December 13, 2021

VIA E-MAIL

President Shamann Walton and Supervisors
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

Re: Agenda Item 44
469 Stevenson Street Project (Case No. 2017-014833PRJ)
Proposed California Environmental Quality Act (CEQA) Motion and Findings

Dear President Walton and Supervisors:

Our office represents Yes In My Back Yard (YIMBY) and its project YIMBY Law, California nonprofits dedicated to increasing the accessibility and affordability of housing in California by enforcing state housing laws, and Sonja Trauss in her individual capacity, Executive Director of YIMBY Law. YIMBY, YIMBY Law, and Ms. Trauss strongly support the 469 Stevenson Street Project, Planning Case No. 2017-014833PRJ, which would provide 495 new residential units on a vacant parking lot, with 73 of the units restricted as affordable.

The project sponsor submitted an application for this Project over four years ago, and after numerous delays finally secured an approval for a project that will provide critically needed housing to a City in the midst of a housing crisis. Based on nothing more than vague claims of "inadequate analysis" in the CEQA review of a project that has been under review for four years, the proposed motion and findings effectively denies the Project by overturning the Commission's certification of the Environmental Impact Report (EIR) and putting the Project back to square one. The complete lack of any evidentiary support for the Board's action on the EIR demonstrate that the Board's concern is not with the CEQA document. The Board simply dislikes the Project and is attempting to abuse the CEQA process in order to deny the Project and avoid compliance with state housing laws.

We submit this letter to inform the City that the proposed motion and findings violate CEQA, the Permit Streamlining Act (PSA), the Housing Crisis Act of 2019, and the Housing Accountability Act (HAA). We urge the City to comply with its duties under state law and approve the Project.

1. <u>The City's Action Violates CEQA.</u>

The Planning Commission certified the EIR for the Project on July 29, 2021, finding that the EIR was "adequate, accurate, and objective." Despite these findings, the Board voted to conditionally overturn the Commission's certification on October 26, 2021, subject to written findings in support of the Board's conditional action. The proposed motion and findings do not adequately support overturning the Commission's certification of the EIR and are inconsistent with the requirements of CEQA. The proposed motion and findings confirm that the Board's actions were not supported by substantial evidence and therefore the Commission's certification must be upheld.

The decision to overturn factual determinations that underlie the analysis in an EIR must be supported by substantial evidence. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516.) CEQA Guidelines section 15384 states that substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts," but does not include "argument, speculation, unsubstantiated opinion or narrative." An EIR is procedurally adequate if the EIR included "sufficient detail" to "enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Id.* at 510, 516.)

The proposed motion and findings are not clear whether the Board is overturning the Commission's certification due to purported procedural deficiencies or factual determinations, stating only an "inadequate analysis" related to historic resources, geotechnical impacts, and unidentified "potential physical impacts" from gentrification. The Initial Study for the Project included a sufficient analysis of all of these issues and determined that potential environmental effects related to these issues would be less than significant. The rationale of the Planning Department's conclusions included sufficient detail for the public to understand and consider these issues, which is all that is procedurally required. Thus in order to overturn the Commission's certification, there must be substantial evidence in support of the Board's actions to overturn the Commission's factual determinations.

With regard to historic resources, the Project is on a vacant parking lot and is not located within a historic district. The Project was reviewed by a Planning Department Historic Preservation Planner, who reviewed all relevant historic information and determined there would

be no material impact to nearby historic resources. The Planning Department identified all nearby historic districts and contributors to those districts, analyzed the potential impacts, and determined based on their expertise that the Project is sufficiently setback from adjacent historic resources so as not to materially impair their character or setting.

The proposed motion and findings state that the Project may have potential impacts to historic resources merely based on statements of opinion from individual Board members that "surrounding taller buildings do impact historic districts." No evidence from historic preservation experts was presented. No facts were provided to identify specific historic resources and character defining features that would be impacted from the Project. The motion and findings confirm that the Board's action is based solely on unsubstantiated opinion that tall buildings are, by their very nature, a significant impact to historic districts. The proposed motion and findings are simply not based in fact or evidence.

With regard to geotechnical impacts, a preliminary geotechnical investigation was completed for the Project by Langan Engineering and Environmental Services, Inc. on August 18, 2017. The investigation determined that, with the implementation of the report's recommendations, the Project will not have an impact on geology and soils, and the Project would be safe from seismic hazards and liquefaction. The Planning Department further found that the Project would be required to comply with the California Building Code, the City's *Interim Guidelines and Procedures for Structural, Geotechnical, and Seismic Hazard Engineering Design Review for New Tall Buildings*; the City's *Guidelines and Procedures for Structural Design Review, Requirements*, and the City's *Guidelines for the Seismic Design of New Tall Buildings using Non-Prescriptive Seismic-Design Procedures*, further ensuring that the Project would not have any adverse impacts to geology and soils. Courts have confirmed that compliance with standard regulations is "a common and reasonable mitigation measure" to ensure potential effects are less than significant. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 933.) It is also important to note that the City routinely relies on the Building Department's future

review of compliance with the building code and seismic guidelines to determine that a project will not have a significant environmental effect.[1]

The motion and findings confirm that the Board's action is based solely on their unsubstantiated opinion that compliance with the California and San Francisco Building Codes in insufficient to reach a conclusion on geological impacts. First, as the Planning Department explained, this conclusion was based on the recommendation and analysis of geotechnical experts, *in addition* to compliance with these requirements. Again, no evidence from geotechnical experts was presented to refute the Planning Department's conclusion. No facts were provided to identify specific impacts that would be caused from the Project. The proposed motion and findings are simply not based on any fact or evidence.

