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**VIA ELECTRONIC TRANSMISSION**

San Francisco Bay Conservation and Development Commission  
Attn: Hanna Miller  
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**Re: Comment Letter for BCDC Permit Application No. 2017.007.00**

Dear Ms. Miller and Honorable Commission Members:

This firm represents Kashiwa Fudosan America, Inc. ("Kashiwa"), owner of the property that is the site of two office buildings located at 395 and 400 Oyster Point Blvd., immediately adjacent to the Oyster Point Specific Plan area in the City of South San Francisco ("City") and subject to all of the construction and operational effects associated with implementation Oyster Point Development Project that is the subject of the BCDC Permit Application No. 2017.007.00 ("Project").

Kashiwa is not opposed to development within the Oyster Point Specific Plan area, but maintains significant reservations regarding the substantive defects in the Project application described in more detail below.

**1. INTRODUCTION AND OVERVIEW**

The Project application and staff report contain serious deficiencies including, but are not limited to:

- **Inadequate Time:** Given the late release of the staff report, more time is needed for public and decision makers to properly analyze the Project and provide comments. A continuance is needed.
- **Inadequate Project Description:** The Project description is vague and lacks transparency. The lack of an accurate, stable, and finite project description, due to

improper segmenting, does not allow the public and decision makers to properly evaluate the Project.

- **Cumulative Impacts:** The staff report fails to fully evaluate cumulative impacts of the Project, largely due to segmenting.
- **No Alternatives Analysis:** The staff report does not evaluate any Project alternatives.

The Project application prevents informed consideration by the public and decision makers regarding the Project, and fails to include information necessary to evaluating the Project and its impacts. BCDC should 1) continue this matter to allow stakeholders sufficient time to evaluate the Project's impacts, and 2) continue this matter until the applicant submits a full Project application containing all areas within the BCDC's jurisdiction.

## **2. THE PROJECT IS SUBJECT TO CEQA, BUT THE STAFF REPORT FALLS SHORT OF BEING A "FUNCTIONAL EQUIVALENT" OF AN EIR**

BCDC is subject to CEQA regulations such as "the policy of avoiding significant adverse effects on the environment where feasible." 14 Cal. Code of Regs. § 15250; Pub. Res. Code § 21080.5(c); *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, 618 ("Legislature has manifested an intent to retain the applicability of the other provisions of CEQA and of the Guidelines, particularly the substantive criteria and the specific aspects of environmental effect that must be evaluated before a project may proceed").

"State agencies, operating under their own regulatory programs, generate a plan or other environmental review document that serves as a functional equivalent of an EIR." *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 113. In this case, BCDC has apparently intended that the staff report serve as the "functional equivalent" of an EIR for the Project. Thus, the staff report must include either (1) alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project may have on the environment, or (2) a statement that BCDC's review of the Project showed that the Project would not have any significant or potentially significant effects on the environment and, therefore, no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. 14 Cal. Code of Regs. § 15252(a). If the latter approach is used, the required statement must be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion. *Ibid.* The staff report does neither of these two things, and is therefore legally insufficient.

BCDC is also required to disapprove the Project "if there are feasible alternatives or feasible mitigation measures available that would substantially lessen a significant effect that the activity may have on the environment." Pub. Res. Code § 21080.5(d)(2)(A). The staff report does not even attempt to analyze alternatives, so it is legally insufficient.

### **3. THE PUBLIC AND DECISION MAKERS HAVE NOT HAD SUFFICIENT TIME TO RESPOND TO THE STAFF REPORT**

The document that functions as the equivalent of an EIR (the staff report in this case) must be "available for a reasonable time for review and comment by public agencies and the general public." Pub. Res. Code § 21080.5(d)(3)(B); *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1230. Public Resources Code section 21091 requires that the public review period for a draft EIR not be less than 30 days, and this section has been held to specifically apply to agencies with certified regulatory programs such as BCDC. *Ultramar, Inc. v. South Coast Air Quality Management District* (1993) 17 Cal.App.4th 689, 698-700 (30-day comment period applicable to the district's abbreviated environmental document). In *Ultramar*, the court held that the certified regulatory agency was bound by section 21091's 30-day review period. *Id.* at 669-700. In reaching this conclusion, the court found that the fact that section 21091 refers to EIR's, rather than that entity's functional equivalent document, "is of no consequence." *Id.* at 699.<sup>1</sup>

In this case, the Staff Report and its exhibits were not made available to the public until April 13, 2018 at 4:36 p.m., just 6 calendar days (4 business days) prior to the BCDC hearing on April 19, 2018. Kashiwa simply has not had sufficient time to arrange for review by consultants, and prepare meaningful comments on these reports prior to the hearing. BCDC did not make its staff report available for a reasonable time for review and comment by the general public as required by Public Resources Code section 21080.5(d)(3)(B) and 21091. This matter should be continued for at least 30 days to comply with the Code, and allow for the public and decision makers to properly review and comment on the Project.

