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Sent: Friday, November 06, 2015 4:40 PM
To: BOS Legislation, (BOS)
Subject: Fifth and Mission-5M Project - 5M Project LLC Response to Appeals
Attachments: Fifth and Mission - 5M Project LLC Response to Appeals-c.pdf

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Attached is a letter on behalf of 5M Project LLC. in connection with the appeals scheduled to be heard on November 17. The original and 18 copies are being deliver by hand.

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November 6, 2015

VIA HAND DELIVERY

and

E-DELIVER TO: bos.legislation@sfgov.org

Ms. Angela Calvillo
Clerk of the Board of Supervisors
City and County of San Francisco
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

Re: Fifth and Mission/5M Project-
5M Project, LLC Response to Appeals

Dear Ms. Calvillo:

We respond on behalf of our client, 5M Project, LLC ("5M"), to the appeals filed challenging the EIR Certification, and the Conditional Use and Office Space Allocation authorizations ("Appeals") for the 5M Project, approved by the Planning Commission on September 17, 2015. The appeals are scheduled for consideration by the Board of Supervisors on November 17, 2015. The Appeals should be rejected as inadequate for failing to describe valid reasons and specific grounds for the Appeals.

I. The 5M Project.

The 5M Project is located on an underutilized four acre site (under one ownership), bordered by Fifth Street between Mission and Howard Streets. It is at a transit rich nexus of the downtown, SOMA and Mid-Market areas. Revitalization of this special opportunity site has been under discussion with the Planning Department since 2008.

The 5M Project has evolved through extensive environmental, Planning Department and community reviews, and closely resembles the "Preservation Alternative" analyzed in the EIR. Thus, the 5M Project will retain existing historic resource buildings on the site, and provide an important transition in the urban form and density between the downtown, SOMA and Mid-Market neighborhoods. It will provide a mix of uses, including three new buildings, approximately 690 residential units, with one-third of the market rate units being affordable

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units, approximately 800,000 square feet of office and an additional approximately 65,000 square feet of active ground floor uses. It will add over one acre of much needed open space to create an enriched, vibrant, and inter-active pedestrian environment, including the conversion of the northerly portion of Mary Street to pedestrian only use.

In addition to the significant jobs, urban revitalization and other economic benefits of the 5M Project, the proposed Development Agreement will provide community benefits and fees far in excess of what could be achieved through application of existing City ordinances, regulations and policies. These additional benefits will directly assist the City and the surrounding community in meeting goals for affordable housing, workforce development, youth development and community and recreational facilities, transit, pedestrian and bicycle safety improvements, public art and cultural programming facilities, including the donation of the historic Dempster building and dedication of art fees for use in rehabilitation of facilities and for community-based artistic and cultural programming, rehabilitation of the Old-Mint building, and support the creation of a Filipino Cultural Heritage District, among other things.

II. Fundamental Defects in Appeals - Opposition without Substance.

The 5M Project Appeals consist solely of a two-page laundry list of broad categories of objections, unaccompanied by any explanation of the specific purported defects to the project approvals. This approach, based on an outline of general topic areas, does not identify any actual bases for overturning the Planning Commission's decisions. In fact, the appeals do not provide enough basic information to understand the grounds for appeal or to craft detailed responses.

For example, appellants generally and broadly allege a failure to conduct necessary wind, shadow, height and massing analyses; a failure to perform full and complete traffic analyses, a failure to respond adequately to comments on the Draft EIR, that the EIR is inadequate and incomplete, and that there is an inadequate and incomplete analysis of and failure to disclose the severity of the level of impact for any of 14 general categories of impacts. Appellants, however, do not actually describe any specific bases for these claims. Similarly, Appellants allege inconsistency with the General Plan, and open space requirements. In none of these, or in almost any other point, do appellants explain what they actually claim to be in error.

