

ATTACHMENT C

City Council Hearing, June 20, 2006

Oak to Ninth Avenue Mixed Use Development Project

Response to Appeal Filed by Arthur Levy

A. Response to Attachment "D" Issues Raised

Each of the appeal issues are presented below in italics followed by a response.

1. *All issues raised in the letters attached as Attachment 'E' previously submitted by appellants, which are incorporated here by reference as though set forth in full.*

Response: Each letter attached to Mr. Levy's appeal is responded to below.

2. *All issues raised by or on behalf of appellants at the Planning Commission hearing on March 15-16, 2006.*

Response: The appellants are: Oakland Heritage Alliance, John Sutter, Rajiv Bhatia, East Bay Bicycle Coalition, League of Women Voters of Oakland, Waterfront Action, Coalition of Advocates for Lake Merritt, Sierra Club, Northern Alameda County Regional Group. The issues raised by the representatives from these groups who appeared at the Planning Commission hearing are summarized and responded to as follows:

a. Naomi Schiff/Oakland Heritage Alliance: Ms. Schiff asked for additional financial information regarding the preservation of the Ninth Avenue Terminal, stated that the use of tax credits and public/private funding sources would eliminate the financial shortfall identified with the preservation alternatives, and suggested that reuse of the building could be accomplished in a manner similar to the rehabilitation of the Torpedo Factory or Chelsea Piers.

In deciding that preservation of the Ninth Avenue Terminal beyond the 15,000 square feet proposed by the project sponsor was infeasible, the Planning Commission relied on, among other evidence in the record, the "Oak to 9th Mixed Use Project, Ninth Avenue Terminal Reuse Feasibility" report prepared by Economics & Planning Systems, Inc (Attachment D3 to the March 15, 2006 Planning Commission staff report), the Oak to 9th Mixed Use Project, Feasibility Analysis of Alternatives 1B, 2, 3 prepared by Economic & Planning Systems, Inc. (Attachment D4 to the March 15, 2006 Planning Commission staff report) the Ninth Avenue Pier Renovation, Structural Feasibility Study" prepared by Rutherford & Chekene Consulting Engineers (Attachment D1 to the March 15, 2006 Planning Commission staff report), and the Oak to Ninth Avenue Development, Feasibility Analysis for Shoreline Improvements and Pier Retrofit, prepared by Moffat & Nichol (Attachment D2 to the March 15, 2006 Planning Commission staff report). These reports contain detailed factual analysis that provides substantial evidence to support the Planning Commission's decision.

For example, the Economic & Planning Systems report on the Terminal reuse feasibility examined the feasibility of the Project proposal for reusing 15,000 square feet of the Terminal and five options for reusing 90,000 square feet of the Terminal. The report evaluated these six options in terms of consistency with the Estuary Policy Plan, market demand for the various proposed uses, and financial feasibility based on potential revenues and development costs, including the significant cost associated with the necessary seismic retrofit. The report found that all of the reuse options, including the proposed Project, result in a financial shortfall ranging from a low of \$16.5 million for the Project to a high of \$35.6 million. The report included detailed revenue projections, development costs, (breakdowns of hard and soft construction costs and tenant improvements) and annual debt service costs.

Additionally, the Economic & Planning Systems report on the feasibility of the alternatives proposed in the EIR included a full preservation of the Terminal alternative and a partial preservation and reuse option for the Terminal. This report examined the project alternatives in terms of projected revenues and costs as well as the annual maintenance costs and the fiscal impact on the City's annual operating costs and revenues. Detailed cost and revenue charts are included in both reports.

The structural feasibility report is based on life safety performance standards, an evaluation of the existing structural deficiencies, a detailed list of necessary upgrades, and twenty technical drawings. The shoreline improvements and pier retrofit feasibility analysis included a detailed technical assessment of existing site conditions, development of shoreline improvement methods for the site, technical figures, and supporting photographs.

Each of these reports was prepared by highly regarded experts with substantial experience in their technical fields and was based on specific, documented facts and accepted methods of analysis. No contradicting report or other testimony by economic, structural, or engineering experts has been submitted into the record. The objections to these reports do not raise or identify any specific errors, omissions, or other issues that would call into question the validity of these reports. The only contradictory statement was submitted by the Western Office, National Trust for Historic Preservation stating that with tax credits it would be possible to reuse a significant portion of the terminal. This letter, however, contained no factual analysis or other evidence specific to the Terminal, relying instead on unsupported conclusions. Consequently, the expert reports provide adequate substantial evidence to support the Planning Commission's certification of the EIR, adoption of the CEQA findings and statement of overriding benefits, and other decisions and recommendations. No additional information was necessary to support these Planning Commission actions.

The staff informed the Planning Commission and the public that it would have an independent review of the Economic & Planning Systems feasibility analyses prepared for the City Council review and decisions on the project. This independent review was proposed out of an abundance of caution to further address concerns by OHA, not because the staff questioned the analysis in the reports cited above.

In response to questions raised during the Planning Commission consideration of the Project and at the March 28, 2006 City Council hearing on the Project, three additional

documents were prepared in connection with the feasibility of preserving the Terminal. First, the PFM Group reviewed the Economic & Planning Systems reports and financial data from the project sponsors. (See the PFM Group memorandum to Dan Vanderprieem and Oakland Harbor Partners, dated June 1, 2006 and attached to the staff report).

PFM found the following: (a) even adjusting cost and revenues to remove costs such as retrofitting the pier and landscaping the open area, none of the alternatives for preserving the Terminal, including the Project, show a positive cash flow; (b) the amount of the annual losses associated with the alternatives increases with the increase in size and complexity of the alternatives; (c) the risk associated with the larger preservation alternatives are greater than those associated with the Project; (d) additional capital investment to eliminate loan debt service would reduce the Project to an infeasible rate of return; (e) the project sponsor's financial assumptions are reasonable given the long term nature of the Project and current financial conditions; and (f) the return on equity for the Project is in the lower quartile of the range of returns on equity for similar projects and the Project is a relatively high risk development.

