File No. 130805

Committee Item No. _____
Board Item No. 30

COMMITTEE/BOARD OF SUPERVISORS
AGENDA PACKET CONTENTS LIST

Committee _____ Date _____

Board of Supervisors Meeting Date October 1, 2013

Cmte	Board	
☐	☐	Motion
☐	☐	Resolution
☐	☐	Ordinance
☐	☐	Legislative Digest
☐	☐	Budget Analyst Report
☐	☐	Legislative Analyst Report
☐	☐	Introduction Form (for hearings)
☐	☒	Department/Agency Cover Letter and/or Report
☐	☐	MOU
☐	☐	Grant Information Form
☐	☐	Grant Budget
☐	☐	Subcontract Budget
☐	☐	Contract/Agreement
☐	☐	Award Letter
☐	☐	Application
☐	☒	Public Correspondence

OTHER (Use back side if additional space is needed)

☐	☐	Appeal of Determination of Exemption from Environmental Review for 435-437 Potrero Avenue
☐	☐	Appellant's Appeal Response
☐	☐	Project Owner's Appeal Response
☐	☐	Planning Department's Appeal Response

Completed by: Joy Lamug Date September 19, 2013
Completed by: _____ Date _____

An asterisked item represents the cover sheet to a document that exceeds 20 pages. The complete document is in the file.

BOARD of SUPERVISORS

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. 554-5184
Fax No. 554-5163
TDD/TTY No. 544-5227

August 21, 2013

Mica Ringel
485 Potrero Avenue, Unit C
San Francisco, CA 94110

Subject: Appeal of Determination of Exemption from Environmental Review for a Project Located at 435-437 Potrero Avenue

Dear Mr. Ringel:

The Office of the Clerk of the Board is in receipt of a memorandum dated August 16, 2013 (copy attached), from the City Attorney's office regarding the timely filing of an appeal of the determination of exemption from environmental review for a project located at 435-437 Potrero Avenue.

The City Attorney has determined that the appeal was filed in a timely manner.

A hearing date has been scheduled on **Tuesday, September 24, 2013, at 3:00 p.m.**, at the Board of Supervisors meeting to be held in City Hall, Legislative Chamber, Room 250, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

Pursuant to the Interim Procedures 7 and 9, please provide to the Clerk's Office **by**:

8 days prior to the hearing: any documentation which you may want available to the Board members prior to the hearing;

11 days prior to the hearing: names of interested parties to be notified of the hearing.

Please provide 1 electronic file and 18 hard copies of the documentation for distribution, and, if possible, names and addresses of interested parties to be notified in label format.

If you have any questions, please feel free to contact Legislative Deputy Director, Rick Caldeira at (415) 554-7711 or Legislation Clerk, Joy Lamug at (415) 554-7712.

Very truly yours,

Angela Calvillo
Clerk of the Board

File #130605 Bds-11 COB C.A. CPapp

Interoffice Memorandum
September 19, 2002

To: Nicholas C. Maiden Via: Brian Bateman BB
From: Jane Lundquist JHL Barry Young BY

Subject: Risk Screen for RCN Telecom Services, Inc., P# 14083, A# 4739, Emergency Generator Diesel Engine

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2013 SEP 23 P 1:02

At your request, a risk screening analysis was performed for the operation of an emergency generator diesel engine. For 100 hours of operation per year, excluding periods when operation is required due to emergency conditions, the maximum cancer risk is

25 in a million.

This level of risk is not acceptable under our risk management policy and the operation of this source, as currently proposed, fails the risk screen.

To bring the risk down to an acceptable level, one in a million cancer risk, the applicant should consider:

1. Limiting the hours of operation, excluding periods when operation is required due to emergency conditions, to no more than 4 hours per year.

2. Installing a diesel particulate filter that can reduce diesel particulate emissions to a level equivalent to TBACT or installing an engine that meets the TBACT requirement. This would result in lower emissions and allow for a ten in a million cancer risk to pass the risk screen.

EMISSIONS: Diesel particulate emissions used in the analysis are based on 2.20 E-3 lbs/hp-hr for the 517 hp engine operating 100 hours per year. The annualized diesel particulate emission rate is 1.64 E-3 g/s.

MODELING: The ISCST3 and ISCPrime models were run with SCREEN3 meteorological data and the urban land use option to determine the maximum one-hour average ground-level concentrations. The annual average concentrations were calculated by applying a persistence factor to the one-hour average concentrations.

CANCER RISK: Estimates of residential risk assume continuous 70-year exposure to annual average pollutant concentrations.

Cancer risk = (emission rate g/s) * (one-hour average X/Q ($\mu g/m^3$) / (g/s)) * (persistence factor) * (exposure adjustment factor) * (unit risk $(\mu g/m^3)^{-1}$)

Receptor	Emissions (g/s)	X/Q ($\mu g/m^3$) / (g/s)	persistence factor	exposure adjustment factor	unit risk $(\mu g/m^3)^{-1}$	Cancer risk in a million
Residential	1.64 E-3	499	0.1	1	3.0 E-04	25

BAY AREA
AIR QUALITY
MANAGEMENT
DISTRICT

ALAMEDA COUNTY
Roberta Cooper
Scott Haggerty
(Vice-Chairperson)
Nate Miley
Shelia Young

CONTRA COSTA COUNTY
Mark DeSaulnier
Mark Ross
Gayle Uilkema

MARIN COUNTY
Harold C. Brown, Jr.

NAPA COUNTY
Brad Wagenknecht

SAN FRANCISCO COUNTY
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Leland Yee
(Vacant)

SAN MATED COUNTY
Jerry Hill
Marland Townsend
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Pamela Torliatt

William C. Norton
INTERIM
CEO/EXECUTIVE
SECRETARY

Ellen Garvey
Air Pollution Control
Officer

September 24, 2002

RCN Telecom Services, Inc.
1400 Fashion Island Blvd., Suite 100
San Mateo, CA 94404

Attention: Jan Fields, Facilities Manager

Application Number: 4739
Plant Number: 14083
Equipment Location: 437 Potrero Street
San Francisco, CA 94110

Dear Ms. Fields:

The District's Air Toxic Evaluation Section performed a Risk Screen Analysis (RSA) for source **S-1 Emergency Generator.** The RSA is part of a standard procedure that precedes the District's approval or denial of an Authority to Construct (A/C) or Permit to Operate a source that is a potential emitter of air toxics within the District's jurisdiction.

The District regrets to inform you that source S-1 failed the RSA and hence cannot be granted a Permit to Operate the Standby Generator per terms (i.e. operating scenarios) you outlined in your application. However, the District would like to provide RCN Telecom Services, Inc. with the following compliance options as an alternative to operate the diesel engine:

- Limiting the hours of operation, excluding periods when operation is required due to emergency conditions, to no more than 4 hours per year.
- Installing a diesel particulate filter that can reduce the diesel particulate emissions to a level equivalent to TBACT or installing an engine that meets TBACT requirement. This would result in lower emissions and allow for a ten in a million cancer risk to pass the risk screen.

Please respond immediately if you are willing to accept the above permitting option. Failure to respond to the District immediately may result in the cancellation of your application.

Please include your application number with any correspondence with the District. If you have any further questions, please call me at **(415) 749-5183, (fax 415-749-5030).**

Sincerely,

Nicholas C. Maiden
Limited Term Air Quality Permit Technician

NCM:ncm

CHAPTER 9:
GREENHOUSE GAS EMISSIONS TARGETS AND DEPARTMENTAL ACTION PLANS

SEC. 900. FINDINGS AND PURPOSE.

The Board of Supervisors finds that:

(a) In 2002, the Board of Supervisors adopted Resolution 158-02 that called for the City to develop plans to reduce its greenhouse gas emissions to 20 percent below 1990 levels by the year 2012.

(b) In 2004, the Department of the Environment and the San Francisco Public Utilities Commission issued "The Climate Action Plan For San Francisco," which included an accounting of greenhouse gas emissions associated with City activities, an accounting of greenhouse gas emissions within the City and County of San Francisco but not associated with City operations, and emission reduction recommendations for transportation, energy efficiency, renewable energy and solid waste management sectors.

(c) City Departments, under the leadership of the Department of the Environment and on their own initiative, are engaged in various undertakings to implement the recommendations in "The Climate Action Plan," and are making steady progress in certain areas toward the 2012 goal.

(d) In 2005, Governor Schwarzenegger issued Executive Order S-3-05 which established Statewide greenhouse gas emissions reduction targets for California as follows: by 2010, reduce greenhouse gas emissions to 2000 levels; by 2020, reduce greenhouse gas emissions to 1990 levels, and by 2050 reduce greenhouse gas emissions to 80 percent below 1990 levels.

(e) In 2006, California enacted AB 32, the California Global Warming Solutions Act of 2006. (CA Health and Safety Code Section 38.500 et seq.) which requires the California Air Resources Board to determine the statewide greenhouse gas emissions level in 1990, set that 1990 level as the statewide greenhouse gas emissions level to be achieved by 2020, and to adopt and implement statewide plans, protocols, rules and regulations to achieve and exceed the 2020 goals.

(f) It is the intent of the Mayor and the Board of Supervisors to protect the health and welfare in a manner that compliments state and federal efforts to improve air quality by exercising a leadership role in mandating local actions to reduce global warming, and, in particular, to call upon City departments and the private sector to integrate emission reduction measures into their standard operating procedures in order that the City meets and exceeds the greenhouse gases emissions established in this Ordinance.

(Added by Ord. 81-08, File No. 071294, App. 5/13/2008)

SEC. 902. GREENHOUSE GAS EMISSIONS LIMIT.

(a) The following San Francisco greenhouse gas emissions limits are hereby established:

(i) By 2008, determine 1990 City greenhouse gas emissions as provided in Section 902(c) below;

(ii) By 2017, reduce greenhouse gas emissions by 25 percent below 1990 levels;

(iii) By 2025, reduce greenhouse gas emissions by 40 percent below 1990 levels; and

(iv) By 2050, reduce greenhouse gas emissions to 80 percent below 1990 levels. These targets shall remain in effect unless otherwise amended or repealed.

(b) All City departments shall consider the effect of all decisions and activities within their jurisdiction on green house gas emissions and undertake their responsibilities to the end that the City achieves the greenhouse gas emissions limits set forth in this Ordinance.

(Added by Ord. 81-08, File No. 071294, App. 5/13/2008)

SEC. 903. GREENHOUSE GAS EMISSIONS REDUCTION PLAN.

(i) The San Francisco Planning Department shall:

(A) Review the City's General Plan, including but not limited to the environmental protection, air quality, urban design and transportation elements, for consistency with this Ordinance and, as appropriate, urge the Planning Commission to recommend to the Board of Supervisors amendments to the General Plan to add the greenhouse gas emissions limits in this Ordinance and policies to achieve those targets;

(B) Include consideration of a project's impact on the San Francisco greenhouse gas emissions limits in this Ordinance as part of its review under the California Environmental Quality Act (CEQA);

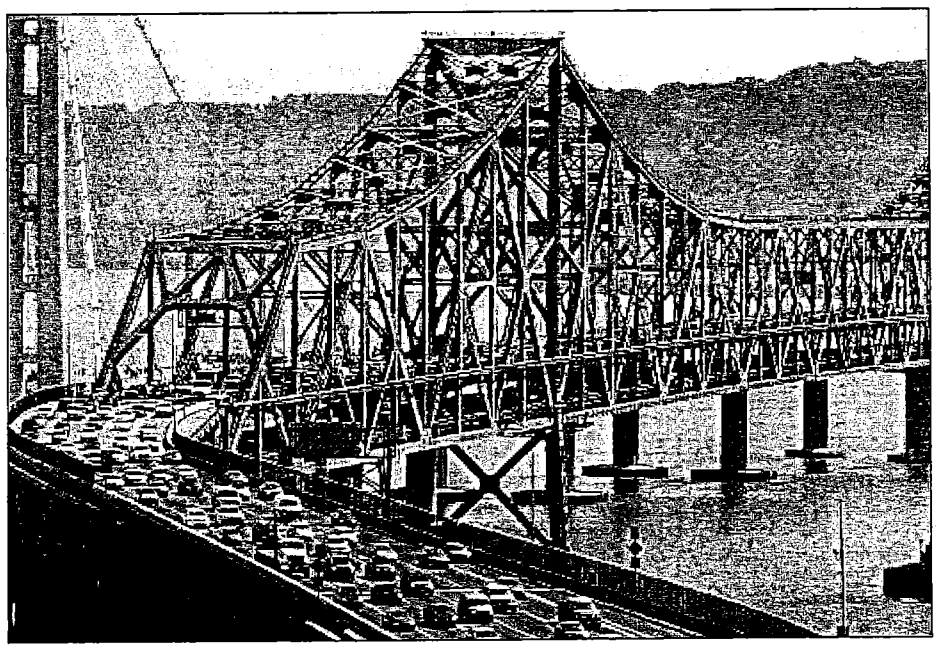
(Added by Ord. 81-08, File No. 071294, App. 5/13/2008)

San Francisco Examiner

Wednesday
August 23,
2013

City should not fall behind in progress toward curbing greenhouse gas emissions

Examiner Editorial



Although San Francisco has made strides since 2005 to reduce greenhouse gas emissions, it fell short of its 2012 goal by a margin that is disappointing, but not fatal, in the quest to make The City more environmentally friendly.

Under then-Mayor Gavin Newsom, San Francisco laid out goals for reducing its greenhouse gas emissions. The aim was a 20 percent reduction from 2005 levels by 2012 and an 80 percent reduction by 2050.

In many ways, the goals were ambitious. After all, San Francisco's program came before Assembly Bill 32, passed in 2006, which mandated a 20 percent statewide decrease in emissions from 1990 levels by 2020. The City's goals also preceded Gov. Arnold Schwarzenegger's 2006 executive order mandating an 80 percent reduction in emissions from 1990 levels by 2050.

San Francisco's goal to reduce its carbon emissions also was groundbreaking at a time when the Republican administration in Washington, D.C., was still pushing an oil- and coal-focused agenda that, despite paying lip service to concerns about climate change, did little to set the nation on a path toward clean energy to help offset harmful greenhouse gas emissions.

Despite San Francisco's early leap into the fight against emissions, it fell significantly shy of its 2012 reductions goal, having only reduced emissions in The City by 12 percent instead of 20 percent. Two items seem to have held up the goal: A planned installation of new backup generators at San Francisco General Hospital and continued emissions from Muni vehicles.

The issue at General Hospital is the change from a natural gas-powered steam boiler that must run continually to a diesel-powered generator that can switch on only when needed. That change is apparently in the works.

The situation at Muni is more complicated. The transit agency has one of the oldest fleets in the nation. That means that more vehicles still in operation use older, more polluting technology, especially among the buses. The agency has made strides in decreasing its greenhouse gas footprint, reducing it by 30 percent since 2004, mainly by using biofuels. But further improvements for Muni, such as moving more of the fleet to hybrid electric models, face the usual problem: funding. The transit agency is chronically underfunded, especially for its capital projects, and improvements for ridership are sure to generally trump those for environmental issues.

The lack of capital, such as that delaying the improvements at Muni, truly is an issue to be reckoned with if The City means to carry on the fight to reduce greenhouse gas emissions. San Francisco's reduction of more than 26,000 metric tons of greenhouse gases a year since 2005 is a solid start, but future projects for clean energy will require capital. While many investments deliver an immediate return, the move to cleaner energy is more abstract: fewer greenhouse gas emissions. This is not something that can be seen, but it is important nonetheless.

San Francisco should redouble its effort to be a leader in reducing emissions. The true investment is making a better world for future generations.

Air Quality Element

OBJECTIVE 4
IMPROVE AIR QUALITY BY INCREASING PUBLIC AWARENESS REGARDING THE NEGATIVE HEALTH EFFECTS OF POLLUANTS GENERATED BY STATIONARY AND MOBILE SOURCES.

POLICY 4.3
Minimize exposure of San Francisco's population, especially children and the elderly, to air pollutants.

Children and elderly people are the population groups who are most susceptible and sensitive to air pollution in the ambient air. Through educational programs public awareness needs to be increased to particularly protect children and elderly people from exposure to air pollutants.

OBJECTIVE 6
LINK THE POSITIVE EFFECTS OF ENERGY CONSERVATION AND WASTE MANAGEMENT TO EMISSION REDUCTIONS.

POLICY 6.3
Encourage energy conservation through retrofitting of existing facilities.

Existing older commercial and residential facilities in the city do not comply with recent energy conservation standards. These facilities waste a considerable amount of energy that produce air pollution in the process. Generation of any kind of energy used in these facilities produces air pollution. Existing facilities should be encouraged to retrofit to minimize the use of energy. Energy conservation in these facilities will result into air quality improvements.

