



**Appeal of Final Environmental Impact Report
India Basin Mixed-Use Project**

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DATE: September 17, 2018
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RE: Board File No. 180841, Planning Department Case No. 2014-002541ENV
Appeal of the Final Environmental Impact Report for the India Basin Mixed-Use Project
HEARING DATE: September 25, 2018
ATTACHMENTS: None

PROJECT SPONSOR: BUILD
San Francisco Recreation and Park Department
Supervisor Cohen (legislative sponsor)
APPELLANTS: Mikhail Brodsky on behalf of Archimedes Banya SF and 748 Innes Ave. HOA
Bradley Angel on behalf of Greenaction for Health & Environmental Justice

INTRODUCTION

This memorandum and the attached documents are a response to two letters of appeal submitted to the Board of Supervisors (“Board”) regarding the Planning Department’s (“Department”) publication of a Final Environmental Impact Report (“Final EIR”) under the California Environmental Quality Act (“CEQA”) for the India Basin Mixed-Use Project (“Project”). The Final EIR (provided on a compact disc to the Board on September 17, 2018) was certified by the Planning Commission (“Commission”) on July 26, 2018.

The first appeal to the Board was filed by Mikhail Brodsky on behalf of Archimedes Banya SF and 748 Innes Ave. HOA (“Banya”) on August 23, 2018. The second appeal to the Board was filed by Bradley Angel on behalf of Greenaction for Health & Environmental Justice (“Greenaction”) on August 27, 2018. Both appeal letters are part of Board File No.180841 and can be accessed online at <https://sfgov.legistar.com/LegislationDetail.aspx?ID=3646252&GUID=CB4D0848-D2CF-4491-B350-86D5B0105801&Options=ID|Text|&Search=180841>.

The decision before the Board is whether to uphold the Commission’s decision to certify the Final EIR and deny the appeals, or to reverse the Commission’s decision to certify the Final EIR and return the Project to the Department for staff to conduct additional environmental review.

PROJECT DESCRIPTION

The project site, which is approximately 39 acres, is on the northeast side of Innes Avenue between Hunters Point Boulevard and Earl Street. The project site is bounded by Hunters Point Boulevard on the northwest, Innes Avenue on the southwest, Earl Street on the southeast, and San Francisco Bay on the northeast. There are two existing parks, India Basin Open Space and India Basin Shoreline Park, on the project site.

Through a public-private partnership between the San Francisco Recreation and Park Department (“SFRPD”) and the privately owned real estate development company BUILD, the Project would develop approximately 39 acres located along the India Basin shoreline into an integrated network of new public parks, wetlands habitat, and a mixed-use urban village. For the mixed-use urban village that would be developed by BUILD, the EIR analyzed two development scenarios: a residentially-oriented project and a commercially-oriented variant. The residentially-oriented project would include up to 1,575 dwelling units, approximately 209,000 square feet of nonresidential space, and 1,800 parking spaces, and the commercially-oriented variant would include approximately 500 dwelling units, 1,000,000 square feet of commercial space, 50,000 square feet of institutional space, and 1,932 parking spaces.

The SFRPD would partner with BUILD to develop a total of approximately 24.5 acres of public open space on the project site. The existing parks on the project site, India Basin Open Space and India Basin Shoreline Park, would undergo various improvements. India Basin Open Space could include sand dunes, bird islands, brackish lagoons, landscaping, and new wetlands and ponds. India Basin Shoreline Park could include basketball courts, an exercise/cross-training course, barbecue pits, a promenade, event areas, fishing areas, a pier and dock with human-powered boat launch ramp, and interpretive exhibits. In addition, about 0.64 acre of tidal marsh and wetlands would be created along the park’s shoreline. Two new open spaces, at 700 Innes Avenue and 900 Innes Avenue, would also be developed. The 700 Innes Avenue property would feature a new public park known as the Big Green, which would include pedestrian and bicycle pathways, stormwater bioretention ponds, swales, planters, a wet meadow, a children’s play area, a fitness course/loop, benches and pavilions, and small gathering spaces. The 900 Innes Avenue property would be developed as a waterfront park that provides a connection between India Basin Open Space and India Basin Shoreline Park, a connection between existing segments of the Blue Greenway/Bay Trail, and pedestrian and bicycle access to the shoreline. Other potential amenities include piers, picnic areas, educational displays, an ADA-accessible garden path, a concessions building, a welcome center, a pavilion for youth programming, and tidal marsh and wetlands areas.

The following discussion provides a brief overview of the Project’s procedural background and a succinct list of the EIR’s significant and unavoidable impacts and accompanying mitigation measures.

PROCEDURAL BACKGROUND

Table 1: CEQA Procedural Background, identifies the dates of the major CEQA milestones for the Project’s environmental review.

TABLE 1: CEQA PROCEDURAL BACKGROUND	
CEQA Milestone	Date
Notice of Preparation (“NOP”) of an EIR and Initial Study Published	June 1, 2016
<i>NOP/Initial Study Public Review Period</i>	June 1, 2016 to July 1, 2016 (30 days)
<i>Public Scoping Meeting</i>	June 16, 2016
Draft EIR Published	September 13, 2017
<i>Draft EIR Public Review Period</i>	September 14, 2017 to October 30, 2017 (47 days)
<i>Public Hearing on Draft EIR</i>	October 19, 2017
Responses to Comments Published	July 11, 2018
Certification of the Final EIR	July 26, 2018

Significant and Unavoidable Project Impacts and Mitigation Measures

Table 2. Significant and Unavoidable Impacts and Mitigation Measures, provides an abbreviated list of the significant and unavoidable impacts and accompanying mitigation measures identified in the EIR. All other impacts would be either less than significant or can be reduced to less-than-significant levels with implementation of mitigation measures identified in the EIR.