It is neither adequate nor appropriate to list categories of objections and attach voluminous documents, unaccompanied by an explanation of their relevance, without elaborating on the grounds for appeal beyond such broad-brushed categories. The record materials attached to the Appeals actually undermines the Appeals. This is because the record of the Conditional Use and Project Authorizations, including the findings and hearing transcripts establish a strong record in support of the Planning Commission's actions.

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A fair and meaningful description of specific concerns is the cornerstone of any legitimate appeal. Appellants' broad approach makes it abundantly clear that there are no specific or substantive bases for the Appeals. The EIR is in fact appropriately certified, and the Conditional Uses and Office Allocation authorizations are both in the interests of the City and are supported by the findings and evidence.

Nor is there anything new in these Appeals. This is not surprising given the lengthy, voluminous, thorough and well-documented history and approvals processing of the 5M Project. Written comments previously made on the Draft EIR or in subsequent correspondence or public hearings have been fully and adequately responded to in the EIR Responses to Comments document, or in subsequent responses provided to or made by the Planning Commission, including in the Commission's detailed findings in support of the challenged approvals.

The record prepared by the Planning Department, and fully considered by the Planning Commission, is substantial, complete and reflects the independent judgement of the City. The Commission made all appropriate and necessary findings in support of the certification of the EIR, CEQA findings, and general plan and zoning consistency findings, and findings in support of the use permit and office allocation authorizations. Those findings are supported by the evidence. Appellants provide no new legal arguments and provide no evidence to the contrary.

The Planning Commission's efforts should be respected. It held five hearings and there are no grounds to grant these Appeals.

III. Limited Scope of EIR Appeal.

Appellants purport to appeal the CEQA findings and statement of over-riding considerations adopted by the Planning Commission. They are not appealable to the Board of Supervisors. Under San Francisco Administrative Code Section 31.16(c)(3), the grounds for appeal of an EIR are limited to whether the EIR complies with CEQA. Specifically, Section 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 Planning Commission certification findings are correct."

Thus, the grounds for appeal may include concerns related to the findings in the Commission's certification motion, but concerns regarding the Commission's CEQA findings and statement of overriding considerations related to its project approval actions are not within the scope of the grounds for appeal as set forth in Section 31.16(c)(3). The Board of Supervisors may, of course, adopt, modify, or reject the Commission's CEQA findings and statement of overriding considerations in connection with any other project approvals that require action by

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the Board of Supervisors, but the Commission's findings themselves are not a proper subject of appeal.

IV. Conditional Use and Office Allocation Appeals – Four Broad Claims.¹

There are four broad claims that have been and continue to be made that reflect the overwhelming sum and substance of the 5M Project Appeals. None of these arguments are supported by any evidence whatsoever in the record and to a large extent reflect gross mischaracterizations of the 5M Project and its relationship to the community. These claims may be summarized as follows:

- the 5M Project will displace residents and conflicts with the goals and aspirations of creating a Filipino Cultural Heritage District – It does neither;
- the 5M Project is not providing sufficient affordable housing - It does, and far in excess of what is currently required by law;
- the 5M Project conflicts with the SOMA Youth and Family Special Use District ("YFD"), which should be expanded in some unspecified way – It does not conflict; and
- a "code-compliant" alternative has not been and should be considered – It was considered and rejected. The revised Project offers far greater public benefits.

¹ Appellants' stated issues on appeal of the Office Allocation approvals repeat the same generalized categories of issues raised with respect to the EIR and conditional use appeals, and are therefore jointly responded to in this letter.

One procedural point, however, should be made with respect to whether any appeal has have been properly filed with respect to the two Office Allocation authorizations in accordance with Planning Code Section 308.1. Under Planning Code Section 322(b), "[i]n cases in which a conditional use application was filed, the decision of the City Planning Commission may be appealed only to the Board of Supervisors pursuant to Section 308.1." As permitted, five members of the Board subscribed to the appeal. However, the five Board members specifically subscribed only to an appeal of the Planning Commission's Conditional Use authorization. No specific appeal of the Office Space Allocations was filed under Section 308.1, or otherwise, and therefore no such appeal is properly before the Board.