OBJECTIVE 3
DECREASE THE AIR QUALITY IMPACTS OF DEVELOPMENT BY COORDINATION OF LAND USE AND TRANSPORTATION DECISIONS.

POLICY 3.7
Exercise air quality modeling in building design for sensitive land uses such as residential developments that are located near the sources of pollution such as freeways and industries.

Project review and approval in the City should consider air quality implications. Certain land uses such as some types of industrial uses and freeways generally emit air pollutants that could be hazardous to human health, particularly that of sensitive receptors such as children, elderly and people with respiratory diseases. When reviewing new housing projects or other land uses to be used by sensitive receptors, location of industrial sites or other sources of air pollution should be considered in the design of the building to orient the air intake of the building away from the sources of pollution. Conversely, future industrial and other air polluting development should consider the existence of sensitive receptors in the vicinity.

POLICY 3.8
Promote the development of non-polluting industries and insist on compliance with established industrial emission control regulations by existing industries.

Currently all air polluting industries are subject to permit requirements by the BAAQMD. However, the City should actively encourage the development and expansion of industries which do not add to the air pollution problem. The City should assist the Air District in enforcing compliance for the existing industries in the city that do not comply or in the past have violated industrial emission control regulations.

POLICY 1.4
Assure that all new development meets strict environmental quality standards and recognizes human needs.

In reviewing all proposed development for probable environmental impact, careful attention should be paid to upholding high environmental quality standards. Granted that growth provides new economic and social opportunities, uncontrolled growth can also seriously aggravate environmental deterioration. Development projects, therefore, should not disrupt natural or ecological balance, degrade the visual character of natural areas, or otherwise conflict with the objectives and policies of the General Plan.

OBJECTIVE 4
ASSURE THAT THE AMBIENT AIR OF SAN FRANCISCO AND THE BAY REGION IS CLEAN, PROVIDES MAXIMUM VISIBILITY, AND MEETS AIR QUALITY STANDARDS.

Air pollution is one of the major problems facing the cities of the San Francisco Bay Region. In San Francisco, the need for conserving the air resource and improving air quality is undeniable. While San Francisco benefits from having few large upwind industrial polluters and from certain topographical and climatic conditions, Federal and State air quality standards continue to be violated on a number of days in the city.

The local air supply extends beyond the physical boundaries of San Francisco, covering the entire Bay Region, and effective air resource management must include regionwide planning, monitoring, regulations, and enforcement. San Francisco, however, can take certain actions which supplement and strengthen the efforts of existing regional programs. Local initiatives should be keyed to the curtailment of pollution emissions from sources typically found in San Francisco. Ultimately, solutions to the air pollution problem must be interrelated with virtually all facets of urban existence — industry, transportation, employment, housing, open space, recreation — even the products we buy and consume.

POLICY 4.1
Support and comply with objectives, policies, and air quality standards of the Bay Area Air Quality Management District.

Regionwide monitoring of air quality and enforcement of air quality standards constitute the primary means of reducing harmful emissions. The conservation of San Francisco's air resource is dependent upon the continuation and strengthening of regional controls over air polluters. San Francisco should do all that is in its power to support the Bay Area Air Quality Management district in its following operations:

- Monitoring both stationary and mobile sources of air pollution within the region and enforcing District regulations for achieving air quality standards.
- Regulating new construction that may significantly impair ambient air quality.
- Maintaining alert, permit, and violations systems.
- Developing more effective controls and method of enforcement, as necessary.

POLICY 4.4
Promote the development of nonpolluting industry and insist on compliance of existing industry with established industrial emission control regulations.

The City and County of San Francisco, in cooperation with the Chamber of Commerce, should actively encourage the development and expansion of industries which do not add to the air pollution problem. Those industries which are a major source of industrial air pollution should be identified and made to comply with all industrial emission control regulations. They should be equipped with effective air Quality Management devices.

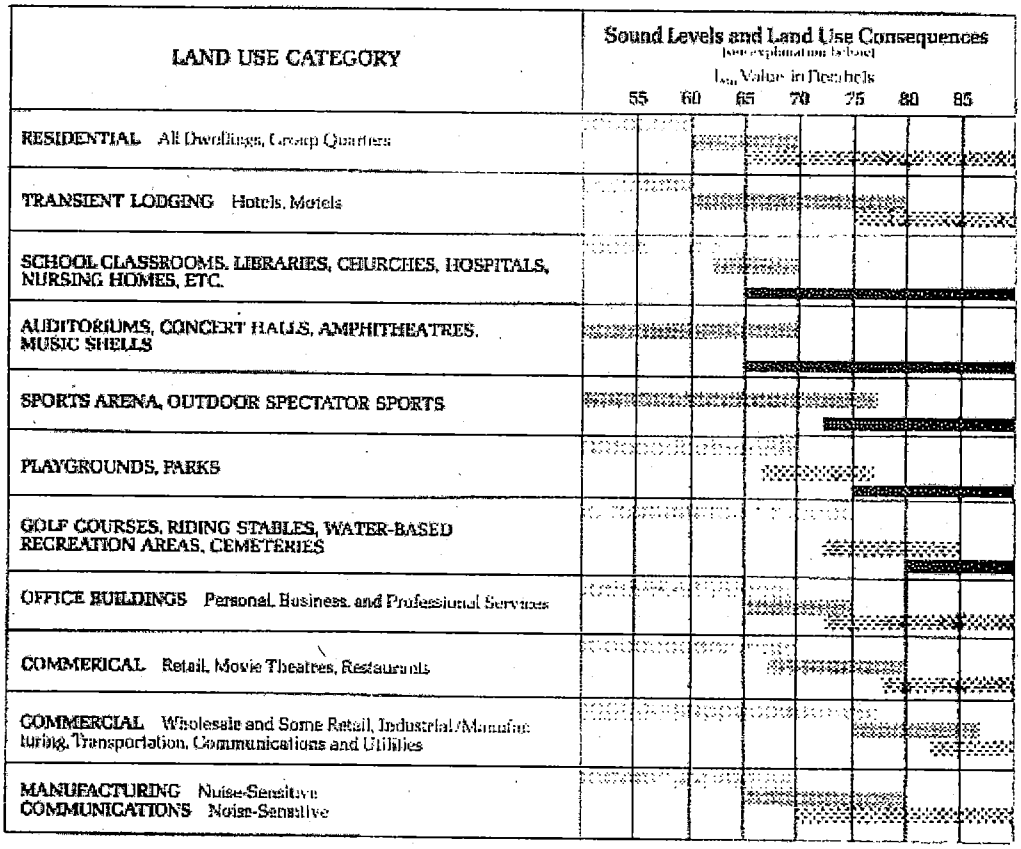
Environmental Protection Element

OBJECTIVE 10
MINIMIZE THE IMPACT OF NOISE ON AFFECTED AREAS.

The process of blocking excessive noise from our ears could involve extensive capital investment if undertaken on a systematic, citywide scale. Selective efforts, however, especially for new construction, are both desirable and justified.

OBJECTIVE 11
PROMOTE LAND USES THAT ARE COMPATIBLE WITH VARIOUS TRANSPORTATION NOISE LEVELS.

LAND USE COMPATIBILITY CHART FOR COMMUNITY NOISE



Satisfactory, with no special noise insulation requirements.

New construction or development should be undertaken only after a detailed analysis of the noise reduction requirements is made and needed noise insulation features included in the design.

New construction or development should generally be discouraged. If new construction or development does proceed, a detailed analysis of the noise reduction requirements must be made and needed noise insulation features included in the desdign.

New construction or development should generally not be undertaken.

POLICY 11.2
Consider the relocation to more appropriate areas of those land uses which need more quiet and cannot be effectively insulated from noise in their present location, as well as those land uses which are noisy and are presently in noise-sensitive areas.

Many commercial and industrial activities do not need to be in a quiet area, because interior noise levels typically are already high and tend to override noise from exterior sources. On the other hand, some uses require quiet locations and cannot be effectively insulated from noise. When feasible and desirable to do so, such activities should be encouraged to relocate to quieter areas. Conversely, there may on occasion be opportunities to relocate noisy uses to areas where the noise they generate will be less disturbing to their neighbors.

POLICY 11.3
Locate new noise-generating development so that the noise impact is reduced.

Developments which will bring appreciable traffic into or through noise-sensitive areas should be discouraged, if there are appropriate alternative locations where the noise impact would be less. For those activities — such as a hospital — that need a quiet environment, yet themselves generate considerable traffic, the proper location presents a dilemma. In those cases, the new development should locate where this traffic will not present a problem and, if necessary, incorporate the proper noise insulation.

The feasibility of making noise-reducing changes to existing transportation facilities remains an obstacle to any large-scale transformation. New thoroughfares and new Municipal Railway facilities, however, offer opportunities to overcome objectionable noise aspects. Ideally, new transportation facilities should be located in areas or along routes of least noise-sensitive land uses. Where it is infeasible or undesirable to do so, special noise-suppressing design features should be incorporated into the facilities in order to make them acceptable neighbors.

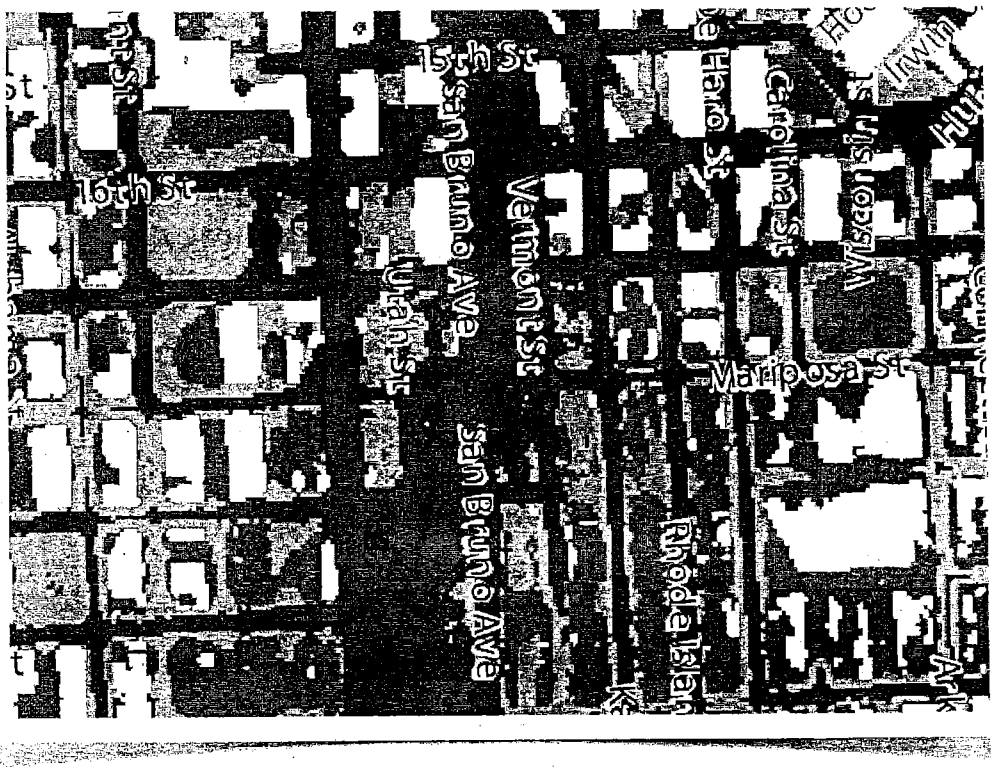
AREAS POTENTIALLY REQUIRING NOISE INSULATIONS

Date: March 2009

Noise Levels
Ldn

- Below 50
- 50 - 55
- 55 - 60
- 60 - 65
- 65 - 70
- above 70

The model is in decibels A weighted (dBA) averaged over 24 hours and penalized for night yelling - what is called a Ldn.



POLICY 14.2
Insure adequate local enforcement of California's non-residential building standards.

The California Energy Commission has adopted and periodically reviews energy design standards for all new non-residential buildings (Title 24). The standards require that all new buildings be designed to use significantly less energy than buildings built prior to the passage o f the new requirements.

The City is charged with the enforcement of the State building standards. Enforcement of the standards is a responsibility of the City's Bureau of Building Inspection (BBI). Conformance with the State's energy efficiency standards should be a priority in the City's building permit review process. This will require adequate training of building code inspectors on the energy components of the building standards.

POLICY 14.3
Expand the environmental review process to encourage the use of additional measures to save energy in commercial buildings.

California Title 24 Standards do not reflect the state of the art in building efficiency design. There are a number of design features which have been used successfully in some San Francisco high-rise buildings to further reduce energy consumption, e.g. the use of natural ventilation to reduce air conditioning demand. Detailed case studies should be undertaken to evaluate the performance of such features. This information should be shared with parties involved in building design and EIR preparation.

The environmental impact report (EIR) process is designed to review the potential environmental impacts associated with major new development projects. This process provides an opportunity for dialogue among the City, developer and public on a range of issues, including energy. Commercial case studies and energy research efforts should be undertaken to determine cost-effective energy conservation strategies, e.g. single metering, integrated energy systems, flextime to reduce peak transit use, that should be integrated into EIR procedures.

OBJECTIVE 1.5
MINIMIZE THE IMPACT OF NOISE ON AFFECTED AREAS AND ENSURE GENERAL PLAN NOISE REQUIREMENTS ARE MET

Noise, or unwanted sound, is an inherent component of urban living. While environmental noise can pose a threat to mental and physical health, potential health impacts can be avoided or reduced through sound land use planning. The careful analysis and siting of new land uses can help to ensure land use compatibility, particularly in zones which allow a diverse range of land uses. Commercial land uses also generate noise from mechanical ventilation and cooling systems, and though freight movement. Sound control technologies are available to both insulate sensitive uses and prevent unwanted sound from leaving noisy uses. The use of good urban design can help to ensure that noise does not impede access and enjoyment of public space.

POLICY 1.5.1
Reduce potential land use conflicts by providing accurate background noise-level data for planning.

POLICY 1.5.2
Reduce potential land use conflicts by carefully considering the location and design of both noise generating uses and sensitive uses in Showplace Square/Potrero Hill.

OBJECTIVE 1.6
IMPROVE INDOOR AIR QUALITY FOR SENSITIVE LAND USES IN SHOWPLACE SQUARE / POTRERO HILL

Exposure to air pollutants can pose serious health problems, particularly for children, seniors and those with heart and lung diseases. Sound land use planning aims to reduce air pollution emissions by co-locating complementary land uses, which helps to decrease automobile traffic and encourage walkability and by avoiding land use-air quality conflicts that can result in exposure to air pollutants. While there are numerous social, environmental and economic benefits associated with integrating land use and transportation, there is also a potential risk of exposing residents to poor indoor air quality when infill residential developments are located in close proximity to air pollution sources, including traffic sources such as freeways or major streets. Epidemiologic studies have consistently demonstrated that children and adults living in proximity to busy roadways have poorer health outcomes, including higher rates of asthma disease and morbidity and impaired lung development. Given increasing demands for housing, particularly affordable housing, and the limited amount of available and suitable land for housing in San Francisco, it is important that the review process for proposed development projects incorporate analysis and mitigation of air quality conflicts, particularly with respect to sensitive land uses such as housing, schools, daycare and medical facilities.

The policy to address the objective outlined above is as follows:

POLICY 1.6.1
Minimize exposure to air pollutants from existing traffic sources for new residential developments, schools, daycare and medical facilities.

Showplace Square/Potrero Area Plan

OBJECTIVE 3.3
PROMOTE THE ENVIRONMENTAL SUSTAINABILITY, ECOLOGICAL FUNCTIONING AND THE OVERALL QUALITY OF THE NATURAL ENVIRONMENT IN THE PLAN AREA

Given the reality of global climate change, it is essential that cities, and development within those cities, limit their individual and collective ecological footprints. Using sustainable building materials, minimizing energy consumption, decreasing storm water runoff, filtering air pollution and providing natural habitat are ways in which cities and buildings can better integrate themselves with the natural systems of the landscape. These efforts have the immediate accessory benefits of improving the overall aesthetic character of neighborhoods by encouraging greening and usable public spaces and reducing exposure to environmental pollutants.

POLICY 1.4.2
Allow Knowledge Sector office-type uses in portions of Showplace Square/Potrero Hill <u>where it is appropriate</u>.

NOTE:

It is inappropriate to place a Data Center in our district.

They are <u>prohibited</u> because they are polluters of noise and air.