TABLE 2. SIGNIFICANT AND UNAVOIDABLE IMPACTS AND MITIGATION MEASURES	
Significant and Unavoidable Impacts	Mitigation Measures
Aesthetics	
Impact AE-3: The Project would create a new source of substantial light or glare that would adversely affect day or nighttime views in the area or would substantially affect other people or properties.	M-AE-3: Implement Good Lighting Practices
Impact C-AE-1: The proposed project or variant, in combination with past, present, and reasonably foreseeable future projects in the vicinity of the project site, would substantially contribute to cumulative impacts related to aesthetics.	See M-AE-3.
Cultural Resources	
Impact CR-1: Construction of the Project would cause a substantial adverse change in the significance of a historical resource as defined in	M-CR-1a: Prepare and Implement Historic Preservation Plans and Ensure that Rehabilitation Plans Meet Performance Criteria

TABLE 2. SIGNIFICANT AND UNAVOIDABLE IMPACTS AND MITIGATION MEASURES	
CEQA Guidelines Section 15064.5, including those resources listed in Article 10 or Article 11 of the San Francisco Planning Code.	M-CR-1b: Document Historical Resources M-CR-1c: Develop and Implement an Interpretative Plan M-CR-1d: Retain the Boatyard Office Building M-CR-1e: Vibration Protection Plan
Impact CR-2: Construction of the Project would cause a substantial adverse change in the significance of an archeological resource pursuant to CEQA Guidelines Section 15064.5.	M-CR-2a: Undertake an Archeological Testing Program
Impact CR-3: Construction of the Project would disturb human remains, including those interred outside of formal cemeteries.	M-CR-3a: Implement Legally Required Measures in the Event of Inadvertent Discovery of Human Remains
Impact CR-4: Construction of the Project would cause a substantial adverse change in the significance of a tribal cultural resource as defined in Public Resources Code Section 21074.	M-CR-4a: Implement Tribal Cultural Resources Interpretive Program
Impact C-CR-1: The Project, in combination with past, present, and reasonably foreseeable future projects in the vicinity of the project site, would substantially contribute to cumulative impacts related to cultural resources.	See M-CR-1a, M-CR-1b, M-CR-2a and M-CR-3a.
Transportation and Circulation	
Impact TR-3: The Project would cause a substantial increase in transit demand that would not be accommodated by adjacent transit capacity, resulting in unacceptable levels of transit service.	M-TR-3P: Implement Transit Capacity Improvements (Proposed Project) M-TR-3V: Implement Transit Capacity Improvements (Variant)
Impact TR-8: Under the variant, passenger loading demand associated with the school during the peak hour of loading activities would not be accommodated within proposed on-site passenger loading facilities or within convenient on-street loading zones, and would create potentially hazardous conditions affecting traffic, transit, bicycles, or pedestrians or significant delays affecting transit.	M-TR-8V: Implement Passenger Loading Strategies for the School (Variant)
Impact C-TR-2: The Project, in combination with past, present, and reasonably foreseeable future projects in the vicinity of the project site, would substantially contribute to significant cumulative impacts related to transportation and circulation for transit delay.	M-C-TR-2: Implement Transit-Only Lanes

TABLE 2. SIGNIFICANT AND UNAVOIDABLE IMPACTS AND MITIGATION MEASURES	
Noise and Vibration	
Impact NO-2: Construction of the Project would result in a substantial temporary or periodic increase in ambient noise levels in the project vicinity above levels existing without the Project.	M-NO-2a: General Construction Noise Control Measures M-NO-2b: Noise and Vibration Control Measures during Pile Driving
Impact NO-3: Noise from stationary sources associated with operation of the Project would result in a substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the Project.	M-NO-3: Design Future Noise-Generating Uses near Residential Uses to Minimize the Potential for Noise Conflicts
Impact NO-6: The Project would result in exposure of persons to or generate excessive groundborne vibration.	M-NO-6: Implement Vibration Mitigation Measure for Pile Driving
Impact C-NO-1: The Project, in combination with past, present, and reasonably foreseeable future projects in the vicinity of the project site, would substantially contribute to cumulative impacts related to noise.	No feasible mitigation measures are available.
Air Quality	
Impact AQ-1: The Project would generate emissions of criteria pollutants and precursors during construction, operations, and overlapping construction and operational activities that could violate an air quality standard, contribute substantially to an existing or projected air quality violation, or result in a cumulatively considerable net increase in criteria pollutants.	M-AQ-1a: Minimize Off-Road Construction Equipment Emissions M-AQ-1b: Minimize On-Road Construction Equipment Emissions M-AQ-1c: Utilize Best Available Control Technology for In-Water Construction Equipment M-AQ-1d: Offset Emissions for Construction and Operational Ozone Precursor (NOx and ROG) Emissions M-AQ-1e: Implement Best Available Control Technology for Operational Diesel Generators M-AQ-1f: Prepare and Implement Transportation Demand Management
Impact AQ-2: The Project would generate construction-related and operational emissions of criteria pollutants and precursors that could conflict with or obstruct implementation of the applicable air quality plan.	See M-AQ-1a through M-AQ-1f.
Impact AQ-3: The Project would generate emissions that could expose sensitive receptors to substantial pollutant concentrations.	See M-AQ-1a through M-AQ-1f.

TABLE 2. SIGNIFICANT AND UNAVOIDABLE IMPACTS AND MITIGATION MEASURES	
Impact AQ-4: The proposed project or variant would not generate emissions that create objectionable odors affecting a substantial number of people.	See M-AQ-1a through M-AQ-1f.
Impact C-AQ-1: The proposed project or variant, in combination with past, present, and reasonably foreseeable future development in the project area, would contribute to cumulative regional air quality impacts.	See M-AQ-1a through M-AQ-1f.
Impact C-AQ-2: The proposed project or variant, in combination with past, present, and reasonably foreseeable future development in the project area, would contribute to cumulative health risk impacts on sensitive receptors.	See M-AQ-1a through M-AQ-1f.
Wind	
Impact WI-1: The Project would alter wind in a manner that substantially affects public areas or outdoor recreation facilities.	M-WI-1a: Wind Impact Analysis and Mitigation for Buildings 100 Feet or Greater in Height During Partial Buildout M-WI-1b: Temporary Wind Reduction Measures during Construction M-WI-1c: Reduce Effects of Ground-Level Hazardous Winds through Ongoing Review
Recreation	
Impact RE-2: The Project would include recreational facilities, the construction of which would cause significant environmental effects but would not require the construction or expansion of other recreational facilities that might have an adverse effect on the environment.	See mitigation measures in EIR Section 3.5, Transportation and Circulation; Section 3.6, Noise; Section 3.7, Air Quality; Section 3.14, Biological Resources; and Section 3.15, Hydrology and Water Quality.
Utilities and Service Systems	
Impact UT-2: The Project would require or result in the construction of new water, wastewater, or stormwater drainage treatment facilities or expansion of existing facilities, the construction of which could cause significant environmental effects.	See mitigation measures listed in EIR Section 3.5, Transportation and Circulation; Section 3.6, Noise; and Section 3.7, Air Quality.
Biological Resources	
Impact BI-1: The Project would have an adverse effect, either directly or through habitat	M-BI-1a: Prepare and Implement a Hydroacoustic Monitoring Program for Special-Status Fish and