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There is no substance to these claims. Rather, these claims are in direct conflict with the facts in the record. These, and Appellants' unsubstantiated claims that the 5M Project will "obliterate" the YFD, "displac[e]" the Filipino community, or "hamper and jeopardize the development and establishment of the Filipino Cultural Heritage District" are without foundation.

- 5M Project Will Not Displace Anyone. Most of the 5M Project covers vacant lots and/or under-utilized commercial buildings. The 5M Project is not displacing any persons or any cultural uses. To the contrary, the 5M Project protects and creates arts and cultural opportunities, preserves historic buildings, creates housing and community oriented open space where none exists, and supports creation of a Filipino Cultural Heritage District. And, as the City's Chief Economist, Ted Egan, recently concluded, building new housing does not exacerbate, but rather protects against displacement and rising prices. (Report, "Potential Effects of Limiting Market-Rate Housing in the Mission," dated September 10, 2015.) The 5M Project will not displace anyone and will deliver a significant amount of new affordable housing.
- 5M Project Creates Significant New Affordable Housing – Without Displacement. The 5M Project substantially exceeds legally required affordable housing meets the goal of Prop K, by generating affordable housing equal to approximately one-third of the Project's market rate units—over 212 affordable housing units.
- The 5M Project is Consistent with the YFD. The 5M Project will have no adverse effect on the YFD. The YFD covers a large area, but only a small portion of the 5M site at the very north edge of the YFD is currently within the YFD (a portion of the "H-1" office building site at Howard and Mission Streets). The actual practical effect of the YFD is to require an additional conditional use permit for restaurants within the portion of the YFD on the 5M Project site. The 5M Project has conditional use authorizations – the very ones being appealed. Indeed, Appellants fail to acknowledge that the entire 5M Project (including the H-1 site) has obtained conditional use authorizations. In addition, the 5M Project approvals will, as recommended by the Planning Commission, effectively mirror the conditional use requirements of the YFD over the entire 5M site. In short, neither the scope of YFD nor its application are impacted by the 5M Project.

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- There has been ample review of project alternatives –The 5M Project delivers the most benefits for the Community and City.² The 5M Project EIR addresses a reasonable range of alternatives, including a Code Compliant alternative. (See Draft EIR, Section V, Alternatives, pages 598-609; and Response to Comments, AL-2, at RTC-268.) As noted by the Planning Commission, the 5M Project is the right project and at the right place and with the right public benefits. The alternative would not advance the City's general plan and transit policies and would not respond to the City's need for open space-parks and for pedestrian-oriented spaces. It also would not provide and cultivate participatory community-based arts and cultural facilities, and would not take advantage of the site's transit-rich location to respond to the City's pressing need for centrally located housing and commercial development. In short, it would not take advantage of the potential presented by this rare situation of a 4-acre transit served site, under single ownership, to provide the foundational community investments associated with the 5M Project Development Agreement.

V. 5M Project is the Product of Careful Project Planning and Rigorous Reviews.

Appellants also claim that the 5M Project has been "fast-tracked." There is no merit to this claim. The 5M Project presents a thoughtful, carefully considered and extensively reviewed project.

a. Public Participation.

Public participation in and influence upon the 5M Project has been extensive over the course of more than seven years, commencing in 2008, including community outreach and communication, formal and informal meetings with interested stakeholders both in the neighborhood of the project and throughout the City, and through the EIR and public hearing process.

Seven public meetings and hearings were convened by the Planning Department over the past two and a half years prior to the Planning Commission taking action on September 17, 2015. In addition, the Arts Commission and the Municipal Transportation Agency Board of Directors, held public hearing and approved the proposed 5M Project Development Agreement with respect to the arts program and transportation program within their respective jurisdictions.