Additionally, Economic & Planning Systems prepared a report entitled "Subsidization of the Chelsea Piers and the Torpedo Factory Adaptive Reuse Projects" dated May 2006 (attached to the staff report). This report shows that both the Chelsea Piers and Torpedo Factory projects have required substantial public subsidies. Moreover, these projects are substantially different from the Ninth Avenue Terminal in terms of market dynamics, construction costs, economics and allowable uses. Consequently, the projects do not serve as a feasible model for preservation of the Terminal.

Finally, Novogradac & Company, certified public accountants, reviewed the potential impact of federal rehabilitation tax credits and federal new market tax credits on the economic feasibility of the Project and alternatives in connection with preservation of the Terminal. Novogradac found that, even assuming best case conditions, the funding shortfall for the preservation alternatives ranges from \$19.6 million to \$28.9 million. Consequently, Novogradac concluded that "maintaining the Shed as is or reducing it down to the 1927 size of the building is not economically feasible with the use of federal Rehabilitation Tax Credits or New Market Tax Credits."

b. John Sutter: Mr. Sutter's testimony covered three main points: he asserted that the Project represents a 40% reduction in the open space set forth in the Estuary Policy Plan; he asserted that the Project would result in a wall of buildings along the water that would block views of the estuary; and he questioned why Measure DD funds were not being used by the City to create the parks on the project site.

As noted by Commissioner Boxer at the March 15-16 hearing, the Estuary Policy Plan does not contain any acreage requirements for open space. The Oak to Ninth Avenue Final EIR notes that Mr. Sutter is relying on potential open space acres used in the Estuary Policy Plan EIR for the purposes of analyzing the impacts of a potential buildout scenario under the Plan. (See Draft EIR p.IV.L-17, Table IV.L-2). The Estuary Policy Plan EIR does not change the Plan or establish standards under the Plan. The assumptions in the Estuary Policy Plan EIR have no

regulatory effect and it is not appropriate to evaluate the Project's consistency with the Estuary Policy Plan against analytical assumptions in the Plan EIR.

With respect to views of the Estuary, currently most of the Project site is not open to the public and existing uses block views of, and access to, the Estuary. The Project will provide continuous public open space along the water's edge of the site, opening views of and access to this area of the Estuary. No buildings will be located along the water's edge. Additionally, the project site plan shows how the new streets will create views through the site to the water. Draft EIR pp. IV.K-30-34 provides additional analysis and a visual simulation of the site's internal view corridors.

The open space improvements installed as part of the Project will be the responsibility of the project sponsor and maintenance of these improvements will be the responsibility of future Project residents and occupants. The Measure DD funds will be available for the City to use for other improvements in the Estuary area. The Measure DD funds (approximately 18 million) would be insufficient to install and maintain the improvements planned for the project.

c. Sandra Threlfall/Waterfront Action: Ms. Threlfall testified that the State Lands letter submitted on the Draft EIR asked the City to raise the open space standard for the site calling for a regional standard instead of a local-serving standard.

As explained in the Final EIR, the City's OSCAR includes standards for parkland and for local-serving parks in order for the City to evaluate whether Oakland residents are properly served by open space and recreational facilities. The evaluation of the Project in light of these standards is not a determination that the Project will provide only local-serving parks. With almost 30 acres of open space, the Project open space will exceed the OSCAR's definition of a region-serving park (25-acres). Moreover, given the location of the open space along the Estuary and the inclusion of the Bay Trail, the Project is expected to attract visitors from throughout the region, thereby serving public trust purposes.

d. James Vann/ Coalition for Advocates for Lake Merritt: Mr. Vann requested that the Commission maximize open space on the site, stated that he believes the Project will block vistas from the Embarcadero to the water, that open space will be limited to small areas along the water, and that the plan does invite people into the site.

The Project will provide almost 30 acres of new and existing open space and trails throughout the site and primarily along the water's edge. The park areas are significant, including the 9.7 acre Shoreline Park, the 3.12 acre Gateway Park, the 2.30 acre South Park, the 5.52 acre Channel Park and the existing 7.7 acre Estuary Park. Approximately 44 percent of the Project site will be devoted to open space. With trails for pedestrians and bikes, parking, and recreational facilities, the Project achieves the Estuary Policy Plan goal of providing significant new open space along the Estuary for all Oakland residents.

Currently, no vistas exist from the Embarcadero Roadway through the site to the Estuary, thus the Project will not block any existing vistas. (Draft EIR, IV.K-1-35.) New views

of the Estuary will be created along the entire water's edge of the site and from the internal Project streets. The Project site will be fully accessible to the public. The new open space, the Estuary location, the trails including an extension of the Bay Trail, the recreational uses, the marinas, and the commercial uses will collectively draw the public into the site.

e. Arthur Levy: Mr. Levy asserted that the financial feasibility studies prepared by Economic & Planning Systems were unsupported and the financial data not provided. Additionally, Mr. Levy stated that the Planning Department had not completed its review of the financial feasibility studies, because it had asked for an independent review of the studies.

As described above, the financial feasibility studies prepared by Economic & Planning Systems contained substantial supporting data, including financial data. (See Response A.2) The Planning staff determined that these studies provided sufficient substantial evidence to support the Planning Commission's actions on the EIR and the Project approvals. The independent review has been undertaken to provide an additional measure of certainty in response to concerns raised by the public. (See Response A.2 for a summary of the report prepared by PFM)

f. Helen Hutchison/League of Women Voters: Ms. Hutchison asked that City Council certify the EIR instead of the Planning Commission, asserted that the Project would reduce open space called for in the Estuary Policy Plan, and requested that the City use Measure DD money to develop the parks now and not according to the Project phasing plan.

