimed water should be used whenever possible.

(12) loading haul trucks carrying excavated material and other non-excavated material so that the material does not extend above the walls or back of the truck bed. Tightly cover with tarpaulins or other effective covers all trucks hauling soil, sand, and other loose materials before the trucks leave the loading area. Wet prior to covering if needed.

(13) establishing speed limits so that vehicles entering or exiting construction areas shall travel at a speed that minimizes dust emissions. This speed shall be no more than 15 miles per hour.

(14) sweeping streets with water sweepers at the end of each day if visible soil material is carried onto adjacent paved roads. Reclaimed water must be used if required by Article 21, Section 1100 et sea, of the San Francisco Public Works Code. If not required, reclaimed water should be used whenever possible.

(15) installing wheel washers to clean all trucks and equipment leaving the construction site. If wheel washers cannot be installed, tires or tracks and spoil trucks shall be brushed off before they reenter City streets to minimize deposition of dust-causing materials.

(16) terminating excavation, grading, and other construction activities when winds speeds exceed 25 miles per hour.

(17) hydroseeding inactive construction areas, including previously graded areas inactive for at least 10 calendar days, or applying non-toxic soil stabilizers.

(18) sweeping of surrounding streets during demolition, excavation and construction at least once per day to reduce particulate emissions.

(Added by 176-08, File No. 071009, App. 7/30/2008)

SEC. 1243. EXEMPTION FOR INTERIOR ONLY TENANT IMPROVEMENT PROJECTS.

Interior Only Tenant Improvement Projects that are over one half acre is size and will not produce any exterior visible dust are exempt from complying with these requirements. If the interior only tenant improvement projects are changed during the course of construction and begin producing exterior visible dust then they will be required to immediately comply with Section 1242 by submitting a site-specific dust control plan for the Director's approval.

(Added by 176-08, File No. 071009, App. 7/30/2008)

SEC. 1244. WAIVER OF REQUIREMENTS FOR COMPLIANCE: RESCISSION OF WAIVER.

(a) The Director may waive the requirements for a site-specific dust control plan as described in Section 1242(a) or if the Applicant demonstrates to the Director's satisfaction that a site-specific dust control plan should not be required.

(b) The Director may rescind a waiver,

(1) if sensitive uses are placed within 1,000 feet of the project;

(2) if requested by the Director of Building Inspection; or

(3) the Director is presented with information that contradicts the Applicant's demonstration that a site-specific dust control plan should not be required.

The Director shall provide the Director of Building Inspection with a copy of the rescission order. If the Director orders rescission of the waiver, the owner of the property and the contractor or other persons responsible for construction activities at the site shall comply immediately with Section 1242 by submitting a site-specific dust control plan for the Director's approval.

(Added by 176-08, File No. 071009, App. 7/30/2008)

SEC. 1245. DIRECTOR'S APPROVAL OF DUST CONTROL PLAN AND NOTIFICATION TO THE DIRECTOR OF BUILDING INSPECTION.

After the Director has approved the Applicant's dust control plan, the Director shall provide the Applicant and the Director of Building Inspection with written notification that the Applicant has complied with the requirements of this Article.

(Added by 176-08, File No. 071009, App. 7/30/2008)

SEC. 1246. RULES AND REGULATIONS.

The Director may adopt, and may thereafter amend, rules, regulations and guidelines that the Director deems necessary to implement the provisions of this Article. A public hearing before the Health Commission shall be held prior to the adoption or any amendment of the rules, regulations and guidelines recommended for implementation. In addition to any notices required by law, the Director shall send written notice, at least 15 days prior to the hearing, to any interested party who sends a written request to the Director for notice of hearings related to the adoption of rules, regulations and guidelines under this section.

(Added by 176-08, File No. 071009, App. 7/30/2008)

SEC. 1247. CONSTRUCTION ON CITY PROPERTY.

All departments, boards, commissions, and agencies of the City and County of San Francisco that authorize construction or improvements on land under their jurisdiction under circumstances where no building, excavation, grading, foundation, or other permit needs to be obtained under the San Francisco Building Code shall adopt rules and regulations to insure that the same dust control requirements that are set forth in this Article are followed. The Directors of Public Health and Building Inspection shall assist the departments, boards, commission and agencies to insure that these requirements are met.

(Added by 176-08, File No. 071009, App. 7/30/2008)

SEC. 1248. NO ASSUMPTION OF LIABILITY.

In undertaking the enforcement of this ordinance, the City is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

(Added by 176-08, File No. 071009, App. 7/30/2008)

SEC. 1249. FEES.

The Director is authorized to charge the following fees to defray the costs of document processing and review, consultation with applicants, and administration of this Article: for fiscal year 2008-2009 (1) an initial fee of $492, payable to the Department upon the filing of a Dust Control Plan with the Department; and (2) an additional fee of $164 per hour for time spent in document processing and review and applicant consultation exceeding three hours or portion thereof payable to the Department. Beginning with fiscal year 2009-2010, no later than April 15 each year, the Controller shall adjust the fees provided in this Article to reflect changes in the relevant Consumer Price Index, without further action by the Board of Supervisors. In adjusting the fees, the Controller may round these fees up or down to the nearest dollar. The Director shall perform an annual review of the fees scheduled to be assessed for the following fiscal year and shall file a report with the Controller no later than May 1st of each year, proposing, if necessary, an adjustment to the fees to ensure that costs are fully recovered and that fees do not produce significantly more revenue than required to cover the costs of operating the program. The Controller shall adjust fees when necessary in either case.

(Added by 176-08, File No. 071009, App. 7/30/2008)

Appeal of Planning Commission Decision on Brickyard Cove Residential Project

Brickyard Cove Residential Project (Project) (PLN21-444): Public hearing to consider Density Bonus Waivers, a Major Design Review, and a Vesting Tentative Map for a 94-unit residential development.

15.04.803.140- Appeals.

A. 5. *Appeals of Planning Commission Decisions.* Decisions of the Planning Commission on permits and related approvals may be appealed to the City Council only after exhaustion of all other administrative remedies by filing a written appeal with the City Clerk.

D. **Procedures.**

1. *Filing.* The appeal must be written on the appropriate form provided by the City, identify the decision being appealed, clearly and concisely state the reasons for the appeal, and also state specifically how and where the underlying decision constitutes an abuse of discretion and/or is not supported by substantial evidence in the record. The appeal must be accompanied by the required fee.

2. *Proceedings Stayed by Appeal.* The timely filing of an appeal shall stay all proceedings in the matter appealed including, but not limited to, the issuance of City building permits and business licenses.

3. *Transmission of Record.* The Director or, in the case of appeals to the City Council, the City Clerk must schedule the appeal for consideration by the authorized hearing body within 60 days of the date the appeal is filed. The Director must forward the appeal, the notice of action, and all other documents that constitute the record to the hearing body. The Director must also prepare a staff report that responds to the issues raised by the appeal and may include a recommendation for action.

E. **Standard of Review.** The appellate body will review whether the underlying decision is supported by substantial evidence and/or constitutes an abuse of discretion. The same standards and evaluation criteria, including the findings required, apply as they were for the original application. The appellate body's review is limited to the issue(s) raised in the petition for appeal.

The City committed prejudicial abuses of discretion by not supporting its findings, determinations or decisions by substantial evidence and/or by not proceeding in a manner required by law in the following instances:

1. The City conducted a Program EIR (using an 11-year old GP EIR) rather than a Project EIR for this Project. CEQA Guidelines Section 15168 – see definition. Contrast with Project EIR.
2. The City did not fully prepare an EIR that identifies significant environmental effects of the proposed Project. (PRC 21002.1). Ex. Cumulative Impacts, Air Quality
3. The City did not meet the requirements for tiering the Program EIR from the General Plan Program EIR.

4. The City refused to allow the Design Review Board and the Planning Commission to consider feasible alternatives or mitigation measures that would substantially lessen significant environmental effects. Ex. Project alternative that required no imported fill and yet produced more housing. (PRC 21002; 14 CCR 15002)
5. The City nullified the public's comments, writings and oral presentations at the Design Review Board and Planning Commission hearings. The City Attorney's office and the Planning Department staff insisted, over the objections of members of the Design Review Board and Planning Commission, that the Board and the Commission had no right or ability to do anything but approve the developers project as submitted and adopt the Planning Department staff's prepared findings, determinations and decisions.
6. The City's preclusion of evidence from the public in the administrative process meant that the Design Review Board's and the Planning Commission's decisions were not based on the evidence in the record, because the public's input was not allowed to be considered. In effect, it was the equivalent of not giving interested parties notice and an opportunity to present evidence and comments on the Project, especially on CEQA issues, at the administrative level. If allowed, it would have been evident that facts are in dispute and that additional findings were needed and further conditions of approval were required. (PRC 21168 and 21168.5)
7. The City has treated this Project as a ministerial project, not a discretionary project, contrary to CEQA requirements. This removes public input from the process. PRC 21080; CG 15357.
8. The City did not include an investigation of cumulative impacts of nearby projects in the Program EIR. Ex. Honda Port of Entry, Terminal 1, Quarry Project and from bay dredging. CG 15065, 15355; PRC 21083(b)
9. The City fails to recognize that "environment" includes the area in which significant effects would occur either directly or indirectly as a result of the project, including both natural and human-made conditions. Ex. Dust and dirt blanketing neighboring high density residential developments. PRC 21060.5; CG 15360
10. The City did not consider the cumulative impact of other nearby air pollution generators that emit dangerous and hazardous PM2.5 and PM10 airborne particulates. This includes but is not limited to the Richmond Municipal Sewer District (RMSD, managed by Veolia), Gold Bond Building Products, Phillips 66, and Kinder Morgan.
11. The City did not address the health and safety issues raised by the public. Ex. Dirt and dust from the imported fill; PM2.5 particulates from tire/road dust from dump trucks and other construction-related traffic; emergency ingress and egress impacts from the Applicant's imported fill dump trucks.
12. The City does not follow its own mitigation procedures for projects, leaving the surrounding community at risk to their health and safety. Ex. Honda Port of Entry mitigation measures (Richmond Resolution 129-08).
13. The City did not put conditions of approval on the project that would mitigate the health risks to the community. Ex. Dust monitoring instruments around project
14. The City did not address the hydrocompression risks brought forth by the Applicant's own geotechnical report. Ex. Cornerstone Earth Group analysis that up to 9 inches of hydrocompression could result in the deepest fill areas, potentially undermining buildings and main water lines.

