

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

May 21, 2009

SUBJECT: REVIEW OF ENVIRONMENTAL IMPACT REPORT FOR THE CITY OF
NEWARK HOUSING ELEMENT UPDATE

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 City of Newark Housing Element and relevant background documentation for technical adequacy and compliance with the California Environmental Quality Act (CEQA) and its implementing Guidelines. 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 review indicates that the CEQA documentation for the project is inadequate and incomplete, and that the EIR fails to meet CEQA Guidelines. Specifically, the EIR's project description is incomplete and inconsistent, the range of alternatives is inadequate, there are analytical inconsistencies and problems with assumptions used in the document, certain mitigation measures are weak and unenforceable, and some technical analyses are omitted/flawed in a manner that results in omission or understatement of important potential impacts. The bases for these conclusions are detailed below.

Reliance on Past Environmental Impact Reports

The Introduction (DEIR p.4) to the DEIR states that the DEIR "relies on environmental setting, impact, and mitigation measures contained in two previous EIRs adopted by the City of Newark." Those EIRs covered the City's General Plan and a previous proposal for development of Area 2, and were prepared in 1992 and 1999, respectively. Given the age of those documents (17 and 9 years), the amount of new development in Newark and adjacent communities since their preparation, the abundance of more recent data on biological resources, traffic, and air quality, and regulatory changes since 1992 and 1999, their analyses of traffic, air quality, noise, hydrology, land use, and biological resources settings, impacts, and mitigation measures are obsolete and cannot be assumed to be



adequate for the currently proposed project. In addition, according to the DEIR, the 1999 Area 2 plan has been abandoned and replaced with an entirely new development plan, therefore the 1999 Area 2 Plan EIR does not appear relevant to the current project impact assessment.

Project Description Issues

The “project” for the purposes of this EIR is the proposed Housing Element (HE) and associated general plan and zoning changes that assist in implementing the HE. The Project Description (DEIR p. 8) states that Newark requires 1755 new housing units of various affordability levels to comply with State of California requirements. However, the Project Description fails to identify the number of units assumed to be provided by the proposed project zoning and general plan revisions. Elsewhere in the DEIR, a figure of 1993 units is used, which, according to the HE (HE p. 34) is the number of units expected on identified HE sites by 2014. Yet, according to the HE housing site inventory full development the proposed general plan and zoning revisions assumed in the DEIR would permit an additional approximately 3800 units, for a total of 5523 units, over three times the unit count assumed in some of the DEIR technical analyses. Other DEIR technical analyses use a total of 5738 units, for which I can find no supporting documentation. The unit count is further complicated by substantial internal inconsistencies in the HE between the text discussion on pp 29-35 and the numbers in HE Table 5-36, which purports to summarize expected housing units by 2014. These inconsistencies/full development numbers are summarized in the table on the following page.

CEQA defines 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” (CEQA Guidelines, Section 15378(a)). As summarized above, the actions necessary to provide the units assumed/required in the HE would, at full buildout result in 5523 units. Therefore, the EIR should assess the impacts of that full buildout. Failure to do so results in impermissible piecemealing of the GPA/rezoning portion of the project.

Another substantial problem with the stability of the project description is its treatment of Area 2. The Housing Element assumes that some portion of a 2008 Concept Plan for which a Specific Plan has not been approved would be implemented during the 2010-2014 period. The City planning documents include three different scenarios for Area 2. The General Plan of 1992 for industrial; the 1999 Specific Plan for community college and assorted high-technology with some commercial; the current so-called plan for a TOD. The proposed Housing Element’s assumption that the only unapproved scenario of the three would be approved and partially built out by 2014 is puzzling.