Under the Oakland Municipal Code (Oakland Municipal Code section 17.158) both the Planning Commission and the City Council must certify the EIR in connection with the project approval actions taken by each body. As explained above, the Estuary Policy Plan does not contain an acreage requirement for parks and open space, thus the Project does not result in a reduction of open space under the Estuary Policy Plan. The potential use of Measure DD funds is addressed above. The timing of developing and improving the parks on the site depends on remediation activities, termination of the leases for the existing uses on the site, and the implementation of the shoreline improvements. (Final EIR pp. V-16-17.) Consequently, it is not possible to immediately implement the park improvements.

g. Rajiv Bhatia and students: Dr. Bhatia and his students informed the Commission that they are preparing a health impact assessment for the project. The issues raised and statements made by this group at the hearing included: the opportunity for the project to promote health through a site design that encourages the growth of community ties and social cohesion; the statement that Project would decrease the amount of open space proposed in the Estuary Policy Plan thereby causing adverse health impacts and reducing the contact that Oakland residents will have with the natural landscape and the waterfront; the Project should increase the accessibility, visibility, and safe transportation to the site; increase the number of low and moderate income residents living adjacent to the open space, which would address racial and ethnic disparities and the rate of diabetes, hypertension and obesity; the EIR did not adequately address pedestrian safety and the Project will cause more pedestrian injuries; the City should require mitigations such as "crosswalk treatments, sidewalk treatments and roadway reconfigurations;" the Project location near the I-880 highway will result in air and noise

impacts; the pedestrian injuries associated with the Project will result in medical and lost productivity costs of \$3 to \$13 million annually; there should be a democratic planning process for the Project; the City needs to ensure that the housing in the Project is not segregated; the City has not considered the relationship between affordable housing and the environment.

Attached is a memorandum prepared by ENVIRON, International Corporation (entitled "Evaluation of U. C. Berkeley Health Impact Assessment Recommendations for the Oak to Ninth Project, dated May 26, 2006) which responds to the letters submitted to the City from Rajiv Bhatia and addresses many of the issues covered by these comments. Generally, the conclusions stated above about the Project impacts are unsubstantiated and based on inaccurate information about the Project.

For example, as noted in other responses, the Project will substantially increase open space in the City by approximately 20 acres and will open this area of the Oakland waterfront to the public. All the potential health benefits associated with open space will result from implementation of the Project. Additionally, the open space and commercial areas will promote social contact and cohesion and provide the health benefits associated with those results. In terms of transportation, the Project will provide new access to transit through the extension of Line 11 to the site and through a project shuttle service (Draft Transportation Demand Management Plan, Appendix A, Final EIR). Thus, the health benefits of these transportation features will result from the implementation of the Project. Parcels F and G will be made available to the Oakland Redevelopment Agency for the development of between 420-465 units of affordable housing, which will promote the health benefits of providing new affordable housing.

As demonstrated in the Draft EIR (pp. IV.B-55-57) and the Final EIR (pp. VI-145-146), the EIR addressed the potential for pedestrian safety impacts. This information and the attached memorandum from Fehr and Peers demonstrate that the pedestrian safety consequences claimed by Dr. Bhatia and his students cannot be substantiated and are not based on accepted methodologies used by traffic engineers. Accidents rates in the City have been reviewed and there is no correlation to the Project traffic. The speakers did not identify a credible methodology for linking increased traffic from the Project with a rate of increase in pedestrian accidents at the intersections affected by the project. The pedestrian safety mitigations suggested by the speakers (cross walk treatments, sidewalk treatments, and roadway reconfigurations) are vague and not tied to any particular intersection or documented Project impacts.

The Project site will be designed to have appropriate crosswalks, sidewalks, and roadway configurations that comply with City regulations and safety standards. The Project will provide a substantial pedestrian benefit by virtue of the new trails along the waterfront and through the site. Additionally, the Project mitigation measures require installation of new traffic signals at certain intersections (See Mitigation Monitoring and Reporting Program attached to the staff report), require maintenance of the fence along the Embarcadero that limits access to the railroad tracks adjacent to the Project site, and require installation of bicycle and pedestrian warning signage at the existing at-grade track crossing. In these ways, the Project will benefit pedestrian safety.

The noise and air quality impacts of the Project have been fully examined in the Draft EIR (sections IV-C and IV G) and in the Final EIR. Both the air quality and the noise sections in the Draft EIR considered the Project site location near I-880 in the analyses. The air quality analysis examined the potential health impacts of diesel emissions from nearby sources, including I-880, and found that these potential impacts would not be significant given the new regulations governing diesel emission, the long-term chronic exposure necessary for health risks, and the wind conditions in the Project area. The additional air quality analysis prepared by ENVIRON, which considered the potential impacts from non-diesel emission based on wind patterns, further demonstrates that no adverse air quality health impacts are expected.

Outdoor noise from I-880 for uses located closest to the freeway is acknowledged in the Draft EIR as a significant unavoidable impact. The units closest to the freeway, however, will be designed to comply with indoor noise standards (Mitigation Measure G.3a) and open space areas along the waterfront on the site will be located a substantial distance from the freeway and buffered by intervening buildings. Additionally, the Oak to Ninth Design Guidelines call for buildings along the Embarcadero frontage to maintain a 25-foot setback and provide landscaping to create a noise buffer (Design Guidelines p. 31). These requirements will also serve to further protect against any air quality or noise impacts from the freeway.

The City has undertaken an extensive public outreach process in connection with its consideration of this Project. (See Final EIR p. V-4.) The Landmarks Preservation Advisory Board, the Parks and Recreation Advisory Commission, the Planning Commission and the City Council have held multiple hearings on the Project. Hundreds of City residents and business owners have participated in these meetings and public hearings and have influenced the Project. Thus, the benefits associated with a democratic process have been realized.

The comments by this group about affordable housing issue appear to be based on the assumption that the Project will not provide affordable housing. Parcels F and G have been identified for the affordable housing units. These units will be part of the Oak to Ninth community and adverse "segregation" impacts are not expected. Additionally, the Project will generate substantial tax increment, a portion of which the Redevelopment Agency will be required to use for affordable housing in the larger redevelopment plan area.

3. *The Planning Commission otherwise failed to analyze the issues, address inadequacies in the project, and consider alternatives.*

Response: Although this allegation does not specify the issues, inadequacies, and alternatives that the Planning Commission failed to analyze, address, and consider, the administrative record demonstrates that the Planning Commission reviewed and considered substantial evidence with respect to all of the project issues and considered a broad range of alternatives prior to taking any action on the Project.