15. The Planning Commission approved a vesting tentative map with ~68,000 cubic yards of imported fill, even though the developer stated at the hearing that they would lower the fill to ~48,000 cubic yards of fill.
16. The City did not consider new information which was not known and could not have been known at the time the environmental impact report was certified as complete, when it became available. PRC 21166(c). Ex. Tire dust PM 2.5 AB 617. A subsequent EIR is required in order to consider these impacts. (PRC 21166; 14 CCR 15162-15164)
17. The City did not fully and properly analyze truck traffic, truck queuing and increased particulates, in violation of the City's 2012 FEIR and City Resolution 129-08.
18. The City did not analyze the health effects on elementary school children one block away of massive dump trucks queuing around the railroad crossings when trains are being switched.
19. The City did not consider that the amount of imported fill proposed by the developer does not include an analysis of the actual amount of cubic yards of fill based on soil type and swell factor. Ex. Typical swell factor is 20% to 30%.
20. The City ignored the Bay Area Air Quality Management District guideline that 10,000 cubic yards or more of dirt being dumped is a significant impact for purposes of an EIR. The City states that it will follow BAAQMD guidelines in its Final Program EIR.
21. The City did not investigate the developer's claim that they were required to use up to fifty feet of fill to act as a buffer between the future residents and any residual subsurface contamination, despite the community providing both City Staff and the developer a letter from the RWQCB that clearly states they "did not require the fill or specify its thickness".
22. The City failed to accurately describe the height for the project by not properly calculating it per the Richmond Municipal Code. The Applicant and City Staff initially said the height waiver was for 35' to 38'. The community had to inform City Staff that they were not conforming with Zoning Ordinance/RMC: 15.04.103.050, 15.04.103.060, and 15.04.104.020. This meant that the actual height variance was 51', as the final height was determined to be 86'.
23. The City has failed to provide the public with critical, detailed information on the Project, despite a Public Records Request, Government Code Section 6250 et seq., made on March 3. As of this date all that has been provided are documents released to the public as part of the Design Review Board and Planning Commission hearings on the Project.
24. The City allowed an incomplete geotechnical report to stand as substantial evidence of CEQA compliance and of the completeness of the developer's application to the City. That report failed to analyze the north end of the property, where landslides have occurred.
25. The City accepted the developer's application as complete even though their geotechnical report referencing slope stability analyses, dated 4/5/2022, to satisfy CEQA, while the report on the slope stability was not generated until 2/8/2023.
26. The City ignored that the entire hillside lies in areas that are characterized as "Liquefaction Potential Possibly Absent" and "Liquefaction Potential Unknown" as shown in the City's General Plan 2030 Map 12.2 (see Figure 10).
https://www.ci.richmond.ca.us/DocumentCenter/View/8855/Map-122---Liquefaction-Potential?bidId=
27. The City did not address and mitigate inadequate guest parking for the Project. There is no public transit in or near Brickyard Cove. There is no on street parking on Brickyard Cove Rd, Seacliff Dr. or within the Private Brickyard Landing and Seacliff Estates properties.

28. The City did not address the potential situation should the City not accept dedication of both private sections of Brickyard Cove Rd. prior to development of the site. The developer and ultimately the new HOA must have the equivalent obligation that the other community HOAs have regarding the ongoing maintenance of Brickyard Cove Rd. They are to agree to an allocation of the costs based on the number of units in the development.
29. The City allowed this Project to proceed through design changes without a definite description of a fixed and static project. Ex. Design changes from various Design Review Board exchanges with the developer; inaccurate height descriptions; changes in amount of fill. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (*i.e.,* the "no project" alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.
30. The City should have re-circulated the EIR given the design changes which took place on the Project. PRC 21092.5; CCR 15088.5.
31. The City did not provide substantial evidence for its CEQA findings on air quality. The quality and correctness of the air quality technical assessment and the information presented is insufficient for proper technical review:
    A. The air quality analysis (contained in Exhibit A-1 and Appendix A) is missing information for transparency, quality assurance, and full record of the analyses undertaken.
    B. The documentation lacks clarity and proper labeling to understand assumptions made in the analysis.
    C. The MIR (maximally impacted sensitive receptor) presented in the report does not align with common sense quality assurance checks but sufficient data inputs are not provided to check the analysis.
    D. There is not enough modeling input information provided to check the quality of assumptions on mitigation measures implemented to reduce the cancer risk from 91.21 cancer risk in a million at the MIR in the unmitigated scenario to 1.31 cancer risk in a million in the mitigated scenario.
    E. Mitigation measures must include more robust commitments to ensure the modeled "less than significant" impact is truly met in practice.
    F. The cumulative health impacts assessment is not a good representation of the real cumulative health impacts in the area.

32. The City has not fully investigated or considered all the CEQA issues, relying upon the incomplete or erroneous reports submitted by the developer. Ex. Cumulative Impacts, Traffic, Noise, Geologic, Air Quality. 14 Cal Code Regs Guideline 15064(b)(2) specifies that compliance with a threshold does not relieve the lead agency of the need to consider substantial evidence indicating that impacts are still significant.
33. The City did not put a condition of approval that the HOAs CC&Rs will include language stipulating that no more than 25% of the units in the Project are allowed to be rented at any one time and that no short-term rentals of less than 30 days are allowed at any time.
34. Violates California Constitution Art. XI (Charter City). The City of Richmond was not created by the State. In fact, the City, invoking Section 5(a) of Article XI of the California Constitution, provides that a Charter City shall not be governed by State law in respect to 'Municipal Affairs.'

Rather, 'so far as "Municipal Affairs" are concerned, Charter Cities' laws are 'supreme and beyond the reach of [State] legislative enactment.' (California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 35 Cal.3d 1, 12.)

35. Violates the First Amendment speech rights of cities, city officials, and residents. the state's housing regulations compel the City Council to arrive at a pre-ordained, "fixed," "State-contrived" speech. State housing regulations require the City Council Members to replace their free speech, i.e., the verbal expressions of their freely formed opinions and decision-making thoughts, with the words of the State that advance the State's political agenda. Circumventing public hearings is itself a legal violation, the city says.
36. Violates the California Environmental Quality Act (CEQA). The Free Speech violation described above isn't a matter of mere philosophy. It puts city officials in a bind: In order to obey state housing regulations, they must override CEQA; to obey CEQA, those officials must violate housing regulations. For the two State laws, RHNA Laws and CEQA, to be in direct competition or conflict forces local City Council's to relinquish local decision-making one way or the other.
37. The California Department of Housing and Community Development (HCD) regulatory process is broken.
38. Violates California Constitution Article XI (Due Process).
39. Violates the 14th Amendment of US Constitution. Applying a system based on faulty data; to cities chosen for the political orientation; that requires city officials to violate one law in order to follow another: for these and other reasons, the state's housing mandates violate the U.S. Constitution's protection against "patently arbitrary classification." "A flawed state mandate can be no 'mandate' on a city at all." "These laws are so flawed, conflicting, vague, arbitrary and capricious, and left to subjective interpretation and application of political actors as to be unconstitutional."
40. The City doesn't have credibility with the public since the City, as the lead agency, has been violating CEQA Findings of Fact for 14 years (Honda Port of Entry Project, Resolution 129-08) and never enforced legally required mitigations when Waterline was developed.
    A. See: https://californiapolicycenter.org/wp-content/uploads/2023/03/RHNA-Conformed-Complaint.pdf
41. The City Council and Staff recognize that the General Plan EIR Amendment that they passed on Jan 24, 2023 — which was after the date that the City and Republic Urban used the GP EIR and associated checklist to review the BYC Residential Project — is inadequate in two key areas and needs further revisions/amendments to: 1) Element 12 - Public Safety; and 2) Environmental Justice, particularly around hazardous materials & sites. The City's violation of Resolution 129-08 directly conflicts with Element 12 (Public Safety) of the General Plan, and underscores how inadequate the current Public Safety and the Environmental Justice Elements are in protecting the public's health and safety.

Memo re meaning of "as designed" as a criteria for blocking rejection of DBL waivers (Note: this memo will need editing. It is more inclusive of material cited to provide full context to reduce the need to look again at case or statutory material.)

The project proposes to build a 94 unit residential development on a vacant parcel which abuts on its north side on the ridge where a slide occurred on January 23, 2023. The parcel is situated on the north side of Brickyard Cove Road between the Brickyard Landing residential development to the west and Seacliff residential development to the east. Because the Project is providing ten percent "moderate income" units, the developer sees benefits under the Density Bonus Law (DBL) (Government Code Sections 65915 – 65918) including "waivers". The waiver which is the focus of this comment is described in the Staff Report as follows:

> "Increase in Building Height: RMC Section 15.04.201.050 limits building heights to 35 feet. The Applicant requests for an allowance of heights up to 38 feet to top of roof from proposed finished grade to allow variations in rooflines (dormers and pitched roofs) and space for interior duct work. This waiver also accommodates the fill required to develop the site at the density allowed. The fill creates a buffer from residual contaminated soil and increases the developable area for housing units.[1] The distance to the top of the highest roof would be up to 86 feet from the existing grade left by PG&E, which is up to 30 feet lower than the former natural grade and is lower than the adjacent roadway. The distance to the top of the highest roof would be up to 65 feet from the former natural grade."

