From:	Mark Gilligan
To:	Major, Erica (BOS)
Subject:	Public Comment-Land Use and Transportation Committee -2/22/2021 - Item 210015
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Attachments:	Land-Use-Commission-02-22-2021.pdf

I would like to offer the attached document as Comments on the Proposed "Expanded Compliance Control and Consumer Protections Where History of Significant Violations" Ordinance that is being considered by the Committee and by the Board of Supervisors.

BOS file #210015

Mark Gilligan SE
510-548-8029

Public Comment by Mark Gilligan S.E. for the San Francisco Land Use and Transportation Committee:

Regarding "Expanded Compliance Control and Consumer Protections Where History of Significant Violations" (BOS file #210015)

These comments are submitted to educate the Committee and the City and County of San Francisco regarding problems with the Proposed ordinance Titled "Expanded Compliance Control and Consumer Protections where History of Significant Violations"

The proposed ordinance should be rejected because it does not address the root cause of the problem, it is not necessary, and because the City does not have the legal authority to do what is being proposed.

Public Comment is Being Suppressed

We are being told at the hearings that changes to the proposed ordinance will be made but the exact language of the changes are not being made available to the public in time for individuals to make comments at the hearings.

The Ordinance Does Not Solve the Problem.

While there are bad actors involved with some projects they should be seen more as a symptom of a dysfunctional system. The problem is that the permit process in San Francisco is unusually slow, cumbersome, and restrictive, especially in the Planning Department. This means project sponsors are incentivized to find faster ways to get projects constructed. Thus, when a bad actor is eliminated Owners will just be motivated to find another individual to take their place.

The current ordinance attempts to ignore this reality by blaming the problem on a few bad actors thus allowing the City to continue to ignore the dysfunctional permitting system.

If the City wishes to really address this problem, they will need to address the current dysfunctional system. But instead, the City is proposing a solution that makes the existing permitting system even more dysfunctional. This will further incentivize and reward bad actors.

The Ordinance is Not Necessary.

SFDBI already has sufficient legal options to deal with the perceived bad actors. For example, the City can report problem individuals to the state licensing boards. Just because the City is not happy with that option this does not give the City the authority to ignore the state system of regulation and to replace it with one of their liking.

If the City believes that a crime has been committed the City Attorney could prosecute the transgression as a crime but in such a case the defendant would have more legal protections than the City's appeal process allows.

The City of San Francisco Does Not Have the Authority to Take Action Against Architects, Engineers, and Contractors.

The Laws authorizing the adoption of building codes contemplate a system that regulates the characteristics of the building. More bluntly the building code says the building shall comply with the adopted regulations. Thus, it is the building owner who has control over the building and it is the owner who is responsible for compliance with the building code. The Architect and Engineer, are acting as consultants to the Owner and while they may have contractual obligations

E-MAIL: mark@gilligan.name

to the Owner, they are not subject to direct regulation by the DBI or the Planning Department.

The state of California has preempted the regulation of building construction and Cities only have the authority to regulate in this area if the legislature has specifically given the City such authority. Similarly, the state of California has preempted the regulation of the practice of Architecture, Engineering, and Contracting and has delegated no authority to adopt regulations to local jurisdictions.

By placing extra burdens on the practice of engineering and contracting with respect to construction permitting, in effect regulates the scope of practice of engineers and contractors. The City does not have any authority to regulate the practice of architecture, engineering or contracting. Being placed on the Expanded Compliance Control List will essentially blacklist a design professional or contractor from doing work in the City.

The ordinance is formulated to punish those architects, engineers, and contractors that the City has had problems with. When an individual or company is on the City's blacklist, they will have difficulty finding clients. In addition, design professionals will be penalized by having to spend more time responding to the City's review comments which will either require higher professional service fees, which will result in fewer projects, or they will be penalized by having to accept lower profits.

Similarly, Contractors as well as architects and engineers will be additionally penalized by having to spend more time dealing with the enhanced inspections contemplated by the ordinance.

Supporting the contention that the City intends the ordinance to punish those on the list is the statement made by Ms. Beinhart that it was expected that the City would charge higher permit fees for those projects subject to expanded compliance control. This is evidence of a desire to penalize certain projects. This would also evidence a desire of the city to abandon the current system for determining permit fees based on cost of construction or fixed fees for particular reviews.

