

Mr. Terrence Grindall  
Community Development Director  
37101 Newark Boulevard  
Newark, CA 94560

May 28, 2010

SUBJECT: REVIEW OF FINAL ENVIRONMENTAL IMPACT REPORT FOR NEWARK  
AREAS 3 AND 4 SPECIFIC PLAN PROJECT

Dear Mr. Grindall;

Grassetti Environmental Consulting (GEC) has been retained by the Citizens' Committee to Complete the Refuge to review the Environmental Impact Report (EIR) on the Newark Areas 3 and 4 Specific Plan and relevant background documentation for technical adequacy and compliance with the California Environmental Quality Act (CEQA) and its implementing Guidelines. GEC submitted comments on the Draft EIR in our January 17, 2010, letter. We have reviewed the City's responses to those comments and offer the following comments on the Final EIR (FEIR). This review was conducted by Richard Grassetti, the firm's principal, and is based on my 25 years of experience in CEQA document preparation, review, and training. My comments are summarized below.

**Uses of the EIR (Response I-1)**

As discussed in our January letter, the DEIR is vague as to its use with respect to future projects. The City's response to comments continues to fail to recognize that this DEIR is a programmatic analysis that neither describes nor assesses project-specific impacts of implementing any specific components of the project. Therefore it cannot assure, absent subsequent CEQA documentation, that full disclosure, analysis, or mitigation was included for as-yet undesignated specific project components. Although the response to Comment I-1 is vague, the response to Comment J-1 unequivocally states that the "The EIR for the Specific Plan is a project-level EIR". Given that the subject EIR includes no site-specific development plans, it fails to meet even the most basic requirements of a project-level document. Specifically, it has no lotting plans (other than conceptual sketches); no roadway plans for internal circulation (again, other than conceptual sketches); no internal traffic analysis, including analysis of school loading areas, parking adequacy, and intersection operations; no design plans for homes (other than conceptual sketches), commercial structures, or schools; no analysis of hauling of fill materials or construction materials/equipment; no landscape plans (other than a few conceptual

## Newark Areas 3 and 4 Specific Plan FEIR Comments

May 28, 2010

Page 2 of 10

sketches); no detailed site assessments for cultural resources; and no detailed infrastructure plan (other than a minimal drainage “plan” for the major subareas). Therefore the EIR is clearly programmatic and cannot be relied upon for future approvals absent subsequent CEQA review. The requirements for this review are clearly detailed in Guidelines section 15152.

Given that this document is programmatic in scope and content, the City’s response continues to erroneously rely on CEQA Guidelines section 15162, which applies to subsequent or supplemental EIRs on the same project, and not tiering from a program EIR, which is what would be required under CEQA when approving a specific development project within a program, such as a Specific Plan. The CEQA section that applies to future use of this EIR, as well as necessary subsequent CEQA documentation, is Section 15152, not 15162. Specifically, Guidelines section 15152(b), states that, “Tiering is appropriate when the sequence of analysis is from an EIR prepared for a General Plan, policy, or program to.....a site-specific EIR or negative declaration.”

### **Project Description (Response I-2)**

The comment noted that the project description defers the development of a number of plans the contents of which are critical to identifying the magnitude of potential project impacts. The response mysteriously refers the reader to response I-1, which does not specifically address any of these missing items. Compounding this deficiency is Response I-1’s failure to acknowledge the CEQA requirement for subsequent CEQA review if and when these plans are completed. This appears to be setting the stage for a shell game, where a major project item necessary to identify impacts is deferred to subsequent CEQA review, which then does not occur. This is impermissible under Guidelines Section 15152, which state, “Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of a project and does not justify deferring such analyses to a later tier EIR or negative declaration.” If this EIR is supposed to be a project-level EIR, it is clearly missing key project description components necessary to completing an adequate analysis. If it is a program-level EIR, it also is not excused from providing these key elements for impact assessment. The response is off-point and inadequate.