Site	Total 2014 Units Identified in HE Table 5-35	Total 2014 Units identified in HE Text (pp. 29-35)	Additional Post 2014 Units Permitted under Proposed GP/Zoning changes**	Total Units Permitted under Proposed GP/Zoning changes**
A	74	74		74
B	0	0	192	192
C	10	10	10*	10
D	0	0	20	20
E	9	9	0	9
F	0	0	87	87
G	217	217	209	426
H	30	24	73	97
I	38	30	92	122
J	0	0	207	207
K	22	15	0	15
L	85	36	10*	46
M	91	47	0	47
N	54	53	0	53
O	0	0	53	53
P	23	23	0	23
Q	200	200	317	517
R	70	29	166	195
Area 2	357	356	1714	2070
Areas 3+4	713	713	547	1260
Totals	1993	1836	2797	5523

*No GP amendment/rezone needed

**Where HE table conflicts with HE text, HE text is assumed to be correct

Development assumptions for Area 4 also are subject to conflicting plans. Part of Area 4 is within the congressionally approved expansion boundary for the Don Edwards San Francisco Bay National Wildlife Refuge. From the DEIR of the 1992 General Plan "Inclusion of a large portion of Newark's planning area into the wildlife preserve (San Francisco Bay National Wildlife Refuge) will greatly assist in protecting sensitive habitats..." "Figure 4-4 indicates the proposed expansion area of the San Francisco Bay National Wildlife Refuge into the Newark planning area." That map clearly a large portion of Area 4 is within the Wildlife Refuge expansion boundary. This information

should be evaluated when determining the development potential for Area 4 in the Housing Element, as well as in the DEIR.

In addition, a large part of the new residential development in areas shown in the DEIR (except most of Area 4) would be in a redevelopment area, which would reduce the economic benefits of the project to the City. The details of this proposed redevelopment area should be described in this DEIR, as it may affect the City's ability to fund proposed mitigation measures.

These internal inconsistencies in the HE, coupled with lack of a clear, fixed unit count in the DEIR's Project Description results in an impermissibly vague and unstable Project Description. CEQA case law requires that a project description be accurate and stable throughout the EIR, stating that; "An accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (County of Inyo v. City of Los Angeles, 1977). As summarized above and discussed further in the comments herein on technical assessments, the DEIR Project Description unit count, which forms the basis for traffic, air quality, land use, population/housing, public services (schools), utilities (water and wastewater), and noise analyses, is neither accurate, stable, or finite.

Further, the EIR project description is vague with respect to the possible demolition/relocation of the City Hall and historic library structure, both of which could result in potentially significant impacts.

Adequacy of EIR's Range of Alternatives and Environmentally Superior Alternative

The DEIR addresses the impacts of two alternatives, both of which are variations of the required No Project Alternative. The DEIR states that a high-rise alternative and an alternative permitting additional second-units were considered and rejected because "it was determined that either of these would have resulted in either significantly more intensive impacts than those associated with the proposed project or would not have allowed the City to meet its state-mandated housing goals." This rejection is not supported by evidence or fact, counter to CEQA requirements (see Laurel Heights Improvement Assn. v. University of California, 1988), which require that a proper discussion of alternatives provide "sufficient information to the public to enable it to understand, evaluate, and respond" to the agency's conclusions, and that such information must "contain facts and analysis, not just the agency's bare conclusions or opinions" and "should include meaningful detail".

In addition, the DEIR fails to consider numerous other reasonable, feasible alternatives that would meet the CEQA requirement of reducing or avoiding project impacts. Such

alternatives include different combinations of sites and densities culled from the list provided in the HE (as summarized in the above table). Alternatives avoiding the potentially significant sea level rise and traffic/GHG impacts associated with development of Areas 2 and 3/4 should be evaluated. It should be noted that development of some or all of Areas 2 and 4 may not be feasible due to flood hazards, given the most recent sea level rise projections.

Finally, the EIR selects one of the two "No Project" alternatives as the CEQA-mandated "Environmentally Superior Alternative". This fails to comply with CEQA's express requirement that "If the environmentally superior alternative is the no-project alternative, the EIR shall also identify an environmentally superior alternative *among the other alternatives*" (CEQA Guidelines section 15126(e) (2), emphasis added).