The fill that would be "accommodated" by this waiver, includes approximately 68,000 cubic yards (cy) that must be imported to the site by truck transport described by staff as follows:

> "An additional approximately 68,100 cubic yards of fill material would be imported to raise the elevation of the Project Site and create construction pads. A total of 131,800 cubic yards of fill would be used on-site, including reuse of the on-site cut material. Depending on the characteristics of the soil, one truck could carry between 13 and 16 cubic yards of fill, requiring 5,238 truck trips over the five-month period required to bring the fill to the Project Site. Up to 153 trucks per day could be scheduled to bring fill to the site, although the number of trips would vary from day to day."

(t the Planning Commission meeting on March 16, 2023, the applicant representatives, without providing any advance notice to members of the public or, apparently, to City Staff or the Planning Commission itself, announced that they had been able to revise the design (by increasing the height of a retaining wall) and were thereby able to reduce the amount of imported fill by 20,000 cubic yards. While this would reduce the number of truck trips to 3,692, their announced intention was still to aim for 153 truck trips into the site each 11 hour day, meaning that a truck, carrying up to 25 tons of fill, would enter the site every 4 minutes 18 seconds. Each truck would, obviously, also have to leave the site after

---

[1] This statement is misleading in implying that fill is required for this purpose. The Regional Water Quality Board (RWQB) has issued a clarification to its No Further Action letter concerning this project as follows: The fill, which serves as a buffer between the residents and subsurface contamination, was a factor in our determination of no unacceptable risk/no further action necessary; however, we did not require the fill or specify its thickness. (Underlining is emphasis added.)

unloading, making a total of 306 passes over the roadway through this residential area every one of those days, and a grand total 7,384 passes for the trips in and out to import all 48,100 cubic yards.

A key section providing essential context for this waiver is RMC 15.05.103.050 A. 1:

> **Measuring Building Height on Sloped Lots**. On lots with a grade change of 10 percent or more between the front and rear lot lines, or between the front lot line and its most distant point when there is no rear lot line, building height is measured from the adjacent natural or finished grade, whichever is lower, to the coping of a flat roof or to the deck line of a mansard roof or to the average height of the highest gable of a pitched or hipped roof. (Underlining is emphasis added.)

The term "grade" and its subsets are defined as follows:

> *Grade*. The location of the ground surface.
>
> > *Adjacent Grade*. The lowest elevation of ground surface within five feet of the building exterior wall.
> >
> > *Average Grade*. A horizontal line approximating the ground elevation through each building on a site used for calculating the exterior volume of a building. Average *grade* is calculated separately for each building.
> >
> > *Existing Grade*. On vacant parcels before any land development activities are undertaken, the elevation of the ground at any point on a lot as shown on the required survey submitted in conjunction with an application for a building permit or *grading* permit. Existing *grade* also may be referred to as natural *grade*.
> >
> > *Finished Grade*. The lowest point of elevation of the finished surface of the ground, paving, or sidewalk within the area between the building and the lot line, or when the lot line is more than five feet from the building, between the building and a line five feet from the building.

An applicant may request a waiver or reduction of development standards that would have the effect of physically precluding the construction of a development at the allowed density. The specific language of the statute (GC 65915) supporting this interpretation is as follows:

> (e)(1) In no case may a city, county, or city and county apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section. Subject to paragraph (3), an applicant may submit to a city, county, or city and county a proposal for the waiver or reduction of development standards that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted under this section, and may

request a meeting with the city, county, or city and county. If a court finds that the refusal to grant a waiver or reduction of development standards is in violation of this section, the court shall award the plaintiff reasonable attorney's fees and costs of suit....
(2) A proposal for the waiver or reduction of development standards pursuant to this subdivision shall neither reduce nor increase the number of incentives or concessions to which the applicant is entitled pursuant to subdivision (d).
(3) A housing development that receives a waiver from any maximum controls on density pursuant to clause (ii) of subparagraph (D) of paragraph (3) of subdivision (f) shall only be eligible for a waiver or reduction of development standards as provided in subparagraph (D) of paragraph (2) of subdivision (d) and clause (ii) of subparagraph (D) of paragraph (3) of subdivision (f), unless the city, county, or city and county agrees to additional waivers or reductions of development standards.
(f) For the purposes of this chapter, "density bonus" means a density increase over the otherwise maximum allowable gross residential density as of the date of application by the applicant to the city, county, or city and county, or, if elected by the applicant, a lesser percentage of density increase, including, but not limited to, no increase in density. The amount of density increase to which the applicant is entitled shall vary according to the amount by which the percentage of affordable housing units exceeds the percentage established in subdivision (b)." (Underlining is emphasis added.)

The referenced subdivision (b) provides, in pertinent part:

(b)(1) A city, county, or city and county shall grant one density bonus, the amount of which shall be as specified in subdivision (f), and, if requested by the applicant and consistent with the applicable requirements of this section, incentives or concessions, as described in subdivision (d), waivers or reductions of development standards, as described in subdivision (e), and parking ratios, as described in subdivision (p), if an applicant for a housing development seeks and agrees to construct a housing development, excluding any units permitted by the density bonus awarded pursuant to this section, that will contain at least any one of the following:
(A) ...
(B) ...
(C) ...
(D) Ten percent of the total dwelling units of a housing development are sold to persons and families of moderate income, as defined in Section 50093 of the Health and Safety Code, provided that all units in the development are offered to the public for purchase.
...

The language of the statute reflects the sole basis that requires a City to grant a waiver in the first instance. If the project qualifies for treatment under the DBL because it will have the requisite number of units available to the proper percentage of families in a particular income level, the only question to be answered is whether the refusal to grant the waiver will have the effect of physically precluding the construction of a development at the qualifying levels of affordability densities. In other words, without any consideration of any adverse health or safety impacts which may provide a basis for the City to deny a waiver (to discussed infra), at the outset of the evaluation, if an applicant has met the percentage requirements for a particular level of affordable units, the applicant is entitled to a waiver or reduction of development standards that, if not waived, would have the effect of physically precluding the construction of a development meeting the affordability requirements of the statute at the densities permitted under the statute. (GC, § 65915 (e) (1)) Logically, therefore, the corollary is that if such a qualifying project **can** be built without the requested waiver, the City can reject it if it is in violation of a

codified development standard. In this case, the imported fill is not necessary to accomplish the DBL's intended purpose. Attached as exhibits 1 and 2 respectively are a plan view and an architectural rendering of a similar design, using the same footprint as the project at issue, having more units, but not requiring the imported fill, and thereby eliminating the significant health and safety problems to be discussed infra. This design strongly supports the conclusion that the applicant's project can be built without the imported fill. While a waiver of the building height to allow it to be 38' above the ultimate finished grade rather than the zoning ordinance's 35' to keep the structures at the same volume might be required, the rejection of the waiver as presently proposed, thereby eliminating the massive amount of imported fill, would allow the applicant to proceed with essentially the same project while avoiding some of the critical issues for the community that are created by the massive importation of fill which is accommodated by the waiver. Notwithstanding the surprise announcement at the Planning Commission meeting of a revised design and a reduction of imported fill, at the earlier Design Review Board meeting held on February 22, 2023, the applicant's representatives asserted the unsupported conclusions that if they had to reduce the imported fill, they would "lose some buildings." While the project could be more expensive in the "net" after deducting the costs associated with the imported fill and the mitigation monitoring that it would require (still yet to be shown), their unsupported conclusion that they would" lose some buildings" shouldn't be sufficient. They should have burden, or at least some of it, to provide factual proof of such a statement. In the interests of protecting its own development standards, and the promise to its citizens implicit in them about the control it will exercise over development, the Planning Commission and the City, should at the very least require reasonable documentation for the foundational basis for the requested waiver as provided by GC 65915(a)(2):

> "GC 65915(a)(2) A local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an additional report or study that is not otherwise required by state law, including this section. This subdivision does not prohibit a local government from **requiring** an applicant to provide reasonable documentation to establish eligibility for a requested density bonus, incentives or concessions, as described in subdivision (d), waivers or reductions of development standards, as described in subdivision (e),..." (Underling and bold are emphasis added.)

In addition to the foregoing basis for denying the waiver at the outset as it is presently requested, the DBL provides an exception to the mandate to grant such a waiver which is directly applicable to this project. The statute, in the same paragraph of the same section (GC 65915(e)(1))also provides that a City can deny a waiver in the specified circumstances, to wit:

> "...This subdivision shall not be interpreted to require a local government to waive or reduce development standards if the waiver or reduction would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact...."

GC 65589.5(d) defines the specific impact as follows:

> "A local agency shall not disapprove a housing development project, ... for ... moderate-income households, ... or condition approval in a manner that renders the housing development project infeasible for development for the use of ... moderate-income households, ..., including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:
> (1) ...
> (2) The housing development project ... as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households.... As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete."

If there is a specific adverse impact from the project on public health or safety, and there is no feasible method to satisfactorily mitigate it without rendering the development unaffordable to (for this specific project) moderate-income households, the City can disapprove the project. In other words, health or safety of the public comes first. Given this language, where there is a feasible method to satisfactorily mitigate or avoid the adverse impact, this is clear authority for the City to require a modification of the project to include as a condition to its approval a further "feasible" method to mitigate or avoid such an impact. It is not a direction to ignore requiring the developer to do more where necessary to mitigate such an impact as a condition to granting the waiver, unless to do so would render the project unaffordable to that percentage of moderate-income households that has been used to qualify the project for the DBL. If that is the case, in the interests of public health of safety, the project can be disapproved. There is nothing here to support the argument that the developer gets to design it in whatever way it wants and then to refuse to change it even when a change in the design which will work to eliminate or reduce the negative impact can be made with the same number of units remaining affordable to moderate-income households. They should have burden, or at least some of it, to prove that. The City should not have the entire burden to disprove it within the constraints or Schreiber to the effect that they can't ask the developer for its proforma. And even Schreiber and the statute say that the City can request financial information about the financial impact of rejecting the waiver.