TABLE 2. SIGNIFICANT AND UNAVOIDABLE IMPACTS AND MITIGATION MEASURES	
modifications, on species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by CDFW or USFWS.	<p>Marine Mammals</p> <p>M-BI-1b: Implement Avoidance and Minimization Measures for Special-Status Species</p> <p>M-BI-1c: Prepare and Implement a Vegetation Restoration Plan and Compensatory Mitigation</p> <p>M-BI-1d: Avoid Ridgway’s Rail Habitat During the Nesting Season</p> <p>M-BI-1e: Avoid Nests during Bird Nesting Season</p> <p>M-HY-1a: Monitor Turbidity during Construction</p> <p>M-HY-1b: Implement Pile Removal Best Management Practices</p>
Impact BI-2: The Project would have an adverse effect on riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by CDFW or USFWS.	See M-BI-1c.
Impact BI-3: The Project would have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means.	See M-BI-1c, M-HY-1a, and M-HY-1b.
Impact BI-4: The proposed project or variant would interfere with the movement of native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites.	See M-BI-1a and M-BI-1d.
Hydrology and Water Quality	
Impact HY-1: The Project would violate water quality standards or waste discharge requirements.	<p>M-HY-1a: Monitor Turbidity during Construction</p> <p>M-HY-1b: Implement Pile Removal Best Management Practices</p> <p>M-HY-1c: Use Clamshell Dredges</p>
Impact HY-2: The Project would alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner that would result in substantial erosion or siltation or flooding on- or off-site.	See M-HY-1a and M-HY-1b.
Impact HY-3: The Project would create or	See M-HY-1a and M-HY-1b.

TABLE 2. SIGNIFICANT AND UNAVOIDABLE IMPACTS AND MITIGATION MEASURES	
contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff, and the project would not otherwise degrade water quality.	
Impact C-HY-1: The Project, in combination with past, present, and reasonably foreseeable future projects in the vicinity of the project site, would substantially contribute to cumulative impacts related to hydrology and water quality.	See M-HY-1a through M-HY-1c.
Hazards and Hazardous Materials	
Impact HZ-1: The Project would create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials.	See M-HY-1b.
Impact HZ-2: The Project would create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment.	M-HZ-2a: Prepare and Implement a Site Mitigation Plan for Areas Above the Mean High-Water Line M-HZ-2b: Prepare and Implement a Nearshore Sediment and Materials Management Plan for Areas Below the Mean High-Water Line M-HZ-2c: Prepare and Implement a Remedial Action Plan for the 900 Innes Property
Impact HZ-3: The Project is located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5 and, as a result, would create a significant hazard to the public or the environment	See M-HY-1a, M-HY-1b, M-HZ-2a, M-HZ-2b, and M-HZ-2c.
Impact HZ-4: The Project would emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school.	See M-HZ-2a through M-HZ-2c.
Impact C-HZ-1: The Project, in combination with past, present, and reasonably foreseeable future projects in the vicinity of the project site, would substantially contribute to cumulative impacts related to hazards and hazardous materials.	See M-HY-1a, M-HY-1b, and HZ-2a through M-HZ-2c.

CEQA Findings and Statement of Overriding Considerations

As described in CEQA Guidelines Section 15093, if the Final EIR identifies significant effects for a proposed project, but the effects are not avoided or reduced to less than significant levels (i.e., significant and unavoidable impacts), a decision-maker that approves the project must find that any such unavoidable significant effects are acceptable due to overriding economic, legal, technological, social, or other policy considerations. This is known as a statement of overriding considerations. In making these findings, the decision-maker must balance the benefits of the proposed project against its unavoidable environmental effects.

The Commission has sole authority to adopt a resolution recommending that the Board approve the Development Agreement, the Design Guidelines, and the legislative amendments (including Planning Code amendments, Zoning Map amendments, and General Plan amendments). The Commission was the decision-maker, under CEQA, that was required to adopt CEQA findings, including a statement of overriding considerations, when it approved the Project (i.e., adopted resolutions recommending that the Board approve the Project). On July 26, 2018, following certification of the Final EIR, the Commission approved the Project and adopted CEQA findings and a statement of overriding considerations as part of its approval action (Planning Commission Motion No. 20248).

CEQA GUIDELINES

The Final EIR has been prepared in accordance with CEQA, the CEQA Guidelines, and local CEQA procedures under Chapter 31 of the San Francisco Administrative Code. The purpose of the Final EIR is to disclose any potential impacts on the physical environment resulting from implementation of the Project and provide an opportunity for public review and comment before decision-makers decide to approve or deny the Project. The EIR is an informational document intended to inform public agency decision-makers and the public of the significant environmental effects of a project proposal, identify possible ways to minimize the significant effects, and describe feasible alternatives to the project to reduce or eliminate those significant effects. Certification of an environmental document does not constitute a project approval of any kind.

STANDARDS OF ADEQUACY FOR CERTIFICATION OF AN EIR

On July 26, 2018, the Commission reviewed and considered the Final EIR at a duly noticed public hearing. The Commission found that the Final EIR reflected the independent judgment and analysis of the City and County of San Francisco. The Commission found that the Final EIR was adequate, accurate and objective, and that the Responses to Comments (RTC) document contained no significant revisions to the Draft EIR. The Commission certified the Final EIR in compliance with the requirements of CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code.

Under Administrative Code Section 31.16(c)(3), the grounds for appeal of an EIR

shall be limited to whether the EIR complies with CEQA, including whether it is adequate, accurate and objective, sufficient as an informational document, correct in its conclusions, and reflects the independent judgment and analysis of the City and whether the Planning Commission certification findings are correct.

The standards for adequacy of an EIR are set forth in CEQA Guidelines Section 15151, which provides:

An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.

Administrative Code Section 31.16(b)(6) provides that in reviewing a CEQA decision on appeal, the Board “shall conduct its own independent review of whether the CEQA decision adequately complies with the requirements of CEQA. The Board shall consider anew all facts, evidence and issues related to the adequacy, accuracy and objectiveness of the CEQA decision, including, but not limited to, the sufficiency of the CEQA decision and the correctness of its conclusions.”