- [RH-2] 400 blocks of Utah Street & San Bruno Avenue (abutting the freeway) is 100% residential
- [UMU] East side of Potrero is 80% residential
    - 455 Potrero - two new apartments approved.
- [UMU] West side 63 low-income families at Mariposa Gardens Housing Development one block away
    - 480 Potrero - 78 apartments approved.
- Franklin Square Park is ½ block away.
- There are 2 gas stations on the corners of Potrero & 17th.
- Sunny Auto Body operates a toxic spray booth across the street.
- UPS Facility is a block away
- MUNI yard is two blocks away.

OBJECTIVE 1.3
INSTITUTE FLEXIBLE "LEGAL NONCONFORMING USE" PROVISIONS TO ENSURE A CONTINUED MIX OF USES IN SHOWPLACE SQUARE/POTRERO

Showplace/Potrero already contains a mix of offices, retail, housing and other uses, in addition to PDR businesses. The intent of the Plan is to create successful mixed areas where PDR uses can compete well with other uses in the future.

To ensure that this mix remains in place, existing office and retail establishments in the mixed use and PDR districts of Showplace / Potrero should be allowed to stay legally, as long as they were legally established in the first place.

Existing legal non-conforming use rules already provide substantial protections to certain types of establishments that pre-date the proposed rezoning. For example, in areas where limitations will be imposed under new zoning on retail and office uses, existing office and retail uses that do not comply with this limitation would be able to remain, provided they were legally established in the first place.

POLICY 1.3.1
Continue existing legal nonconforming rules, which permit pre-existing establishments to remain legally even if they no longer conform to new zoning provisions, as long as the use was legally established in the first place.

POLICY 1.3.3
Recognize desirable existing uses in the former industrial areas which would no longer be permitted by the new zoning, and afford them appropriate opportunities to establish a continuing legal presence.

SAN FRANCISCO
PLANNING
DEPARTMENT

ZONING ADMINISTRATOR
BULLETIN NO. 7

Planning Code Interpretations for the Eastern Neighborhoods

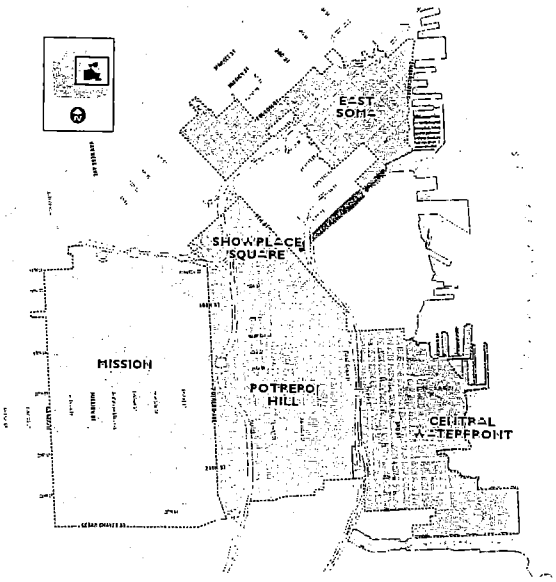
Section 307 of the Planning Code mandates the Zoning Administrator to issue and adopt such rules, regulations and interpretations as are in the Zoning Administrator's opinion, necessary to administer and enforce the provisions of the Planning Code. [Section 7.502 of the San Francisco Charter charges the Zoning Administrator with the responsibility of administering and enforcing the Planning Code.]

Date:
APRIL 2009
Reprinted:
OCTOBER 2009

Relevant Ordinance:
0298-08: Planning Code Amendments for the Eastern Neighborhoods Area Plans

Formerly Known as: Bulletin No. 2009-02

In December 2008, the City adopted the Eastern Neighborhoods Plan. The Plan affected more than 2,200 acres and comprised more than 1,800 pages of ordinance amending the Zoning Maps, Planning Code, and Administrative Code. While Department staff made every effort to ensure the efficacy and accuracy of the Plan's implementing provisions, any effort of this magnitude will inherently contain minor errors and omissions, and require interpretations. Accordingly, the Department intends to draft corrective trailing legislation and forward it to the Planning Commission and Board of Supervisors in the coming months. However, in order to avoid multiple and overlapping pieces of legislation, Zoning Administrator Bulletins will be issued from time to time to address outstanding issues until such time as subsequent legislation is in place, as well as clarifications, amplifications and interpretations that may remain in force even after cleanup legislation. This is the first such Bulletin.



The Eastern Neighborhoods Plan Areas

www.sfplanning.org

From: Teague, Corey
To: "David Silverman"
Subject: RE: 435 Potrero
Date: Friday, March 22, 2013 9:17:00 AM

David,
I received the materials, and I'll go over these issues with Scott in detail next week. The two specific issues are:

1. Is this already a legal nonconforming use per permitting in the early 2000s?
    a. My initial take is that this is not a "legal" nonconforming use because, regardless of how much they invested in the building, no permits were ever reviewed/approved by the Planning Department, and almost all of those permits expired or were withdrawn.

2. If it is not a legal nonconforming use, and thus can only be legalized through the legitimization process, is a Conditional Use Authorization required.
    a. My initial take, as we discussed, is that a Conditional Use Authorization is required. Section 179.1(f)(1) states that "Those uses which, **under the provisions of this Code that were applicable on April 17, 2008**, would have either: (i) required Conditional Use authorization pursuant to Section 303 or (ii) been principally permitted but required an allocation of office space of less than 50,000 gross square feet under the Annual Limit pursuant to Section 321(b)(4), may seek such authorization pursuant to all requirements of the applicable Section."

       The concept is to treat these uses as if they were attempting to legalize on April 17, 2008, both in terms of required approvals and impact fees.

I'll be in touch next week after I've spoken to Scott. In the meantime, it may be a good idea to at least go ahead and schedule a CU intake.

Corey A. Teague, AICP, LEED AP
City Planner
1650 Mission Street, Suite 400
San Francisco, CA 94103

corey.teague@sfgov.org

(415) 575-9081 (phone)
(415) 558-6409 (fax)

From: Teague, Corey
To: "David Silverman"
Cc: James Reuben
Subject: RE: 435 Potrero
Date: Wednesday, March 27, 2013 2:49:00 PM

David,
I reviewed this project with Scott today, and here is the relevant info:

- Conditional Use Authorization: Scott confirmed that pursuant to Planning Code Section 179.1(f)(1), if the legitimization letter confirms this project's eligibility to legalize, it would be subject to a CU Authorization based on the required approvals for an internet services exchange in the M-1 district on April 17, 2008.

- Legal Non-Conforming Use: You have made the argument that the existing use may already be legal, and therefore not need a legitimization request and subsequent CU Authorization. However, there is no formal request to our Department to make such a determination, nor has sufficient documentation been provided or research done to support that claim. If you choose to explore that path, please submit a request for a letter of determination that the existing use is a legal non-conforming use.

- Early Occupancy: You had requested that language be added to the letter of legitimization authorizing a new tenant to occupy the building once the letter was issued. However, because the project will require Planning Commission approval of the CU Authorization, the Department does not have the authority to permit an unpermitted use to occupy the space before all proper approvals are obtained. Therefore, such language cannot be added to the letter.

I hope that helps. Please let me know if you have any other questions. In the meantime, I will work on a draft letter of legitimization.

Corey A. Teague, AICP, LEED AP
City Planner
1650 Mission Street, Suite 400
San Francisco, CA 94103

corey.teague@sfgov.org

(415) 575-9081 (phone)
(415) 558-6409 (fax)

Commerce and Industry Element

GOALS

3. **Environmental Quality**
   The third goal is to maintain and enhance the environment. San Francisco's unique and attractive environment is one of the principal reasons San Francisco is a desirable place for residents to live, businesses to locate, and tourists to visit. The pursuit of employment opportunities and economic expansion must not be at the expense of the environment appreciated by all.

GUIDELINES FOR ALL USES

Uses should be consistent with the purpose of the district in which they are located as stated in the Planning Code.

OBJECTIVE 1
MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKING ENVIRONMENT.

"While the attempt to manage and channel socially desirable growth for the betterment of the city is a more reasoned approach, it is also a considerably more challenging approach due to the need to weigh intangible costs and benefits, and the difficulty of developing, evaluating, comparing and enforcing measures to mitigate potentially harmful consequences. However, it is important to the well-being of the city that this process be undertaken."

Commerce and Industry Element

POLICY 1.1
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development which has substantial undesirable consequences that cannot be mitigated.

In situations where proposed developments have no significant adverse environmental effects and will result in positive fiscal and employment benefits for residents, and where the developments otherwise meet planning objectives, they should be encouraged. Conversely, a potential development which has significant adverse environmental effects and has negligible or negative economic and/or social benefits should be discouraged. In instances where proposed developments would cause adverse environmental effects but would also contain substantial economic and/or social benefits to residents it will be necessary to define carefully and analyze carefully all anticipated economic and social costs and benefits in order to provide decision makers with all available information and facts at hand concerning anticipated effects of the proposed development. Appropriate mitigation measures should be considered as part of the costs of development.

POLICY 1.2
Assure that all commercial and industrial uses meet minimum, reasonable performance standards.

A critical aspect of development management is to mitigate negative impacts created by new development: economic, aesthetic, physical, environmental, and social.

POLICY 4.4
When displacement does occur, attempt to relocate desired firms within the city.

When the benefits of public actions justify dislocation, the City should seek to assist the displaced firm in obtaining a suitable alternative site in the city. This is particularly true if the situation is one in which the employment and tax revenues to the City outweigh costs to the City; it may well be appropriate to use public funds and redevelopment power to create a relocation site within the city for displaced firms.

In situations where proposed developments have no significant adverse environmental effects and will result in positive fiscal and employment benefits for residents, and where the developments otherwise meet planning objectives, they should be encouraged. Conversely, a potential development which has significant adverse environmental effects and has negligible or negative economic and/or social benefits should be discouraged. In instances where proposed developments would cause adverse environmental effects but would also contain substantial economic and/or social benefits to residents it will be necessary to define carefully and analyze carefully all anticipated economic and social costs and benefits in order to provide decision makers with all available information and facts at hand concerning anticipated effects of the proposed development. Appropriate mitigation measures should be considered as part of the costs of development.

In recent years, Federal and State legislation has established administrative procedures whereby environmental impacts of proposed developments, often previously ignored, are to be carefully evaluated before approval of a development. The economic and social benefits of such developments are often presumed, and they sometimes are still unstated and unanalyzed.

Some of the implications that should be considered are changes in employment patterns and resultant impacts on the city's labor market; impacts upon existing businesses and on future development opportunities in the immediate neighborhood and district of the city; impacts upon existing City services that may require improvements; capital investments or new public employment as a result of the development; and any anticipated impacts upon the location and viability of economic development decisions being made in other areas of the city. The process for compiling and assessing these and other economic and social impacts should be initiated and in appropriate cases become a parallel effort to existing environmental impact assessment procedures.

From: Board of Supervisors
To: BOS-Supervisors
Subject: File 130805: Appeal of Internet Services Exchange (Data Center) project planned for 435-437 Potrero

From: Neil Campbell [mailto:nosnaab@yahoo.com]
Sent: Tuesday, September 24, 2013 12:09 PM
To: Board of Supervisors
Subject: Appeal of Internet Services Exchange (Data Center) project planned for 435-437 Potrero

i am in support of the appeal to this project.

neil campbell
475 utah st, sf ca 94110

From: Board of Supervisors
To: BOS-Supervisors
Subject: File 130805: 435-437 Potrero Ave not exempt from air standards appeal

From: jamesbullard@jamesbullard.com [mailto:jamesbullard@jamesbullard.com]
Sent: Tuesday, September 24, 2013 10:26 AM
To: Board of Supervisors
Subject: 435-437 Potrero Ave not exempt from air standards appeal

Hi,

I'm writing in support of the appeal that the planning for 435-437 Potrero Ave is not exempt from the California Environmental Quality Act.

Please vote that the project should conform to project environmental reviews.

Diesel exhaust should not be allowed especially since there are clean backup energy alternatives.

thanks, jhb
James Bullard
514 Utah St. SF, CA 94110

From: Board of Supervisors
To: BOS-Supervisors
Subject: File 130805 : Appeal on data center

From: Emily Wilson [mailto:exj@speakeasy.net]
Sent: Tuesday, September 24, 2013 9:56 AM
To: Board of Supervisors
Subject: Appeal on data center

I live at 514 Utah and I'm very concerned about the data center going in on Potrero with no environmental review. I support the appeal. Thanks,

Emily Wilson

Sent through the air like magic

From: Board of Supervisors
To: BOS-Supervisors
Subject: File 130805: 435-437 Potrero Ave

From: c fh [mailto:potrerohome@hotmail.com]
Sent: Monday, September 23, 2013 12:33 PM
To: Board of Supervisors
Subject: 435-437 Potrero Ave

Hello,

This email is to show my support of the **appeal of the data center located at 435-437 Potrero Avenue**. I am deeply concerned about the air quality and noise levels in the neighborhood as it affects me.

They plan to use a large 4000 KW Diesel generator located on site. This would never have been allowed to be installed under the current air quality regulations because they are known emitters of Toxic Air Contaminants (TAC). TAC has been known to be a direct health risk contributing to asthma, heart attacks, strokes, hyper tension and even shorter life spans.

Potrero avenue is already an industrial area and the proximity to the freeway equates to poor air quality and even high noise levels.

As a native San Franciscan who has lived on Utah street for over 28 years, I am deeply disheartened that city planners and supervisors are not CAREFULLY planning growth and are happy to increase the density of already the second densest city in the country without thinking about quality of life.

Please reconsider.

Sincerely,
Carol Fager-Higgins
500 Utah Street
San Francisco, CA

In Health and Prosperity,
C. Fager-Higgins
potrerohome@hotmail.com

File # 130505

From: Joyce Lavey [joyce.lavey@gmail.com]
Sent: Monday, September 23, 2013 1:38 AM
To: Board of Supervisors
Subject: The appeal of the Internet Services Exchange (Data Center) project planned for 435-437 Potrero

Dear Supervisors:

As a resident of 593 Potrero Avenue, I support the appeal of the Internet Services Exchange (Data Center) project for 435-437 Potrero Avenue to not to be exempted from the regulation of the California Environmental Quality Act. I understand that this project can emit diesel fumes into the surrounding neighborhood.

Our neighborhood already has a tremendous amount of air pollution from the heavy traffic on Highway 101 and from Potrero Avenue. In the near future, the number of building projects for these environs is only going to add to this problem. Therefore, we don't need a project emitting diesel fumes all day.

I'm a 9-year lung cancer survivor and certainly do not want to breath this kind of stuff or to have a recurrence because of the lousy air in my neighborhood.

Please vote that this project be held to the air quality standards set forth in the California Environmental Quality Act and that it not be exempted.

Thank you.

Sincerely,
Joyce M. Lavey

Mica I. Ringel
485 Potrero Avenue, Unit C
San Francisco, California 94110
415-519-7523
supermica@gmail.com

September 16, 2013

Board President David Chiu
and Members of the Board of Supervisors
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2013 SEP 17 PM 12: 32

Re: Appeal of Categorical Exemption Determination
Internet Services Exchange
435-437 Potrero Avenue

Dear President Chiu and Supervisors:

I am appealing a determination made by the Planning Department and Commission (hereinafter collectively "Planning") that a Conditional Use (CU) Permit to establish an Internet Services Exchange (ISE) at 435-437 Potrero Avenue is somehow exempt from the provisions of the California Environmental Quality Act (CEQA) by "stamp" of a Class 1 categorical exemption.

BACKGROUND

On July 11th 2013, the Planning Commission took action and approved Motion No. 18921 adopting findings relating to the approval of CU Authorization pursuant to Planning Code § 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of ISE on the entirety of both floors at 435-437 Potrero Avenue, in an existing two-story building within an Urban Mixed Use (UMU) zoning district bordering Residential (RH-2).

An ISE is a prohibited use within a UMU zoning district, and the Commission's authorization was contingent on approval of a Letter of Legitimization (LOL) signed by the Zoning Administrator (ZA) on June 4th 2013.

It is my contention that Planning has (1) abused its discretion in its determination that this project is categorically exempt and (2) failed to make the required findings that would support an exemption.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

Under CEQA, "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects...." (Pub. Res. Code, § 21002.) Human beings are an integral part of the "environment." An agency is required to find that a "project may have a 'significant effect on the environment'" if, among other things, "[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly[.]" (Pub. Res. Code, § 21083, subd. (b)(3); see also CEQA Guidelines, § 15126.2 [noting that a project may cause a significant effect by bringing people to hazards].)

CEQA'S PURPOSES

The importance of a healthy environment for all of California's residents is reflected in CEQA's purposes. In passing CEQA, the Legislature wisely determined:

- "The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern." (Pub. Res. Code, § 21000, subd. (a).)
- We must "identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached." (*Id.* at subd. (d).)
- "[M]ajor consideration [must be] given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." (Id. at subd. (g).)