- GC 65915(a)(2) A local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an additional report or study that is not otherwise required by state law, including this section. This subdivision does not prohibit a local government from **requiring** an applicant to provide reasonable documentation to establish eligibility for a requested density bonus, incentives or concessions, as described in subdivision (d), waivers or reductions of development standards, as described in subdivision (e),... (Underling and bold are emphasis added.)

To interpret the statute this way would (And the Schreiber case [Schreiber v. City of Los Angeles (2022) 69 Cal.App.5th 549] notwithstanding, the City should be entitled to require that the developer produce information to support the claim that the project will lose its affordability for moderate-income households. Otherwise, the City is asked to make a decision, but is precluded from obtaining the best information on which to evaluate the developer's claim, thus rendering this portion of the statute meaningless and impossible to apply.

However, the applicant seeks to import another restraint on the City's power to deny a waiver, namely that the development standard to be waived will, if not waived, "have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section" -- *as designed.* In the context of the waiver at issue, the applicant contends that if it is required to build the project without the imported fill, even if it is built to the same density, with the same number of moderate income houses, and even with the waiver of the building limitation of 35' to allow the building maximum building height to rise to 38' above the "existing" or "natural" grade, which is some 50' below where he proposes to locate the "finished" grade, the project is not "as designed" and thus the waiver must be granted. Both the representative of the City Attorney's office attending the meeting by Zoom and the City Staff representative attending in person confirmed that this language was part of the standard to be applied and that therefore the City could not deny the waiver. However, this language is not in the statute, and as will be discussed in more detail, infra, there are basic principles of statutory interpretation, one of which is that a court "has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed"(See cases cited and quoted infra.) invalidate the attempted inclusion of this additional restraint. More importantly, the statements by the attorney and the staff representative are wrong, and gave incorrect guidance to the Planning Commission for the evaluation of the project and the resolution they were encouraged to adopt.

To support the applicant's assertion, the applicant's, the City Attorney's representative's, and the staff representative's reliance is improperly placed on language found in the case of Bankers Hill 150 v. City of San Diego (2022) 74 Cal.App.5th 735, issued both by the Court on its own and by language it quotes from other cases. Before turning to those portions of the case that were improperly interpreted for the PC by the City Attorney's representative and City Staff, the statements in Bankers Hill supra, regarding the purpose and workings of the DBL are worthy of keeping in mind. After first noting, at page 769 that the Density Bonus Law is "not a 'free pass'", the Court goes on to say:

> "Government Code section 65915, commonly referred to as the "Density Bonus Law," was first enacted in 1979 with the aim to address the shortage of affordable housing in California. (*Latinos Unidos Del Valle De Napa Y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1164, 159 Cal.Rptr.3d 284 (*Latinos Unidos*).) " 'Although application of the statute can be complicated, its aim is fairly simple: When a developer agrees to construct a certain percentage of the units in a housing development for low- or very-low-income households, or to construct a senior citizen housing development, the city or county must grant the developer one or more itemized concessions and a "density bonus," which allows the developer to increase the density of the development by a certain percentage above the maximum allowable limit under local zoning law. [Citation.]
>
> ...
>
> ...(T)he *density bonus* allows for additional units, above the maximum allowed by zoning, to be added to a project based on the amount of affordable housing included in the project. (Italics in the original.)

Since the applicant here has not requested any concessions or incentives, but instead only waivers, the remaining portions of this case that will be addressed will be confined to waivers. At page 770-771, the Court continues:

"...(A) city must offer a *waiver or reduction* of development standards that would have the effect of physically precluding the construction of a development at the density, or with the requested incentives, permitted by the Density Bonus Law. (§ 65915, subd. (e)(1).)
...

However, before looking at that language, it is worth reviewing basic principles of statutory interpretation.
A California court cannot permissibly add to a statute by interpretation an additional requirement or provision. The role of a court in interpreting a statute is to determine the legislative intent behind the words of the statute and apply that intent to the facts of the case before it. However, a court cannot change the clear meaning of a statute or add a requirement or provision that is not contained within the text of the statute itself. While a court may interpret a statute in a way that clarifies its meaning or resolves ambiguities, it cannot add to or subtract from the text of the statute itself. Any changes to the language of a statute must be made by the legislature through the process of amending or repealing the statute. Statutes should be interpreted as a whole, with the objective of giving effect to all provisions in the statute and avoiding any interpretation that renders any part of the statute superfluous or meaningless. The legislative intent is best served when the different provisions of a statute are interpreted to be consistent with each other. Thus, if a statute contains provisions that seem to conflict with each other or if one provision appears to render another provision meaningless, the court will attempt to harmonize the provisions and give effect to both, if possible. If there is no way to reconcile the conflicting provisions, the court may have to choose between them, but it will do so only after considering the legislative intent and the overall purpose of the statute.
In California Teachers Association v. Governing Board of Realto Unified School District (1997) 14 Cal.4th 627, at 633-634, the California Supreme Court reviewed some of these principles as follows:

"Our first step [in determining the Legislature's intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning. *(Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753, 763, 280 Cal.Rptr. 745, 809 P.2d 404; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735, 248 Cal.Rptr. 115, 755 P.2d 299.)" *(People v. Valladuli* (1996) 13 Cal.4th 590, 597, 54 Cal.Rptr.2d 695, 918 P.2d 999.)" (Underlining is emphasis added.)

And the California Supreme Court again in People v. Loeun (1997) 17 Cal.4th 1, 8-9:

"(2) In construing the relevant provisions of the STEP Act, as with any statute, we strive to ascertain and effectuate the Legislature's intent. *(People v. Gardeley, supra,* 14 Cal.4th 605,621; *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871 [39 Cal.Rptr.2d 824, 891 P.2d 804].) "In undertaking this determination, ***9** we are mindful of this court's limited role in the process of interpreting enactments from the political branches of our state government. In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, ' " 'whatever may be thought of the

wisdom, expediency, or policy of the act.' " ' " (*California Teachers Assn.* v. *Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 632 [59 Cal.Rptr.2d 671, 927 P.2d 1175].) We give the words of the statute " 'their usual and ordinary meaning.'" *(Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 [36 Cal.Rptr.2d 563, 885 P.2d 976], quoting *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal.Rptr.2d 238, 828 P.2d 140].)" 'Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.' [Citation.] Interpretations that lead to absurd results or render words surplusage are to be avoided. [Citation.]" *(Woods v. Young* (1991) 53 Cal.3d 315, 323 [279 Cal.Rptr. 613, 807 P.2d 455].) "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation.] 'Where the statute is clear, courts will not "interpret away clear language in favor of an ambiguity that does not exist." [Citation.]'" *(Lennane v. Franchise Tax Board, supra,* at p. 268.)" (Underlining is emphasis added.)

Gilbert v. Chiang (2014) 227 Cal.App.4th 537, 551:

' " ' Where the language of a statute is reasonably susceptible of two constructions, one which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which will be productive of absurd consequences, the former construction will be adopted. In other words, where the meaning is doubtful, any construction which would lead to absurd results should be rejected ... since absurd results are not supposed to have been contemplated by the legislature.' " *(Aggeler v. Dominguez* (1933) 217 Cal. 429, 434, 19 P.2d 241 ; see *Barber v. Blue* (1966) 65 Cal.2d 185, 188, 52 Cal.Rptr. 865, 417 P.2d 401, [" we indulge in a presumption that constitutional and legislative provisions were not intended to produce unreasonable results"].) (Underlining is emphasis added.)

In addition to the foregoing basis for denying the waiver as it is presently requested, the DBL provides the further basis for rejecting the requested waiver as proposed. The statute, in the same paragraph of the same section (GC 65915(e)(1))also provides that a City can deny a waiver in the specified circumstances, to wit:

> "...This subdivision shall not be interpreted to require a local government to waive or reduce development standards if the waiver or reduction would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact...."

GC 65589.5(d) defines the specific impact as follows:

> "A local agency shall not disapprove a housing development project, ... for ... moderate-income households, ... or condition approval in a manner that renders the housing development project infeasible for development for the use of ... moderate-income households, ..., including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:
> (1) ...
> (2) The housing development project ... as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development ... financially infeasible. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete."

- Tension between waiving/reducing development standards and keeping the promises inherent in the GP goals, policies and actions regarding how development will take place and be controlled.
- Along the lines of the suit recently filed by the City of Huntingon Beach (WE SHOULD GET A COPY OF THE COMPLAINT), the City has made commitments and promises to its citizens with regard to how development will be done and not done in the provisions, goals, policies and actions enacted as part of its General Plan and the zoning ordinances. This creates a tension between the DBL, which intends to encourage affordable housing by making it easier for developers to build it by avoiding those commitments and controls and the City's responsibilities to its citizens to preserve and enforce them as promised. Therefore, if possible, the statute must be interpreted
    - To permit the City to be able to preserve and enforce the development standards that are part of the GP and zoning laws and thus a promise/commitment/legal responsibility to its citizens, particularly if the project can still be built at the density and with the percentage of "affordable" units in the project's design without the requested waiver. In

this regard, it seems significant that the developer has already come up with two reductions in the imported fill, the last one of 20K cubic yards, requiring the construction of a retaining wall 2' higher than previously designed.