PLANNING DEPARTMENT RESPONSES

Two appeal letters were timely filed concerning certification of the EIR for the Project. The concerns raised in each appeal letter are addressed below. Where multiple appellants raise a similar concern, the response below refers to those concerns in the plural (e.g., “Appellants”). The responses below refer to the appellant in the singular when one appellant raises a concern that the other appellant did not (e.g., “Appellant”).

Response 1: The Commission’s adoption of CEQA findings and statement of overriding considerations for the Project are not appealable to the Board under CEQA Section 21151(c) or Chapter 31 of the Administrative Code.

CEQA Requirement

One Appellant claims to appeal the Commission’s adoption of CEQA findings and statement of overriding considerations on the basis that the Project should not be approved due to its significant and unavoidable air quality impacts. Appellant raises no issues regarding the adequacy of the air quality analysis presented in the EIR. Both Appellants raise concerns related to the Project’s air quality impacts, but these concerns are related to the merits of the Project and not the adequacy or accuracy of the analysis contained in the EIR.

As discussed in Section 3.7, Air Quality, of the Project’s EIR, the air quality analysis was conducted in accordance with guidance and methodologies established by local, regional, state, and federal agencies, including the Bay Area Air Quality Management District (Draft EIR pp.3.7-23 through 3.7-31).

The EIR disclosed that the Project would result in significant impacts and identified six mitigation measures (M-AQ-1a through M-AQ-1f)-that would reduce the Project’s significant impacts to less-than-significant levels (Draft EIR pp. 3.7-35 through 3.7-85).

Regarding the Commission's CEQA findings and statement of overriding considerations, CEQA Section 21151(c) provides:

If a nonelected decision-making body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that *certification, approval, or determination* may be appealed to the agency's elected decision-making body, if any (emphasis added).

That is, CEQA provides for appeal to the Board ("the agency's elected decision-making body") of the certification of the EIR by the Commission ("a nonelected decision-making body of a local lead agency"), approval of a negative declaration or mitigated negative declaration, or determination that a project is not subject to CEQA. Section 21151(c) does not provide for appeal of any project approval actions.

Chapter 31 of the Administrative Code establishes the types of environmental review decisions that may be subject to appeal, as well as the grounds for such an appeal. Chapter 31.16(a) establishes that: (1) certification of a Final EIR by the Commission; (2) adoption of a negative declaration by the first decision-making body; and (3) determination by the Department, or any other authorized City department, that a project is exempt from CEQA are the only environmental review decisions that may be appealed to the Board. Chapter 31.16(c)(3) states that

the grounds for appeal of an EIR shall be limited to whether the EIR complies with CEQA, including whether it is adequate, accurate and objective, sufficient as an informational document, correct in its conclusions, and reflects the independent judgment and analysis of the City and whether the Commission's EIR *certification* findings are correct (emphasis added).

Pursuant to CEQA Guidelines Sections 15093(b)–(c),

When the lead agency approves a project which will result in the occurrence of significant effects which are identified in the final EIR but are not avoided or substantially lessened, the agency shall state in writing the specific reasons to support its action based on the final EIR and/or other information in the record. The statement of overriding considerations shall be supported by substantial evidence in the record.

If an agency makes a statement of overriding considerations, the statement should be included in the record of the *project approval* and should be mentioned in the notice of determination (emphasis added).

The Commission's Adoption of CEQA Findings and Statement of Overriding Considerations

The Commission's CEQA findings and statement of overriding considerations are not separate environmental determinations subject to appeal under Chapter 31, because they are part of the project approvals, not the environmental review process itself. In fact, the Commission adopts the CEQA findings and statement of overriding considerations subsequent to, not together with, the certification of

the EIR. CEQA Section 21081 provides that “no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant impacts on the environment” unless the agency makes required findings. As this language makes clear, the CEQA findings are required only if the agency decides to approve the project and only after the EIR has been certified. Pursuant to CEQA Guidelines Sections 15093(b)–(c), the Commission’s adoption of CEQA findings and a statement of overriding considerations was legal.

Project approvals are also not environmental review decisions subject to appeal under Chapter 31. However, the Board may adopt, modify, or reject the Commission’s CEQA findings and statement of overriding considerations in connection with any approvals that require action by the Board, such as approval of the Development Agreement, the Design Guidelines, and the legislative amendments (including Planning Code amendments, Zoning Map amendments, and General Plan amendments).

Response 2: The Department’s publication and distribution of the Notice of Preparation and the Draft EIR complied with the requirements of CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code, did not exclude any limited- or non-English-speaking communities from meaningful participation in the CEQA process, and did not violate civil rights laws.

CEQA Requirement

CEQA Guidelines Section 15201 provides that “public participation is an essential part of the CEQA process” and that “each public agency should include provisions in its CEQA procedures for wide public involvement, formal and informal, consistent with its existing activities and procedures, in order to receive and evaluate public reactions to environmental issues related to the agency’s activities. Such procedures should include, whenever possible, making environmental information available in electronic format on the Internet, on a web site maintained or utilized by the public agency.”

CEQA Section 21083.1 provides that “courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines.”

Publication and Distribution of the Notice of Preparation and the Draft EIR

One Appellant asserts that the Department refused to translate key notices and key documents during the preparation of the Project’s EIR. This statement is incorrect.

This issue was discussed in Response GC-1 of the RTC document (RTC pp. 4-110 through 4-111). The Department translated the Notice of Preparation of an EIR (NOP) into Spanish at the request of Greenaction. Due to an administrative oversight, the translated NOP was never distributed. When the Department published the Draft EIR, the Department translated the Notice of Availability of the Draft EIR (NOA) into Chinese, Spanish, and Tagalog. In addition, BUILD translated the Executive Summary of the Draft EIR into Chinese and Spanish. These translated documents were posted on the Department’s website (<http://sf-planning.org/environmental-impact-reports-negative-declarations>).

Limited- and non-English-speaking individuals have had meaningful opportunity to participate in the CEQA process and provide comments on the EIR, either in writing or in person during the public scoping meeting on June 19, 2016, the Draft EIR hearing on October 19, 2017, and the Final EIR certification hearing on July 26, 2018. Such individuals will also have other opportunities to comment during additional public hearings on the approvals for the project. Furthermore, individuals can request interpreters be present at any public meetings and hearings if they require them and make such requests to the Department ahead of time. Therefore, the record reflects that limited- and non-English-speaking individuals have been provided opportunities for meaningful involvement in the CEQA process and that no violation of CEQA has occurred.