The following summarizes the primary sources of information before the Planning Commission: (1) the March 15, 2006 staff report, which reviewed the Project approvals, public outreach, consistency of the Project with City land use plans and regulations, the vesting tentative tract map, the preliminary development plan, the development agreement, environmental issues, the consultant studies prepared by Rutherford & Chekene, Moffat &

Nichol, and Economic & Planning Systems, recommendations from the Parks and Recreation Advisory Commission, recommendations from the Landmarks Preservation Advisory Board, and “key issues” including the vision of the waterfront and historical and cultural issues; (2) attachments to the March 15, 2006 staff report, including the January 25, 2006 staff report, the Project phasing plan, correspondence about the Project, the mitigation monitoring reporting program, conditions of approval, Project and CEQA findings, the development agreement, consultant studies, the various ordinances and resolutions relating to the Project approval, and the preliminary development plan and tentative tract map; and (3) the Draft and Final EIR, which extensively covered the environmental issues associated with the Project (land use, transportation, air quality, noise, hydrology and water quality, geology, hazardous materials, biological resources, population, housing, and employment, visual quality and shadows, public services, and utilities), mitigation measures and Project alternatives.

Additionally, the Planning Commission held several public hearings on the Project including a hearing on September 28, 2005 regarding the Draft EIR, design review hearings on December 14, 2005 and January 25, 2006, a site visit on December 3, 2005 and the hearing on March 16, 2006 at which it heard from over 60 members of the public. The Commission considered the five alternatives examined in the EIR (Draft EIR pp. V-1-67), an additional five alternatives for reusing the Ninth Avenue Terminal (Ninth Avenue Terminal Reuse Feasibility Report, Economic & Planning Systems, Inc.), as well as alternatives suggested during Project hearings. Thus, it is apparent that the issues associated with the Project and Project alternatives have received extraordinary attention and analysis.

4. *The actions and recommendations of the Planning Commission at the hearing on March 15-16, 2006 were premature and violated CEQA and the Oakland City Code because the record before the Planning Commission remained incomplete, including but not limited to as follows: (a) the proposed Development Agreement contained blanks and remained incomplete as to various material terms; and (b) the Planning Department had not completed its analysis of feasibility and mitigation issues under CEQA and had not yet received all evidence relating to those issues.*

Response: All of the Planning Commission actions and recommendations were fully supported by the administrative record. With respect to the Development Agreement, the Planning Commission's authority is limited to a recommendation to the City Council, which is vested with the authority to approve development agreements. The Planning Commission had available the full text of the body of the Agreement. Several Exhibits to the Development Agreement were not final at the time of the Planning Commission hearing. Some of these Exhibits cannot be finalized until the Project approvals are final (i.e., the site plan, the development parcels, the phasing plan, the final conditions of approval and mitigation measures, the final project approvals, the Ninth Avenue Terminal Shed Building Operation and Maintenance), some are official requirements and regulations (City development fees and the Port Ordinance No. 3694), and some depended on further negotiations with other agencies (Affordable Housing and Off site Sewer Improvements). For the items that required further negotiations, the Commission was informed of the status of those negotiations and the issues to be resolved. Thus, the Planning Commission was fully informed of the content of the

Development Agreement and had all the appropriate documentation and information related to the Development Agreement in making its recommendation.

Additionally, the Planning Commission had before it ample documentation in the record to consider the required factors as set forth in Municipal Code Chapter 17.138.060 (i.e., the project plans, information about the area relating to retention of flexibility, the traffic, parking, public service, visual, and other impacts of the project, the provisions for land that will be publicly accessible, the project's economic benefits to Oakland, the project's contribution to meeting housing needs, and other relevant factors). The Development Agreement Exhibits that remained to be finalized following the Planning Commission hearing were not necessary for the Commission to consider and make a recommendation based on these factors or the Commission had sufficient information about the content of these Exhibits to make the appropriate findings. Moreover, nothing in City or state law prohibits additions or modifications to the Development Agreement at any time prior to the City Council action.

The Planning Department staff presented substantial evidence to the Planning Commission to support the Commission's decisions regarding the feasibility of alternatives and mitigation measures. As described above, in addition to other evidence, the record contained four expert reports (two prepared by Economic & Planning Systems, one prepared by Rutherford & Chekene, and one prepared by Moffat & Nichol) relating to the feasibility of various project alternatives. No credible testimony or documentary evidence was presented to the Commission contradicting or invalidating the information and analysis in these expert reports. Thus, the Commission properly relied on these reports in reaching its decisions and recommendations.

The staff decision to seek a review of the Economic & Planning Systems report was intended to provide additional assurance to the City that the feasibility of the Project alternatives had been thoroughly reviewed. At the time of the Planning Commission hearing, the staff had confidence in the Economic & Planning Systems reports, had received no credible evidence suggesting that the reports were unreliable, and recommended that the Commission base its decisions on these reports. Given that certification of the EIR and all of the Project approval decisions would be considered and ultimately determined by the City Council, seeking additional information to further inform the Council's decisions and confirm the sound basis of the staff recommendations, particularly given the concerns raised by the appellants, was appropriate and prudent. No provisions of CEQA or the Oakland Municipal Code prevent this cautious course of action.

5. *The CEQA Findings and Statement of Overriding Considerations adopted by the Planning Commission at the hearing on March 15-16, 2006 were not adequately supported by the evidence before the Planning Commission as to the infeasibility of project alternatives and mitigation measures.*

Response: The appellants do not identify any specific inadequacy in the findings. The CEQA findings adopted by the Planning Commission regarding the infeasibility of Project alternatives and mitigation measures contain substantial factual evidence supported by the reports described above, all of the information in the Draft EIR and Final EIR, information contained in the staff report and attachments, including the "Oak to 9th Mixed Use Project, Fiscal Impact Analysis" prepared by Economic & Planning Systems, information in the Project

applications, testimony presented at the public hearings on the Project, applicable City plans and policies, and all other evidence constituting the administrative record for the Project. Thus, the facts supporting the findings constitute substantial evidence and are legally adequate.

6. *The notice and agenda for the Planning Commission hearing on March 15-16, 2006 were deficient and violated Government Code sections 54950 et seq., CEQA and the Oakland City Code.*

Response: The notice for the Planning Commission hearing included the following information: (1) the time and date of hearing; (2) the hearing location; (3) the actions to be considered at the hearing; (4) the Project description and approvals required; (5) the publication of the Final EIR; (6) notice that issues raised in court may be limited to those raised at the hearing or in writing before the hearing; (7) the name and phone number of the project planner, Margaret Stanzione and (8) the address for written comments.