- Look at all the polices, etc in the GP that are being ignored or violated by approving this project as it is being present now.
  - Note in this regard the admission Mike Carnall found in the Geotech report to the effect that they did not assess the stability of the slope to the north. His public comment included the following:
    - "You are no doubt aware of the potential hillside slip behind the Seacliff development. That hillside is contiguous with the hillside above the north side of PG&E parcel. The stability of that northern hillside should, therefore, be a serious concern of any geotechnical analysis of the parcel. However, review of the geotechnical report by Cornerstone Earth Group dated April 25, 2022, contains no analysis of the stability of that slope." As noted in that report in Section 4.7 Slope Stability Analysis, "We performed slope stability analysis of the proposed slopes and retaining wall systems along the eastern and western edges of the project based on the proposed grading plans (Sections C-C', D-D', G-G' and H-H' as shown on Sheet TM-7)[1]. These analyses specifically do not include the north slope. Section 4.6 of the report, which addresses "Landsliding", acknowledges that "Air photo interpretation by Nilsen (1975), shows the lower third of the existing slope above the 2:1 cut slope as being a landslide"[2]. It also acknowledges that, due to "existing conditions", no borings were taken in the area above the cut slope. The report does recommend that, apparently during construction, "grading activity should be observed by a certified engineering geologist to confirm the soil and bedrock conditions and to **confirm that adverse bedding or evidence of instability is not present**."[3] This seems a rather cavalier approach to assuring the stability of a slope that is within feet of the foundations of buildings in both the Seacliff and Brickyard Landing developments.
- The City faces an impossible conflict. It is told on the one hand that it has legally committed to protecting the interests of its citizens by limiting development to certain codified standards, based on codified goals, policies and actions, and on the other hand to ignore those same responsibilities by approving a design which would violate those laws when, as here, a slightly modified design would produce the same result in terms DBL's goals of density and affordability while continuing to recognize and enforce in a reasonable, albeit at a "slightly" reduced level (38' height limit vs. 35') a development standard that if so enforced will drastically reduce the numerous adverse impacts on public health and safety.

- The health or safety basis to reject a requested waiver must be harmonized with the rest of the statute in the context of its intended purpose. To use "as designed" in the way staff and Cty atty claim forces an interpretation of the statute would effectively render the public health or safety basis to deny a waiver meaningless. The statute cannot legally be interpreted in such a manner. In addition, and more importantly, we propose a feasible way to mitigate the problems. They

claim this is the way they designed it so they assert that the statute can't be used to require them to change the design to do a better job of mitigation even though they could put the same project in place without the imported fill. They have asserted that they would lose buildings. We've shown a design that gives them more units rather than just the same. The project could be more expensive in the "net" after deducting the costs associated with the imported fill and the mitigation monitoring that would require, but their unsupported conclusion that they "would lose some buildings" shouldn't be sufficient. The response should be the same if they say it would make the project "unaffordable to...moderate-income households...." They should have burden, or at least some of it, to prove that. The City should not have the entire burden to disprove it within the constraints or Schreiber to the effect that they can't ask the developer for its proforma. And even Schreiber and the statute say that the City can request financial information about the financial impact of rejecting the waiver.

- GC 65915(a)(2) A local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an additional report or study that is not otherwise required by state law, including this section. <u>This subdivision does not prohibit a local government from **requiring** an applicant to provide reasonable documentation to establish eligibility for a requested density bonus, incentives or concessions, as described in subdivision (d), waivers or reductions of development standards, as described in subdivision (e)</u>,... (Underling and bold are emphasis added.)

Excerpts from Bankers Hill re "as designed:"

P 774: Indeed, while the Density Bonus Law does not require a developer to establish that the requested incentives and waivers are necessary to ensure financial feasibility, the record demonstrates that including the affordable units in the Project was possible only if the building was designed as proposed. In other words, imposing the setback requirement, decreasing the height, or redistributing the units would preclude construction of the Project. This reality was confirmed by representatives of Greystar, who told the City Council that reducing the height of the building would result in the elimination of "onsite affordable housing" and "would ruin the economics that allow for the onsite affordable housing." If the City had denied the requested incentives or failed to waive any inconsistent design standards, it would have physically precluded construction of the Project, including the affordable units, and defeated the Density Bonus Law's goal of increasing affordable housing.

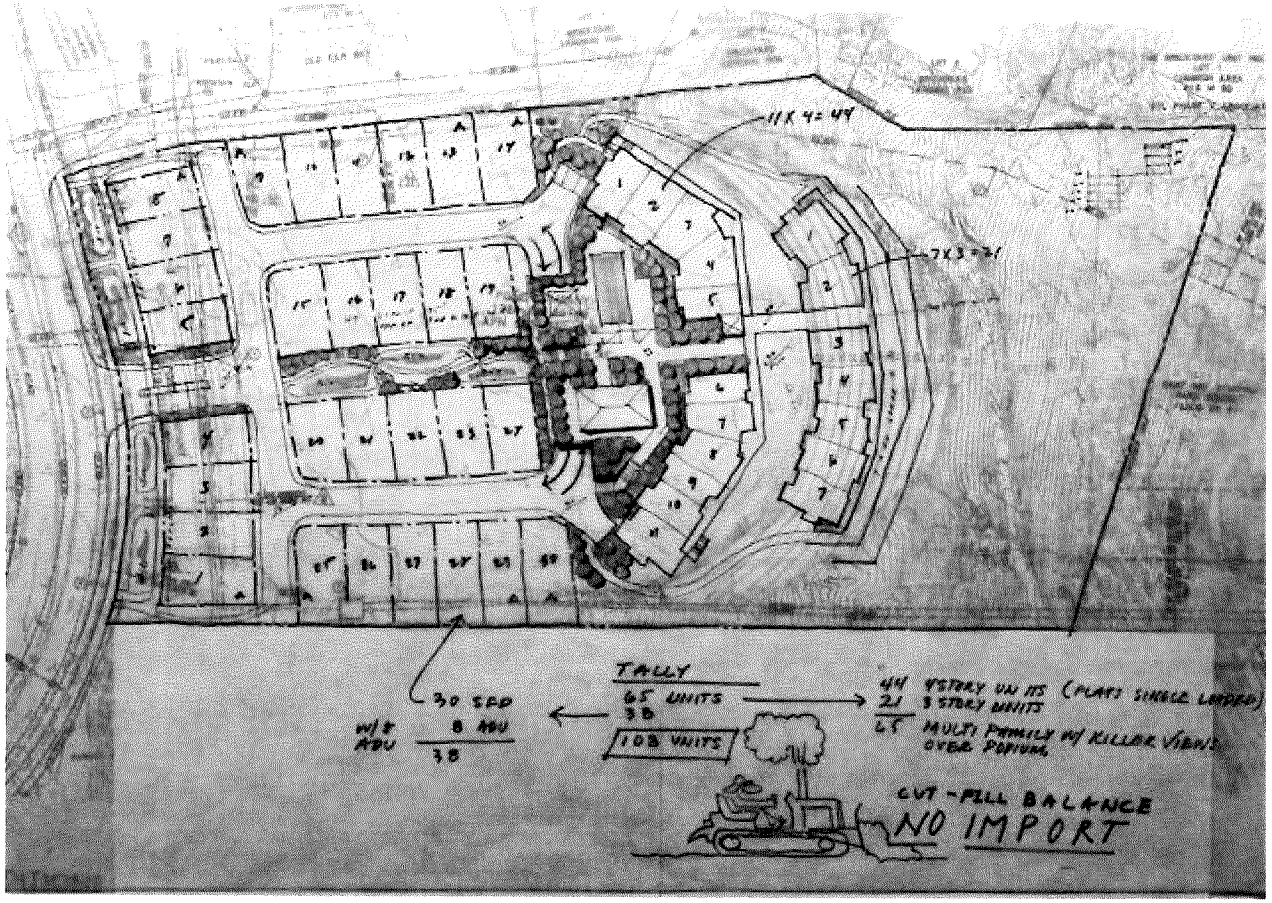
P 774-775: This precise argument was raised and rejected in Wollmer v. City of Berkeley (2011) 193 Cal.App.4th 1329, 122 Cal.Rptr.3d 781 (Wollmer), which also involved a density bonus project designed with a courtyard. The First District considered the history of the Density Bonus Law's language and concluded that when a developer proposes a project that qualifies for a density bonus, the law provides a developer with broad discretion to design projects with additional amenities even if doing so would conflict with local development standards. The court held that nothing in the Density Bonus Law "requires the applicant to strip the project of amenities, such as an interior courtyard, that would require a waiver of development standards. Standards may be waived that physically preclude construction of a housing development meeting the requirements an applicant for a waiver of development standards must show that the waiver was necessary to render the project economically feasible." (Id. at p. 1346, 122 Cal.Rptr.3d 781.)

The Wollmer court explained that a city would be in violation of the Density Bonus Law if it failed to waive development standards that would <u>physically preclude construction of a project</u>. (Wollmer, supra, 193 Cal.App.4th at p. 1347, 122 Cal.Rptr.3d 781.) "<u>If the project were not built, it goes without</u>

saying that housing units for lower- income households would not be built and the purpose of the [D]ensity [B]onus [L]aw to encourage such development would not be achieved." (Ibid.) Thus, unless one of the statutory exceptions applies, so long as a proposed housing development project meets the criteria of the Density Bonus Law by including the necessary affordable units, a city may not apply any development standard that would physically preclude construction of that project as designed*, even if the building includes "amenities" beyond the bare minimum of building components.

As applied here, the interpretation of section 65915 set forth by the court in Wollmer leads us to conclude that the City (or, by extension, the Association via this lawsuit) could not demand Greystar remove the courtyard or redesign its building to satisfy the Association's subjective concerns. Under the Density Bonus Law, a City may only impose such development standards if not doing so "would have a specific, adverse impact ... upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact..."
*(THE USE OF THIS PHRASE HERE IS INCONSISTENT WITH THE PROPER DICTATES OF THE STATUTE – IF, WITH A REVISION TO THE DESIGN, THE PROJECT CAN PROVIDE THE SAME AFFORDABILITY, NEITHER THE CITY, NOR ITS CITIZENS TO WHOM PROMISES HAVE BEEN MADE ABOUT HOW DEVELOPMENT WILL BE DONE AND WILL BE CONTROLLED THROUGH THE CITY ORDINANCES AND GENERAL PLAN, SHOULD BE HELD HOSTAGE TO THE "AESTHETIC WHIM" OF THE DEVELOPER. THIS IS **PARTICULARLY** THE CASE WHERE THE DESIGN FEATURE IS NOT NECESSARY TO ACHIEVE THE AFFORDABILITY GOAL AND VIOLATES A BASIC, CODIFIED, DEVELOPMENT STANDARD.)