Translating the NOP and NOA into other languages is not required under CEQA, the CEQA Guidelines, or Chapter 31 of the Administrative Code. Although meaningful public participation is an essential part of the CEQA process, CEQA itself does not require agencies to provide language access services. In addition, CEQA Section 21083.1 prohibits the interpretation of CEQA in any manner that imposes additional procedural or substantive requirements beyond those explicitly stated in CEQA. Imposing language access services as a requirement of CEQA is explicitly prohibited by the statute, because such services are not explicitly required under CEQA.

Appellant further claims that the City's alleged refusal to translate some documents and notices constitutes a violation of state and federal civil rights laws. However, Appellant's generalized claims fail to meet the basic legal standards to establish a viable claim under these laws. It is settled law that in order to prevail on a claim of unlawful discrimination under the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, individuals must show that the alleged discrimination was intentional. The Ninth Circuit has stated that "violations of equal protection and Title VI require similar proofs –plaintiffs must show that actions of the defendants had a discriminatory impact, and that the defendants acted with an intent or purpose to discriminate based on plaintiffs' membership in a protected class." (*Comm. Concerning Cmty. Improvement v. City of Modesto* (9th Cir. 2009) 583 F.3d 690, 702-03.) However, "courts consistently have required more evidence of discriminatory intent than a simple failure of diligence, perception, or persistence in a single case." (*Moua v. City of Chico* (E.D. Cal. 2004) 324 F. Supp. 2d 1132, 1140). Here, the Department's failure to distribute the translated NOP due to an "administrative oversight" is not sufficient to establish the required discriminatory intent.

Similarly, to establish a violation of the California Civil Rights Act based on a claimed denial of language access services, Appellant would have to prove that limited-English proficiency persons were harmed by the failure to translate the NOP. (*Blumhorst v. Jewish Family Servs of LA* (2005) 126 Cal. App. 4th 993, 1002.) Appellant cannot do this, given that the alleged failure to translate was corrected promptly, and all the relevant notices were translated into Chinese, Spanish and Tagalog. In addition, as explained above, BUILD translated the Executive Summary of the Draft EIR into Chinese and Spanish, and all of these translated documents were posted on the Department's website (<http://sf-planning.org/environmental-impact-reports-negative-declarations>). Furthermore, limited-English proficiency persons have had ample opportunity to request interpreters to participate in the multiple hearings provided in the CEQA review process. Given these facts, Appellant cannot seriously claim that anyone was personally harmed by the Department's temporary failure to translate one particular notice.

Meaningful public participation is an essential part of the CEQA process. The City has followed all required guidelines and procedural steps to provide opportunities for meaningful participation to all members of the community, including translating the relevant documents and providing interpreter services. No more is required.

Response 3: The EIR is adequate, accurate, objective, and sufficient as an informational document pursuant to the requirements under CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code.

CEQA Requirement

CEQA defines “substantial evidence” to include “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact” (CEQA Sections 21080(e)(1) and 21082.2(c)). “Substantial evidence” under CEQA “is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment” (CEQA Sections 21080(e)(2) and 21082.2(c)). Pursuant to CEQA Guidelines Section 15064, an effect shall not be considered significant in the absence of substantial evidence in the record.

Analysis in the India Basin EIR

On July 26, 2018, the Commission voted to certify the Project’s Final EIR as compliant with CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code. Appellants contend that the Project’s EIR is inaccurate, inadequate, and/or incomplete. However, Appellants have not provided facts or other substantial evidence necessary to support these claims or to support their argument that the certification of the Final EIR should be overturned. Section 31.16(b)(6) of the Administrative Code requires appellants to provide “facts, evidence and issues” in support of the appeal, and Appellants’ bulleted claims and generalized reference to the record do not meet this requirement. Furthermore, in order for the Board to accept Appellants’ claims and reject the Commission’s Final EIR certification, its findings would need to be supported with substantial evidence in the record.

The appeal letters raise a number of alleged deficiencies in the EIR that Appellants do not explain or support with data or references offering facts, reasonable assumptions based on facts, or expert opinion supported by facts. The Department is unable to respond to conclusory or speculative statements set forth by Appellants. The responses in this document are a reasonable, good faith effort by the Department to respond to Appellants’ claims, and to describe where the EIR addresses the issues raised in the appeal letters.

The RTC document provides responses to all comments submitted on the Project’s Draft EIR. Other than the claims specifically addressed in this appeal response, Appellants have provided no other support for their claims that the responses are allegedly inadequate. Where Appellants have resubmitted their Draft EIR comment letters without providing information explaining how their comments on the Draft EIR have not been adequately addressed, no further response is required.

The EIR is adequate, complete, and complies with CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code, and Appellants have not met their burden to provide evidence to the contrary.

Response 4: Implementation of the proposed changes to the Project would not result in new environmental impacts that were not previously disclosed, would not result in environmental impacts that are more severe than those previously disclosed, and would not change any of the EIR's conclusions. Therefore, recirculation of the EIR is not required.

CEQA Requirement

Pursuant to CEQA Guidelines Section 15088.5, recirculation of an EIR is required when “significant new information” is added to the EIR after publication of the Draft EIR but before certification of the Final EIR. New information added to an EIR is not “significant” unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project’s proponents have declined to implement.

CEQA Guidelines Section 15088.5 further defines “significant new information” that triggers a requirement for recirculation as including, but not limited to, identification of a new significant impact, a substantial increase in the severity of an impact (unless mitigation is adopted to reduce the impact to a less-than-significant level), or identification of a new feasible alternative or mitigation measure that would lessen the environmental impacts of the proposed project that the project sponsor declines to adopt.

Analysis in the India Basin EIR

Citing CEQA Guidelines Section 15088.5, one Appellant asserts that the revisions made to the Project after the publication of the Draft EIR (an increase of 335 dwelling units, a decrease of approximately 66,225 gross square feet of commercial space, and the elimination of the proposed school) constitute significant new information that requires recirculation of the EIR. Pursuant to CEQA Guidelines Section 15088.5(a), new information added to an EIR is not “significant” unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project’s proponents have declined to implement.