### **Project Description (Response I-3)**

The comment requested a description of the additional quantities of fill required to protect the project from sea level rise anticipated during the project live span (100 years?). The comment noted that the 50-year project life assumed in the Sea Level Rise discussion is illogical in the context of houses, which typically are in use far longer than that (at least 100 years; by the EIR’s logic, houses built in 1960 would have no useful life left). The response directed the reader to Master Response 1, regarding sea level rise. A

review of that response found no mention of 100-year sea level rise impacts to the proposed project; the FEIR continues to rely on the 50-year sea level rise in its impact assessment. It then discusses 100-year flood events in addition to the 50-year sea level rise. This fails to address the comment, which requested an analysis of the 100-year flood event added to the 100-year sea level rise estimate.

This deficiency is further compounded by the Master responses mischaracterization of the conclusions of the Vermeer, Martin, and Rahmsdorf study. That study concludes [emphasis added]:

*“If our method presents a reasonable approximation of the future sea-level response to global warming, then for a given emission scenario sea level will rise approximately three times as much by 2100 as the projections (excluding rapid ice flow dynamics) of the IPCC AR4 (2) have suggested. Even for the lowest emission scenario (B1), sea-level rise is then likely to be (approximately) 1 m; for the highest, it may even come closer to 2 m.*

*“Uncertainties remain, however. While the thermal expansion response has been tested on simulated data, it is less clear whether the information contained in the 120 years of observational data about the ice response is sufficient to describe the future ice-melt contribution out to the year 2100. The key question then is: will the ice-melt response observed so far, as captured in our dual model, overestimate or underestimate future sea-level rise? On one hand, the surface area of mountain glaciers vulnerable to melting will decrease in future as glaciers disappear. However, more ice higher up in mountains and particularly the big continental ice sheets will increasingly become subject to melting as temperatures warm. The net effect, an increasing or decreasing surface area subject to melting, is not easily determined without detailed regional studies. In addition, highly nonlinear responses of ice flow may become increasingly important during the 21st century. These are likely to make our linear approach an underestimate. Therefore, we have to entertain the possibility that sea level could rise faster still than suggested by the simple projection based on Eq. 2.”*

Further, the FEIR correctly notes that the updated CEQA Guidelines section 15126.2 requires that the EIR assess flooding in the future, and that the “future” to be evaluated should be based on the life of the project. The 50-year analysis included in the FEIR fails to address the fact that the specific plan may not be built out for 10-20 years, and that the houses and commercial structures would have a lifespan of far greater than another 30-40 years.

The EIR’s reliance on the “speculative” exception for analysis fails to hold water in light of the availability of detailed maps of sea level rise in the Bay referenced in our

comments on the DEIR, and acknowledged in the FEIR. This erroneous impact assessment of long-term sea level rise results in an inadequate and incomplete analyses of site flooding and drainage issues raised in the comments. Please note that we have provided other detailed comments on the EIR's failure to address flooding impacts to the project associated with sea level rise in our discussion of response I-11, below.

#### **Project Objectives and Alternatives (Response I-4)**

The comment noted that CEQA requires that that project objectives may not be so narrow as to unreasonably restrict the range of alternatives considered in the EIR or preclude other feasible alternatives that may be environmentally superior. This EIR includes Project Objectives that unreasonably restrict the range of alternatives considered in the document. Specifically, the project objectives set forth on p. 26 of the DEIR are little more than a regurgitation of the project description. The City's response asserts that the project objectives reflect the goals of the General Plan. This response fails to address the substance of the comment, which is that the objectives unreasonably restrict the range of alternatives that can be deemed to be "feasible". This objective is also in conflict with itself, given that the stated goals apply only to Area 4, but not Area 3, which has an industrial technology park designation in the General Plan. Given that the project proposes to amend the General Plan for Area 3, it is unclear why all alternatives must be beholden to the goals for Area 4.

The comment also stated that the overall level of analyses of impacts of the alternatives is insufficient to permit decision makers to seriously consider the relative merits of the alternatives. There is less than one paragraph of impact analysis for each of the "Build" alternatives (factoring out the General Plan compliance language), which fails to comply with the Laurel Heights I case dictum regarding alternatives, that the EIR provide "meaningful detail" and "sufficient information to the public to enable it to understand, evaluate, and respond" to the agency's conclusions. The comment requested a discussion comparing each impact of the alternative with that of the project, or explaining why they would be the same. Response I-4 has no language at all responding to this key deficiency in the document. Therefore this response fails to meaningfully respond to the comment.