With regard to gentrification impacts, CEQA Guidelines section 15384 states that "evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." First, we not that the potential socio-economic impacts were already analyzed in a report by ALH Economics, which concluded that the project would be a benefit to the community, findings that were confirmed in a peer review by Siefel Consulting. No evidence of potential physical impacts were identified in these experts analysis of the proposed Project.

The proposed motion and findings, on the other hand, are based on Board members unsubstantiated opinions that the Planning Department's approach to analyzing the impacts of gentrification was "fundamentally flawed" and that the EIR lacked analysis of the "foreseeable physical impacts." Again, no evidence from experts was presented to refute the expert reports or the Planning Department's conclusion. The proposed motion and resolution fail to even identify what those supposed physical impacts might be, even if there was evidence to demonstrate the Project would cause gentrification. Once again, there was no evidence from any socio-economic experts and the Board's proposed findings are not based in fact or evidence.

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[1] See, e.g., Planning Department, *Notice of Preparation of an Environmental Impact Report and Public Scoping Meeting 5M Project*, January 20, 2013 at pp. 126-27; Planning Department, *Mitigated Negative Declaration 530 Sansome Street*, July 29, 2021 at pp. 158-160, which we incorporate into our letter and the record by reference.

The proposed motion and findings demonstrate that the Board's action was not based in fact or evidence, and therefore there is no legal basis to overturn the Commission's certification of the EIR for the Project. The Board's vague concerns regarding the adequacy of the EIR, without any supporting evidence, confirms that the Board is not concerned with the EIR – the Board simply dislikes the Project. As the California Department of Housing and Community Development (HCD) noted in its Nov. 22, 2021 letter, the Board's action constitutes an "effective denial" of the Project and is part of a larger trend by the City to ignore its duties under state law to approve housing development projects. The City's actions are an abuse of the CEQA process. The Board should rescind its prior action and uphold the Commission's certification of the EIR and approval of the Project.

2. <u>The City's Action Violates the Permit Streamlining Act.</u>

The PSA sets strict timelines for local agencies to act on proposed development projects, including a requirement for a lead agency to approve or disapprove a project within 120 twenty days from the date of certification of an EIR. (Gov. Code § 65950(a)(2).) The HAA states that a failure to comply with the PSA's time limits constitutes the disapproval of a housing development project. (Gov. Code § 65589.5(h)(5)(B).) CEQA, in turn, requires an EIR to be certified within one year from the date an application is accepted as complete, which may be extended for 90 days by ordinance or resolution if justified by compelling circumstances and if the applicant consents. (Public Resources Code § 21151.5; CEQA Guidelines § 15108.) The duty to certify an EIR within the time limits is a ministerial duty and an agency "has no discretion" to refuse to timely certify an EIR. (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 222.) Taking the 120-day PSA and 365-day EIR certification timelines together, an agency must act to approve or disapprove a housing development project that requires an EIR within 485 days from the time an application is accepted as complete, which may be extended to 575 days by ordinance or resolution if justified.

An application for the 469 Stevenson Street Project was first submitted 1,487 days ago on November 17, 2017. A revised application for the Project was accepted as complete by the Planning Department 1,292 days ago on May 31, 2018, over two and half times beyond the 485-day statutory limit to take action on the Project. Even if the City had adopted an ordinance to

extend the time to certify an EIR for the Project, which is not the case here, the City would still be 717 days beyond the statutory limit to take action on the Project.

The City had already failed in its duty to timely certify an EIR for the Project when the Commission certified the EIR on July 29, 2021, which was 790 days beyond the time limit to certify the EIR and 670 days beyond the limit to approve the Project. The Board's proposed motion and findings that directs the Planning Department to conduct further environmental review will result in a further failure by the City to comply with CEQA's statutory time limits to certify an EIR and, by extension, will result in a further failure to comply with the PSA's time limits to take action on the Project. The City's failure to comply with these statutory time limits ***also*** constitutes an unlawful disapproval of the Project under the HAA.