Technical Issues

It is my understanding that the Citizens Committee to Complete the Refuge is submitting a detailed list of technical deficiencies under separate cover. Therefore, the technical comments herein focus only on the most egregious deficiencies, in the CEQA context.

Aesthetics: The significance criteria limiting impacts to visual impacts and views to public vista points fails to comply with recent CEQA case law, which extends this potential impact to both public and private views/impacts. In *Ocean View Estates Homeowners Association, Inc. v. Montecito Water District*, the court evaluated the issue of whether potential impacts on "view and other features of beauty could constitute a significant environmental impact under CEQA." Confirming that the District was required to consider the impact of its project on private views, the court, after analyzing the administrative record, also found substantial evidence to support a fair argument that the project would have a significant impact on private views. Therefore the EIR should be revised to assess impacts to private views as well as public ones.

The aesthetics discussion also notes that the project would not affect the aesthetics of the Civic Center area; this fails to account for the possible removal of the civic center as a result of the proposed General Plan amendments and rezoning.

Finally, Under Aesthetics and Noise it should be noted there will be significant impacts to the federal Wildlife Refuge; especially by development in Area 2. Noise impacts would affect both wildlife and the public who visit the refuge for a peaceful outdoor experience. Visual impacts - glare, tall buildings obstructing views of the hills also would affect visitors to the Wildlife Refuge. While lighting and glare impacts to the refuge are mentioned they are not treated with any substance, e.g. impacts to the viewshed from the refuge looking east towards the hills and Mission Peak. Instead they

are dismissed as being unlikely, but with no supporting documentation. The EIR should describe the factual basis for this determination, or revise it to reflect actual potential impacts.

Air Quality: The DEIR fails to address one of the proposed criteria for significance of GHG emissions included in the Draft CEQA Guidelines Amendments submitted by the Governor's Office of Planning and Research to the Resources Agency on April 13, 2009 (http://www.opr.ca.gov/ceqa/pdfs/PA_CEQA_Guidelines.pdf), namely "Would the project generate GHG emissions that may have a significant effect on the environment?" This is a much broader criterion than compliance with regulations, and requires a broader analytical approach than contained in this DEIR. Specifically, the EIR provides no factual evidence supporting the DEIR's contention that the construction of 1755, 1836, 1933, or 5523 new housing units would not generate substantial quantities of GHG's. In fact, the DEIR does not indicate which of the above-referenced unit factors is used in the analysis of GHGs or criteria pollutants. Further, given that the EIR considers GHG emissions as a cumulative impact, it should be including the full 5523 new units, and any contributions to exceedences of 1990 GHG levels to be significant. Any emissions from growth not already assumed in the BAAQMD's should be considered a significant contribution to GHG emissions. Compliance of the Housing Element with SB375 also should be addressed in this EIR.

The EIR's reliance on compliance with the AB32 scoping plan as adequate mitigation is in conflict with the BAAQMD's recently released calculations (summarized in: <http://www.baaqmd.gov/pln/ceqa/documents/workshopdraft-ceqathresholdoptionsreport4-28-2009.pdf>; contact BAAQMD staff for details), showing that, for the Bay Area Air Basin, those measures would not reduce regional emissions to the levels mandated by AB 32, and requiring additional mitigation. In addition, the EIR provides no evidence supporting the conclusion that mitigation measures for criteria pollutants would mitigate the project's contribution to GHG emissions. Further, the discussion of Mitigation 4.2-2's effectiveness in reducing GHGs (DEIR p. 37) uses the wrong baseline – it compares post-mitigation impacts to a pre-mitigation impact baseline, rather than to AB32 requirements (reductions compared to 1990 emissions) or even existing conditions, thereby falsely giving the reader the impression that the project would reduce GHGs compared to existing conditions or AB32 requirements.

