From:	John Kevlin
To:	BOS Legislation, (BOS)
Subject:	700 Indiana St - CEQA Appeal - BOS File 240777
Date:	Thursday, September 19, 2024 5:46:04 PM
Attachments:	image882969.png 700 Indiana Project Sponsor Brief to BOS CEQA Appeal 9-19-2024.pdf

Clerk's office and supervisors –

On behalf of the project sponsor of the 700 Indiana Street project, I am submitting the attached legal brief in response to the appellant's brief. Please let me know if you have any questions. Thanks!

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September 19, 2024

Delivered Via E-Mail (bos.legislation@sfgov.org)

President Aaron Peskin and Supervisors
San Francisco Board of Supervisors
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Re: 700 Indiana Street
Opposition to Appeal of General Plan Evaluation
BOS File No.: 240777
BOS Hearing Date: September 24, 2024
Planning Department Case No.: 2023-001074ENV/SHD
Our File No.: 7139.04

Dear President Peskin and Supervisors:

Our office represents MBC Biolabs, the sponsor ("**Sponsor**") of a project to construct a new non-life-science laboratory building at 700 Indiana Street in San Francisco's Dogpatch/Potrero Hill Neighborhood (the "**Project**").

As detailed in the Planning Department's response to the appeal of the Project's General Plan Evaluation ("**GPE**"), substantial evidence demonstrates that the GPE and the underlying technical studies are legally sufficient under CEQA. Appellants have failed to show either that the Project is not eligible for GPE nor that it would result in any peculiar Project-specific impacts not analyzed in the Eastern Neighborhoods Plan Area Environmental Impact Report ("**PEIR**"). Therefore, this appeal is without merit and should be dismissed.

A. STANDARD OF REVIEW

Under San Francisco Administrative Code Section 31.16, the Board of Supervisors is required to affirm the exemption determination if it finds that the project conforms to the requirements for exemptions set forth in CEQA.

Under CEQA, projects that are consistent with development density established by a General Plan EIR such as the Eastern Neighborhoods PEIR, do not require additional environmental review except as necessary to determine whether project-specific effects not identified in the area plan EIR exist.[1] In fact, CEQA "***mandates***" that projects consistent with

[1] CEQA Guidelines, Section 15183(b).

development density established through a General Plan EIR "***shall not***" require additional environmental review unless except where the project would result in: [2]

> (1) significant effects that are peculiar to the project or its site,
> (2) new significant impacts not analyzed under the PEIR,
> (3) potentially significant off-site impacts and cumulative impacts which were not discussed in the PEIR, or
> (4) increased severity of significant impacts discussed in the PEIR due to substantial new information which was not known at the time.[3]

In other words, if an impact is not peculiar to the project site or to the project; has already been addressed as a significant effect in the prior EIR, or can be substantially mitigated, then a GPE is appropriate.[4]

When it comes to the adequacy of the environmental analysis, the question for the Board is whether the Department's determination is supported by substantial evidence in light of the whole record.[5] Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."[6] CEQA Guidelines are clear that "Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial evidence."[7]

CEQA does not require technical perfection, scientific certainty, or an exhaustive analysis of all potential issues or all information that is available on an issue.[8] Nor is a lead agency required to conduct every recommended test and perform all recommended research in evaluating a project's environmental impacts.[9] The standard is whether the environmental document, when looked at as a whole, provides a reasonable, good faith disclosure and analysis of the project's environmental impacts.[10]

B. THE PROJECT IS WITHIN THE SCOPE OF THE EASTERN NEIGHBORHOODS PEIR

CEQA allows a project to utilize a GPE when it is consistent with the development density established by existing zoning or a General Plan for which an EIR was certified.[11] Consistency with every aspect of the underlying General Plan is not required – only the development density.

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[2] *Id*.
[3] *Id*.
[4] CEQA Guidelines, Section 15183(c).
[5] Public Resources Code, Section 21168.
[6] CEQA Guidelines, Section 15384(a).
[7] CEQA Guidelines, Section 15604(f)(5).
[8] *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1397; *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.
[9] CEQA Guidelines, Section 15204(a).
[10] CEQA Guidelines, Section 15151.
[11] CEQA Guidelines, Section 15183.