3. <u>The City's Action Violates SB 330.</u>

The Housing Crisis Act of 2019, commonly referred to as SB 330, recognizes that permitting delays exacerbates the cost of residential construction and significantly contributes to the housing crisis. (Housing Crisis Act of 2019, Sec. 2(a)(10).) To expedite the approval of housing, SB 330 imposes a strict five-hearing rule for housing projects. (Gov. Code, § 65905.5.) SB 330 defines a "hearing" to include any public hearing, and specifically states that continued hearings "shall count as one of the five hearings." (Gov. Code, § 65905.5(a), (b)(2).). SB 330 requires a local government to approve or disapprove of a housing development application at one of the five hearings. *(Id.)*

The City has already violated the five-hearing rule for the 469 Stevenson Street project. The Planning Commission held the first public hearing on the DEIR for the Project on April 16, 2020. The Commission held the second and third public hearings on the entitlements and the EIR for the Project on June 10, 2021 and June 24, 2021, but continued the item both times without a vote. The Commission conducted a fourth hearing on July 29, 2021, where the Commission voted to approve the Project and certify the EIR. The Board held the fifth hearing, and the final hearing allowed by law, on October 26th, 2021, where the Board reversed the Commission's certification of the EIR without explicitly taking an action to approve or disapprove the Project.

The public hearing currently scheduled for December 7, 2021 to adopt findings to reverse the Commission's certification of the EIR represents the sixth public hearing on the Project, a

clear violation of SB 330's five-hearing rule. The proposed motion appears to put the City on a path toward further violations of the five-hearing rule by directing the Planning Department to undertake further environmental review and requiring additional hearings on the entitlements and EIR for the Project. The Board must revise the proposed motion and findings to explicitly take action to approve or disapprove the Project, as required by law.

SB 330 recognizes that long permitting delays increases construction costs and exacerbates the housing crisis. Unnecessary and costly permitting delays have the same effect as the disapproval of a housing project, which is the reason behind SB 330's five-hearing limit. As HCD noted in its November 22, 2021 letter, the Board's action to overturn the Commission's certification of the EIR "by extension" overturned the approval of this critically needed housing Project, and constitutes an "effective denial" of the Project. We agree. The Board's proposed motion purports to only overturn the EIR certification but is in fact a disapproval of the Project itself.

4. <u>The City's Action Violates the HAA.</u>

The HAA also sets strict timelines for local agencies to determine whether a proposed housing development project is inconsistent, not in compliance, or not in conformity with any applicable plan, program, policy, ordinance, standard, or other requirement. Gov. Code § 65589.5(j)(2)(A)(ii) states that a local agency must provide written documentation identifying and explaining any code noncompliance "[w]ithin 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains more than 150 units." Gov't. Code § 65589.5(j)(2)(B) further states that if an agency fails to provide the required written code noncompliance documentation within the specified timeframe, "the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision."

Here, the application was deemed complete by the City on May 31, 2018. The Project contains more than 150 units, and thus Gov. Code § 65589.5(j)(2) required the City to provide written documentation identifying and explaining any noncompliance with applicable ordinances, policies, or standards within 60 days (i.e. by July 30, 2018). The City failed to

provide any written noncompliance documentation within that timeframe, and thus as a matter of law, the Project was deemed code-compliant on July 31, 2018. Because the Project has been deemed code-compliant as a matter of law, the City is obligated by Gov. Code § 65589.5(j)(1) to approve the Project at the proposed density unless the City provides substantial evidence to establish that the Project will have a specific, adverse impact upon public health or safety. (*See Cal. Renters Legal Advocacy and Educ. Fund v. City of San Mateo* (Sept. 10, 2021, A159320) __ Cal.App. __.) The City has not identified any specific, adverse impacts to public health and safety that would be caused by the Project, and thus must approve the Project at the density proposed *even if* there was substantial evidence of an environmental effect, which is not the case.

In addition, the HAA makes clear that receipt of a density bonus "shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision." (Gov. Code § 65589.5(j)(3).) This is reiterated in Planning Director Bulletin No. 5, which explains that "[a]ny waivers, concessions, or incentives, conferred through the State Density Bonus Law are considered code-complying, and therefore are consistent with the objective standards of the Planning Code." Thus, even though the Project has already been deemed code-compliant, we want to be clear that the density bonus and waivers/concessions have no impact on the Project's code-compliance.[2]

As explained above and as confirmed by HCD, the Board's proposed action on the EIR is an effective disapproval of a code-compliant housing development Project without the required findings. The City has not identified or provided any evidence of specific, adverse impacts to public health and safety that would be caused by the Project, and therefore the proposed motion and findings are violation of the HAA. The Board must act to approve the Project at the proposed density as required by the HAA.

Conclusion

[2] The Density Bonus Law also requires "expeditious processing of a density bonus application" and requires local governments to "Adopt procedures and timelines for processing a density bonus application." (Gov. Code § 65915(a)(3)(A).) Although the City has failed to adopt procedures and timelines for processing density bonus applications, 1,292 days does not constitute the expeditious processing of a density bonus application.

The City's long delays in the permit approval process for the 469 Stevenson Street Project has already violated multiple state laws. The proposed motion and resolution only exacerbate these past violations, and puts the City on the path toward numerous more flagrant violations. We therefore respectfully request that the Board rescind its prior action and uphold the Commission's approval of the Project or we will be forced to take action to enforce state law.

Respectfully Submitted,

ZACKS, FREEDMAN & PATTERSON, PC



Brian O'Neill