The RTC document included a topic-by-topic analysis of the environmental impacts associated with the proposed changes to the Project (RTC pp. 2-1 through 2-36). Pursuant to the standard articulated in CEQA Guidelines Sections 15088.5(a)(1)–(4), the RTC document concluded that: (1) the proposed changes would not result in a new significant environmental impact; (2) the proposed changes would not increase the severity of an environmental impact; (3) there would be no new feasible Project alternatives or mitigation measures different from those analyzed in the EIR that would lessen the environmental impacts of the Project; and (4) the EIR is adequate and provided an opportunity for meaningful public review and comment. Moreover, no mitigation measures in addition to those previously identified are required to address the environmental impacts of the proposed changes to the Project. Appellant

provides no evidence demonstrating how the EIR's evaluation of the proposed changes to the Project deprives the public of a meaningful opportunity to review and comment upon a substantial adverse environmental effect or a feasible way to mitigate or avoid such an effect that the Project's proponents have declined to implement.

Response 5: Based on the information contained in the EIR, which included results from environmental testing, the Commission thoroughly considered the presence of hazardous materials on the project site. The Commission's decision to approve the Project was not improper or premature.

CEQA Requirement

CEQA Guidelines Section 15121(a) provides that

an EIR is an informational document which will inform public agency decision makers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project. The public agency shall consider the information in the EIR along with other information which may be presented to the agency.

CEQA Guidelines Section 15121(b) provides that

while information in the EIR does not control the agency's ultimate discretion on the project, the agency must respond to each significant effect identified in the EIR by making findings under Section 15091 and if necessary by making a statement of overriding consideration under Section 15093.

Appendix G of the CEQA Guidelines includes a checklist of environmental topics that should be addressed as part of a project's environmental review. Pursuant to the checklist in Appendix G of the CEQA Guidelines, a project would have a significant impact related to hazards and hazardous materials if it would:

- create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials;
- create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment;
- emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school;
- be located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code Section 65962.5 and, as a result, would create a significant hazard to the public or the environment; or

- impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan.

Analysis in the India Basin EIR

One Appellant asserts that it is improper and premature for the Project to be approved before the BUILD portion of the project site has undergone comprehensive testing for and remediation of hazardous materials.

An EIR is not an approval document. As discussed above, an EIR discloses information about a proposed project so that public agencies and their representatives can make informed decisions. Section 3.16, Hazards and Hazardous Materials, of the Project's EIR (Draft EIR pp. 3.16-1 through 3.16-69) identified applicable regulations related to hazardous materials, disclosed the presence of hazardous materials on the project site, which was ascertained through environmental testing, and identified mitigation measures that would reduce the Project's significant impacts to less-than-significant levels.

The Project is required to comply with the Maher Ordinance (San Francisco Public Health Code Article 22A), which provides a process for identifying, investigating, analyzing, and when deemed necessary, remediating or mitigating hazardous substances in soils. The Project is also required to comply with other local regulations as well as regional, state, and federal regulations related to hazardous materials (Draft EIR pp. 3.16-8 through 3.16-18).

As part of the analysis for the EIR, the project site underwent environmental testing, which included soil samples (Draft EIR pp. 3.16-3 through 3.16-7). The type of testing and documentation for the project site is included in Appendix M of the Project's EIR and is briefly summarized below.

- India Basin Shoreline Park
 - a limited Phase II soil investigation undertaken in 1999;
 - a Phase I Environmental Site Assessment ("ESA") conducted in 2015;
 - a data gap analysis, prepared in October 2016, identifying the information necessary to complete a site characterization of and risk assessment for the property; and
 - a site characterization report presenting the results of onshore sampling activities undertaken in late 2016 and offshore sediment sampling undertaken in March 2017.
- 900 Innes Avenue
 - a Phase I/II targeted brownfields assessment conducted for the U.S. Environmental Protection Agency Region 9 in September 2013;
 - an analysis of brownfield cleanup alternatives undertaken in September 2013;

- a foreshore sediment sampling technical memorandum prepared for the San Francisco Department of the Environment in September 2015;
 - a data gap analysis, prepared in October 2016, identifying required information necessary to complete a site characterization of and risk assessment for the property; and
 - a site characterization report, which presents results of onshore sampling activities undertaken in late 2016 and offshore sediment sampling undertaken in March 2017.
- India Basin Open Space
 - a soil characterization report dated September 2016;
 - a Phase I ESA dated April 2017 ; and
 - a site mitigation plan prepared in 2017.
 - 700 Innes Avenue
 - a Phase I ESA conducted in 2013;
 - a Phase II ESA conducted in 2014;
 - an updated Phase I ESA conducted in 2014; and
 - a site mitigation plan conducted in 2017.

The EIR disclosed that the Project would result in significant impacts and identified five mitigation measures (M-HY-1a, M-HY-1b, and M-HZ-2a through M-HZ-2c)-that would reduce the Project's significant impacts to less-than-significant levels (Draft EIR pp. 3.16-26 through 3.16-66).

As discussed in Response HZ-2 of the RTC document (RTC pp. 4-105 through 4-107), environmental testing was conducted for the entire project site, including the BUILD portion at 700 Innes Avenue. Regarding testing for radiological contamination, Response HZ-2 states that:

... the Technical Memorandum included in Appendix M of the Draft EIR (pp. 4166-4172 of Appendix M) explains the environmental testing rationale for all properties within the project site, and summarizes the extent of radiological contamination at the adjacent Hunters Point Navy Shipyard site. The Technical Memorandum states there were no indications of materials associated with radiological contamination such as radiological debris or sand blast material noted during the subsurface investigations within the project site. In addition, a review of the regulatory documentation of investigations and remediation activities at the nearby areas of Hunters Point Naval Shipyard have uncovered no evidence that radiological contamination has migrated to or threatens the project site. The Technical Memorandum concludes that radiological testing at the project

site is not required. This conclusion is based on available information, regulatory guidance, and opinions of professional engineers who performed the environmental assessments of the properties and determined that radiation issues do not raise a significant potential environmental concern.

In addition, the Site Mitigation Plans (Appendix M, pp. 3322-3449 and 3450-4098) prepared for the project contain contingency plans in the event that unexpected conditions are encountered during construction. The contingency plans include notification of regulatory authorities and response actions, in the unlikely event that radiological materials are discovered. These contingency plans, along with other mitigation requirements, were included in the Draft EIR and formed the basis for the analysis and conclusions that impacts of the proposed project or variant related to hazardous materials would be less than significant with mitigation incorporated.