#### **Technical Issues**

GECo also provided specific comments on technical deficiencies in the DEIR. Responses to those comments are assessed for adequacy below:

#### **Response I-5**

**Traffic:** The comment requested an analysis of the traffic impacts of hauling fill material from the BART tunneling project to the site, and requested analysis of the traffic impacts if BART fill were not available. The response is that the construction truck traffic would be less than operational traffic from the project. While this may be true, it is not an impact analysis but rather a relative comparison. In addition, the EIR assesses project traffic assuming a number of major roadway improvements are constructed prior to project completion, however it is likely that project filling would occur prior to those improvements being constructed. Therefore the EIR remains deficient in failing to analyze truck impacts (600 trucks/day) on the existing roadway system.

#### **Response I-6**

**Air Quality:** The comment states that DEIR fails to correctly address emissions associated with trucks hauling fill. The EIR assumes that 100 truckloads of material would be transported each day. Given that the EIR states that “all grading activities were assumed to occur in the first two years”, the EIR air quality assessment (and traffic assessment, too) should have assumed over 600 haul-trucks per day (or more, if no weekend work is to occur).

The response continues to assert that all grading vehicles were assumed to occur in the first 2 years, but does not correct the apparent model input from 100 trucks/day to the correct 600-700 trucks/day. If the latter number is, in fact, correct, as implied by the text of both the DEIR and the Response, the EIR remains deficient.

#### **Response I-7**

**Noise:** The comment states that the EIR construction noise analysis fails to include any analysis of the 600 or more haul trucks required to transport fill to the project site each day for over two years. What route would those trucks use? Please identify sensitive receptors along that route? What would the noise impacts be? The response also requests an analysis of the effects of repeated single event truck noise as required by the *Berkeley Keep Jets Over the Bay v. Board of Port Commissioners* decision (2002).

The response states, with no supporting evidence, that the 600+ truck trips/day would result in “no noise impacts” because truck traffic would make up a small percentage of total traffic volume along area roadways. This is a conclusion, not an analysis. In addition, the response fails to address the request for consideration of repeated single-event truck traffic noise.

#### **Response I-8**

**Biological Resources:** The comment requests that the EIR investigate whether eviction

of burrowing owls as proposed in mitigation BIO-4.2 may result in those evicted owls being depredated at a higher rate than if not evicted, or otherwise suffer population losses as a result of this eviction. The comment notes that, if no such studies exist, impacts to owls should be considered significant and unavoidable.

The response states that the EIR biologists are not aware of any studies showing that depredation would increase, therefore the EIR analysis is adequate. Please note that the document, "Status of Burrowing Owls in Southern California," published by the nonprofit Institute for Bird Populations, found that the owl population in western Riverside County continues to drop despite a sweeping habitat conservation plan that is supposed to protect the birds and 145 other species of animals and plants. As reported in the Riverside Press Enterprise, January 14, 2008:

The study's authors found that one-fourth of the owl habitat in western Riverside County was destroyed in the first three years after the habitat plan went into effect. "As long as we treat the mitigation efforts the same, it is very likely burrowing owls will become extinct from the local area," said the study's lead author, Jeff Kidd, a wildlife biologist who lives in the Lake Mathews area of Riverside County. Developers in Riverside County most often use "passive relocation" when owls stand in the way of development. In passive relocation, one-way doors are installed at burrow entrances to keep the owls from re-entering and being killed when the land is graded, said Kidd, a licensed wildlife biologist. Kidd said he calls the process "active eviction." "They usually have no other home to go to, so they die. They get predated or they get hit by vehicles," he said.

This expert opinion directly contradicts the admittedly unsupported conclusion of the EIR.

Please note that the CDFG, the state agency with expertise and responsibility for species of special concern, in its letter of January 14, 2010, also identified the burrowing owl mitigation as non-protective of the species, stating that the mitigation habitat acreage is inadequate.