- We must "[t]ake all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise." (Pub. Res. Code, § 21001, subd. (b).)

Specific provisions of CEQA and its Guidelines require that local lead agencies consider how the environmental and public health burdens of a project might specially affect certain communities. Several examples follow.

ENVIRONMENTAL SETTING AND CUMULATIVE IMPACTS

There are a number of different types of projects that have the potential to cause physical impacts. One example is a project that will emit pollution. Where a project will cause pollution, the relevant question under CEQA is whether the environmental effect of the pollution is significant. In making this determination, two long- standing CEQA considerations that may relate to environmental justice are relevant – setting and cumulative impacts.

It is well established that "[t]he significance of an activity depends upon the setting." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718 [citing CEQA Guidelines, § 15064, subd. (b)]; see also *id.* at 721; CEQA Guidelines, § 15300.2, subd. (a) [noting that availability of listed CEQA exceptions "are qualified by consideration of where the project is to be located – a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant."]) For example, a proposed project's particulate emissions might not be significant if the project will be located far from populated areas, but may be significant if the project will be located in the air shed of a community whose residents may be particularly sensitive to this type of pollution, or already are experiencing higher-than-average asthma rates. A lead agency therefore should take special care to determine whether the project will expose "sensitive receptors" to pollution (see, e.g., CEQA Guidelines, App. G); if it will, the impacts of that pollution are more likely to be significant

In addition, CEQA requires a lead agency to consider whether a project's effects, while they might appear limited on their own, are "cumulatively considerable" and therefore significant. (Pub. Res. Code, § 21083, subd. (b)(3).) "'[C]umulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future

projects." (*Id.*) This requires a local lead agency to determine whether pollution from a proposed project will have significant effects on any nearby communities, when considered together with any pollution burdens those communities already are bearing, or may bear from probable future projects. Accordingly, the fact that an area already is polluted makes it *more likely* that any additional, unmitigated pollution will be significant. Where there already is a high pollution burden on a community, the "relevant question" is "whether any additional amount" of pollution "should be considered significant in light of the serious nature" of the existing problem. (*Hanford, supra*, 221 Cal.App.3d at 661; see also *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025 [holding that "the relevant issue ... is not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant in light of the serious nature of the traffic noise problem already existing around the schools."])

ALTERNATIVES AND MITIGATION

CEQA's "substantive mandate" prohibits agencies from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that would substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134.) Where a local agency has determined that a project may cause significant impacts to a particular community or sensitive subgroup, the alternative and mitigation analyses should address ways to reduce or eliminate the project's impacts to that community or subgroup. (See CEQA

Guidelines, § 15041, subd. (a) [noting need for "nexus" between required changes and project's impacts].)

Depending on the circumstances of the project, the local agency may be required to consider alternative project locations (see *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404) or alternative project designs (see *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1183) that could reduce or eliminate the effects of the project on the affected community.

CATEGORICAL EXEMPTIONS

In *McQueen v. Mid-Peninsula Regional Open Space* (1988) 202 Cal. App. 3d 1136, the court reiterated that categorical exemptions are construed strictly, shall not be unreasonably expanded beyond their terms, and may not be used where there is substantial evidence that there are unusual circumstances (including future activities) resulting in (or which might reasonably result in) significant impacts which threaten the environment.

Class 1 categorical exemption is applicable to the "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (Guidelines, § 15301.)

This section describes the class of projects wherein the proposed activity will involve negligible or no expansion of the use existing at the time the exemption is granted. Application of this exemption, as all categorical exemptions, is limited by the factors described in section 15300.2. Accordingly, a project with significant cumulative impacts or which otherwise has a reasonable possibility of resulting in a significant effect does not quality for a Class 1 exemption.

SIGNIFICANT CHANGE OF USE

435-437 Potrero Avenue had been without a tenant for a minimum of 3 years on July 11th, 2013 when the Commission took action and granted the CUP. By definition, an unoccupied property is empty, vacant, and without an active use. Any subsequent use beyond that which existed at the time of project approval, which was nothing, would have to be considered a clear expansion of use.

The former tenant [RCN/Astound] had used the site to house an ancillary hub for the broadcast and transmission of their digital cable franchise [1].

The Project Sponsor's submittal in support of the CUP outlines the framework for the site to become a public Data Center serving "local retail business customers." It will be "much like a local print shop" or a Kinko's. "At any given time there will be 4-6 people employed at the facility with 2-4 employees of customers rotating on and off-site at any given time." Whereas, the commerce element had not previously existed at this site before, it becoming a commercial web host would again, have to be considered a clear expansion of use.

In their quest to compete with the Tier V [top rated] data centers at 365 Main Street and 200 Paul Avenue, the Project Sponsor's submittal states this project will "represent a local choice for the San Francisco Small Business Community". It will "help attract and retain small businesses and start-up companies" and in turn, that will "promote further job growth in San Francisco." They believe they can "provide a higher degree of service than the larger national and multi-national platforms" as long as it will "not require construction of a new facility."

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[1] "RCN has a principal headend and hub site located at 200 Paul Avenue, San Francisco, California 94124. RCN utilizes an ancillary hub site at the following location: 437 Potrero Avenue, San Francisco, CA, 94110. This hub site is served by and technically integrated with the principal headend. RCN serves the general population within this OVS service area." **www.fcc.gov/bureaus/mb/ovs/rcnsfnoi.doc**

An ISE would have been principally permitted under the site's previous M-1 (Light Industrial) zoning, however pursuant to Eastern Neighborhoods rezoning to UMU, Data Centers are prohibited in UMU.

The Project Sponsor admits that the site had been vacant since 2010 and in that time, RCN/Astound had not secured the appropriate permits to establish an ISE at 435-437 Potrero Avenue. It is my contention that they never provided Internet Services from 435-437, but rather from their Data Center at 200 Paul. Pursuant to their Franchise agreement and Utility Permit, the Potrero hub site was considered a "facility" and thus was unregulated by Planning.

This calls into question the lack of due diligence by the Department.

Why wasn't this assessed as a new project for CU approval, rather than "legitimized" as an existing business that could forego environmental review?

In this context, CEQA analysis becomes very important. If the project fails to meet the Class 1 guidelines of an "existing facility" it is not categorically exempt. The facility exists, yes… but it is no longer an ancillary hub for digital cable. RCN/Astound abandoned the utility use of 435-437 Potrero in 2010 when their lease expired. The pending use is predicated by what it has sought entitlement to become, a commercial web host.

Negligible refers to a quantity *so* small it *can* be ignored; something *so* insignificant it is neither important, nor worthy of consideration. The planned expansion of use is neither insignificant nor negligible… and even if it was, it's still not categorically exempt.

The exception to the exemption is that a project with the *potential* of causing significant cumulative impacts, or which otherwise has a reasonable *possibility* of resulting in significant effects, precludes eligibility for exemptions.

PUBLIC HEALTH AND SAFETY

The following statement from the Project Sponsor's Submittal is not true: "the CU Authorization *will not be* detrimental to the health, safety or general welfare of the persons or the businesses in the vicinity."

There is an industrial sized 4,000 KW Diesel Generator on-site and the emission "stack" vents directly into our back yards. The health risks associated from exposure to Toxic Air Contaminants [TAC] are quantified by ones distance from the source. TAC's are directly related to asthma, heart attacks, strokes, hypertension and a shorter life span. Potrero Avenue has very poor air quality[2] and noise levels[3] measuring comparable to Highway 101.

SUBSTANTIAL EVIDENCE

From this neighborhoods past experience this use at this location will harm the environment. See Attached Letter to the Commission from David Wurtman, MD who concurs a Class 1 Categorical Exemption does not apply to this project.

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[2] http://www.sf-planning.org/ftp/files/legislative_changes/new_code_summaries/080934_Air_Quality_for_Urban_Infill.pdf

[3] http://www.sf-planning.org/ftp/files/publications_reports/library_of_cartography/Noise.pdf

San Francisco Municipal Code § 2001 states:

The Board of Supervisors finds and declares the following: [4]

(a) Diesel Backup Generators emit large amounts of smog-forming nitrogen oxides (NOx), particulate matter with a diameter of 10 microns or less (PM10), sulfur oxides and hydrocarbons contributing to ground-level ozone, and reduced visibility.

(b) Diesel exhaust is linked to short and long-term adverse health effects in humans, which include lung cancer, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, and chronic bronchitis and decreased lung function.

(c) In August of 1998, the California Air Resource Board listed diesel exhaust, specifically particulate emissions from diesel fueled engines, as a "toxic air contaminant."

(d) According to the Bay Area Air Quality Management District (BAAQMD), Diesel Backup Generators tend to emit more pollutants than a new well-controlled power plant. In fact, even a clean diesel backup generator may emit more than 20 times as much NOx per kilowatt-hour as a new well-controlled power plant. Older dirtier Diesel Backup Generators may emit 200 times as much NOx.

(e) The Bay Area is currently designated nonattainment for the national ozone standards by the United States Environmental Protection Agency.

(f) The Bay Area is currently designated nonattainment for the state ozone and PM10 standards by the California Air Resource Board.

(g) The City and County of San Francisco is concerned about the health hazards posed by diesel emissions polluting the air, and wishes to impose limitations on Diesel Backup Generators to reduce the emission of diesel exhaust.

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[4] (Added by Ord. 202-02, File No. 012186, App. 9/27/2002)

NUISANCE

Although the permit to operate the generator had expired during vacancy, the BAAQMD has already issued a new permit for the new use. As part of the exhibits attached is a copy of the new permit. For your comparison is also an emissions report which details 19 of a hundred plus toxins this generator emitted into my backyard under the previous permit. Please note that the toxins are measured in **.lbs per day** (yearly emissions divided by 365 days).

Generator's are *not* just for emergency use. Generators have to be regularly tested and maintained. Anytime there is interruption in power the engine fires on. There is not always staff at the facility and sometimes problems can't be immediately fixed.

Is my neighborhood expected to shelter in-place? Indeed, we are. They have 1,500 Gallons of fuel reserves on-site and due to the "mission critical" nature of a data center there is a very real potential for hours upon hours of industrial strength diesel emissions bellowing into our increasingly residential neighborhood.

From experience: several adjacent neighbors on Utah Street and Potrero Avenue have testified that the old generator would emit visible plumes of black "smoke" – which is not smoke at all, it is carcinogenic soot being emitted directly into our backyards and the air we breathe; vibrations could be felt whenever the generator was in operation.

The problems are not just attributed to the generator, but also to noise from the rooftop fans. One neighbor described a constant electrical hum that emanated from the building that could be heard prominently in the evenings. Two neighbors who live directly behind 435-437 Potrero describe the period after the former tenants left as being "a relief from the audible static" they had endured for years.

The Project Sponsor assured Planning that the existing HVAC meets noise standards. They also propose specific mitigation measures (e.g. Mufflers) to reduce sound. The motion adopted by the Commission recognizes that a noise study is underway, yet not

completed. Under CEQA, you have to complete the environmental analysis prior to project approval. There is not a CEQA checklist, nor any environmental documents in the case files.

PROJECT CONDITIONS CANNOT SUPPORT A CATEGORICAL EXEMPTION

Categorical Exemptions only apply to projects that exemptions only apply to projects that have no potential environmental impacts and require no mitigation measures.
As held by the First District Court of Appeal In *Salmon Protection And Watershed Network v. County Of Marin* (2004) 125 Cal.App.4th 1098, any project that requires mitigation measures cannot be approved via categorical exemption:

> Only those projects having no significant effect on the environment are categorically exempt from CEQA review. (Pub. Resources Code, §§ 21080, subd. (b)(9), 21084, subd. (a).) If a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1199-2000.) *Mitigation measures may support a negative declaration but not a categorical exemption.* (*Id.* at 1102, italics added.)

This project is *not* exempt from environmental review, but rather this project is a *prime candidate* for environmental review.

Not only did the former tenant fail to obtain permits with Planning for an ISE, but throughout their entire lease they never finalized a single permit with DBI, not even the electrical. They were tenants who officially terminated use when they left and now the landlord is attempting to continue use years later, thus the so-called "legitimization".

There has (still) been no disclosure of any adverse environmental or health effects to the surrounding neighborhood from the Project Sponsor or from Planning.

This project has nearly escaped environmental review via "legitimization" and the CU process, thus my appeal to you.

LAND USE STANDARDS

GENERAL WELFARE STANDARD

- "The establishment, maintenance or conducting of the use for which a use permit is sought will not, under the particular case, be detrimental to the public welfare or injurious to property or improvements in the neighborhood" (*Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586).

NUISANCE STANDARD

- "Any use found to be objectionable or incompatible with the character of the city and its environs due to noise, dust, odors or other undesirable characteristics may be prohibited" (*Snow v. City of Garden Grove* (1961) Cal.App.2d 496).

GENERAL PLAN CONSISTENCY STANDARD

- "Although use permits are not explicitly made subject to a general plan meeting the requirement of state law, that condition is necessarily to be implied from the hierarchical relationship of land use laws. Thus, use permits are struck from the mold of the zoning law, the zoning law must comply with the adopted general plan, and the adopted general plan must conform with state law; the validity of the permit process derives from compliance with this hierarchy of planning laws (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176).

ZONING CONSISTENCY STANDARD

- "To obtain a use permit, the applicant must generally show that the contemplated use is compatible with the policies in terms of the zoning ordinances, and that such use would be essential or desirable to the public convenience or welfare, and will not impair the integrity and character of the zoned district or be detrimental to the public health, safety, morals or welfare" (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151).

CALL FOR RELIEF

Please grant this appeal, and require Environmental review and compliance with San Francisco's plans and ordinances following submission of a revised project application.

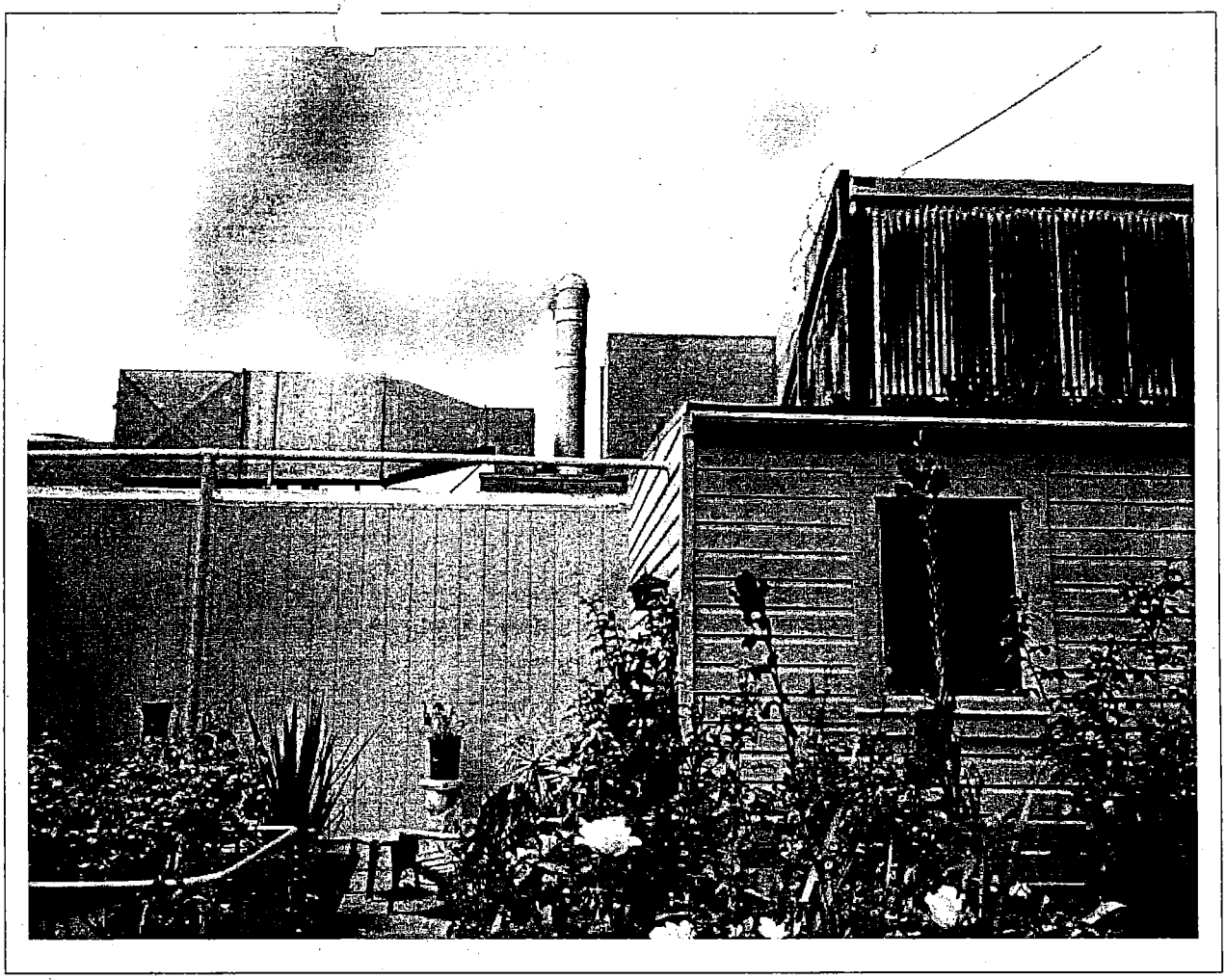
All newly provided information will be put to good use to assist City Decision makers in making discretionary land use decisions that protect the integrity of a livable neighborhood.