The agenda for the Planning Commission hearing included: (1) the date, time, and location of the hearing; (2) the location of the Project; (3) the Project description; (4) the identity of the applicant and contact information for the applicant; (5) the land owner; (6) the case file numbers; (7) the permits and approvals required; (8) the general plan and zoning designations; (9) the publication date for the Final EIR; (10) the historic status of the Ninth Avenue Terminal; (11) the service delivery district; (12) the City Council district; (13) the proposed actions of the Planning Commission; and other general information regarding the conduct of the hearing.

The Government Code, CEQA, and the Oakland Planning Code do not require any additional information about the Project or the hearing. Thus, the hearing notice and agenda were adequate.

7. *All issues raised by letters and speakers relating to the Planning Commission hearing on March 15-16, 2006.*

Response: Issues raised by letters sent to and speakers at the Planning Commission hearing in addition to the issues outlined above under item 2 include generally fall into two categories: (a) support for the Project based on new housing and job opportunities, economic benefits of the project to the City, the revitalization of this area of Oakland and the Project's positive impact on surrounding areas, the provision of new open space and trails, and the remediation of the site, among other benefits; and (b) requests for affordable housing to be included in the Project, which have been responded to through the agreement between the Project sponsor and the Redevelopment Agency as set forth in the Development Agreement.

8. *All issues raised by written comments on the Draft Environmental Impact Report.*

Response: The Final EIR contains comprehensive responses to all the comments received on the Draft EIR.

9. *All issues raised by written comments on the Final Environmental Impact Report.*

Response: Any comments received on the Final EIR have been addressed in the EIR Addendum.

10. *The City's appeal procedures are illegal under CEQA and other state laws to the extent the City interprets or applies them to interfere with the administrative integrity of the Planning Commission's full and fair public determination of CEQA issues by allowing the project proponent and/or City to supplement the record with post-hearing evidence that was not before the public or the Commission at the time of the Planning Commission.*

Response: This objection misunderstands the nature of the administrative process. There is no prohibition in City or state law against supplementing the administrative record after a consideration of a project by an administrative body and before final action is taken by the legislative body. To the contrary, the ability to add information to the record as a project proceeds through the approval process, in response to concerns raised or otherwise, is a fundamental aspect of the administrative process.

In this case, both the Planning Commission and the City Council must certify the EIR. Thus, information regarding CEQA issues may be added to the record at the City Council hearing. Moreover, as described above, the findings of the Planning Commission were fully supported by substantial evidence in the record and no further evidence was necessary for the Commission's EIR certification or adoption of CEQA findings.

11. *The City's appeal procedures violate the statutory right of appeal to the elected body under Public Resources Code section 21151(c) by imposing unreasonable and onerous filing fees and by imposing unreasonable and onerous documentation requirements.*

Response: The City's filing fee of \$912.27 is appropriate given the amount of staff time and administrative costs that must be spent in responding to the appeal. (Although there are eight appellants, the City only charged one filing fee.) The City's actual costs of responding to the appeal far exceed the fees charged to appellants. Moreover, the fee has not prevented eight appellants from filing this appeal. The appellants have not identified how the documentation requirements are unreasonable and onerous. The documentation requirements (all supporting evidence for the issues raised) allow the City to fully consider and respond to the issues that are raised in any appeal. Additionally, the appellants may submit documentation at any time during the appeal process. Thus, the documentation requirements are not unreasonable or onerous.

B. Response to Attachment E

1. Letter from John Sutter to Margaret Stanzone, October 14, 2005:

This letter was responded to in the Final EIR

2. Letter from Naomi Schiff to Margaret Stanzone, October 24, 2006:

This letter was responded to in the Final EIR. Since this letter was submitted to the City, additional information has been prepared regarding the feasibility of preserving the Ninth Avenue Terminal building. This information includes: the reports referred to in Response A.2 above; the May 17, 2006 letter from Novogradac & Company to Lisa Rhine regarding the impact of rehabilitation tax credits and new markets tax credits on the project feasibility; the May 2006 Economic & Planning Systems report entitled "Subsidization of the Chelsea Piers and the Torpedo Factory Adaptive Reuse Projects," and the June 1, 2006 memorandum prepared by the

PFM Group. These reports document the issues and costs associated with a variety of preservation scenarios.

3. First Letter from Naomi Schiff to Colland Jang , March 14, 2006:

a. Response to OHA October 24, 2006 letter on the Draft EIR: Ms. Schiff states that her comments on the EIR are not adequately responded to in the Final EIR, but does not identify any specific deficiency. Staff believes that the responses to this letter contained in the Final EIR fulfill the requirements of CEQA by providing reasoned, good faith analysis of the environmental issues raised in the letter.

b. Preservation of Terminal Not Included as a Mitigation Measure: Ms. Schiff complains that the EIR mitigation measures do not consider alternative preservation scenarios for the Ninth Avenue Terminal. Various proposals for the preservation of the Ninth Avenue Terminal are considered in the project alternatives discussion in the EIR. When a project would result in a significant environmental impact, CEQA permits an agency to consider "feasible alternative or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment." (CEQA Guidelines section 15021(a)(2).) Since preservation of additional portions of the Ninth Avenue Terminal would substantially change the Project, it is appropriate for these to be considered as project alternatives rather than mitigation measures. Moreover, there is no requirement in CEQA for the consideration of a proposal in both the mitigation and alternatives sections. As noted above, several expert reports have been prepared addressing the feasibility of the preservation alternatives and these reports are part of the administrative record for this project. The EIR itself need not address the feasibility of project alternatives. (San Franciscans Upholding the Downtown Plan v. City of San Francisco, 102 Cal.App.4th 656 (2002))

c. General Plan Amendment: Ms. Schiff argues that the need to amend the General Plan is a significant impact that is not mitigated through the amendments themselves. The impact dealt with in Impact A.2 is only the Project's potential conflict with certain General Plan policies. Thus, amendment of those policies to express the City Council's balancing of various public policy concerns and determinations with respect to the Project's land uses and density is appropriate to resolve the potential conflict. Mitigation measures A.2a and A.2b do not purport to provide mitigation for the physical impacts associated with the proposed General Plan and zoning amendments. The physical environmental impacts associated with these potential conflicts are covered in the appropriate sections of the EIR. With respect to the other impacts identified by Ms. Schiff, the evidence in the EIR demonstrates that these potential impacts (A.3, E.7, K.1, K.2, K.5) are not significant under the criteria established in the EIR or are mitigated to a less than significant level.