### **Response I-9**

**Geology:** The response acknowledges that, "the EIR discussion of building design is relatively general in nature, commensurate with the amount of project detail available at the Specific Plan level". Please refer to responses I-2 and I-3; this response acknowledges that the EIR is being done at a program level, and is not appropriate for consideration of project-specific impacts.

### **Response I-10**

**Aesthetics:** The comment noted that the visual drawings of post-project conditions included in the Aesthetics section do not accurately portray post-project conditions, but are actually an artist's rendition of a buildings obscured by full-grown trees. The comment requested actual photo-simulations showing the views in the photos both upon completion of the project and, if desired, after 10 years. The response fails to provide the requested information, and instead implies that, because significant impacts were found, that no additional supporting evidence is required. This runs counter to prevailing CEQA case law and logic. CEQA does not consider unsupported conclusions as adequate impact assessment.

### **Response I-11**

**Flooding:** The comment stated that assessment of flooding impacts inappropriately relies on 2009 FEMA 100-year flood maps that don't include any sea level rise component and incorrectly concludes that, "the proposed Specific Plan development would not subject housing to 100-year flood hazards." CEQA case law cautions against use of significance criteria that are not protective of the environment, and inappropriate limiting of an EIR's scope to only questions posed in the IS checklist. The DEIR insistently relies on flood hazard maps that are intended not for impact assessment but rather for insurance purposes and refuses to extend its review past the IS checklist questions. The FEMA maps relied on in the EIR are especially deficient because they ignore the greatest source of flooding in the project area, namely sea level rise.

The response quotes CEQA's requirement that an EIR consider existing conditions as the baseline for impacts assessment, and mentions the use of flood hazard maps for that use. While we generally agree with that assertion, it is not relevant to the comment. The comment is not that the DEIR inadequately described the 100-year flood hazards as they exist today, but rather that the EIR inadequately described the 100-year flood hazards that would affect the project during its lifetime. As described above, the FEIR's Master Response on sea-level rise also fails to address the 100-year flood hazard impacts to the project.

This EIR's approach is in clear conflict with the newly revised CEQA Guidelines, section 15126.2(a), which includes a new sentence that adds further examples, as follows:

*Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.*

## Newark Areas 3 and 4 Specific Plan FEIR Comments

May 28, 2010

Page 8 of 10

The BCDC maps cited in our original comments on the DEIR constitute such authoritative hazard maps. The EIR's Hydrology and Water Quality Report (EIR Appendix G) Climate Change Impact Addendum (p. 10) acknowledges the authoritative nature of the BCDC maps, stating:

*The ADEIR concluded that the only quantifiable flood risk impact to Newark due to climate change is the increase in sea level rise, and a wide range, with no assigned certainties or upper bounds to that range, is projected. While this update does not change that basic conclusion, reports specific to the state of California as well as the BCDC have now adopted specific values for sea level rise projections: 16 inches (1.3 feet) by 2050 and 55 inches (4.6 feet) by 2100.*

The EIR also has arbitrarily revised the criteria of significance in its Global Climate Change section (FEIR p. 276) for sea level rise from from "two to three feet" in the DEIR to "4.6 feet" the FEIR. This revision seems to have been engineered to allow the EIR's conclusions of about 2 feet of sea level rise by 2050 to slip under the EIR's significance level. The EIR provides no analysis or justification for this change in its significance criteria. Oddly, the criteria matches the BCDC sea level rise projections noted in the EIR's Climate Change Impact Addendum, which suggests that only sea level rise greater than that the highest level projected by BCDC would be considered to significantly affect the project.

This approach is in direct conflict with the EIR's own Hydrology and Water Quality Report (EIR Appendix G) Climate Change Impact Addendum (p. 6), which states, "For the 'high' sea level rise scenario, the one-percent surge would inundate the Project by nearly one foot." Therefore, the EIR is ignoring its own technical report's flood hazard projections for the project site, and inexplicably assumes that one foot of flooding over much of the site would not constitute a significant impact.