An EIR will analyze impacts, explore the feasibility of project alternatives, and "demonstrate to an apprehensive citizenry" that the City has analyzed and considered the environmental implications of its actions. (Guideline § 15003, subd. (d).)

Thank you very much for your consideration.



MICA I. RINGEL



View of 435-437 Potrero Avenue from
Mrs. Dinelli's Backyard on Utah Street

This project will allow Toxic Air Contaminants In Our Backyards

Gmail by Google

Mica Ringel <supermica@gmail.com>

re 435-437 Potrero Av - Internet Services Exchange - Conditional Use Permit

David Wurtman <dwurtman@yahoo.com> Wed, Jul 10, 2013 at 9:27 PM
To: commissions.secretary@sfgov.org, corey.teague@sfgov.org
Cc: supermica@gmail.com

Dear Commissioners,

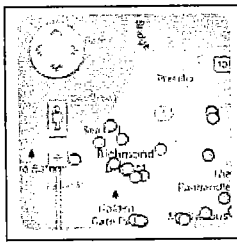
You are in receipt of a letter from Mica Ringel articulating his reasons to oppose the granting of this permit. I live at 2009 17th St, in the neighborhood, and I wholeheartedly agree with the points Mr. Ringel has presented to you. The soot/microparticulate levels in the air in Potrero Hill, due to proximity to 101 and 280, are already unhealthy, alarming, and inconsistent with what the City of San Francisco, a most environmentally progressive city, stands for. While the freeways are what they are and are not at issue here, adding to these pollution levels by allowing a diesel generator on premises of this building, and taking the position that a proposed Conditional Use of an Internet Services Exchange at 435-437 Potrero Avenue is eligible for a Class I Categorical Exemption from the California Environmental Quality Act, is not consistent with the responsibility you have to safeguard the public from unnecessary hazardous exposure to pollutants and
toxins. "Progress at any price" is not progress.

Thank you,
David Wurtman, MD

"The Department, pursuant to Title 14 of the California Code of Regulations §15000 et seq. (CEQA Guidelines), issued a Categorical Exemption for 435-437 Potrero Avenue on July 3, 2013 finding that the proposed project is exempt from the California Environmental Quality Act (CEQA) as a Class 1 categorical exemption under CEQA Guidelines Section 15301."

--Planning Department

- On July 1st the Department launched an interactive CEQA Exemptions Map[1] and 435-437 Potrero Avenue is not listed, nor is the project listed on the Exemptions Archive[2] page either.



New! July 2013

CEQA Categorical, Statutory and Community Plan Exemptions Map

Google Map showing all CEQA exemptions issued since 1 July 2013.

- My first email to City Planner Corey Teague on May 24, 2013

Hello, Corey Teague:

A few questions about 2013.0477C / 435-437 Potrero Ave.

- For those of us who live in the community, is there the possibility of any health or environmental concerns from this use at this address?
- Are there any technical studies in process or have any reports been filed for the proposed project?
- Is CEQA applicable to the Conditional Use Authorization?

Thank you.

--M. Ringel

- There is not a CEQA checklist in the case files.
- There are no environmental findings.
- There was no exemption issued.

[1] http://www.sf-planning.org/index.aspx?page=3447
[2] http://www.sf-planning.org/index.aspx?page=2412

Division 13. California Public Resources Code
Division 13. California Environmental Quality Act

Article 19. Categorical Exemptions

§ 15300. Categorical Exemptions

Section 21084 of the Public Resources Code requires these Guidelines to include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall, therefore, be exempt from the provisions of CEQA.

In response to that mandate, the Secretary for Resources has found that the following classes of projects listed in this article do not have a significant effect on the environment, and they are declared to be categorically exempt from the requirement for the preparation of environmental documents.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

§ 15300.2. Exceptions

(a) Location. Classes 3, 4, 5, 6, and 11 are qualified by consideration of where the project is to be located -- a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant. Therefore, these classes are considered to apply all instances, except where the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies.

(b) Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.

(c) Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

(f) Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.

Note: Authority cited: Section 21083, Public Resources Code; References: Sections 21084 and 21084.1, Public Resources Code; *Wildlife Alive v. Chickering* (1977) 18 Cal.3d 190; *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896; *Citizens for Responsible Development in West Hollywood v. City of West Hollywood* (1995) 39 Cal.App.4th 925;*City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810; *Association for the Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720; and *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464

Discussion: In *McQueen v. Mid-Peninsula Regional Open Space* (1988) 202 Cal. App. 3d 1136, the court reiterated that categorical exemptions are construed strictly, shall not be unreasonably expanded beyond their terms, and may not be used where there is substantial evidence that there are unusual circumstances (including future activities) resulting in (or which might reasonably result in) significant impacts which threaten the environment.

§ 15301. Existing Facilities

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use.

Examples include but are not limited to:

(a) Interior or exterior alterations involving such things as interior partitions, plumbing, and electrical conveyances;

(b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services;

(c) Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety).

(d) Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, unless it is determined that the damage was substantial and resulted from an environmental hazard such as earthquake, landslide, or flood;

(e) Additions to existing structures provided that the addition will not result in an increase of more than:

(1) 50 percent of the floor area of the structures before the addition, or 2,500 square feet, whichever is less; or

(2) 10,000 square feet if:

(A) The project is in an area where all public services and facilities are available to allow for maximum development permissible in the General Plan and

(B) The area in which the project is located is not environmentally sensitive.

(f) Addition of safety or health protection devices for use during construction of or in conjunction with existing structures, facilities, or mechanical equipment, or topographical features including navigational devices;

(g) New copy on existing on and off-premise signs;

(h) Maintenance of existing landscaping, native growth, and water supply reservoirs (excluding the use of pesticides, as defined in Section 12753, Division 7, Chapter 2, Food and Agricultural Code);

(i) Maintenance of fish screens, fish ladders, wildlife habitat areas, artificial wildlife waterway devices, streamflows, springs and waterholes, and stream channels (clearing of debris) to protect fish and wildlife resources;

(j) Fish stocking by the California Department of Fish and Game;

(k) Division of existing multiple family or single-family residences into common-interest ownership and subdivision of existing commercial or industrial buildings, where no physical changes occur which are not otherwise exempt;

(l) Demolition and removal of individual small structures listed in this subdivision;

(1) One single-family residence. In urbanized areas, up to three single-family residences may be demolished under this exemption.

(2) A duplex or similar multifamily residential structure. In urbanized areas, this exemption applies to duplexes and similar structures where not more than six dwelling units will be demolished.

(3) A store, motel, office, restaurant, or similar small commercial structure if designed for an occupant load of 30 persons or less. In urbanized areas, the exemption also applies to the demolition of up to three such commercial buildings on sites zoned for such use.

(4) Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences.

(m) Minor repairs and alterations to existing dams and appurtenant structures under the supervision of the Department of Water Resources.

(n) Conversion of a single family residence to office use.

(o) Installation, in an existing facility occupied by a medical waste generator, of a steam sterilization unit for the treatment of medical waste generated by that facility provided that the unit is installed and operated in accordance with the Medical Waste Management Act (Section 117600, et seq., of the Health and Safety Code) and accepts no offsite waste.

(p) Use of a single-family residence as a small family day care home, as defined in Section 1596.78 of the Health and Safety Code.

Note: Authority cited: Section 21083, Public Resources Code; References: Sections 21084, Public Resources Code; *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307.

Discussion: This section describes the class of projects wherein the proposed activity will involve negligible or no expansion of the use existing at the time the exemption is granted. Application of this exemption, as all categorical exemptions, is limited by the factors described in section 15300.2. Accordingly, a project with significant cumulative impacts or which otherwise has a reasonable possibility of resulting in a significant effect does not quality for a Class 1 exemption.

Open Video System
Notice of Intent

Attention:
Media Bureau

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
RCN Telecom Services, Inc.	)	
	)	**File No.** _____
	)	
Notice of Intent to Establish an Open Video System	)	
	)	

NOTICE OF INTENT TO ESTABLISH AN OPEN VIDEO SYSTEM

RCN Telecom Services, Inc. ("RCN"), pursuant to Section 651 of the Telecommunications Act of 1996 and Section 76.1503(b)(1) of the Commission's Rules, hereby submits its "Notice of Intent," ("Notice") to establish an open video system ("OVS"). As required by Section 76.1503(b)(1), RCN respectfully submits the following information:

1. The OVS operator is RCN Telecom Services, Inc., with its principal offices located at 1400 Fashion Island Blvd., Suite 100, San Mateo, California 94404. The contact person for the operator, David Hankin, is located at 1400 Fashion Island Blvd., Suite 100, San Mateo, California 94404, and may be reached at (650) 212-8010.

2. RCN's service area is located in the City and County of San Francisco, California. The boundaries of RCN's service area are located within the neighborhoods of Amazon Crocker, Castro, Corona Heights, Dolores Heights, Eureka Valley, Excelsior, Glen Park, Mission District, Noe Valley, North Bernal Heights, Outer Mission, Portola, and Potrero Hill. RCN has a principal headend and hub site located at 200 Paul Avenue, San Francisco, California 94124. RCN utilizes an ancillary hub site at the following location:

437 Potrero Avenue, San Francisco, CA, 94110

This hub site is served by and technically integrated with the principal headend. RCN serves the general population within this OVS service area.

3. The anticipated maximum analog capacity of the OVS is 330 analog channels, each consisting of 6-MHz analog capacity. The anticipated maximum digital capacity of the OVS is 678 digital channels.

4. Video Programming Providers ("VPPs") interested in carriage on RCN's OVS may obtain additional information about the system by completing the OVS Information Request Form (Attachment 1) and submitting it to:

David Hankin
1400 Fashion Island Blvd., Suite 100
San Mateo, California 94404

Pursuant to 47 C.F.R. § 76.1503(b)(2) of the FCC's rules, within five business days of RCN's receipt of a request for information, RCN will provide the VPP with additional information regarding the OVS to enable the VPP to make an enrollment decision. With this information, the VPP also will be provided with additional forms and instructions necessary for carriage on RCN's OVS. If a VPP decides to seek carriage on RCN's OVS after receipt of the additional information, the VPP must submit the required forms, a non-refundable application processing fee, and a channel reservation deposit no later than 30 days after the end of the enrollment period.

5. One third of the system's maximum capacity will be set aside for RCN and/or its affiliates. In addition, RCN will reserve approximately seventeen (17) channels to carry public programs, educational programs, governmental programs and those "must-carry" stations

entitled to demand carriage pursuant to 47 C.F.R. § 76.56 and §76.1506 of the FCC's rules. The remaining channels will be available for interested VPPs. No VPP will be assigned more than the capacity set aside for RCN and its affiliates.

6. The enrollment period for VPPs seeking carriage on RCN's open video system will commence on the date the Commission releases its Public Notice of this Notice of Intent and will expire ninety days after the Public Notice release date. In order to allow for contract finalization, ensure orderly channel allocation and allow timely systems allocation to occur, RCN encourages VPPs to submit their preliminary enrollment requests as soon as possible within this ninety-day period. Allocation of capacity in the event demand exceeds system capacity will occur as described in Attachment 2.

7. Attached is a certification that RCN has complied with all relevant requirements under the FCC's open video system regulations concerning must-carry and retransmission consent (47 C.F.R. §§76.64, 76.1506) (Attachment 3). Also attached is a certificate of service showing that RCN's Notice of Intent has been served on the applicable local franchising authority (Attachment 4).

Respectfully submitted,

RCN Telecom Services, Inc.

Kathy L. Cooper
Danielle C. Burt
SWIDLER BERLIN LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel)
(202) 424-7643 (Fax)

Dated: July 8, 2005

Network Topology

There are five major parts to a traditional coaxial cable system: 1) the headend, 2), the trunk cable, 3) the distribution (or feeder) cable in the neighborhood, 4) the drop cable to the home and in-house wiring, and 5) the terminal equipment (consumer electronics). Since the beginning of CATV systems, HFC (Hybrid Fiber Coax) networks have taken over among cable systems. HFC added fiber optic cable to the system and drastically shortened the trunk cable in the cable plant.

Headend

The headend or central office is the location where all the cable system originates from. It usually contains one building with one 100ft tall tower for antennas and about six large satellite dishes. In the headend, the signals from the tower with the local TV channels and the satellite dishes feed into the building. Also fiber optic cables usually from the local phone company bring in the Internet and PSTN (Public Switched Telephone Network). Within the headend, there are over a hundred separate pieces of signaling equipment which control and combine the TV, Internet, and phone service signals. From here multiple fiber optic cables leave the headend to a few hubsites with the signals on this fiber.

Hubsite

The hubsite is a small building with a generator for backup power. Here at the hubsite the fiber comes into the building from the headend. The hubs are about 20 miles geographically spread apart. Inside the hub, the fibers are spliced and sent out to many dozens of neighborhoods. Some cable systems are small enough that the hubsites do not exist and the fiber go right from the headend out to the neighborhoods.

Fiber Optic Node

The fiber from the hubsite or headend now enters the node in your neighborhood. The node is the location where the fiber optic cable ends and the coaxial cable begins. In other words, this is where the light signal on the fiber changes to an electrical RF (radio frequency) on the coax cable. The node also contains the first amplifier inside it. From here, the trunk cable leaves down the street.

Trunk Cable

The trunk cable is the main coax cable that runs down the street between the amplifiers. No customers receive their signal from this distribution cable. Since HFC technology, the amount of trunk cable used has decreased. It is meant to feed the bridger amplifiers which have the feeder cable exiting from them.

Feeder Cable

The feeder cable is the cable which have taps every 150ft on average. Out of the taps comes the flexible RG6 cable which we are all so familiar with feeding our TVs. The taps can be closer together than 150ft. Some are only 100ft apart or up to 200ft apart. This is the cable though that feeds our homes and businesses.

© 2012 Forest Hill Networks, Forest Hill, MD 21050

The site is in close proximity to major transit and highway routes. Both the San Francisco Municipal Transportation Agency (SFMTA) Muni Metro T Third Street light rail vehicle line and Caltrain regional rail service lines are located to the east of the project site, 500 and 0 feet respectively. The Gilman/ Paul station at the intersection of Paul and Gilman avenues is the closest station to the project site on the SFMTA's T Third light rail line. The Bayshore Caltrain Station is one mile to the southwest of the project site. Highway 101 is located 400 feet to the west with access via Bayshore Boulevard and San Bruno Avenue. The project site is within the Bayview Hunters Point Area Plan (BVHP Area Plan), formerly the South Bayshore Area Plan, and was amended in 2006 by the Bayview Hunters Point Redevelopment Projects and Rezoning amendment.[3] The program-level Bayview Hunters Point Redevelopment Projects and Rezoning Final Environmental Impact Report (BVHP FEIR)[4] was certified on March 2, 2006, and analyzed proposed rezoning and other changes to the BVHP Area Plan.

Currently, there are four buildings on the project site as shown on Figure 3 on p. 10. In the early 2000s, the project sponsor acquired the property and began operation of the ISE in the front two buildings, Buildings D and F. The project sponsor uses Buildings A and B for storage of materials and leases the remaining space to various tenants.

Presently, all four buildings are at least partially occupied. The two warehouse buildings are being used for the storage of construction materials by the project sponsor, as well as a utility meter installation contractor. There are two subcategories of uses operating within the existing ISE facility: colocation[5] and telco[6] uses. In the approximately 425,000-square-foot ISE facility (Buildings D and F), tenants providing telco services occupy approximately 55,000 square feet of building area, colocation tenants occupy approximately 212,000 square feet, and a tenant offering both colocation and telco services occupies 60,000 square feet. Additionally, approximately 38,000 square feet of building area are used for office and support functions and another approximately 60,000 square feet are leased, but not occupied.