Appellant has provided no evidence demonstrating that this approach is inadequate or that testing for radiological contamination would be required, or that approval of housing and open space facilities would result in significant environmental effects that were not previously disclosed in the EIR.

The Commission reviewed and considered the information contained in the EIR prior to approving the Project on July 26, 2018, and its decision to approve the Project was neither improper nor premature.

Regarding recent media reports about the discovery of a radioactive object at the Hunters Point Shipyard development site, the object in question (a deck marker for a naval vessel) is characteristic of former United States Navy (“Navy”) operations in the project vicinity. The Navy did not conduct operations on the India Basin project site, so it is highly improbable that such objects would be found on the India Basin project site.

Furthermore, the site mitigation plan for 700 Innes Avenue is still in draft form, and it includes mitigation measures to ensure that any contamination at the site would not be harmful to the environment or persons at the site, such as contingency measures for the discovery of any unknown substances, including radiological materials. If such materials are found, government regulators would ensure that such materials would be disposed of properly.

Response 6: The EIR evaluates impacts associated with sea level rise.

CEQA Requirement

Appendix G of the CEQA Guidelines includes a checklist of environmental topics that should be addressed as part of a project’s environmental review. Sea level rise is not included in this checklist, but impacts related to sea level rise can be addressed under the topic of hydrology and water quality. Pursuant to the checklist in Appendix G of the CEQA Guidelines, a project would have a significant impact related to hydrology and water quality if it would:

- place within a 100-year flood hazard area structures that would impede or redirect flood flows;
- or

- expose people or structures to a significant risk of loss, injury, or death involving flooding, including flooding as a result of the failure of a levee or dam.

Analysis in the India Basin EIR

Section 3.15, Hydrology and Water Quality, of the EIR addresses sea level rise. Under Impact HY-6 (Draft EIR pp. 3.15-52 through 3.15-60), the EIR discloses that sea level rise may increase the chance of flooding on the project site. The analysis in the EIR considered four different future sea-level-rise scenarios. Some of the Project's shoreline recreational facilities (boardwalk, pedestrian pathways, portions of the Bay Trail, grassy areas, wetlands) would be flooded under future sea-level-rise scenarios, but the Project's habitable structures would be far enough inland that they would not be flooded under any of the future sea-level-rise scenarios considered in the EIR. The shoreline recreational facilities are flat features that would not channel or redirect water flow toward higher elevations or inland locations during storm surges. For these reasons, the EIR concluded that the Project would result in less-than-significant impacts related to flooding and sea level rise.

Furthermore, flooding of the project site associated with sea level rise would be an impact of the environment on the Project, not an impact of the Project on the environment. CEQA requires that the Project's impacts on the environment be studied and analyzed, not the environment's impacts on the Project, with very limited exceptions that are not present here, such as when a project exacerbates the effects of existing environmental hazards. (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) Cal. 4th 369, 388.) Here, for the reasons explained above, the Project does not exacerbate existing environmental impacts or hazards related to flooding. Appellant has not provided any evidence to demonstrate that this approach is inadequate.

Response 7: Implementation of the Project would not result in significant impacts related to population and housing and would not result in potential social and economic effects that would directly or indirectly result in significant impacts on the physical environment beyond those identified in the EIR.

CEQA Requirement

Population and Housing

Appendix G of the CEQA Guidelines includes a checklist of environmental topics that should be addressed as part of a project's environmental review. Pursuant to the checklist in Appendix G of the CEQA Guidelines, a project would have a significant impact related to population and housing if it would:

- induce substantial population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure);
- displace substantial numbers of existing housing units or create demand for additional housing, necessitating the construction of replacement housing; or

- displace substantial numbers of people, necessitating the construction of replacement housing elsewhere.

Gentrification

Pursuant to CEQA Guidelines Section 15131(a), “economic or social effects of a project shall not be treated as significant effects on the environment. An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic or social changes. The intermediate economic or social changes need not be analyzed in any detail greater than necessary to trace the chain of cause and effect. The focus of the analysis shall be on the physical changes.”

The analysis conducted pursuant to CEQA focuses on physical environmental impacts, such as impacts of a project on air quality, water quality, or wildlife habitat. In general, socioeconomic effects are beyond the scope of the CEQA environmental review process unless a link can be established between anticipated socioeconomic effects of a proposed action and adverse physical environmental impacts (CEQA Guidelines Section 15131(a); CEQA Section 21082.2).

Analysis in the India Basin EIR

One Appellant asserts that implementation of the Project would: (1) result in significant impacts related to population and housing; (2) add several thousand primarily upper-class residents to Bayview Hunters Point, significantly increasing the population; and (3) dramatically change the neighborhood’s demographics and contribute to gentrification, especially in combination with the nearby Hunters Point Shipyard Project.

Population and Housing

Section 3.3, Population and Housing, of the EIR (Draft EIR p. 3.3-1 through 3.3-14) discusses the increase in population and housing that would result from implementation of the Project. Impact PH-1 states that:

This analysis considers whether the proposed project or variant would contribute to substantial daytime and/or residential population growth. “Substantial” population growth is defined as increases in population that are unplanned, without consideration of or planning for infrastructure, services, and housing needed to support proposed residents, employees, and visitors. Acting in coordination with the California Department of Housing and Community Development, the Association of Bay Area Governments determines the Bay Area’s regional housing need based on regional trends, projected job growth, and existing needs. San Francisco’s fair share of the regional housing need for January 2015 through June 2022 was calculated as 28,870 units, or about 3,850 units per year. Although the proposed project or variant would cause the study area’s population to increase, growth in this area has long been the subject of many planning activities, including the *Bayview Hunters Point Area Plan*. In summary, the direct population and housing growth provided as part of the Project aligns with the City’s

redevelopment effort to create a vibrant high-density, mixed-use neighborhood along the Bayview shoreline.

As discussed under Impact PH-2, the Project would not displace substantial numbers of people or existing housing units. There are two residential parcels, 838-840 Innes Avenue and 702 Earl Street, on the project site that are currently occupied. These two parcels have a combined population of six people. With implementation of the Project, the residential structure at 838-840 Innes Avenue would be demolished, but the structure at 702 Earl Street, which currently houses four people, would be moved to a new location on the project site. Thus, two people would be displaced by the Project.