In the case of Contractors, the state contractors licensing board already has provisions for disciplining contractors who have done work without a permit. Thus, because the state has preempted the regulation of certain groups the City cannot have the authority to punish Contractors for the same reason.

While the City denies that they intend to punish individuals it is clear to structural engineers that the ordinance creates a system that is meant to punish individuals on the list.

Measures which restrict or revoke the ability of design professionals or contractors to work in their fields are governed by the State regulatory boards, which have more robust due process rules than the rules under the proposed ordinance.

The Ordinance May Expose the City to Antitrust Liability

The Ordinance obviously penalizes those firms or individuals on the City's list in ways that will make them unable to effectively compete for clients. This has the effect of displacing competition which would subject the City of San Francisco to antitrust liability. While states acting as a sovereign are not subject to antitrust laws the US Supreme Court is clear that Cities cannot avail themselves of this immunity because the clear articulation requirement of the State Action Doctrine can only be satisfied if the Legislature has clearly articulated the desire to displace competition. The Supreme Court has made it clear that Cities or Counties cannot satisfy this requirement.

San Francisco's Claim that they Have Authority to Adopt Administration Provisions is Flawed.

While the City does have some flexibility with regards to enforcement this is not without constraints. The City must harmonize any such requirements with relevant state statutes and regulations. Thus, any attempts to enforce the building code cannot have the effect of regulating the practice of architecture, engineering, or contracting. The City must find another way to accomplish their objective.

It is interesting to note that state law prohibits a state agency from adopting a regulation where another state agency has exclusive authority. This means that another state agency such as DSA that has construction enforcement responsibilities for public schools cannot adopt a regulation that regulates the practice of engineering or architecture since other agencies have the exclusive authority to adopt such regulations. Thus, it would be inconsistent for local jurisdictions to have an authority that a state agency cannot have. As a result, the authority that the City may have to adopt procedural requirements related to enforcement cannot have the effect of punishing various parties.

The Ordinance Results in Guilt by Association.

Civil and Structural Engineers provide recommendations to the Client and thus do not control the contractor. The licensing laws are clear that professional engineers do not have an obligation to inspect the work unless provided for in their contract. Thus, it is unfair to punish an engineer for acts of others simply because he was involved with a project

In many small projects the engineer may not be aware if a permit has been issued or whether construction has started.

The injustice of finding guilt by association is compounded by the lack of any requirement that the individual intended to violate the building regulations.

The Due Process Provisions in the Ordinance are Inadequate

While the provision requires multiple individuals be involved with any decision to place an individual on the blacklist, it needs to be appreciated that all these individuals are part of the same operational group and subject to the same biases. This is unfair.

By only allowing an appeal after an individual is on the blacklist the City has only allowed an appeal after much of the damage has been done. Is this fair?

The Building Inspection Commission membership is not able to provide an independent appeal process. Not only do the individual commissioners lack the training regarding administrative law but there is also a concern that they cannot provide an independent review with respect to SFDBI policy because they are ultimately beholden to either the Mayor or the Board of Supervisors. In addition, the BIC will be dependent on the advice from City Attorney's Office which is also tasked with defending the ordinance. So where is the independence?

The Ordinance Creates a System That is in Conflict with the Right to Have Equal Protection Under the Law.

The ordinance could unfairly penalize future projects and their owners, design professionals and contractors involved in them, by subjecting those projects to more review and more delay than normal where a contractor or design professional is on the Expanded Compliance Control List.

This system creates a situation where there are in effect two different regulatory systems with those on the list being subject to a more aggressive interpretation of the laws than those not sanctioned.

Experience with some notorious state agencies suggests that more aggressive enforcement often results in a de facto different interpretation of the code provisions. The fact that the ordinance effectively expects the plan checkers to make more comments, whether justified or not, will pressure the plan checkers to adopt questionable interpretations of the regulations. The net effect will effectively result in different regulations for some individuals or projects.

Given the politically charged nature of the proposed ordinance whoa be the plan checker who attempts to treat such projects the way they would treat any project not subject to the expanded compliance control. Thus, no matter how good the design is the plan checkers will be incentivized to make extensive comments that would not normally be made.

Given the different levels of enforcement one might ask whether this is being done to protect the public or to punish certain engineers or architects. If there is a claim that the requirement is to protect the public then one might ask whether the default level of enforcement is by implication deficient. On the other hand, if the intent is to punish certain entities then the City has exceeded their authority and have denied individuals equal protection under the law.

Sincerely,

Mark K. Gilligan S.E.