The ISE is an energy-dependent facility due to the need for the continued operation of a large number of rooftop cooling units that maintain an acceptable temperature and humidity range for the computer equipment, and to power the computer equipment itself. The data center industry strives to meet 100 percent uptime[7] and any interruption to the power supply can take the computers off-line. Power is supplied to the facility by Pacific Gas and Electric (PG&E) via overhead power lines. Seventeen diesel generators are

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[3] Bayview Hunters Point Area Plan. Accessed on June 25, 2013. http://www.sf-planning.org/ftp/general_plan/Bayview_Hunters_Point.htm.

[4] *Bayview Hunters Point Redevelopment Projects and Rezoning Final EIR* (Case 1996.546E; State Clearinghouse No. 2003062094), certified by the San Francisco Planning Commission on March 2, 2006. This document is available for review at 1650 Mission Street, Suite 400, San Francisco, CA.

[5] Colocation, or data center use, is a use in which a tenant provides the mechanical cooling, backup power supply, and communications connections and leases smaller portions of its tenant space, such as racks, cabinets, and cages with multiple racks and cabinets, to colocation customers who install their own network servers and other computer hardware.

[6] Telco tenants provide telecommunication carrier services to support land-based telephone lines and/ or wireless phone service. Much of the leased space for telco services is used as a physical hub for the voice and data communications network and requires less energy use than a concentration of Internet computer servers, or a data center use. However, due to the telecommunication industry's growth in "voice over Internet protocol (IP) services" (VOIP), telco tenants are revising their facilities to handle VOIP services that require the use of Internet computer servers to provide an IP networking system. The transition to VOIP services requires the need for a backup power supply for the computer servers.

[7] Uptime refers to the state in which the computer servers are running and available for processing data.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
DETAIL POLLUTANTS - ABATED
MOST RECENT P/O APPROVED (2010)

Printed: DEC 23, 2011

Astound Broadband (P# 19489)

S#	SOURCE NAME	SOURCE CODE DATE	POLLUTANT	CODE	LBS/DAY
MATERIAL THROUGHPUT					
1	Generator	C22AG098			
			Benzene	41	1.09E-04
			Formaldehyde	124	6.85E-04
			Organics (part not spec el	990	5.29E-03
			Arsenic (all)	1030	9.53E-08
			Beryllium (all) pollutant	1040	5.59E-08
			Cadmium	1070	2.38E-07
			Chromium (hexavalent)	1095	4.93E-09
			Lead (all) pollutant	1140	2.02E-07
			Manganese	1160	3.17E-07
			Nickel pollutant	1180	3.86E-06
			Mercury (all) pollutant	1190	6.74E-08
			Diesel Engine Exhaust Part	1350	5.51E-03
			PAH's (non-speciated)	1840	5.03E-07
			Nitrous Oxide (N2O)	2030	2.93E-05
			Nitrogen Oxides (part not	2990	7.71E-02
			Sulfur Dioxide (SO2)	3990	3.58E-05
			Carbon Monoxide (CO) pollu	4990	1.68E-02
			Carbon Dioxide, non-biogen	6960	3.67E+00
			Methane (CH4)	6970	1.47E-04

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063

9/17/2002 ORDINANCE NO. 202-02
FILE NO. 012186

[Regulation of Diesel Backup Generators.]

Ordinance amending the San Francisco Health Code by adding a new Article 30 to: (1) establish a registration program within the Department of Public Health for diesel backup generators used by facilities in the City and County of San Francisco; (2) require new backup diesel generators to have air emission control technologies; (3) limit the operation of diesel backup generators during non-emergency situations; (4) establish a recordkeeping requirement for the operation of diesel backup generators; (5) provide for an enforcement mechanism for violations of the requirements of this Ordinance.

The Board of Supervisors finds and declares the following:

(a) Diesel Backup Generators emit large amounts of smog-forming nitrogen oxides (NOx), particulate matter with a diameter of 10 microns or less (PM10), sulfur oxides and hydrocarbons contributing to ground-level ozone, and reduced visibility.

(b) Diesel exhaust is linked to short and long-term adverse health effects in humans, which include lung cancer, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, and chronic bronchitis and decreased lung function.

(c) In August of 1998, the California Air Resource Board listed diesel exhaust, specifically particulate emissions from diesel fueled engines, as a "toxic air contaminant."

(d) According to the Bay Area Air Quality Management District (BAAQMD), Diesel Backup Generators tend to emit more pollutants than a new well-controlled power plant. In fact, even a clean diesel backup generator may emit more than 20 times as much NOx per kilowatt-hour as a new well-controlled power plant. Older dirtier Diesel Backup Generators may emit 200 times as much NOx.

(e) The Bay Area is currently designated nonattainment for the national ozone standards by the United States Environmental Protection Agency.

(f) The Bay Area is currently designated nonattainment for the state ozone and PM10 standards by the California Air Resource Board.

(g) The City and County of San Francisco is concerned about the health hazards posed by diesel emissions polluting the air, and wishes to impose limitations on Diesel Backup Generators to reduce the emission of diesel exhaust.

- RCN/Astound never registered their Diesel Generator under SF Health Code Article 30.
- The generator was a menace to the neighborhood.
- The documents shown to the Planning Commission for Project Approval state the generator is in the basement, which is a "material misrepresentation" of the truth. The generator "lives" on the first floor.
- The picture of the generator was omitted from the Commission packet

Section 1. Definitions

(ss) "Facilities" includes any physical element of the System used in connection with, or designed to be used in connection with, the provision of Services or Telecommunication Services, whether or not located in the Public Rights-of-Way, including, without limitation, Hubs, Nodes, the Hub Ring, the Headend, pedestals, cabinets, ducts and conduits (whether empty or occupied), transformers, equipment, drains, hand holds, lines, manholes, poles, power supplies and generators, splice boxes, surface location markers, vaults, tunnels, amplifiers, power guards, coaxial cables, and fiber strands (whether active or dark).

(ggg) "Hazardous Material" means any material that, because of its quantity, concentration or physical or chemical characteristics, is deemed by any federal, state or local governmental authority to pose a present or potential hazard to human health or safety or to the environment. Hazardous Material includes, without limitation, any material or substance defined as a "hazardous substance," or "pollutant" or "contaminant" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ('CERCLA", also commonly known as the "Superfund" law), as amended, (42 U.S.C. Sections 9601 et seq.) or pursuant to Section 25281 of the California Health &Safety Code; any "hazardous waste" as defined in Section 25117 or listed pursuant to Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of any Facilities to be constructed on the Public Rights-of-Way by or on behalf of Grantee, or are naturally occurring substances on, in or about the Public Rights-of-Way, and petroleum, including crude oil or any fraction thereof, and natural gas or natural gas liquids.

(hhh) "Headend" means the point in the System where all Signals are collected and formatted for transmission on the System.

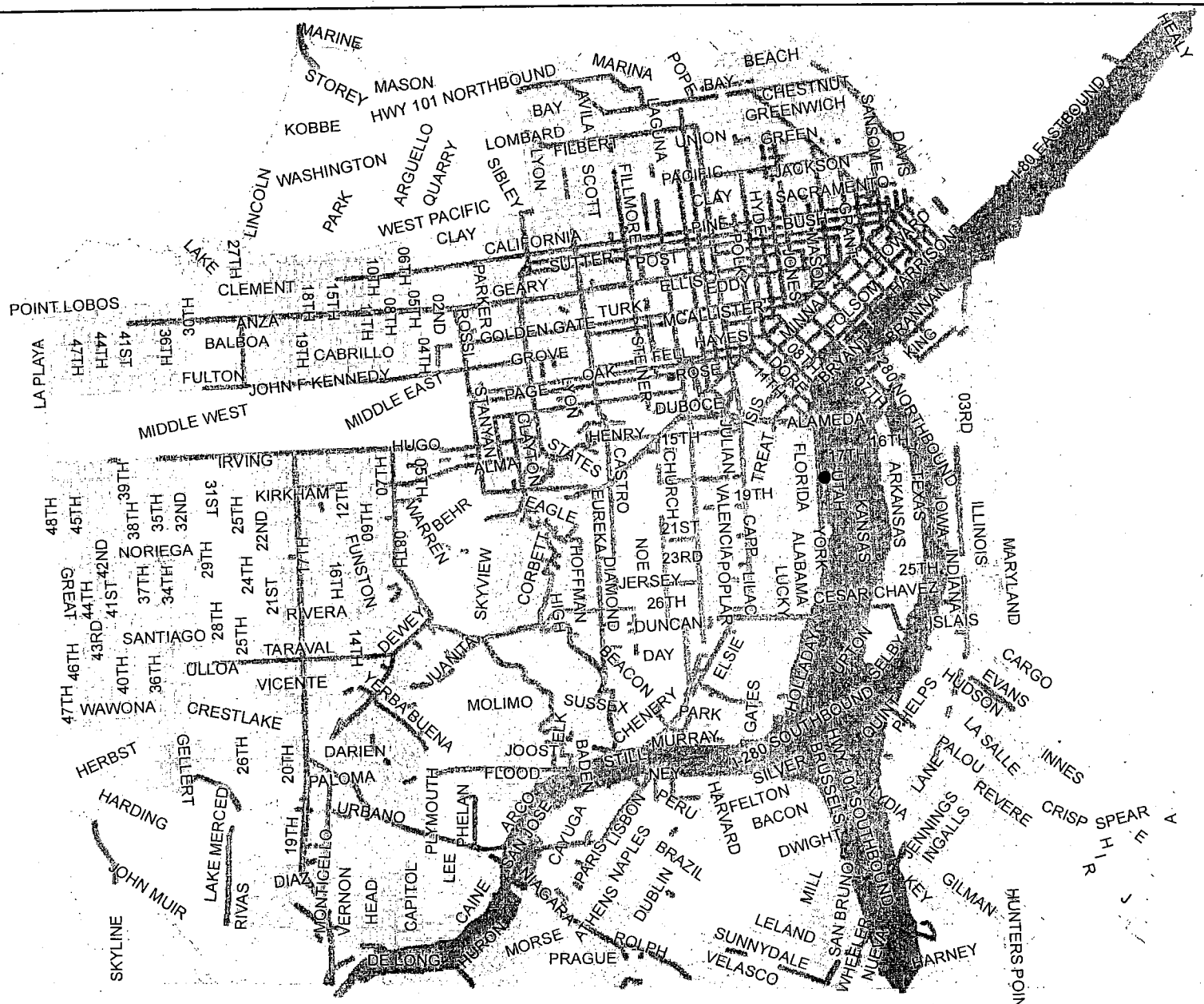
(iii) "Hub" means the equipment in the distribution system that receives Signals from the Headend for transmission to a number of Nodes.

Section 43. SYSTEM CHARACTERISTICS. The System shall, at all times during the Franchise term, meet or exceed the following requirements:

(g) Stand-By Power. Grantee shall provide standby power generating capacity for the Headend, Hubs, Nodes, and distribution Facilities comprising its System meeting the following specifications:

(1) Headend. Grantee shall maintain motorized standby power generators capable of maintaining all Services at the Headend for at least twenty four (24) hours duration after loss of normal commercial power.

(2) Hubs. Grantee shall provide battery standby power capable of maintaining all services at each Hub for at least twenty-four (24) hours duration after loss of normal commercial power, with automatic response systems to alert the Headend when commercial power is interrupted. Grantee shall maintain portable generators to deploy to each Hub in the event the duration of a power disruption is expected to exceed twenty-four (24) hours.



Potential Roadway Exposure Map

Parcels that are within the Potential Roadway Exposure Zone require review by the Department of Public Health

Potential Roadway Exposure Zone

City Blocks

Date: December 18, 2008

For questions concerning this map please contact Jessica Range

File 130805

REUBEN, JUNIUS & ROSE, LLP

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2013 SEP 16 PM 2:03

September 16, 2013

By Messenger

Angela Calvillo
Clerk of the Board
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102

Re: Appeal of Determination of Exemption from Environmental Review
435-437 Potrero Avenue
Board of Supervisors Hearing Date: September 24, 2013 at 3:00 p.m.
Our File No.: 7424.01

Dear Ms. Calvillo:

Please find enclosed 18 copies of the Owner's Response to Appeal of CEQA Determination, along with a CD containing the same, for the project located at 435-437 Potrero Avenue.

Please distribute a copy to each of the Board Members.

Thank you for your helpful assistance.

Very truly yours,

REUBEN, JUNIUS & ROSE, LLP

David Silverman

Enclosures:

(1) 18 hard copies of Owner's Response to Appeal of CEQA Determination
(2) One CD for electronic file

James A. Reuben | Andrew J. Junius | Kevin H. Rose | Daniel A. Frattin
Sheryl Reuben[1] | David Silverman | Thomas Tunny | Jay F. Drake | John Kevlin
Lindsay M. Petrone | Melinda A. Sarjapur | Kenda H. McIntosh | Jared Eigerman[2,3] | John McInerney III[2]
1. Also admitted in Nevada 2. Of Counsel 3. Also admitted in Massachusetts

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

www.reubenlaw.com

REUBEN, JUNIUS & ROSE, LLP

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September 16, 2013

By Messenger

Honorable David Chiu, President
Board of Supervisors
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Re: Response to Appeal of CEQA Determination
435 Potrero Avenue
Board of Supervisors Hearing Date: September 24, 2013
Planning Department Case No.: 2013.0477
Our File No.: 7424.01

Dear President Chiu and Members of the Board:

On behalf of F.W. Spencer & Son, owner of 435 Potrero Avenue ("Property" or "Building"), we are writing to oppose the appeal of the California Environmental Quality Act ("CEQA") exemption adopted by the Planning Commission with respect to a pre-existing use at 435 Potrero Avenue. The approval does not involve any new development or expansion of use, but only a change of operators operating the same type of business, which is providing Internet servers and storage capacity. The Appeal was filed by Mica Ringel ("Appellant") on August 12, 2013. The appeal is meritless, and must be dismissed.

A. Project History

The Planning Commission approved a Conditional Use Authorization ("CU") for a new tenant to operate a pre-existing Internet Services Exchange use in an existing building at 435 Potrero Avenue, and adopted a CEQA exemption for continuation of the pre-existing use by a new tenant on July 11, 2013, on 5-1 vote (Commissioner Hillis absent). See Planning Commission Approval Motion No. 18921 attached as **Exhibit A.** The Conditional Use approval followed a Zoning Administrator Determination of Legitimization pursuant to Planning Code Section 179.1 for the pre-existing use, issued on June 4, 2013, attached as **Exhibit B**. The Conditional Use does not include any expansion of the business.

James A. Reuben | Andrew J. Junius | Kevin H. Rose | Daniel A. Frattin
Sheryl Reuben[1] | David Silverman | Thomas Tunny | Jay F. Drake | John Kevlin
Lindsay M. Petrone | Melinda A. Sarjapur | Kenda H. McIntosh | Jared Eigerman[2,3] | John McInerney III[2]
1. Also admitted in New York 2. Of Counsel 3. Also admitted in Massachusetts

One Bush Street, Suite 60(
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

www.reubenlaw.com

The Planning Commission determined that the CU is exempt from CEQA as it falls within the Class I categorical exemption (CEQA Guidelines Section 15301 – minor alteration of an existing structure involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination).

B. CEQA Process and Standards of Review

1. Standard of Review Under CEQA.

In reviewing the validity of a CEQA exemption, the test is whether "substantial evidence" exists to support the exemption. (Public Resources Code sections 21168, 21168.5.) As stated by the court in Calbeach Advocates v. City of Solana Beach (2002) 103 Cal.App.4th 529, 535-536, 217 Cal. Rptr. 2d 1, 5:

> *'Substantial evidence' . . . means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made is to be determined by examining the entire record. Mere uncorroborated opinion or rumor does not constitute substantial evidence.*

To constitute substantial evidence, statements made by members of the public must be supported by adequate factual foundation. If this foundation is not established, the agency must disregard the comments. (Gabric v. City of Rancho Palo Verdes, 73 Cal.App. 3rd 183, 199 (1977).) In addition, argument, speculation, unsubstantiated opinion or narrative, clearly inaccurate or erroneous evidence, and evidence of social or economic impacts that do not contribute to, and are not caused by, physical impacts on the environment do not constitute substantial evidence. (Public Resources Code sections 21080(e) and 21082.2(c).) Substantial evidence means facts, reasonable assumptions predicated on facts, and expert opinions supported by facts. (Id.). The existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report. (Public Resources Code Section 21082.2(b).) Appellant has failed to submit any evidence in support of his claim that the Internet Services use is not a pre-existing use or that the use is expanding. If the use is pre-existing, as the Planning Commission determined it was, then the CEQA Exemption must stand.