### **4. PROJECT DESCRIPTION IS VAGUE AND LACKS TRANSPARENCY**

The Project description fails to meet the most basic foundational requirements of CEQA. California courts have recognized that an "accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193. The Project description is incomplete, confusing and unstable, which is by definition insufficient, and prevents an adequate analysis and disclosure of Project impacts. Consequently, BCDC's reliance on Project application to support the approvals of the Project entitlements would not be supported by substantial evidence.

Here, the developer has broken up the Project's environmental entitlements into numerous phases, and herein, is only seeking approval for parts of Phases 1 and 2. Although the City may tier its environmental review of certain Project components and may be appropriate in some instances, tiering "does not excuse the lead agency from adequately analyzing reasonably

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<sup>1</sup> Notably, while *Ultramar* was decided in 1993, the Legislature has taken no action since that time to amend the notice requirements applicable to functional equivalent documents. While legislative inaction is not necessarily conclusive, it is further indicia of legislative intent in this case. *See People v. Williams* (2001) 26 Cal.4th 779, 789-90.

foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration.” 14 Cal. Code of Regs. § 15152(b). “An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity.” *Silveira v. Las Gallinas Valley Sanitary Dist.* (1997) 54 Cal.App.4th 980, 990. Here, however, the Project description falls far short, resulting in the failure to adequately evaluate and disclose the Project’s significant environmental effects.

CEQA does not allow an agency to review one part of a larger project in isolation, a prohibited practice known as "piecemealing," "segmenting" or "project-splitting." Instead, CEQA mandates that environmental review focus on the "whole of the action," so the true effects of the project may be analyzed and environmental impacts avoided or reduced. Correctly determining the nature and scope of the Project is a critical step in complying with CEQA's mandates. *See Tuolumne County Citizens for Responsible Growth* (2007) 155 Cal.App.4th 1214, 1222; *McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space Dist.* (1988) 202 Cal.App.3d 1136, 1146-53 (reversing judgment denying writ of mandate where notice of exemption contained inadequate and segmented project description).

CEQA broadly defines a "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and . . . involves the issuance [of an] entitlement for use by one or more public agencies." Pub. Res. Code § 21065. The statutory definition is augmented by the CEQA Guidelines, which define a "project" as "*the whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. . . ." 14 Cal. Code of Regs. § 15378(a) (emphasis supplied). A project proponent may not separate out the component parts of a project requiring multiple entitlements for separate review, "thereby preventing 'consideration of the cumulative impact on the environment.'" *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1190, n.5; *see also City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1452.

A "project" is "given a broad interpretation in order to maximize protection of the environment." *McQueen, supra*, 202 Cal.App.3d at 1143. "This big picture approach to the definition of a project (*i.e.*, including 'the whole of an action') prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect." *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 271 (mining project improperly segmented); *Tuolumne County Citizens for Responsible Growth, supra*, 155 Cal.App.4th at 1231 (home improvement center improperly segmented from adjacent road realignment). The broad scope of the term "project" prevents "the fallacy of division," which entails "overlooking [a project's] cumulative impact by separately focusing on isolated parts of the whole." *McQueen, supra*, 202 Cal.App.3d at 1144 (internal citations removed).

CEQA requires that a project description must include all relevant aspects of a project, including reasonably foreseeable future activities that are part of the project. *See Laurel Heights*

*Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 396. A project description that fails to account for anticipated development activities is counter to CEQA's mandate "that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences." *Bozung v. Local Agency Formation Comm'n.* (1975) 13 Cal.3d 263, 283-84. The Supreme Court in *Laurel Heights* held that that an adequate project description must include those activities that are a "reasonably foreseeable consequence of the initial project" and are such that they "will likely change the scope or nature of the initial project or its environmental effects." 47 Cal.3d at 396.