² Reference to a "code-compliant alternative to the 5M Project is misleading, because in all but a few respects, the 5M Project complies with and exceeds Planning Code requirements. Where it doesn't, it provides a better solution.

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b. Project Evolution. There has been no rush or improper pace of review. Rather, the review and evolution of this unique project has been careful and deliberate with extensive community involvement. The result is a mixed-use project (as described above) that leverages private investment in private land to create an extraordinary number and scope of public benefits.

The community-outreach, environmental review and public hearing processes have resulted in significant modifications to the 5M Project. For example, as noted, the 5M Project now closely resembles the "Preservation Alternative" analyzed in the 5M Project EIR. It preserves and protects three on-site historic buildings, - the Chronicle Building, the Dempster Building (447 Minna Street), and the Camelline Building (at 430 Natoma Street), eliminates one previously proposed new building, expands the central open space plaza and increases the total amount of open space, and reduces the total size of the buildings, as compared to the original proposal.

VI. Shared Goals and Community Benefits.

Appellants have, in various forums, generally claimed to be seeking more support for and active involvement in youth, children and family development, workforce opportunity, open space and children's play areas, and support for community arts, cultural diversity and affordable housing. These are the core community benefits that the 5M Project creates by converting surface parking lots and abandoned buildings into a vibrant and interactive environment. 5M's obligations to deliver these critical community benefits are clear, specific and legally enforceable through the Development Agreement.

- 33% affordable and Family Housing – with No Displacement. As described above, the 5M Project directly responds to the City's urgent need for more housing, including affordable housing equal to one-third of the project's market rate units. The 5M Project includes restricting 20% of the units in the M-2 Building (i.e., 58 units) for occupants at 50% AMI, dedicating the land and providing approximately \$24.5 Million for construction of 83 senior housing units at 967 Mission Street, and providing critical gap funding in the amount of \$18 Million for the 100% affordable TNDC project site located at 168-186 Eddy Street. Further, project community benefit fees will be prioritized for first use to provide affordable housing. 5M is also committing to provide a minimum of 40% two-bedroom units on the site, thereby committing to providing more family housing. These are not goals; they are requirements of the project approvals. See 5M Development Agreement ("DA") Section 4.1 and Exhibit E (5M Housing Program).

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- A Creative Urban Design. The 5M Project expressly recognizes the site's unique urban design opportunity, and provides creative responses to the need for open space, historic preservation, and cultural, artistic and historic expression. 5M will also support public infrastructure in the surrounding area, including providing hard-to-find funds for capital improvements that are critical to area pedestrian and bicycle safety improvements, constructing on- and off-site pedestrian and streetscape improvements, and contributing funding needed for the rehabilitation and retention of the old San Francisco Mint Building. These are not goals; they are requirements of project approvals. See DA Section 4.1, Exhibit B (Project Description), 5M Design for Development and the 5M SUD.
- Cultural and Artist Facilities and Programming. The 5M Project will create new cultural and arts facilities and opportunities for ongoing participation in its open space and arts programming. As a component of the Development Agreement and in an independent agreement with Community Arts Stabilization Trust ("CAST"), the 5M Project will donate the entire (approximately 12,000 square foot) historic Dempster building to CAST, at no cost, for nonprofit based arts, cultural and community servicing uses. It will also be the source of an estimated \$3.2 Million in project-generated dedicated arts funding for the rehabilitation of the building. 5M will also provide approximately \$600,000 to a non-profit arts facilities fund to assist with the very challenging issues of rehabilitating existing arts facilities. In addition to the property dedication and pre-development funding, 5M will provide an additional \$2.2 Million for arts and cultural programming at the 5M Project site for the benefit of the wider community, to be distributed under the jurisdiction of the Art Commission, and dedicated for use in the community. These are not goals they are requirements of project approvals. See DA Sections 3.2.2, 7.8 and Exhibit H (Arts Program).
- An Effective, Imaginative Open Space and Pedestrian Environment – Without Displacement. The 5M Project will provide well over one acre of newly created open space – mostly where parking lots now exist. The publicly accessible open space would be maintained by the Project's owners at no cost to the City. It utilizes exciting urban forms and spaces. 5M will also invest in the success of other open spaces and community facilities, including by providing \$1 Million in direct help with the renovation of the Gene Friend Recreation Center. These are not goals; they are requirements of the Project approvals. See DA Section 4.1 and Exhibit C (Youth Development Program).
- C-3 District Transitional Urban Form: The 5M Project reflects both its downtown, C-3 District urbanity and its hinge position in the transition from the high-rise core