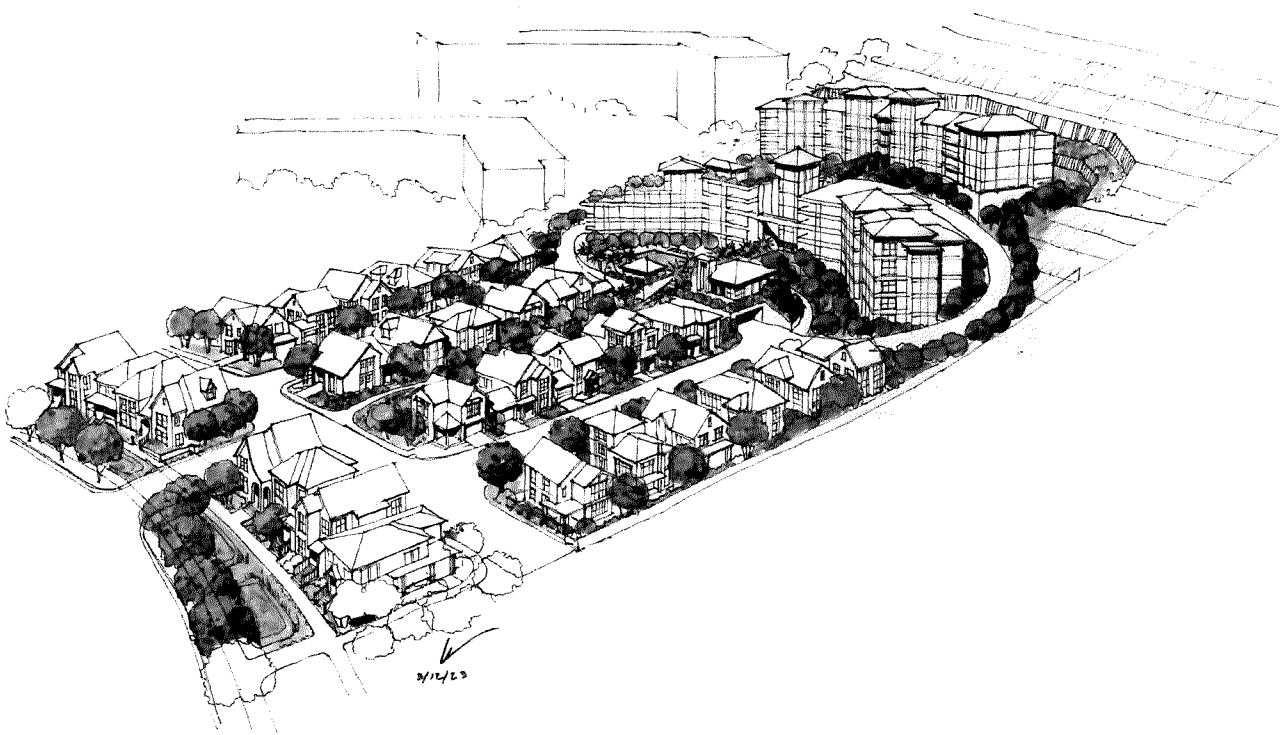
Similar Project – No Imported Fill



Key Features:

- No Imported Fill
- Less impactful to community's public health & safety
- More sustainable & aligned with GP 2030 goals, policies and actions
- More housing units (n=103 vs. 94)

Similar Project – Architectural Rendering



Key Features:

- No Imported Fill
- Less impactful to community's public health & safety
- More sustainable & aligned with GP 2030 goals, policies and actions
- More housing units (n=103 vs. 94)

The Density Bonus Law has been misinterpreted and misapplied to the threshold qualifier for its application:

- The Staff Agenda Report to the Planning Commission summarized the restraints of the Density Bonus Law as follows: "It is important to note that the City may deny a requested waiver only in limited circumstances. Specifically, the City may deny a requested waiver only if granting the waiver would: (a) have a specific, adverse health or safety impact that cannot be mitigated; ... If none of the above statutory exceptions applies, the City is required to waive any development standard that would physically preclude construction of the Project, as designed."
- The Staff Report's language, parroted by the City Attorney's representative and the Staff representative at the meeting, is a misleading conflation of two components of the DBL and has no application to the threshold question. Keeping in mind that the applicant here does not seek concessions or incentives, but only waivers, the threshold requirement is that a development standard for which a waiver is sought would, without the waiver, "have the effect of precluding the construction of a development meeting the criteria of subdivision (b) (the number of units of affordable at a specific income level to qualify the project for the DBL) at the densities ... permitted by this section." (GC 65915(e)(1))
- Logically, therefore, the corollary is that if such a qualifying project **can** be built without the requested waiver, the City can reject it if it is in violation of a codified development standard. There is no reference in this portion of the statute to "as designed" other than perhaps the specific reference to the qualifying percentage of affordable housing. There is nothing in this initial qualifier for the DBL to support the argument that the developer gets to design the project in whatever way it wants and then to refuse to change it even when a change in the design can be made such that it can be built with the same number of units remaining affordable that are required to make the project DBL qualified.
- In this case, the imported fill is not necessary to accomplish the DBL's intended purpose. Attached as exhibits 1 and 2 respectively are a plan view and an architectural rendering of a similar design, using the same footprint as the project at issue, having more units, but not requiring the imported fill, and thereby eliminating the significant health and safety problems to be discussed infra. This design strongly supports the conclusion that the applicant's project can be built without the imported fill.
- Notwithstanding that the applicant had substantially reduced the imported fill following an initial review by the DRB, and the new surprise (since neither the public nor the PC had advance notice of it) announcement at the Planning Commission meeting of a further revised design and a further reduction of imported fill, at the subsequent earlier Design Review Board meeting (after the applicant had switched to the DBL rather than a PAP) held on February 22, 2023, the applicant's representatives asserted the unsupported conclusions that if they had to reduce the imported fill, they would "lose some buildings." This utterly unsupported conclusionary statement should not be accepted as a sufficient basis for not rejecting the waiver. The applicant should be required provide factual proof of such a statement. In the interests of protecting its own development standards, and the promise to its citizens implicit in them about the control it will exercise over development, the Planning Commission, using the authority under GC 65915(a)(2), should at the very least have required reasonable documentation for the foundational basis for any claim that without the waiver, construction of the project would be physically precluded. It failed to do so.

    > "GC 65915(a)(2) A local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an additional

report or study that is not otherwise required by state law, including this section. This subdivision does not prohibit a local government from **requiring** an applicant to provide reasonable documentation to establish eligibility for a requested density bonus, incentives or concessions, as described in subdivision (d), waivers or reductions of development standards, as described in subdivision (e),..." (Underling and bold are emphasis added.)

A basis for denial of a waiver for its specific adverse impacts on public health or safety has been improperly restricted by a misleading misinterpretation of the DBL's requirement to exercise it:

- The Staff Report statement summarizing the restraints of the DBL imports the two-word phrase "as designed." This is not the language of the statute. The statements by the attorney and the staff representative are wrong, and gave incorrect guidance to the Planning Commission for the evaluation of the project and the resolution they were encouraged to adopt. To the extent the intention of Staff and the City Attorney's representative was to claim that this language is supported by the cases, and in particular, language from Bankers Hill 150 v. City of San Diego (2022) 69 Cal.App.5th 549, it is not what the Court intended. If it were, it would be a violation of basic principles of statutory interpretation.
    - California Teachers Association v. Governing Board of Realto Unified School District (1997) 14 Cal.4th 627, at 633-634:
        - "We begin with the touchstone of statutory interpretation, namely, the probable intent of the Legislature. To interpret statutory language, we must "ascertain the intent of the Legislature so as to effectuate the purpose of the law." *(Dyna-Med, Inc.* v. *Fair Employment & Housing Cum.* (1987) 43 Cal.3d 1379, 1386, 241 Cal.Rptr. 67, 743 P.2d 1323 (hereafter *Dyna- Med).)* In undertaking this determination, we are mindful of this court's limited role in the process of interpreting enactments from the political branches of our state government. In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, " ' "whatever may be thought of the wisdom, expediency, or policy of the act."'" *(People v. Weidert* (1985) 39 Cal.3d 836, 843, 218 Cal.Rptr. 57, 705 P.2d 380, quoting *Woodmansee v. Lowery* (1959) 167 Cal.App.2d 645, 652, 334 P.2d 991.) ***633** "[A]s this court has often recognized , the judicial role in a democratic society is fundamentally to interpret laws , not to write them. The latter power belongs primarily to the people and the political branches of government ...." *(Kopp v. Fair Pol. Practices Cum.* (1995) 11 Cal.4th 607, 675, 47 Cal.Rptr.2d 108, 905 P.2d 1248 (cone. opn. by Werdegar, J.).) It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the

Legislature. "This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed." *(Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365, 5 P.2d 882; *People v. One 1940 Ford V- 8 Coupe* (1950) 36 Cal.2d 471, 475, 224 P.2d 677; *County of Madera v. Superior Court* (1974) 39 Cal.App.3d 665, 668, 114 Cal.Rptr. 283; *Woodmansee v. Lowery, supra,* 167 Cal.App.2d 645, 652, 334 P.2d 991.) (Underling is emphasis added.)