2. Appellant has Failed to Establish the Threshold Requirements for Additional Environmental Review.

Appellant claims, without any evidentiary support, that the Planning Commission action requires further environmental review due to a turnover of tenants or operators. The Appellant's conception of how the Planning Department treats a tenant turnover or an operator turnover is at odds with Planning Department policy and practice.

The Zoning Administrator's Letter of Legitimization (**Exhibit B**) examined six criteria set forth in Planning Code Section 179.1, and found, after a seven month review of extensive documentary evidence, that "Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the entirety of the subject Building has been used as an "Internet Services Exchange" (dba RCN Telecom Services, and Astound) since approximately May 30, 2000."

"Since that time, no new use was established in the Building, and it has been actively marketed as an Internet Services Exchange. Therefore, the Internet Services Exchange Use was not discontinued and abandoned pursuant to the provisions of Planning Code Section 183" **(Exhibit B).**

The Zoning Administrator thereby affirmed longstanding Planning Department policy and practice that a use is not considered to be abandoned every time there is a turnover of operators or tenants, with a gap in between, as long as the owner of the Building actively markets the Property for the same use during the interim period between the two tenants or operators. The Planning Commission affirmed the Zoning Administrator's findings in its approval Motion No. 18921 (**Exhibit A**).

Appellant does not dispute the facts of the case:

1. The Internet Services use commenced on May 30, 2000.

2. The previous tenant vacated the premises in June 2010. The new operator entered into a contract with the owner in August 2012. The remainder of the time period from August 2012 to the present has been consumed by the City's permit process.

3. The Property was actively and continuously marketed by the owner for the same use until a new operator was found in August 2012. Since that time, the owner has diligently pursued City permits for the new operator to re-occupy the Property.

Accordingly, the Appellant has misunderstood the applicable CEQA exemption and therefore incorrectly analyzed the exemption as applied to the facts of this case.

3. Applicable Case Law Firmly Supports the Class I Exemption for the Existing Structure and Use at the Property

Reinstatement of higher capacity for an existing wastewater treatment plant that was approved by the Regional Water Board was upheld on appeal as an exempt existing facility. Committee for a Progressive Gilroy v. State Water Resources Control Board, 192 Cal.App.3d 847 (1987). The Court held that, "Since the project was originally built and approved for 6.1 mgd. in full compliance with CEQA, the order restoring that capacity related to an existing facility and was exempt from CEQA." Committee for a Progressive

Gilroy, 192 Cal.App.3d, 847, 864. Thus, the Court determined that there was no significant change or alteration to the operation or intended use of the facility and it upheld the exemption determination.

The Court in Bloom v. McGurk, 26 Cal.App.4th 1307 (1994) upheld the determination by the permitting agency that the extension of the terms of an expired permit for medical waste treatment facility pending review of a new permit application fell within the "existing facilities" exemption. The Court found that the project in question was merely the ongoing operation of a medical waste treatment facility under a new regulatory scheme and, because there was no change in operations incident to renewal of a medical waste permit, the project "fell squarely within the highlighted language of the Class 1 categorical exemption." Bloom, 26 Cal.App.4th 1307, 1312. The project involved only the continued operation of existing private facilities and mechanical equipment. The Court concluded, "We presume that thousands of permits are renewed each year for the ongoing operation of regulated facilities, and we discern no legislative or regulatory directive to make each such renewal an occasion to examine past CEQA compliance at every facility built in the last 24 years." Bloom, 26 Cal.App.4th 1307, 1315.

In Turlock Irrigation District v. Zanker, 140 Cal.App.4th 1047 (2006), the water districts and the trial court found that implementation of water conservation rules by the districts was exempt from CEQA and that no exception to that exemption applied. The town disagreed with both of those conclusions and contended that the implementation of water use rules does not fall under the Class 1 exemption for the "operation, repair, maintenance, ... or minor alteration of existing public ... structures, facilities, mechanical equipment or topographical features, involving negligible or no expansion of use...." It also contended that if this exclusion were otherwise applicable, the current project was excepted from the exclusion because there was a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances and because the project may cause a substantial adverse change in the significance of a historical resource."

The appellate court disagreed with the town and held that the water use rules "involve operation of an existing facility with only minor alteration of the facilities (installation of meter mechanisms on existing meter connectors) and the water rules do not permit expansion of previous use. (In fact, they seek reduction of individual use and limit growth of the system as a whole.)" Turlock,140 Cal.App.4th 1047, 1066. The appellate court also disagreed with the town's contention that there was a reasonable possibility that the activity will have a significant effect on the environment because the "unusual circumstances" that the town listed – "the unusual relationship of the districts and the town concerning the water system ... [and] the evidence concerning sufficiency of the water supply for firefighting" – are not shown to be unusual. Turlock,140 Cal.App.4th 1047, 1067. Finally, the court disagreed with the town's argument regarding historical resources.

The court affirmed the trial court's decision and denied the town's CEQA appeal.

In Santa Monica Chamber of Commerce v. City of Santa Monica, 101 Cal.App.4th 786 (2002), the appellate court found applicable the Class 1 exemption for a parking ordinance that allocated free, on-street parking to neighborhood residents who obtained a permit. The court held that the ordinance "involves the 'operation' of such existing facilities (in the sense that curbside parking is 'operated' by using parking permits, enforcement personnel and ticketing as a form of enforcing the legislatively prescribed use), the 'minor alteration of existing public or private structures, facilities, mechanical equipment or topographical features' (i.e., the signage needed to identify particular curbside spots as permitted parking or not), and 'negligible or no expansion of use beyond that previously existing,' because no additional parking spaces or structures are being added to the parking stock in the relevant area." Santa Monica, 101 Cal.App.4th 786, 793.

In Martin v. City and County of San Francisco, 135 Cal.App.4th 392 (2005), in this case, the appellate court held that although a municipality has very broad statutory discretion to grant or deny a required building permit, that authority does not extend to imposing CEQA review upon an interior home project, even where the residence is listed as a city landmark and is located within an area registered as a state and a national historic district. What an owner plans to do to the private interior of his or her home does not implicate a significant adverse effect on the environment. 135 Cal.App.4th 392, 396.

The court stated that the proposed modifications, being to the interior of an existing single-family residence and not perceptible to others, "lack the potential for causing a significant effect on the environment and are beyond the reach of CEQA. For all intents and purposes, what was visible before will be no different than what will be visible if the modifications are completed. The modifications here in issue would constitute a substantial adverse change neither to the environment nor to a historical resource. In fact, environmentally speaking, it is no change at all." Martin, 135 Cal.App.4th 392, 405. Thus, the court denied the CEQA appeal and concluded that CEQA review of a proposed interior building project was not required.

Accordingly, case law indicates that the Courts will uphold Planning Commission findings that projects fall within the Categorical Exemption for ongoing uses or existing facilities so long as there will be no significant changes to the operation of an existing facility. "Significant changes" cited by the Courts have included the disposal of an additional 3.2 million additional tons of municipal waste in a landfill and the replacement of reactors, a cooling tower, storage tank, and compressor, installation of new pipelines and pumps, and a substantial increase in the operation of an existing cogeneration plant and four boilers. In contrast, no increase is proposed in the operations of the 435 Potrero Internet servers.

C. Bay Area Air Quality Management District Air Quality Regulations Govern the Back-Up Generator

Although not relevant to the CEQA exemption, the Appellant raised a question about the back-up generator, and we will respond. The Building's back-up generator is regulated by Bay Area Air Quality Management District ("BAAQMD") and operates under Permit No. 21731, attached as **Exhibit D**. Back-up generators are ubiquitous throughout the City, and indeed are required by the Building Code for many different types of structures, including public facilities, police stations, office buildings, hospitals, and any other building or use that relies on a continuous stream of power. Back-up generators are used only in the event of a power outage emergency, and then only during the period in which the power outage continues. Back-up generators are heavily regulated by the BAAQMD, which limits the use of back-up generators to 20 hours per year for reliability-related testing, and to mitigate conditions in the event of an emergency. Detailed records of the use of back-up generators are required to be maintained in a BAAQMD-approved log. These limitations are described in more detail in the attached BAAQMD permit. (**Exhibit C**). BAAQMD regulations are more stringent than any applicable City and County regulations relative to air quality controls or generators.

In summary, back-up generators are not used except in the event of an emergency, and for testing purposes. The Building's back-up generator meets and exceeds all air quality regulations and restrictions, and its use is heavily restricted by its BAAQMD permit conditions. Any potential air emissions are regulated and mitigated in accordance with local law and conditions placed on the BAAQMD permit.

D. Fixed Source Equipment (HVAC) is Regulated by the San Francisco Noise Control Ordinance

The San Francisco Noise Control Ordinance limits noise levels that can be generated by stationary noise sources such as mechanical equipment. For commercial properties, Section 2909.B of the Police Code limits the noise that can be generated to no more than 8dBA above the ambient noise level at any point outside of the property. The Building's air cooled fans located on the roof will comply with the noise ordinance by utilizing mufflers and variable frequency drive fans and pumps, along with sound walls. Any failure to comply would result in the shutdown of the fans.

Planning Commission Approval Motion No. 18921 adopted Condition of Approval No. 11 which provides that the "The premises shall be adequately sound proofed or insulated for noise and operated so that fixed source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance" (**Exhibit A**). Therefore, the Planning Commission has already restricted any potential noise to the maximum extent allowed by local law.

E. Conclusion

The Building is a relatively small (10,000 square feet) office-type building that will house Internet servers. This modest office-type Building shares the block with commercial uses such as Sunny Auto Body, Potrero Test-Only Smog, One Day Pictures, and Dean Denelli's Garage Doors. (See photos and Zoning Map attached as **Exhibit E**). Nearly the entire block facing the Building is zoned PDR-1-G, which principally permits production, distribution and repair activities, and prohibits residential use in any form. The use of the Building has continued uninterrupted since May 2000, except for a turnover in operators and the period of marketing for same. The CEQA exemption for a pre-existing use has been extensively reviewed by the Planning Department, the Zoning Administrator, and the Planning Commission, who were unanimous in their conclusion that the CEQA Class 1 exemption applies in this case. Appellant's disappointment at the City's policy decision to approve the pre-existing use for a new operator does not justify overturning the CEQA exemption.

The Appellant has failed to establish any evidence that is contrary to the Planning Commission's findings pertaining to CEQA, or any evidence of an expansion of operations at the Building. Accordingly, we respectfully request that the appeal be denied.

Thank you for your consideration.

Very truly yours,

REUBEN, JUNIUS & ROSE, LLP

David Silverman

Attachments:

Exhibit A - Planning Commission Approval Resolution No. 18921
Exhibit B - Zoning Administrator Determination of Legitimization
Exhibit C - BAAQMD Permit No. 21731
Exhibit D - Photos and Zoning Map
Exhibit E - Letter of Endorsement

cc: Supervisor Malia Cohen
Supervisor Eric Mar
Supervisor Mark Farrell
Supervisor Katy Tang
Supervisor London Breed
Supervisor Jane Kim
Supervisor Norman Yee
Supervisor Scott Wiener
Supervisor David Campos
Supervisor John Avalos
Angela Cavillo, Clerk of the Board of Supervisors
Nannie Turrell, Environmental Planner
Corey Teague, Neighborhood Planner
Mica Ringel, Appellant

(all with attachments)

Subject to: (Select only if applicable)
- ☐ Affordable Housing (Sec. 415)
- ☐ Jobs Housing Linkage Program (Sec. 413)
- ☐ Downtown Park Fee (Sec. 412)
- ☐ First Source Hiring (Admin. Code)
- ☐ Child Care Requirement (Sec. 414)
- ■ Other (TIDF – Sec. 411)

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Planning Commission Motion No. 18921

HEARING DATE: JULY 11, 2013

Date:	July 3, 2013
Case No.:	**2013.00477 C**
Project Address:	**435-437 Potrero Avenue**
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org

ADOPTING FINDINGS RELATING TO THE APPROVAL OF CONDITIONAL USE AUTHORIZATION PURSUANT TO PLANNING CODE SECTIONS 179.1, 227(R), 303, AND 303(H), TO ALLOW APPROXIMATELY 10,000 GROSS SQUARE FEET OF INTERNET SERVICES EXCHANGE ON THE ENTIRETY OF BOTH FLOORS OF THE EXISTING TWO-STORY BUILDING WITHIN A UMU (URBAN MIXED USE) ZONING DISTRICT AND 58-X HEIGHT AND BULK DISTRICT.

PREAMBLE

On April 18, 2013, David Silverman, on behalf of Industry Capital Internet Infrastructure, LLC (hereinafter "Project Sponsor"), filed an application with the Planning Department (hereinafter "Department") for Conditional Use Authorization under Planning Code Sections 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building within a UMU (Urban Mixed Use) Zoning District and 58-X Height and Bulk District.

On July 11, 2013, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Application No. 2013.0477C.

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

The Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of the applicant, Department staff, and other interested parties.

MOVED, that the Commission hereby authorizes the Conditional Use requested in Application No. 2013.0477C, subject to the conditions contained in "EXHIBIT A" of this motion, based on the following findings:

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. The above recitals are accurate and constitute findings of this Commission.

2. **Site Description and Present Use.** The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

3. **Surrounding Properties and Neighborhood.** The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

4. **Project Description.** The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

5. **Public Comment.** When the case report was issued on June 3, 2013, the Department had not received any comments from the public explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator. These concerns were based on their experiences

from previous operators of the building. Additionally, one neighbor on the subject block clarified that they are in fact opposed to the project. In response to these concerns, the current Project Sponsor held a meeting at the project site with a group of concerned neighbors on July 1st.

On July 10th and 11th, the Department received new emails of opposition from two neighbors on the subject block, one email of opposition from a resident living approximately 4 blocks away, and one email of opposition from a resident who didn't identify their address. The primary concerns in those emails stem from the potential noise, vibrations, and discharge from the backup generator in the building.

6. **Planning Code Compliance:** The Commission finds that the Project is consistent with the relevant provisions of the Planning Code in the following manner:

   A. **Legitimization.** Planning Code Section 179.1 established a time-limited program wherein existing uses in the Eastern Neighborhoods plan area that have operated without the benefit of required permits may seek those permits. Uses that could be "legitimized" under this Section are those uses which, under the current provisions of this Code and without this Section, could not otherwise seek the required permits.

   The proposed Internet Services Exchange (ISE) originally occupied the subject building in 2000. The subject property was zoned M-1 at that time, which permitted ISEs with a Conditional Use Authorization. The Zoning Administrator issued a Letter of Legitimization on June 4, 2013 for this project stating that the approximately 10,000 gross square feet of Internet Services Exchange occupying the entire existing building is eligible to be approved as a legal nonconforming use pursuant to Planning Code section 179.1. As such, the project is now seeking a Conditional Use Authorization under the provisions of the properties former M-1 zoning.

7. **Planning Code Section 303** establishes criteria for the Planning Commission to consider when reviewing applications for Conditional Use approval. On balance, the project does comply with said criteria in that:

   A. The proposed new uses and building, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable, and compatible with, the neighborhood or the community.

   The proposed Internet Services Exchange has already existed at the site for more than ten years without any reported complaints from surrounding businesses or residents. The low-intensity nature of the use, along with its relatively small size and scale, make it compatible with the existing mixed use surroundings. Additionally, the use provides a locally-owned, small-scale option for small businesses within the City for data and information storage.

   B. The proposed project will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity. There are no features of the project

that could be detrimental to the health, safety or convenience of those residing or working the area, in that:

i. Nature of proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;

The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

ii. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic or parking.

iii. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;

The existing HVAC equipment consists of seven fan units that will comply with the San Francisco Noise Ordinance the equipment and does not emit any dust or odors. The backup generator will only be used for testing and in emergencies like power outages.

iv. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs;

The existing building covers the entire site and includes no open space or landscaped areas. All lighting and signing will meet Planning Code requirements.

C. That the use as proposed will comply with the applicable provisions of the Planning Code and will not adversely affect the General Plan.

The Project complies with all relevant requirements and standards of the Planning Code and is consistent with objectives and policies of the General Plan as detailed below.

D. That the use as proposed would provide development that is in conformity with the purpose of the applicable Neighborhood Commercial District.

The project is not located within a Neighborhood Commercial District.