MBC Biolabs' Project is clearly consistent with density analyzed under the Eastern Neighborhoods PEIR ("EN PEIR"). During environmental review, staff considered several characteristics of the Project, including massing, height, scale, and other design considerations, and found all consistent with development density established in the UMU zoning district and Eastern Neighborhoods Area Plans, specifically the Central Waterfront Area Plan. Project consistency with these factors was discussed in detail in its Planning Commission approval motion.[12] *In fact, the Project does not even maximize the development density allowed at the Property, as it proposes only 58% of the Gross Floor Area permitted under the FAR Limit.* Further the EN PEIR expressly anticipated that the plan area would include development of laboratory (including biotechnology research) facilities.

As such, CEQA mandates that the Project be exempt from further environmental review unless substantial evidence in the record establishes that there are project-specific impacts peculiar to the Project or the site.

C. GPE PROJECT DESCRIPTION IS ADEQUATE UNDER CEQA

Appellants argue that the GPE's project description was incomplete because (1) it did not state that the proposed laboratory may include biotechnology; (2) it did not explicitly disclaim the inclusion of Life Sciences use; and (3) it did not state that the laboratory would be Biosafety 2 facility. However, none of these items is required by CEQA.

CEQA Guidelines[13] provide that a project description should contain a general description of the proposed site, proposed project, and surroundings, but need not supply extensive detail beyond what is needed for evaluation and review of potential environmental impacts. The GPE's project description met these requirements by describing the proposed use (laboratory), site characteristics, and surroundings in sufficient detail to adequately address environmental impacts.

CEQA does not require lead agencies to specify the biotechnical character of proposed laboratory uses or to identify biosafety levels established by the Center for Disease Control ("**CDC**") associated with such uses.

As cited by Appellants, the Planning Code's definition of Laboratory use (which is permitted at the Property) expressly includes a broad range of laboratory activity including biological laboratories classified by CDC as Biosafety Level 1, 2, or 3 facilities. Further, the Planning Code and published interpretations of the San Francisco Zoning Administrator clearly distinguish between life-science and non-life-science laboratory uses,[14] and the Project approval conditions clearly specify that it will not contain life-science use. An explicit statement in the GPE's project description to this effect was not necessary for environmental review purposes.

[12] Planning Commission Approval Motion No. 21576.
[13] CEQA Guidelines, Section 15124.
[14] San Francisco Planning Code § 102; San Francisco Zoning Administrator, Letter of Determination dated November 6, 2020 (Planning Case No. 2020-006020ZAD); Planning Commission Approval Motion No. 21576, Condition No. 33.

The GPE's description and analysis of laboratory use was sufficient for evaluation and review of potential environmental impacts under CEQA.

D. THE GPE ADEQUATELY ANALYZED POTENTIAL IMPACTS AND IMPOSED APPROPRIATE MITIGATION MEASURES ASSOCIATED WITH AIR QUALITY, SHADOW, AND HAZARDOUS MATERIALS.

The appellant incorrectly alleges that the GPE's analysis regarding air quality, shadow, and hazardous materials was inadequate and speculates that the Project could result in peculiar environmental impacts in these areas. These speculative claims do not constitute the substantial evidence necessary to overturn the GPE under CEQA.

1. Air Quality

Appellants allege that the Planning Department failed to property implement EN PEIR Mitigation Measure G-4 (Siting of Uses that Emit Other TACs) because the language of this measure in the Project's Mitigation Measure and Reporting Program ("**MMRP**") requires that each laboratory use in the project prepare a site survey identifying all residential or other sensitive receptors within 1,000 feet of the project site prior to the beginning of operations, rather than having the new development as a whole prepare such survey "prior to the first project approval action" as stated in the original EN PEIR measure.

First, the GPE accurately identifies and applies EN PEIR Measure G-4 to the Project. The reference to "first project approval" in the EN PEIR measure is undefined, and mitigation measures are typically carried out post-entitlement. The Project MMRP language ties requirements of this measure will occur prior the start of operations for each individual laboratory use within the project, which is a reasonable application of the EN PEIR measure. Further, the Project MMRP language *expands* upon requirements of the EN PEIR measure by requiring each new laboratory use to include an analysis of all potential TAC emissions that may be generated from its particular equipment and demonstrate that all applicable and relevant best available control technology and regulations will be applied to reduce potential TAC emissions.