- People v. Loeun (1997) 17 Cal.4th 1, 8-9:
  - "(2) In construing the relevant provisions of the STEP Act, as with any statute, we strive to ascertain and effectuate the Legislature's intent. *(People v. Gardeley, supra,* 14 Cal.4th 605,621; *Hsu v. Abbara* (1995) 9 Cal.4th 863, 871 [39 Cal.Rptr.2d 824, 891 P.2d 804].)... We give the words of the statute " 'their usual and ordinary meaning.'" *(Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 [36 Cal.Rptr.2d 563, 885 P.2d 976], quoting *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 601 [7 Cal.Rptr.2d 238, 828 P.2d 140].)" 'Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.' [Citation.] Interpretations that lead to absurd results or render words surplusage are to be avoided. [Citation.]" *(Woods v. Young* (1991) 53 Cal.3d 315, 323 [279 Cal.Rptr. 613, 807 P.2d 455].) (Underlining is emphasis added.)

- The DBL's express language for rejecting an otherwise qualifying waiver is also found in GC 65915(e)(1)):
  - "...This subdivision shall not be interpreted to require a local government to waive or reduce development standards if the waiver or reduction would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact...."
- The definition referenced is from the Housing Affordability Act, which reads in pertinent part as follows:
  - "A local agency shall not disapprove a housing development project, ... for ... moderate-income households, ... or condition approval in a manner that renders the housing development project infeasible for development for the use of ... moderate-income households, ..., including through the use of design review standards, unless it makes written findings, based upon a preponderance of the evidence in the record, as to one of the following:
    (1) ...
    (2) The housing development project ... as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households.... As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective,

identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete."

- Therefore, If there is a specific adverse impact from the project on public health or safety, and there is no feasible method to satisfactorily mitigate it without rendering the development unaffordable to (for this specific project) moderate-income households, the City can disapprove the project. In other words, health or safety of the public comes first. Given this language, where there is a feasible method to satisfactorily mitigate or avoid the adverse impact, this is clear authority for the City to require a modification of the project to include as a condition to its approval a further "feasible" method to mitigate or avoid such an impact. It is not a direction to ignore requiring the developer to do more where necessary to mitigate such an impact as a condition to granting the waiver, unless to do so would render the project unaffordable to that percentage of moderate-income households that has been used to qualify the project for the DBL. If that is the case, in the interests of public health of safety, the project can be disapproved. Once again, there is nothing here to support the argument that the developer gets to design the project in whatever way it wants and then to refuse to change it even when a change in the design which will work to eliminate or reduce the negative impact can be made with the same number of units remaining affordable to moderate-income households. And once again, This utterly unsupported conclusionary statement that eliminating the imported fill would cause the loss of some units should not be accepted as a sufficient basis for not rejecting the waiver. The applicant should be required provide factual proof of such a statement. In the interests of protecting its own development standards, and the promise to its citizens implicit in them about the control it will exercise over development, the Planning Commission should at the very least have required reasonable documentation for the foundational basis for the requested waiver as provided by GC 65915(a)(2). The better course would have been for the PC to recommend to the City that the project be disapproved unless the applicant modified the design to eliminate the imported fill and the minimum of 3,692 truck trips, each with 25 tons of fill, over the two lane road with an 11% grade up and down into, and another 3,692 trips back out of, an otherwise peaceful, quiet residential neighborhood, with all the adverse safety and health impacts enumerated elsewhere in this document. The PC did neither.

The Planning Commission exceeded its authority:

- The PC's function for ultimate major decisions such as the final approval of an EIR, a Vesting Tentative Map, and of waivers of development standards pursuant to the Density Bonus Law, is to recommend, not approve. The members of the PC appointed. They are not elected by the public. The resolution presented to the PC for action, which was drafted by City Staff, endorsed by the City Attorney's representative and the City Staff representative, gave outright approval of these and other items, rather than recommendations to the City Council. RMC 15.04.802.030

CORNERSTONE EARTH GROUP

Date:	March 15, 2023
Project No.:	183-15-1
Prepared For:	Ms. Melissa Durkin **REPUBLIC BRICKYARD LLC** 1098 Lincoln Avenue, Suite 200 San Jose, California 95125
Re:	Preferred Risk Reduction Measures for Residential Development PG&E Parcels Brickyard Cove Road Richmond, California

Dear Ms. Durkin:

Per your request, Cornerstone Earth Group (Cornerstone) is pleased to present this letter summarizing our professional opinion of the preferred risk reduction measures for planned residential development at the parcels owned by PG&E located on Brickyard Cove Road in Richmond, California (Site). The Site is identified as Assessor's Parcel Numbers (APN) 560-340-043 and 560-340-039, which occupy approximately 0.51 acres and 5.40 acres, respectively.

We understand Republic Brickyard LLC intends to redevelop the Site for residential use. The proposed development includes 94-unit townhomes consisting of nineteen, three-story buildings and related Site improvements.

Background

In 1949, PG&E acquired the Site and constructed a 379-foot tall, cylindrical natural gas holding tank with a capacity of 17 million cubic feet. Other associated on-Site facilities included a compressor building, a transformer bank, a pump house, and a water cooling building. The gas holder facility discontinued operations in approximately 1987 and was dismantled in 1989.

Soil and groundwater quality studies were conducted at the Site during the 1990s by PG&E. Based on these studies, the primary contaminants of concern identified at the Site consisted of total extractable petroleum hydrocarbons in the diesel and motor oil range (TEPH) in soil; lead and mercury were also identified above background soil levels. A Remedial Action Plan (RAP) subsequently was prepared by PG&E and approved by the San Francisco Bay Regional Water Quality Control Board (Water Board) in a letter dated August 4, 1999. The RAP outlined a proposal to excavate soil impacted with petroleum hydrocarbons exceeding established cleanup goals. Following RAP implementation activities, the Water Board issued a No Further Action (NFA) letter for the Site dated January 31, 2002.

In April 2020, land use restrictions (Covenant to Restrict Use of Property, Environmental Restriction) were established by PG&E for APN 560-340-039 and recorded at the Contra Costa County Recorder's Office. This document notes that residual contaminant concentrations remain at the Site and acknowledges that regulatory screening and cleanup levels have become

more stringent since completion of the prior remedial measures. The Covenant prohibits residential and certain other sensitive uses of the Site unless the proposed development plan is approved by the Water Board or Department of Toxic Substances Control (DTSC).

To comply with the provisions of the land use restrictions, in July 2021 Republic Brickyard LLC submitted the *"Request for Agency Oversight Application"* for the proposed redevelopment at the Site as required under the Memorandum of Agreement (MOA) among Cal/EPA, the DTSC and the Regional Water Boards. Republic Brickyard LLC was notified that the Water Board was selected to provide regulatory oversight for the proposed residential redevelopment. Based on their review of the environmental studies completed at the Site and the conceptual residential development plans, the Water Board issued a No Further Action letter dated March 10, 2022. The Water Board stated the following:

> *"Based upon available information, including the proposed residential land use, and with the provision that the information provided to the Regional Water Board was accurate and representative of Property conditions, the presence of residual contamination in the subsurface soil beneath the Property does not pose unacceptable risk to human health or the environment. No further action related to the pollutant release at the Property is required."*

Opinion of Preferred Risk-Reduction Measures

As discussed, residual impacted soil remains at the Site. From an environmental risk-reduction standpoint, in our professional opinion, the current plan to raise finished grades to accommodate the planned development is the preferred option compared to an at-grade development scenario for the following reasons:

- An at-grade development scenario at the Site likely would involve the following:
  - Earthwork activities including rough grading, utility trenching, and excavations for foundations likely would encounter residual impacted soil. Management protocols would need to be established for handling these impacted materials during construction.
  - Finished construction grades could result in exposed residual impacted soil in the base and/or sidewalls of excavations that could require health and safety measures for some construction trades working in or near these impacted surfaces.
  - Residual impacted soil excavated during construction likely would not be appropriate for reuse as general fill and would need to be transported off-Site for landfill disposal. Additionally, transportation procedures for hauling contaminated soil would also need to be established based on guidelines contained in the *Transportation Plan – Preparation Guidance for Site Remediation* (U.S. EPA 1994).
  - Off-hauling impacted soil for disposal would also trigger the need to replace the off-hauled soil with "clean" imported soil for use as general backfill.
  - Since the Site is located on a hillside, significant grading and excavation would be anticipated for an at-grade development, thus increasing the volume of potentially

impacted soil that could require management, impacted soil off-haul/disposal, and/or import of "clean" soil for general backfill.

- "Clean" utility corridors likely would be necessary for the planned development, to eliminate the need for implementation of special soil management procedures during future utility improvements and/or repairs.

- Under the current development plan, a sufficient volume of "clean" fill will be imported to raise Site grades. Thus, the mitigation measures identified above for the at-grade development scenario would no longer be needed.

  Initial Site development plans anticipated approximately 20 feet of "clean" fill import to achieve finished grade at the front of the Site, with as much as 50 feet of fill on the back of the Site. We understand Republic Brickyard LLC's design team is working to significantly reduce the volume of required "clean" fill needed for the planned development. Fill placement (in areas where residual impacted soil is present) is anticipated to be of adequate thickness to cover the deepest planned utility and/or excavation.

- As part of the Water Board's evaluation of the Site's suitability for residential use, raising Site grades to accommodate the planned development was a consideration. Their No Further Action Letter dated March 10, 2022 does not provide any conditions of approval for a minimum thickness of "clean" fill; however, the Water Board does acknowledge that placement of "clean" fill will serve as an adequate buffer between the residents and subsurface contamination.