The developer here has carefully orchestrated its submittals to BCDC for the purpose of avoiding environmental review of the Project. There is no doubt that the subsequent phases of the Project are a "reasonably foreseeable consequence of the initial project" and therefore must be evaluated holistically. *Laurel Heights*, 47 Cal.3d at 396. Because the Project description fails to include the remaining phases of the Project, it is inaccurate, unstable, and does not afford the public or decision makers to do an accurate analysis of the Project and its impacts.

## 5. CUMULATIVE IMPACTS

It is well-established that a state agency, acting under a certified regulatory program, must consider the potential cumulative impacts of its actions. *Laupheimer v. State of California* (1988) 200 Cal.App.3d 440, 458-466 (prejudicial abuse of discretion when agency failed to show adequate consideration of potential cumulative effects); *see also Schoen v. Department of Forestry* (1997) 58 Cal.App.4th 556, 573 (emphasizing the "importance of a cumulative impacts evaluation to the environmental review process."). Cumulative impacts are the project's incremental effects "viewed in connection with the effects of past projects, the effect of other current projects and the effect of probable future projects." 14 Cal. Code of Regs. § 15065(a)(3).

A legally adequate cumulative impact analysis follows a two-step process: (1) identify whether a cumulative impact has occurred or will occur, which necessarily involves a determination regarding the context of that effect; and (2) determine whether the project would result in a cumulatively considerable contribution to that impact. 14 Cal. Code of Regs. §§ 15064(h)(1), 15065(a)(3), 15355(b).

Here, the staff report (the EIR functional equivalent in this case) fails to adhere to evaluate or consider the potential cumulative effects of the Project at all. Indeed, it entirely ignores the subsequent phases of the Project, stating only that they will be evaluated in future permit applications subject to BCDC approval. Staff report p. 33, item E. This is woefully insufficient because the law requires that cumulative impacts be considered and evaluated. To make matters worse, the fate of the later phases of the Project are completely unknown, as a recent Subsequent EIR was recently put "on hold" by the developer, so we are left guessing at what the final Project will actually look like. *Ibid.*

## 6. STAFF REPORT LACKS ALTERNATIVES ANALYSIS

Pursuant to Public Resources Code section 21080.5(d)(2), BCDC may not approve a project "if there are feasible alternatives or feasible mitigation measures available that would substantially lessen a significant adverse effect that the activity may have on the environment." *See also* Pub. Resources Code § 21002 ("public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects...").

The staff report was required to discuss a reasonable range of potentially feasible alternatives, regardless of whether BCDC imposes mitigation measures that reduce the potential effects to a less than significant level. *Laurel Heights, supra*, 47 Cal.3d at 401; 14 Cal. Code of Regs. § 15126.6(a) ("An EIR ... must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation.").

The staff report fails to identify or consider any alternatives to the proposed Project. Not one. There is no doubt that the staff report is insufficient for this reason.

## 7. MISCELLANEOUS COMMENTS

Kashiwa has two line-edit comments that it would like to propose as well (changes in **bold**):

Staff report Page 12, item C: "Prior to the **use** of the Phase 1D..." should read "Prior to **construction** of the Phase 1D..."

Staff report Page 14, item F: "Within **six** months of the issuance of this permit..." should read "Within **three** months of the issuance of this permit..."

## 8. CONCLUSION

The public and decision makers have not had adequate time to properly review and address the issues raised in the staff report. For that reason alone, this matter should be continued.

Furthermore, there are substantive issues with the staff report that render it flawed as discussed in detail above. The most significant of these is that the Project is unlawfully segmented, which does not allow for a proper analysis of the full environmental effects, even if there had been sufficient time for review. The unlawful segmenting of the Project makes for an inadequate Project description and lack of cumulative impacts analysis. Finally, the lack of an alternatives discussion is also fatal.

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Taking action on this matter at the present time would be inappropriate. Given the improper segmentation of the Project, BCDC should require that the Project applicant submit a full application, including all phases of the Project, for review. That would allow for a proper analysis of the environmental impacts, and avoid many of the issues raised herein.

Very truly yours,

A handwritten signature in black ink, consisting of a stylized, cursive 'B' followed by a horizontal line with a small dot above it.

BENJAMIN M. REZNIK  
DAVID P. CINCOTTA  
NEILL E. BROWER  
SEENA M. SAMIMI for  
Jeffer Mangels Butler & Mitchell LLP

cc: Steven T. Mattas, Meyers Nave (smattas@meyersnave.com)