That Appendix further concludes (p. 10), "If the 'high' sea level rise scenario proves to be true, adaptive strategies to improve flood protection (for example levees or floodwalls) may prove to be necessary in the future." Yet the EIR fails to describe such facilities in its mitigation measures, and fails to address the potential impacts of constructing those facilities (or further raising the site to mitigate for sea level rise impacts).

It is my professional opinion that the EIR's continued failure to assess impacts of the project in light of this acknowledged standard renders the assessment substantially deficient.

**Response I-12**

**Water:** The comment stated that the EIR water supply assessment (WSA) uses the wrong baseline in assessing project impacts. The response states that because the ACWD UWMP already includes the project's water demand, the project would have no impact on the acknowledged drought period water supply shortfalls. CEQA Guidelines section 15125(e) prohibits a "plan-to-plan" assessment, which is exactly what the EIR analysis does in comparing the project demand to a plan that includes the project demand. Although the project is included in the UWMP, the drought period water supply remains inadequate.

### **Response I-13**

**Schools:** The response acknowledges that the high school will be over capacity with the project-generated students and notes that the school fee will mitigate this impact. However, the response fails to address whether new facilities will be required as a result of the project, and what the potential physical impacts on the environment (indirect impacts of the project) might occur. It also should be noted that payment of school impact fees may not be adequate to provide sufficient new schools, resulting in a potentially significant lack of educational facilities. As noted in our discussion of response to comment I-1, above, site-specific school construction impacts, including traffic, have not been analyzed in this document.

### **Response I-14**

**Parks:** The comment noted that the EIR calculates a project demand of about 12 acres of park and then stated that provision of 5.5 acres of parks and trails not meeting the City's minimum park size would meet the project's needs. It also indirectly suggests that use of the school field and golf course, neither of which would be dedicated parks land, would somehow offset this shortage. The response reiterated the EIR analysis and conclusions, but provided no additional information as to how these inadequate acreages and golf course/school would comply with the City's General Plan requirements. This response also neglects the EIR's stated possibility that a golf course might not be constructed.

The project also conflicts with General Plan Recreation Policy a, programs 1 and 2, and Policy b, program 7, which specifically requires that any project "Develop a new Neighborhood Park in conjunction with any residential development of Area 4." This standard was included in the General Plan because that Area is "well removed from the existing neighborhood park system and accessible park space will be important to the qualities of development called for in the land use chapter [of the general Plan] for this area." (General Plan, p. 7-10, item 2) The project proposes a 2.5-acre park in Area 4; this fails to meet the General Plan's minimum 3.5-acres size for a Neighborhood Park.

Provision of funding for parks elsewhere in the City under the Quimby Act would not alleviate the parks shortage for residents in Area 4.

### **Other Issues**

The California Regional Water Quality Control Board, San Francisco Bay Region, which has regulatory jurisdiction over wetlands on the site, commented that the DEIR failed to include even a conceptual mitigation plan for wetlands. The FEIR response was that no such plan was required because it could be developed as part of future studies. Yet, the responses to comments I-1 and I-2, referenced above, fail to commit to any future CEQA review. CEQA requires that EIR's contain an adequate level of information for regulatory agencies to make informed assessments of the potential impacts, including the effectiveness of mitigation. Given that the RWQCB is the agency with expertise and jurisdiction over the affected resource, and that the RWQCB has expressly stated that the level of information on wetlands mitigation is inadequate for their review purposes, the EIR fails to meet CEQA requirements for disclosure.

### **Response I-15**

The comment concluded that the DEIR has a number of substantive flaws that fail to comply with CEQA analysis and disclosure requirements, and that these flaws must be rectified and the DEIR recirculated. A review of the responses indicates that most of the major deficiencies identified in our original letter remain. Further, a number of new mitigation measures have been added to the EIR in response to agency letters commenting on the adequacy of mitigation for biological resources. We continue to advise remediation of the substantive defects and recirculation of a revised DEIR as necessary for CEQA compliance.

Please feel free to contact me at 510 849-2354 if you have any questions regarding the comments herein.

Sincerely

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Grassetti Environmental Consulting