CEQA clearly allows mitigation measures that call for post-approval analysis to confirm compliance with performance standards. In fact, the California Supreme Court expressly blessed this approach for another laboratory project in San Francisco.[15] At UCSF's Laurel Heights campus, the Court stated that conducting a noise study, not at the time of CEQA review but when the mechanical systems were designed, was permissible to ensure certain performance standards were met. The same analysis applies to the Project – the TAC emissions study will be conducted prior to the start of construction and will need to confirm no harmful emissions will impact nearby residences. This is also preferrable as any residential projects constructed between now and then can be considered in the study. To comply with this mitigation measure, the study must conclude that harmful emissions won't impact nearby residences – so the outcome is already clear at the time of Project approval.

[15] Laurel Heights Improvement Assn. v. Regents of University of California, 47 Cal.3d 376, 418 (1988)

Accordingly, Appellants claims are insufficient to require further environmental review.

2. Shadow

Appellants incorrectly argue that Project impacts related to shadow were not adequately considered in the GPE because it did not expressly analyze impact on Dogpatch Arts Plaza.

As noted in the Planning Department's earlier response, the GPE adequately analyzes Project shadow impacts. The GPE analysis appropriately considered whether the project would cause shadow consistent with the standards of Planning Code Section 295. The only property subject to Section 295 in vicinity to the Property is Esprit Park. Shadow impacts on this park were analyzed in detail in the Project's shadow study.

For informational purposes, Project's shadow impacts on the Avalon Dogpatch Dog Park and Dogpatch Arts Plaza are also discussed in the Project's shadow study and supplemental analysis presented to the Planning Commission prior to the project approval hearing on June 13, 2024. These materials constitute substantial evidence in the record supporting the Department's determination that the Project will not result in peculiar shadow impacts beyond those identified in the EN PEIR.

Further, the EN PEIR identified a significant and unavoidable impact to shadow on public open spaces as a result of anticipated development. CEQA Guidelines clearly establish that further environmental review is not required where alleged impacts have already been addressed as a significant in the prior EIR.[16]

Applicants have failed to demonstrate that the Department's determination regarding shadow impacts is not supported by substantial evidence, and therefore further environmental review is not appropriate.

3. Hazardous Materials

Appellants erroneously claim that the EN PEIR and GPE do not adequately analyze and mitigate potential hazardous materials impacts inherent to biotech laboratory uses.

In reality, the EN PEIR broadly analyzed potential hazardous materials impacts from hazardous materials, both construction- and operationally-based. The prior PEIR concluded that the rezoning and plan area development could result in significant hazardous materials impacts, but that implementation of mitigation measures would reduce these impacts to a less-than-significant level. Project-specific analysis was also conducted.

Appellants' speculatory allegations disregard the plethora of regulatory requirements imposed on biotech laboratories by the state and federal government which significantly reduce

[16] CEQA Guidelines §15183(c).

the potential for release of hazardous materials. The existence of such regulatory requirements was acknowledged and incorporated into the analysis of the EN PEIR, as discussed here:[17]

> ***Regulatory Framework***
> *Hazardous materials and hazardous wastes are subject to extensive federal, state, and local regulations, with the major objective of protecting public health and the environment. In general, these regulations define hazardous materials; establish reporting requirements; set guidelines for handling, storage, transport, remediation, and disposal of hazardous wastes; and require health and safety provisions for workers and the public. The major federal, state, and regional agencies enforcing these regulations include the U.S. EPA (federal); the Department of Toxic Substances Control (DTSC), the State Water Resources Control Board and the California RWQCB (state); and the Bay Area Air Quality Management District (BAAQMD) (regional). The San Francisco Department of Public Health (DPH) often acts as lead agency to ensure proper remediation of LUST sites and other contaminated sites in San Francisco.*

Consistent with the PEIR analysis, biotech laboratories like MBC Biolabs are regulated by and receive compliance oversight from a range of local, state, and national entities including:

- The Food and Drug Agency ("**FDA**") regulates MBC resident companies' work on development and testing of pharmaceuticals, biologics, medical devices, and diagnostic tests, ensuring safety, efficacy, and compliance with quality standards. This includes overseeing clinical trials, manufacturing drugs or devices for clinical testing, and the handling of human tissue and cell products.