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financial district to the immediately south lower-rise area. It softens the existing abrupt edge between these districts and creates a much more appropriate urban transition by incorporating a range of heights and creating new open spaces. This is not a goal; it is a requirement of the project approvals. See 5M Design for Development, and DA Exhibit B (Project Description).

- Actual and Direct Participation in Youth and Development Efforts in the Project Area. The 5M Project invests directly in youth development programs in partnership with the City's Department of Children, Youth and Families. For example, it invests in summer and after school youth programming in partnership with the Bessie Carmichael School, funding through the Northern California Community Loan Fund for capital improvements and organizational expansion and/or facility acquisition or improvement. These programs include approximately \$1.5 Million for wrap-around youth programs, \$1 Million for the Gene Friend Recreation Center and \$1.5 Million in capital funds to help family serving organizations stay and grow in SOMA. These are not goals; they are requirements of project approvals. See DA Section 4.1 and Exhibit C (Youth Development Program).
- Support for Filipino Cultural Heritage District. The 5M Project will, as recommended by the Planning Commission, provide \$300,000 to support a needed foundational study for the formation of a Filipino Cultural Heritage District.
- A Robust Workforce Program. The 5M workforce program exceeds the scope of the City's standard requirements. It provides approximately \$1.5 Million for direct funding for specific areas of workforce job training, including barrier removal, preparation for job seeking, information, communications and technology training, specialized construction training, as well as first source hiring program and local business enterprise programs. These are not goals; they are requirements of project approvals. See DA Section 4.1 and Exhibit F (Workforce Agreement).
- A significant transportation and TDM program. The Project includes a robust transportation demand management program that, is designed to achieve an additional 14% reduction in forecasted trips, and substantially exceeds standard City requirements. The Transportation Program will also provide for installation of streetscape, sidewalk-widening, mid-block crossing and other bicycle and pedestrian safety improvements, and provide approximately \$12.2 Million in transportation fees, including approximately \$3.4 Million in TSP funding for

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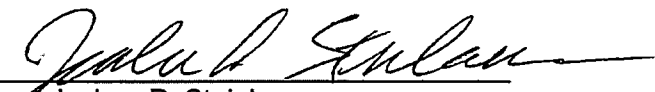
adjacent pedestrian, bicycle safety and streetscape improvement measures, as recommended by the Planning Commission, and approximately \$8.9 Million in TIDF, to help realize a future in SOMA with a safe and sustainable street system. These are not goals; they are requirements of project approvals. See DA Section 4.1 and Exhibits B and E

For all the foregoing reasons and based on the extensive record before you, we urge the Board of Supervisors to reject the Appeals and to approve the 5M Project. 5M offers a unique opportunity for a transit oriented development, with housing, including a substantial percentage of new affordable units and neighborhood-and cultural-arts oriented facilities, programs and open space, in a significantly underutilized location.

Thank you for your consideration.

Respectfully submitted,

COBLENTZ PATCH DUFFY & BASS LLP

By: 
Joshua R. Steinhauer

JRS:jrs

cc: Mayor Ed Lee

London Breed, President of the Board, and members of the Board of Supervisors

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