As discussed above, the Project would not result in substantial population growth and would not displace substantial numbers of people or existing housing units. For these reasons, the EIR concluded that the Project would result in less-than-significant impacts related to population and housing.

Gentrification

Section 5.4, Socioeconomic Considerations under CEQA, of the EIR, addresses gentrification. The following discussion is an excerpt from the EIR (Draft EIR pp. 5-4 through 5-5):

Concerns have been raised in general throughout the City regarding the loss of middle-income jobs and affordable housing. These socioeconomic effects are not considered environmental effects unless they are shown to result in physical impacts on the environment and must be linked to the action undergoing CEQA review. The following discussion addresses these socioeconomic concerns.

By accommodating demand for jobs and housing consistent with regional growth projections, and in particular by increasing the supply of both market-rate and affordable housing, the proposed project or variant would provide some relief to San Francisco's housing market pressures. However, the effect that development under the proposed project or variant would have on housing affordability is a matter of considerable controversy. Although there is general consensus that the high costs of market-rate housing and the limited supply of affordable housing in San Francisco are causing displacement of lower income residents, opinions differ on the underlying causes.

In September 2015, the City Office of the Controller, Office of Economic Analysis, published a report addressing the effects of temporary and permanent moratoria on new market-rate housing projects in San Francisco's Mission District.

The report concluded that constraining the supply of market-rate housing units through a moratorium would result in higher housing prices. With fewer available units, both buyers and renters would engage in bidding wars and drive housing prices upward. Because market-rate housing developers are required to provide a certain percentage of affordable housing units in compliance with the City's inclusionary housing program, a temporary moratorium on new market-rate housing projects would delay the production

of these affordable housing units, while a permanent moratorium would result in no new affordable housing units under this program. The report concluded that a moratorium on new market-rate housing projects would not entirely eliminate the potential for the displacement of existing businesses and residents, because other types of development projects (affordable housing, commercial, production/distribution/repair) could similarly displace existing businesses and residents.

CEQA prohibits the finding of significant impacts that are not based on substantial evidence of adverse physical changes to the environment. As described above, these social and economic concerns regarding affordable housing are being addressed in the City's planning and policy development processes. There is no evidence that the proposed project or variant would result in potential social and economic effects that would result in significant effects on the physical environment. Changes to the physical environment that would result from the proposed project or variant are addressed in the appropriate environmental topics in this EIR and in the accompanying Initial Study.

Appellant does not provide substantial evidence that gentrification caused by the Project, either independently or in combination with other nearby development projects, would result in adverse physical environmental impacts that were not previously disclosed in the EIR.

Response 8: The Banya was included in the EIR as an adjacent land use that could be affected by implementation of the Project.

CEQA Requirement

Pursuant to CEQA Guidelines Section 15125(a),

an EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives.

Pursuant to CEQA Guidelines Section 15126.2,

an EIR shall identify and focus on the significant environmental effects of the proposed project. ... Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land

(including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services. The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. ... 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.

Analysis in the India Basin EIR

One Appellant asserts that the Banya was not considered in the analysis of the Project's environmental impacts. This statement is incorrect.

As discussed in Response GC-2 of the RTC document (RTC pp. 4-115 through 4-117), the Banya was specifically mentioned in the EIR as part of the existing environmental setting and was considered in the analysis of the Project's environmental impacts:

The Archimedes Banya building was analyzed in the EIR under each relevant topic as a residential and commercial property; however, the name of this institution was not mentioned explicitly in the EIR. Text changes have been made to the Draft EIR in Chapter 2.0, "Project Description," and Section 3.2, "Aesthetics," identifying the building by name for clarification.

The following paragraphs discuss some of the key environmental topics identified in the Draft EIR for which the proposed project or variant have the potential to impact the Banya. The proposed project or variant's impacts related to the following topics include the Banya building location as an adjacent use in Draft EIR Section 3.2, "Aesthetics"; Section 3.5, "Transportation and Circulation"; Section 3.6, "Noise"; Section 3.7, "Air Quality"; Section 3.9, "Wind"; and Section 3.10, "Shadow," respectively.

The Banya's roof deck was not identified as an affected location in the EIR's analysis of the Project's wind and shadow impacts, because the Banya's roof deck is not publicly accessible; it is only accessible to the Banya's paying customers. Wind and shadow impacts on privately owned and privately accessible open spaces are not considered physical environmental impacts under CEQA, but they may be considered by City decision-makers during their deliberations on whether to approve, modify, or disapprove a proposed project.

Similarly, impacts on a privately owned and privately accessible open space or recreation facility such as the Banya's roof deck are not considered physical environmental impacts under CEQA. Although implementation of the Project would result in loss of privacy for the Banya's customers who use the roof deck for passive recreation, loss of privacy is not a physical environmental impact. Loss of privacy is a social effect. As discussed in Appeal Response 7 above, CEQA Guidelines Section 15131(a) provides that "economic or social effects of a project shall not be treated as significant effects on the environment." In

general, social effects such as loss of privacy for the Banya's customers who sunbathe nude on the roof deck are beyond the scope of CEQA unless a link can be established between anticipated social effects of a proposed action and adverse physical environmental impacts. City decision-makers may consider loss of privacy during their deliberations on whether to approve, modify, or disapprove a proposed project.

During the Draft EIR hearing on October 19, 2017, the Commission noted that if the Banya had been overlooked in the analysis, that oversight should be corrected. The Commission subsequently reviewed the RTC document. During the Final EIR certification hearing on July 26, 2018, the Commission did not make any additional comments related to the Banya and certified the Final EIR.

CONCLUSION

Appellants have not raised any new issues related to the Project's physical environmental impacts that were not previously addressed in the Draft EIR and appendices, in the RTC document, or during the Final EIR certification hearing. As discussed above, the analysis and conclusions of the Final EIR are supported by substantial evidence in the record. Moreover, Appellants have not provided substantial evidence in support of their arguments regarding the adequacy and accuracy of the Final EIR. Argument and speculation alone are not substantial evidence under CEQA. Even if Appellants had provided substantial evidence that contradicts the analysis and conclusions of the Final EIR, the agency's adequacy determination remains valid when the EIR is based on substantial evidence in the record. The Final EIR and supporting documents provide such substantial evidence.

For the reasons stated above, the Commission's certification of the Final EIR complies with the requirements of CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code. The Department, therefore, recommends that the Board uphold the Commission's decision to certify the Final EIR and deny the appeals.