d. Pedestrian Impacts: Ms Schiff states that the EIR fails to identify and analyze pedestrian safety impacts. In fact the Draft EIR includes a significance criteria for pedestrian safety impacts (p. IV.B-15) and a discussion of pedestrian safety impacts (p. IV.B-55). Additionally, the Final EIR responds to the pedestrian safety concerns associated with the railroad tracks (p.V.14). Also, see the response below to item B.6.

e. Traffic Stream Impacts: Ms. Schiff disagrees with the EIR conclusions that the Project would not have a significant impact based on potential conflicts among traffic streams. As discussed in the Draft EIR (pp. IV.B-57 -62), the Project's compliance with accepted design standards for streets, intersections, signals, crosswalks, sidewalks, curb ramps and other design elements ensure that the multiple streams are managed appropriately. Additional requirements were incorporated in the Final EIR with respect to the railroad crossing (Final EIR p. V-14). Given this combination of improvements, including the substantial new provisions for pedestrian and bicycle access to the site, the Project will not adversely affect pedestrian safety or increase existing safety hazards.

f. Parking: Ms. Schiff states that the Summary of Impacts and Mitigation Measures fails to identify and analyze the impact of demand for parking in the Project. The Draft EIR (pp. IV.B-70-75) extensively discusses the parking demand associated with the Project. This analysis examines the demand from commercial uses, visitors, and residential uses. Additionally, the TDMP included in the Final EIR contains numerous strategies that will reduce parking demand, including increased transit access to the site, bicycle facilities on site, and parking management policies.

g. Geologic Impacts: Ms. Schiff states that the analyses for certain geologic impacts are deferred. The Draft EIR thoroughly analyzes the potential geologic impacts of the Project (Draft EIR pp. IV.F-1-23), including seismic impacts, liquefaction, settlement, subsidence, erosion, and other soil conditions. Consequently, the EIR has not deferred the study of these impacts. The required mitigations incorporate standard industry studies, practices, and techniques that have been shown to reduce potential geologic impacts. All of the mitigation measures contain performance standards and mandatory requirements. The finalization of various techniques necessarily depends on the final designs for the Project components. This type of mitigation has been validated by the courts. Thus, the EIR for this Project does not inappropriately defer impact assessment or mitigation requirements.

h. Mitigation Measures: Ms. Schiff states that the mitigation measures for impacts E.1, E.2, I.2, I.3, I.4 and I. 5 defer the study of the impacts and fails to assess the need for Army Corps of Engineers approval. Impacts E.1 and E.2 are archaeological and paleontological resources. The potential for these impacts is fully documented in the Draft EIR (pp.IV.E-1-25). Additionally, based on a determination about the potential significance of these impacts, comprehensive mitigation measures are provided. Implementation of some aspects of the mitigation necessarily depends on Project construction activities and the discovery of any significant resources. It is not feasible to implement these mitigations or know the contents of any such discoveries prior to the start of Project construction. Nonetheless, the possibility of such discoveries is documented and appropriate protective measures are required through the MMRP. Consequently, the EIR does not inappropriately defer analysis or required mitigation.

Impacts I.2, I.3, I.4 and I. 5 are also fully documented and analyzed in the Draft EIR (pp. IV.I-21-31). The mitigation measures for these potentially significant impacts set forth detailed requirements for mitigation and additional regulatory approvals. The mitigation measures contain specific requirements, performance standards, compliance with regulatory requirements, and are mandatory. Some aspects of the mitigation measures depend on site conditions at the time of construction (e.g. the discovery of bats in any buildings to be

demolished) and detailed construction plans, but these conditions do not render the mitigation measures inadequate under CEQA. Consequently, this impact analysis and mitigations comply with CEQA requirements, do not defer the study of these potential impacts, and are not "contingent." With respect to the Corps permit, the Draft EIR determined that a Corps permit would be required for the Project (Draft EIR p. IV.I-23).

i. Assessment of Impacts to the Ninth Avenue Terminal: Ms. Schiff states that it is premature to evaluate the Project's impact on the Ninth Avenue Terminal based on the preliminary development plan and asks for deferral of environmental review of the Project's impacts until a "definitive development plan" is provided. Under CEQA, project impacts must be assessed at the earliest possible stage. Deferral of studying the impact on the Ninth Avenue Terminal in light of the fact that the developer has a definitive proposal for the Terminal would violate CEQA. The preliminary development plan contains sufficient information to evaluate all of the Project's potential impacts as demonstrated by the detailed analysis contained in the Project EIR. Additionally, the EIR and the various reports prepared by Economic & Planning Systems have examined a wide range of options for reusing the Terminal. This analysis is not dependent on final architectural and other technical plans for the individual Project buildings.

j. Tidelands Trust: Ms. Schiff states that the Project and the alternatives are unlawful because the Project site is encumbered by the tidelands trust. The Oak to Ninth Avenue District Exchange Act, SB 1622, authorizes the State Lands Commission and the Port to enter into an exchange agreement to effectuate the exchange and sale of the property. Proposing a project and local approval of a project contingent on completion of an exchange and sale agreement are not unlawful acts. The City has the authority to grant all the project approvals within its jurisdiction. Implementation of the project will require that the sponsors are successful in obtaining all other relevant public agency approvals. The Development Agreement requires the project sponsor to obtain all necessary governmental approvals for the Project.