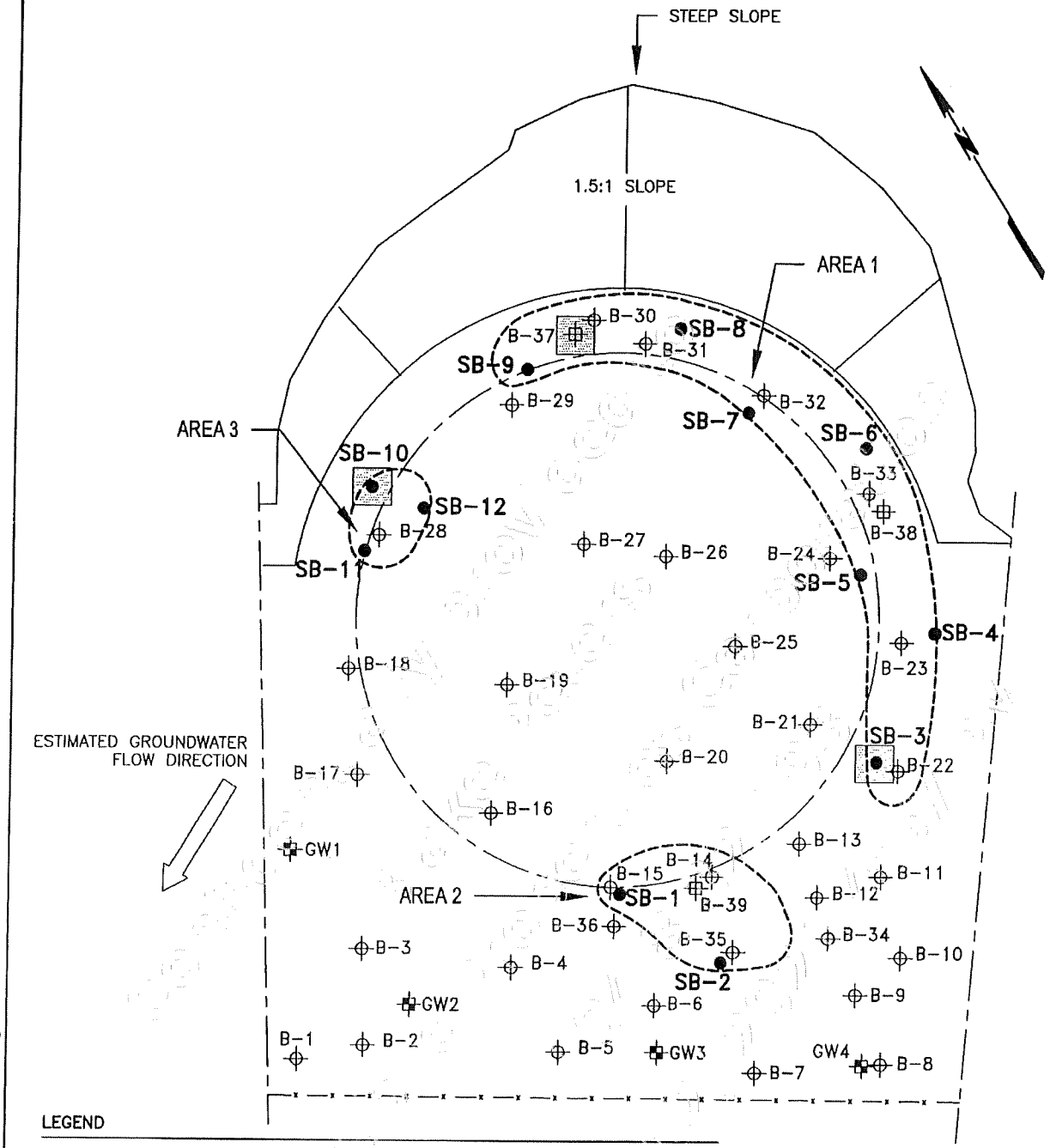
Closing

We thank you for this opportunity to work with you on this important project. Should you have any questions regarding this letter, please contact us at your convenience.

Sincerely,

Cornerstone Earth Group, Inc.

Kurt M. Soenen, P.E.
Senior Principal Engineer



LEGEND

- B-27 SOIL BORING LOCATION, 1990
- B-37 SOIL BORING LOCATION, AUGUST 1998
- GW1 SOIL BORING LOCATION WITH GROUNDWATER GRAB SAMPLE, AUGUST 1998
- SB-12 SOIL BORING LOCATION, DECEMBER 1999
- HOLDER FOOTPRINT
- AREA 1 AREAS OF SOIL INVESTIGATION
- PROPOSED AREA OF EXCAVATION OF TOP 3 FEET OF TEPH AFFECTED SOIL BASED ON AUGUST 1998 AND DECEMBER 1999 INVESTIGATIONS

0 80 160

APPROXIMATE SCALE IN FEET

SECOR International Incorporated

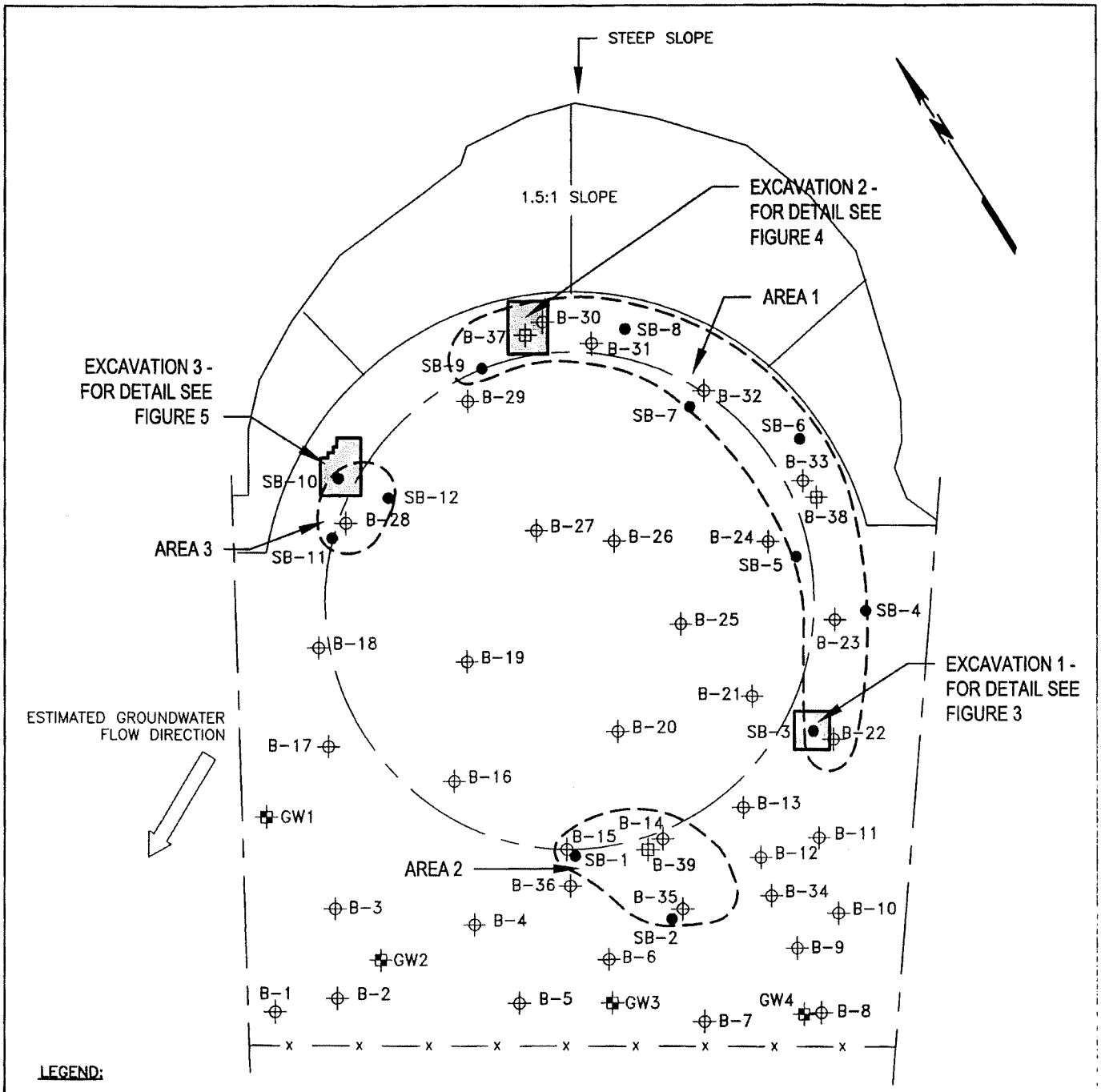
DRAWN	GEL
APPR	NN
DATE	29 JAN 00
JOB NO.	005.02817.002

FIGURE 2

PACIFIC GAS & ELECTRIC COMPANY BRICKYARD COVE PROPERTY
POINT RICHMOND, CALIFORNIA

SITE PLAN WITH SOIL BORING LOCATIONS

20011015.18265777 G:\PG&E\PG&E-RICHMOND\PG&EBRICKYARD-FIGURE-2.dwg



LEGEND:

- B-27 SOIL BORING LOCATION, 1990
- B-37 SOIL BORING LOCATION, AUGUST 1998
- GW1 SOIL BORING LOCATION WITH GROUNDWATER GRAB SAMPLE, AUGUST 1998
- SB-12 SOIL BORING LOCATION, DECEMBER 1999
- HOLDER FOOTPRINT
- AREA 1 AREAS OF SOIL INVESTIGATION
- EXTENT OF EXCAVATION AREA (JULY 2001)

SECOR International Incorporated

DRAWN	DP
APPR	NN
DATE	27 AUGUST 01
JOB NO.	005.02903.003

FIGURE 2

PACIFIC GAS & ELECTRIC COMPANY BRICKYARD COVE PROPERTY
POINT RICHMOND, CALIFORNIA

SITE LAYOUT PLAN SHOWING EXCAVATION LOCATIONS

20011015.11442252 G:\PG&E\PG&E-RICHMOND\PGEBY-101201.dwg