Biological Resources: The biological resources setting Table 4.3-1 and the conclusions that there are no substantial wildlife migration corridors are not sourced to any biologist or biological resources report. What is the evidence/source document supporting the assertions of species likelihood, as summarized in the table, or wildlife corridors, as claimed on p. 41?

Given that detailed biological resources assessments have been completed for some or all of Areas 2 and 4, please include that information in the EIR. For example, it is *known* that the federally-listed endangered salt marsh harvest mouse occurs on Area 4.

Mitigation Measures 4.3-1 and 4.3-2 are inappropriate deferrals of analysis (in conflict with the *Sundstrom v. County of Mendocino* decision) to future mitigation measures. At a minimum, this EIR should include prescriptive measures, similar to others approved by regulatory agencies for other projects in the area that would clearly mitigate the project's potential impacts to special status species.

Cultural Resources: The discussion of cultural resources in this section relies on studies for Area 2; similar studies should be provided for Areas 3 and 4. In addition, the historic structures discussion is from 1989, nearly 20 years ago; it is likely that additional structures have become eligible for listing since that time. Please update this list. The EIR should also clarify if the project includes possible demolition of the historic Newark Library building.

Mitigation Measure 4.4-2 does not guarantee mitigation to a less than significant level. Potential loss of historic structures has been determined by the courts to be an unavoidable significant impact (i.e. *League for Protection of Oakland's Historic and Architectural Resources v. City of Oakland*). This mitigation does not prohibit such a loss therefore this impact remains significant and unavoidable.

Geologic Resources: Impacts of seiches and tsunamis should be evaluated, in concert with anticipated sea level rise, with respect to Area 4 and portions of Area 2.

Mitigations 4.5-1 and 4.5-2 fail to address potentially significant impacts of settlement and other seismic hazards to utilities and infrastructure. The CBC applies to structures and not infrastructure. Therefore impacts to new infrastructure subject to seismic hazards would remain significant. This is especially applicable to the privately-owned levees occur on Area 4 and Area 2. The EIR should discuss if these are maintained to any local, state, or federal standard, and evaluate whether they would withstand a maximum probable earthquake event. This is especially important for any development planned for Area 4 which is protected by old agriculture levees; and for Area 2 and the Cargill bittern pond levees on one side and salt pond levees on the other side. Please describe how these levees would be maintained and protected.

Hazardous Materials: This section relies on ten year old studies for Area 2 and fails to include any analyses of hazardous materials on Areas 3 and 4. Phase 1 assessments should be done for all three of these areas, particularly since contamination was found on Area 2, and portions of Areas 3 and 4 have been used for agriculture and industrial

purposes.

Hydrology and Water Quality: This section fails entirely to address sea level rise (slr). Recent estimates of up to 55 inches of slr during the lifetime of proposed project housing would, if they occur, result in large-scale flooding of many of the proposed sites. Recent maps of slr prepared for BCDC by the Pacific Institute show all of Area 4 and much of Area 2 flooding under this scenario. It should be noted that slr could be far greater, since this mapping failed to consider the possible melting of the Greenland and West Antarctic Ice Sheets. (http://www.pacinst.org/reports/sea_level_rise/maps/index.htm). In addition, rising sea levels will result in rearward flooding of local creeks draining to the Bay. Mitigation 4.7-1 provides no evidence that raising Area 4 outside of possible slr flood levels is feasible. In addition, such elevation increases could require millions of cubic yards of material, the transport of which would result in significant emissions not assessed in this document.

The DEIR, page 61 Mitigation 4.7-1 (flooding impacts), states that “Prior to issuance of grading permits in the western portion of Area 2 and 4: (c) The City shall obtain a revision of the flood hazard maps published by FEMA **prior to occupancy** [is this a typo?] of any building on any site currently mapped as within the 100-year flood zone. This is to be done by filing a Letter of Map Revision (LOMAR) with FEMA. Approval of the LOMAR will ensure that the entire site complies with local and Federal flood protection requirements. It is unclear how the LOMAR will assure flood protection. Also, although FEMA is in the process of re-mapping the Bay Area for its 100-year flood insurance program, FEMA does not include predicted sea level rise in its flood hazard maps. Therefore, any mitigation that involved building to updated FEMA 100-year flood elevations would not protect against that impact.