4. Second letter from Naomi Schiff to Colland Jang, March 14, 2006:

a. March 15, 2006 hearing notice: There is no requirement in local and state law to notice the adoption of CEQA findings.

b. March 16, 2006 agenda: The agenda included certification of the EIR as one of the actions to be taken by the Commission. The CEQA findings are adopted in connection with specific project entitlements and are not adopted independent of an entitlement. Consequently, there are no local or state requirements to separately list the approval of CEQA findings on the Commission agenda.

c. March 16, 2006 hearing notice – MMRP: There is no requirement in local or state law to notice the adoption of an MMRP.

d. March 16, 2006 agenda – MMRP: There is no requirement in local or state law to list the adoption of an MMRP on the Commission agenda.

e. CEQA Findings: The CEQA findings numbers 23-34 properly rely on expert reports in the record which, as outlined above in Response A.2, contain facts, credible evidence, and other supporting documentation and analysis to support the Commission's findings

regarding the feasibility of Project alternatives, including alternatives for reusing the Ninth Avenue Terminal. Ms. Schiff states the following specific claims with respect to the consultant reports and other evidence in the record (specific responses follow each claim):

(1) The reports and evidence are based on unwarranted and unreasonable cost assumptions that are unsubstantiated.

Response: The reports relied on have been prepared by recognized experts and have not been contradicted by any other evidence in the record. To the contrary, the review of the Economic & Planning Systems reports prepared by the PFM Group confirms the methodology and conclusions reached by EPS.

(2) The reports and evidence are contradicted by a preliminary feasibility study previously prepared for the Port of Oakland by the project sponsor.

Response: The feasibility study referred to in this comment was prepared based on a significantly different project description, different market conditions, and the assumption that significant public financing, subsidies, and grants would be needed for the Project. Thus, the 2002 Preliminary Feasibility Study is not applicable to the current Project.

(3) The reports and evidence are contradicted by an appraisal report obtained by the Port.

Response: It is not clear how the EPS and other evidence in the record are contradicted by the appraisal. The appraisal was prepared for a different purpose than evaluating the Project alternatives, assumed that the land was fully remediated, and used cost figures that may no longer apply to the current Project proposal.

(4) The reports and evidence fail to establish the infeasibility of preserving and reusing all or at least the 1920's portion of the historic Ninth Avenue Terminal.

Response: See Response A.2 above, which describes the factual and analytical bases for the finding that various preservation alternatives are infeasible.

(5) The reports and evidence fail to take account of alternative sources of funding preserving and reusing all or at least the 1920's portion of the Terminal including historic and new market credits and other sources of public and private funding.

Response: See Response A.2 above, which describes the analysis prepared by Novogradac & Company finding that the use historic tax credits and new market credits would not make the preservation of the Terminal or the 1920's portion financially feasible. Moreover, Economic & Planning Systems further investigated two other preservation projects, the Chelsea Piers project and the Torpedo Factory project, and found that both of these projects have required significant public subsidies. All of the expert investigation and reports have confirmed that preservation of the Terminal is not feasible without significant public subsidies.

(6) The reports and evidence fail to establish the infeasibility of the project alternatives identified in the DEIR and the FEIR.

Response: See Response A.2 above.

(7) The reports and evidence fail to take account of alternative sources of funding for realizing the project alternatives, including bond funding and other sources of public and private funding.

Response: See response to item (5) above. To implement one of the preservative alternatives would require significant public funding.

f. Independent and unbiased evaluation: Ms. Schiff states that the City has not conducted an independent and unbiased evaluation of the environmental issues or the feasibility of alternatives. City staff directed the preparation of the EIR. Both City staff and decision makers have reviewed the contents the EIR. The EIR conclusions reflect the independent judgment of the City based on all of the evidence in the record. Given the number of public hearings on the Project, this EIR has received extensive public scrutiny. The feasibility analysis prepared by Economic & Planning Systems was scrutinized by the PFM Group at the direction of City staff.

g. Development Agreement and CEQA: Ms. Schiff states that the Development Agreement violates CEQA and certain Civil Code sections because it provides the City with indemnification against CEQA violations and thus exonerates the City from compliance with its lead agency responsibilities. The comment misunderstands the nature of the indemnity provisions. With respect to the Project approvals, these provisions provide that the Developer will indemnify the City for the "Losses arising out of, related to, or in connections with" any City approval. "Losses" generally refers to various costs and other financial liabilities (see definition in Development Agreement), most likely the costs any litigation associated with such approvals. A private indemnity agreement cannot relieve a government agency of its obligations under CEQA and nothing in these provisions purports to or in fact exonerates the City from compliance with CEQA.

h. Development Agreement Unlawful: Ms. Schiff states that the Development Agreement does not comply with the Government Code sections and Oakland Municipal Code sections governing Development Agreements. To the contrary, the Development Agreement meets all of the requirements in the cited Code sections including proper notice and findings as set forth in the General Findings, Exhibit D to the staff report.

i. Development Agreement Unlawful: Ms. Schiff states that the Development Agreement is unlawful because the project sponsor does have a legal or equitable interest in the property. Recital H in the Development Agreement addresses the basis for meeting this requirement given the Option Agreement between the Port and the project sponsor. Additionally, section 3.1 of the Agreement provides that the Agreement shall be effective with respect to the Development Parcels as of either the Effective Date of the Agreement or the date that the Developer provides evidence that it has acquired legal or equitable interest in the property.

j. Federal Approval: Ms. Schiff states that the Project will require federal approvals under section 106 of the National Historic Preservation Act. If the Project requires federal approvals, those approvals may trigger a requirement for a section 106 review. This determination cannot be made until a federal permit review is initiated.

k. Development Agreement/Tidelands Trust: Ms. Schiff states that the Development Agreement is infeasible and unlawful because of the tidelands trust areas on the project site. The tidelands trust will be removed from the property before the project sponsor could acquire title. Consequently, pursuant to the terms of the Development Agreement, it will apply to the development parcels after the trust has been removed.

l. Unlawful approvals/tidelands trust: Ms. Schiff states that the development approvals are unlawful because of the encumbrance of the project site with the tidelands trust. The tidelands trust does not prevent the City from acting within its lawful authority to regulate land use and approve projects. Implementation of the Project will require that the tidelands trust be removed from portions of the site.

5. Letter from Waterfront Action to Margaret Stanzione, dated October 23, 2006.

This letter was responded to in the Final EIR pp.VI-73-78.