- The US Department of Occupational Safety and Health Administration ("**OSHA**") and California Division of Occupational Safety and Health ("**Cal/OSHA**") sets standards for training for employee health and safety on site, including proper handling of hazardous materials and waste.[18] The federal Occupational Safety and Health Act requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.

- The US Environmental Protection Agency ("**EPA**") and Department of Toxic Substances Control ("**DTSC**") issues permits to MBC Biolabs and regulates its hazardous waste generation. DTSC oversees issuance and compliance oversight of Hazardous Waste Facility Permits.[19]

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[17] Eastern Neighborhoods Rezoning and Area Plans Final EIR, certified August 7, 2008, at p. 483 (available at : https://archives.sfplanning.org/documents/4005-EN_Final-EIR_Part-8_Prk-Shd-Arch-Hist-Haz-Oth.pdf, last accessed September 18,2024)

[18] See OSHA, Laboratory Safety Guidance, available online at: https://www.osha.gov/sites/default/files/publications/OSHA3404laboratory-safety-guidance.pdf, last accessed September 18, 2024; OSHA Laboratory Standards website: https://www.osha.gov/laboratories/standards, last accessed September 18, 2024; Cal/OSHA website: https://www.dir.ca.gov/dosh/, last accessed September 18, 2024.

[19] See DTSC web site: https://dtsc.ca.gov/who-we-are/, last accessed September 18, 2024.

- California Environmental Reporting System Unified Program regulates biotech laboratory hazardous materials and hazardous waste management. This entity requires an inventory of all hazardous materials on laboratory sites along with safety data to ensure scientists are appropriately trained and that the laboratory and local officials can respond safely and appropriately in the event of an accident.[20]

- SF Department of Public Health ("**SFDPH**") regulates and inspects biotech laboratories to ensure hazardous materials and hazardous, medical and biological waste are managed properly. SFDPH oversees a Hazardous Materials and Waste Program which implements six state environmental mandates and two local mandates. Businesses that store, handle, or use hazardous materials are required to obtain a certificate of registration from SFDPH to Staff inspect regulated businesses at least once every three years.[21]

- SF Public Utilities Commission regulates and inspects laboratories to ensure they are not releasing hazardous waste to the water system.

- The Bay Area Air Quality Management District ("**BAAQMD**") is the local agency responsible for regulating stationary sources of regulated or hazardous air pollutants in the San Francisco Bay Area.[22]

- The Centers for Disease Control and Prevention ("**CDC**") and the National Institutes of Health ("**NIH**") publish a manual outlining what is allowed under biosafety level 2 (BSL2) designation.[23] This advisory document recommending best practices for the safe conduct of work in biomedical and clinical laboratories from a biosafety perspective.

We note that Appellants also erroneously suggest that the Planning Department's environmental review omitted school notice and consultation procedures associated with facilities that would emit certain hazardous materials and located within ¼ mile of a school, citing CEQA Regulations Section 15186. These requirements do not apply to the Project's GPE approval.

Applicants have failed to demonstrate that the Department's determination regarding hazardous materials impacts is not supported by substantial evidence, and therefore further environmental review is not appropriate.

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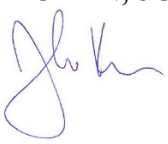
[20] See CERS Unified Program web site: https://calepa.ca.gov/cupa/, last accessed September 18, 2024.
[21] See SFDPH Hazardous Materials and Waster Program web site: https://www.sfdph.org/dph/eh/HMUPA/, last accessed September 18, 2024.
[22] See BAAQMD web site: https://www.baaqmd.gov/rules-and-compliance/current-rules, last accessed September 18, 2024.
[23] See CDC & NIH, Biosafety in Microbiological and Biomedical Laboratories, 6th Edition, available online at: https://www.cdc.gov/labs/pdf/SF__19_308133-A_BMBL6_00-BOOK-WEB-final-3.pdf, last accessed September 18, 2024.

E. CONCLUSION

Requiring further environmental review for the Project would be unnecessary and contrary to CEQA. The Project is consistent with development density analyzed under the Eastern Neighborhoods PEIR, and appellant has failed to provide substantial evidence to meet its burden to overturn the City's decision to issue a GPE for the Project. Therefore, we respectfully request that you deny the appeal.

Very truly yours,

REUBEN, JUNIUS & ROSE, LLP



John Kevlin

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