Maps of both revised FEMA flood elevations and projected sea level rise inundation of portions of the site should be added to the EIR.

In addition, the EIR fails to address the project’s potential impacts on stormwater quality, either during construction or post-construction, and does not identify any mitigation for those potential impacts.

Noise: “Existing” noise levels in this section (p. 63) are taken from the 17+-year old General Plan Noise Element, and may not reflect current noise levels, especially related to traffic on local and regional roadways, which has increased substantially since that time. Please reevaluate noise along major arterials and highways using the current traffic studies included in this EIR. Deferral of such evaluation to the future, as proposed in Mitigation 4.8-2, is inappropriate per the *Sundstrom v. County of Mendocino* decision.

Noise impacts analyses for project construction should address both human and sensitive wildlife receptors.

Public Services: The schools analysis uses 5738 dwelling units, which, although conservative, is inconsistent with unit counts discussed above under Project Description Issues. However the DEIR fails to analyze whether additional schools would be necessary to house these students, and, if so, what the impacts to the physical environment might be of constructing those schools. While it is correct that an EIR cannot require additional schools fee, this does relieve the EIR of the requirement to analyze and disclose the project's impacts on schools, including the impacts of new required school facilities, locations of potential school sites, and other schools-related impacts, including increased transportation of students.

Traffic: This section again uses 5738 housing units in its traffic generation calculations. It also erroneously uses LOS "D" as its criteria of significance. As discussed on pp. 83-84, the City considers LOS "C" to be its lowest acceptable level except that "conditions approaching LOS "D" will be acceptable if appropriate mitigations are identified..." This is clarified in Program 15, which specifically states that LOS D conditions are only acceptable where funding/mitigation "will restore LOS C conditions". In addition LOS "C" is required "at all intersections on the border of Newark". Notwithstanding these express City General Plan conditions, and absent any other supporting evidence, the DEIR instead uses LOS "D" as its criteria of significance. The DEIR's traffic impacts should be reevaluated such that any impacts that are not fully mitigated to LOS "C" are considered significant and unavoidable. All tables that list LOS "D" as "Target Levels" must be similarly revised.

There are no traffic numbers for the intersections of Mowry and Stevenson along Cherry Street. Not only would there be impacts from residential development on Areas 3 and 4 but Cherry is used by vehicle traffic from the Dumbarton Bridge to the South Bay area as a way to avoid the freeway. [e.g. the future extension of Fremont Blvd to McCarthy Blvd.].

There also some speculative/outdated references for example, the so-called "Southern Crossing" or and the north-south road within the railroad right of way that should be removed.

Utilities: The water supply analysis uses 1933 units, which is inconsistent with the unit counts used in the Traffic and Schools analyses. This results in a substantial underestimate of the project's water consumption (and wastewater generation). The EIR includes no evidence that adequate water supplies are available for full development under the proposed General Plan Amendment and rezoning. Further, mitigation measure

4.12-1a, requiring provision of a “will serve” letter as mitigation, has been ruled inadequate by the courts in the Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal.App.4th 182 (5th Dis. 1996) decision. That decision (and subsequent decisions) stated that an EIR must show water availability through an actual analysis, and that a “will-serve” letter does not constitute adequate mitigation for water supply impacts. Therefore this impact appears to be significant and unmitigable.

Conclusion

As described above, this DEIR has numerous substantive flaws that render it inadequate to meet even the most basic CEQA requirements. It is my professional recommendation that this document be revised as indicated in this letter and recirculated for public review and comment. Please feel free to contact me at 510 849-2354 if you have any questions regarding the comments herein.

Sincerely



Richard Grassetto
Principal
Grassetto Environmental Consulting