6. Letter from Rajiv Bhatia to Colland Jang, dated March 3, 2006.

This letter presents Dr. Bhatia's position that the Project will result in pedestrian injuries. Comments in the letter are addressed by information in the Draft EIR, the Final EIR, the EIR Addendum, and the attached memorandum prepared by Fehr and Peers. The following points summarize the response to this letter:

a. Dr. Bhatia makes numerous unsupported statements or overstates the relationship between variables. Most notably, Dr. Bhatia presents no evidence to support his assertion of a direct correlation between an increase in traffic from a specific development and an increase in pedestrian injuries throughout the City. Fehr and Peers has reviewed pedestrian accidents rates and found no correlation with the Project traffic.

b. From a review of the literature cited in this letter, it is clear that a host of factors influence pedestrian safety. These factors include the physical configuration of an intersection, the availability of crosswalks and medians, pedestrian signals, surrounding land uses, on-street parking patterns, travel speed, traffic signalization, the number of pedestrians, time of day, lighting conditions, motorist behavior, pedestrian behavior and pedestrian demographics. Dr. Bhatia's discussion of his formula for calculation of impacts fails to account for any of these factors and does not comport with generally accepted methodologies used by the traffic engineers. Thus, the letter's discussion of this issue is not reliable.

c. Fehr and Peers conducted a review of the available articles cited by Dr. Bhatia in his letter and found that none of the articles provided any scientific basis for a direct correlation between pedestrian injuries and increased traffic from a development project at a specific location. It appears that many of the statements in Dr. Bhatia's letter with respect to the findings in the scientific literature have been taken out of context.

d. The USDHHS standards quoted by Dr. Bhatia do not relate to the impacts of individual projects. These appear to be objectives for encouraging government agencies to adopt measures related to pedestrian safety. Oakland has adopted a comprehensive Pedestrian Master Plan that includes an implementation section. In fact, the Pedestrian Master Plan documents that pedestrian injuries have declined in recent years. Injury collisions declined from 1996 to 2000 by 18% (from 292 to 240) and fatalities fell 25% (from 8 to 6) in the same period.

e. Despite Dr. Bhatia's estimate of a "baseline rate" of pedestrian injuries in certain neighborhood, he has no factual basis for this determination and it is unrelated to information about the intersections that will experience an increase in traffic from the Project. Information presented by Fehr and Peers shows that 20 of the 50 intersections affected by the Project had no reported pedestrian related collisions from 1995 to 2004. Another 20 intersections had three or fewer pedestrian collisions from 1995 to 2004. Given that traffic likely increased at these intersections during this time, there does not appear to be any direct relation between an increase in traffic from a specific project and a significant increase in pedestrian injuries as predicted by Dr. Bhatia.

f. Dr. Bhatia's definition of the rate of injury per unit time fails to account for population numbers. He mixes his definition with the USDHHS definition that is based on population. Thus, his discussion does not provide support for the conclusions he reaches.

g. Dr. Bhatia fails to examine any intersection specific information with respect to project traffic increase and other circumstances related to pedestrian safety.

h. The Project will provide a safe system of roads and pedestrian and bicycle pathways on the Project site. Appropriate crosswalks, traffic signals, signage and trails will enhance pedestrian safety on site. The Project will also be required to install traffic signals at several locations that will increase pedestrian safety at these intersections.

7. Letter from Rajiv Bhatia to Jane Brunner, dated March 23, 2006

This letter states Dr. Bhatia's belief that the Project will have adverse air quality impacts that have not been assessed and mitigated. The information in the Draft EIR, Air Quality section, the Final EIR pp. VI 147-148, and the attached analysis from ENVIRON respond to the statements in this letter. It is important to note that the EIR examined the potential health impacts of the Project location near the freeway and found that no significant health impacts would be expected. The additional analysis performed by ENVIRON responds to the request for analysis of diesel and non-diesel particulates taking into account wind information. ENVIRON found that no significant impacts would be expected.

With respect to noise impacts, see Response A.2g above. Additionally, it is important to note that residents will not experience high noise levels "whenever" they are outside. Many of the noise levels recorded in the Draft EIR are at elevated heights and do not reflect groundlevel conditions. Noise levels will depend on traffic levels on the freeway, which do not remain constant throughout the day. Moreover, buildings along the Embarcadero will be shielded from noise by setbacks and landscaping. The main open space areas will not be located in high noise level areas and will provide the primary outdoor experiences for Project residents and visitors.

The mitigations suggested for air quality impacts are not necessary as no adverse air quality impacts have been identified that require these measures. The Project already includes a comprehensive transportation demand management plan and affordable housing. Realigning the Embarcadero to the interior of the site would increase noise and air quality impact to the residential uses and thus is not advisable. Given the air quality and noise data and exiting requirements and mitigations, there is no need to modify the layout of the Project.

8. Letter from Rajiv Bhatia to Margaret Stanizone, dated October 24, 2006.

This letter is responded to in the Final EIR pp. VI-145-149.

9. Letter from Rajiv Bhatia to Jane Brunner dated February 28, 2006.

This letter is responded to in the attached report prepared by ENVIRON. The City received Dr. Bhatia's HIA for the Project on June 2, 2006. The HIA raises many of the same issues addressed above. A separate response to that document will be provided prior to the June 20, 2006 hearing.

10. Letter from Rajiv Bhatia to Colland Jang dated March 8, 2006.

This letter asserts that the Project should contain affordable housing in order to reduce the adverse transportation and air quality impacts of the Project. Dr. Bhatia appears to be unaware that the Project contains an affordable housing component for approximately 420 units in accordance with the Development Agreement. Dr. Bhatia claims that certain environmental benefits will result from affordable housing. Although it is not clear that Dr. Bhatia used accurate data or methodologies in his analysis, to the extent that affordable housing units have any beneficial effect in terms of air quality and transportation impacts, these will be realized with the Project. Since the EIR contained a conservative analysis of Project impacts (without any offset for affordable units), there is no need to undertake the additional analysis requested by Dr. Bhatia.

11. Letter from Coalition of Advocates for Lake Merritt to Oakland Planning Commission dated September 28, 2005

This letter is responded to in the Final EIR pp.VI-89-90.

12. Letter from Sierra Club to Margaret Stanziona dated October 24, 2006

This letter is responded to in the Final EIR pp.VI-50-53.