8. Planning Code Section 303(h) establishes additional criteria for the Planning Commission to consider when reviewing applications for Conditional Use Approval of Internet Services Exchanges. On balance, the project does comply with said criteria in that:

   a. The intensity of the use at this location and in the surrounding neighborhood is not such that allowing the use will likely foreclose the location of other needed neighborhood-serving uses in the area;

      The use has a low intensity and has existed in the building for more than ten years with no known negative impacts. Additionally, the existing building is not currently designed to easily accommodate a more active commercial use, and therefore is suitable for an Internet Services Exchange.

   b. The building in which the use is located is designed in discrete elements, which respect the scale of development in adjacent blocks, particularly any existing residential uses;

      The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

   c. Rooftop equipment on the building in which the use is located is screened appropriately;

      The project is required to provide adequate screening of rooftop equipment pursuant to Planning Code Section 141 and Condition of Approval No. 6 in this motion.

   d. The back-up power system for the proposed use will comply with all applicable federal state, regional and local air pollution controls;

      The existing backup generator complies with all relevant controls and is permitted by the Bay Area Air Quality Management District (Permit No. 21731).

   e. Fixed-source equipment noise does not exceed the decibel levels specified in the San Francisco Noise Control Ordinance;

      A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code). This requirement is also listed as Condition of Approval No. 11 of this motion.

f. The building is designed to minimize energy consumption, such as through the use of energy-efficient technology, including without limitation, heating, ventilating and air conditioning systems, lighting controls, natural ventilation and recapturing waste heat, and as such commercially available technology evolves;

The existing equipment at the site is fully operable. However, the project will also use the following energy saving techniques to reduce the total power consumption of the building:

1) *Energy efficient Toshiba G90000 UPS systems to increase the efficiency of the current uninterruptible power system from 80 percent efficiency to 96.5 percent efficiency.*
2) *Cold isle containment, which can reduce the power associated with mechanical cooling by 25 to 30 percent.*
3) *Air-side economization, which can reduce the cooling power consumption by an estimated 50 to 60 percent.*

g. The project sponsor has examined the feasibility of supplying and, to the extent feasible, will supply all or a portion of the building's power needs through on-site power generation, such as through the use of fuel cells or co-generation;

The project sponsor studied the feasibility of using on-site Co-generation and fuel cells. However, due to the limited lot size, such power generation is not possible.

h. The project sponsor shall have submitted design capacity and projected power use of the building as part of the conditional use application;

The building is served by PG&E with a 1.0 mega volt ampere ("MVA") dedicated underground feed transformer that is located inside the building. This translates into a serviced capacity of approximately 800kW of power per hour. Using a vacancy factor estimate of 7.5 percent, the projected maximum annual energy use is 6,500,000 KWh per year, or 540,000kWh per month.

The following table provides projected monthly energy use per year as the building is leased up over time:

Power Use per Month	*2013*	*2014*	*2015*	*2016*
Total Capacity (KWh)	*36,000*	*216,000*	*360,000*	*540,000*

9. **General Plan Compliance.** The Project is, on balance, consistent with the following Objectives and Policies of the General Plan:

COMMERCE AND INDUSTRY

Objectives and Policies

OBJECTIVE 1:

MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKINIG ENVIRONMENT.

Policy 1.1:
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development that has substantial undesirable consequences that cannot be mitigated.

The project will provided a much needed support service for other businesses within the City without producing undesirable consequences.

OBJECTIVE 3:
PROVIDE EXPANDED EMPLOYMENT OPPORTUNITIES FOR CITY RESIDENTS, PARTICULARLY THE UNEMPLOYED AND ECONOMICALLY DISADVANTAGED.

Policy 3.4:
Assist newly emerging economic activities.

OBJECTIVE 4:
IMPROVE THE VIABILITY OF EXISTING INDUSTRY IN THE CITY AND THE ATTRACTIVENESS OF THE CITY AS A LOCATION FOR NEW INDUSTRY.

Policy 4.1:
Maintain and enhance a favorable business climate in the city.

Policy 4.2:
Promote and attract those economic activities with potential benefit to the City.

The project will provided a much needed support service for other businesses to locate and grow within the City, especially businesses with technological support needs.

10. **Planning Code Section 101.1(b)** establishes eight priority-planning policies and requires review of permits for consistency with said policies. On balance, the project does comply with said policies in that:

    A. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses be enhanced.

    The proposal will not remove or otherwise impact any existing neighborhood-serving retail uses in the area.

    B. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods.

The proposed use has existed within the subject building since 2000 (including periods of vacancy). Continuing the use at this location will not impact existing housing or neighborhood character.

C. That the City's supply of affordable housing be preserved and enhanced,

No housing is created or removed as part of this project.

D. That commuter traffic not impede MUNI transit service or overburden our streets or neighborhood parking.

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic, parking, or MUNI.

E. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced.

The Project will not displace any service or industry establishment, but will instead preserve and industrial service that has existed at this site since 2000.

F. That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake.

The project includes no significant changes to the existing building.

G. That landmarks and historic buildings be preserved.

The subject building was determined to not be a historic resource by the Showplace Square/Northeast Mission Historic Survey.

H. That our parks and open space and their access to sunlight and vistas be protected from development.

The project will have no impact on existing parks and open spaces.

11. The Project is consistent with and would promote the general and specific purposes of the Code provided under Section 101.1(b) in that, as designed, the Project would contribute to the character and stability of the neighborhood and would constitute a beneficial development.

12. The Commission hereby finds that approval of the Conditional Use authorization would promote the health, safety and welfare of the City.

DECISION

That based upon the Record, the submissions by the Applicant, the staff of the Department and other interested parties, the oral testimony presented to this Commission at the public hearings, and all other written materials submitted by all parties, the Commission hereby **APPROVES Conditional Use Application No. 2013.0477C** subject to the following conditions attached hereto as "EXHIBIT A" in general conformance with plans on file, dated May 30, 2013, and stamped "EXHIBIT B", which is incorporated herein by reference as though fully set forth.

APPEAL AND EFFECTIVE DATE OF MOTION: Any aggrieved person may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion No. 18921. The effective date of this Motion shall be the date of this Motion if not appealed (After the 30-day period has expired) OR the date of the decision of the Board of Supervisors if appealed to the Board of Supervisors. For further information, please contact the Board of Supervisors at (415) 554-5184, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

I hereby certify that the Planning Commission ADOPTED the foregoing Motion on July 11, 2013.

Jonas P. Ionin
Acting Commission Secretary

AYES: Commissioners Antonini, Borden, Fong, Moore, and Wu

NAYS: Commissioner Sugaya

ABSENT: Commissioner Hillis

ADOPTED: July 11, 2013

EXHIBIT A

AUTHORIZATION

This authorization is for a conditional use to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building located at 435-437 Potrero Avenue, Block 3972, and Lot 22, pursuant to Planning Code Section(s) **179.1, 227(r), 303, and 303(h)** within the **UMU** District and a **58-X** Height and Bulk District; in general conformance with plans, dated **May 30, 2013**, and stamped "EXHIBIT B" included in the docket for Case No. **2013.0477C** and subject to conditions of approval reviewed and approved by the Commission on **July 11, 2013** under Motion No. **18921**. This authorization and the conditions contained herein run with the property and not with a particular Project Sponsor, business, or operator.

RECORDATION OF CONDITIONS OF APPROVAL

Prior to the issuance of the building permit or commencement of use for the Project the Zoning Administrator shall approve and order the recordation of a Notice in the Official Records of the Recorder of the City and County of San Francisco for the subject property. This Notice shall state that the project is subject to the conditions of approval contained herein and reviewed and approved by the Planning Commission on **July 11, 2013** under Motion No **18921**.

PRINTING OF CONDITIONS OF APPROVAL ON PLANS

The conditions of approval under the 'Exhibit A' of this Planning Commission Motion No. **18921** shall be reproduced on the Index Sheet of construction plans submitted with the Site or Building permit application for the Project. The Index Sheet of the construction plans shall reference to the Conditional Use authorization and any subsequent amendments or modifications.

SEVERABILITY

The Project shall comply with all applicable City codes and requirements. If any clause, sentence, section or any part of these conditions of approval is for any reason held to be invalid, such invalidity shall not affect or impair other remaining clauses, sentences, or sections of these conditions. This decision conveys no right to construct, or to receive a building permit. "Project Sponsor" shall include any subsequent responsible party.

CHANGES AND MODIFICATIONS

Changes to the approved plans may be approved administratively by the Zoning Administrator. Significant changes and modifications of conditions shall require Planning Commission approval of a new Conditional Use authorization.

Conditions of Approval, Compliance, Monitoring, and Reporting

PERFORMANCE

1. **Validity.** The authorization and right vested by virtue of this action is valid for three (3) years from the effective date of the Motion. The Department of Building Inspection shall have issued a Building Permit or Site Permit to construct the project and/or commence the approved use within this three-year period.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

2. **Expiration and Renewal.** Should a Building or Site Permit be sought after the three (3) year period has lapsed, the project sponsor must seek a renewal of this Authorization by filing an application for an amendment to the original Authorization or a new application for Authorization. Should the project sponsor decline to so file, and decline to withdraw the permit application, the Commission shall conduct a public hearing in order to consider the revocation of the Authorization. Should the Commission not revoke the Authorization following the closure of the public hearing, the Commission shall determine the extension of time for the continued validity of the Authorization.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

3. **Diligent pursuit.** Once a site or Building Permit has been issued, construction must commence within the timeframe required by the Department of Building Inspection and be continued diligently to completion. Failure to do so shall be grounds for the Commission to consider revoking the approval if more than three (3) years have passed since this Authorization was approved.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

4. **Extension.** All time limits in the preceding three paragraphs may be extended at the discretion of the Zoning Administrator where implementation of the project is delayed by a public agency, an appeal or a legal challenge and only by the length of time for which such public agency, appeal or challenge has caused delay.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

5. **Conformity with Current Law.** No application for Building Permit, Site Permit, or other entitlement shall be approved unless it complies with all applicable provisions of City Codes in effect at the time of such approval. *For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.*

DESIGN – COMPLIANCE AT PLAN STAGE

6. **Rooftop Mechanical Equipment.** Pursuant to Planning Code 141, the Project Sponsor shall submit a roof plan to the Planning Department prior to Planning approval of the building permit

application. Rooftop mechanical equipment, if any is proposed as part of the Project, is required to be screened so as not to be visible from any point at or below the roof level of the subject building.

For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

PROVISIONS

7. **Transit Impact Development Fee.** Pursuant to Planning Code Section 411 (formerly Chapter 38 of the Administrative Code), the Project Sponsor shall pay the Transit Impact Development Fee (TIDF) as required by and based on drawings submitted with the Building Permit Application. Prior to the issuance of a temporary certificate of occupancy, the Project Sponsor shall provide the Planning Director with certification that the fee has been paid.

   For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

MONITORING

8. **Reporting.** As long as the use remains an Internet Services Exchange, the project sponsor shall submit to the Planning Department on an annual basis power use statements for the previous twelve-month period as provided by all suppliers of utilities and shall submit a written annual report to the Department of Environment and the Planning Department which shall state: (a) the annual energy consumption and fuel consumption of all tenants and occupants of the Internet Services Exchange; (b) the number of all diesel generators located at the site and the hours of usage, including usage for testing purposes; (c) evidence that diesel generators at the site are in compliance with all applicable local, regional, state and federal permits, regulations and laws; and (d) such other information as the Planning Commission may require.

   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

9. **Enforcement.** Violation of any of the Planning Department conditions of approval contained in this Motion or of any other provisions of Planning Code applicable to this Project shall be subject to the enforcement procedures and administrative penalties set forth under Planning Code Section 176 or Section 176.1. The Planning Department may also refer the violation complaints to other city departments and agencies for appropriate enforcement action under their jurisdiction.

   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

10. **Revocation due to Violation of Conditions.** Should implementation of this Project result in complaints from interested property owners, residents, or commercial lessees which are not resolved by the Project Sponsor and found to be in violation of the Planning Code and/or the specific conditions of approval for the Project as set forth in Exhibit A of this Motion, the Zoning Administrator shall refer such complaints to the Commission, after which it may hold a public hearing on the matter to consider revocation of this authorization.

For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

OPERATION

11. **Noise Control.** The premises shall be adequately soundproofed or insulated for noise and operated so that fixed-source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.
For information about compliance with the fixed mechanical objects such as rooftop air conditioning, restaurant ventilation systems, and motors and compressors with acceptable noise levels, contact the Environmental Health Section, Department of Public Health at (415) 252-3800, www.sfdph.org.

12. **Vibration.** The Project Sponsor shall attempt to reduce vibration from equipment within the building and on the roof through repair, retrofit, or replacement of the equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

13. **Backup Generator Operation.** The Project Sponsor shall attempt to reduce the emissions of the backup generator, such as use of biofuels instead of diesel fuel to operate the backup generator.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

14. **Sidewalk Maintenance.** The Project Sponsor shall maintain the main entrance to the building and all sidewalks abutting the subject property in a clean and sanitary condition in compliance with the Department of Public Works Streets and Sidewalk Maintenance Standards.
For information about compliance, contact Bureau of Street Use and Mapping, Department of Public Works, 415-695-2017, http://sfdpw.org.

15. **Community Liaison.** Prior to issuance of a building permit to construct the project and implement the approved use, the Project Sponsor shall appoint a community liaison officer to deal with the issues of concern to owners and occupants of nearby properties. The Project Sponsor shall provide the Zoning Administrator with written notice of the name, business address, and telephone number of the community liaison. Should the contact information change, the Zoning Administrator shall be made aware of such change. The community liaison shall report to the Zoning Administrator what issues, if any, are of concern to the community and what issues have not been resolved by the Project Sponsor.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

16. **Six-Month Report.** The Project Sponsor shall report back to the Planning Commission approximately six months after occupancy of the building. The report shall focus on the operation of the building during that time, especially regarding the generation of noise and emissions from the backup generator and other equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

David Silverman

From: Teague, Corey [corey.teague@sfgov.org]
Sent: Tuesday, July 16, 2013 3:57 PM
To: Mica
Cc: Darius Contractor; Dean Dinelli; Sanchez, Scott; David Silverman
Subject: RE: Notice of Intent to File an Appeal: 435-437 Potrero Av.
Attachments: 18921.pdf

Mica,
The final Motion No. 18921 for this case is attached. Please let me know if you have any questions.

Corey A. Teague, AICP, LEED AP
City Planner
1650 Mission Street, Suite 400
San Francisco, CA 94103

corey.teague@sfgov.org

(415) 575-9081 (phone)
(415) 558-6409 (fax)

From: Teague, Corey
Sent: Friday, July 12, 2013 3:34 PM
To: 'Mica'
Cc: Darius Contractor; Dean Dinelli; Sanchez, Scott; David Silverman (dsilverman@reubenlaw.com)
Subject: RE: Notice of Intent to File an Appeal: 435-437 Potrero Av.

Mica,
I have to work with the Zoning Administrator to finalize the wording for the additional conditions of approval that were added by the Commissioners yesterday before the motion can be finalized. He is out of the office today, so that will happen sometime early next week. Once it is finalized I will send you a copy.

You may already be aware, but here is the link to Board of Supervisors information on Conditional Use appeals:

http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=28246

Corey A. Teague, AICP, LEED AP
City Planner
1650 Mission Street, Suite 400
San Francisco, CA 94103

corey.teague@sfgov.org

(415) 575-9081 (phone)
(415) 558-6409 (fax)

From: Mica [mailto:supermica@gmail.com]
Sent: Friday, July 12, 2013 2:41 PM
To: Teague, Corey

SAN FRANCISCO
PLANNING DEPARTMENT

Letter of Legitimization

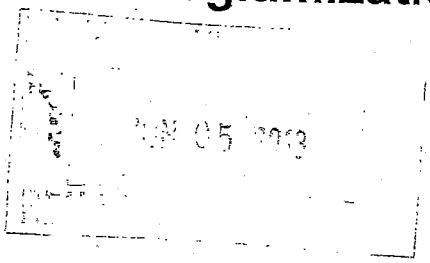
1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

June 4, 2013



David Silverman
Reuben, Junius & Rose LLP
1 Bush Street, Suite 600
San Francisco, CA 94104

Site Address:	435-437 Potrero Avenue
Assessor's Block/Lot:	3974/022
Zoning District:	UMU
Staff Contact:	Corey Teague, (415) 575-9081 or corey.teague@sfgov.org

Dear Mr. Silverman:

This letter is in response to your request for a Letter of Legitimization per Planning Section 179.1 regarding the property at 435-437 Potrero Avenue. This parcel is located in the UMU Zoning District and a 58-X Height and Bulk District. The request is to legitimize the existing "Internet Services Exchange" use on the entirety of both floors in the existing two-story building totaling approximately 10,000 gross square feet.

Procedural Background

The Department received the request for legitimization of office space at 435-437 Potrero Avenue on October 15, 2012. Staff reviewed the request and associated materials and the Zoning Administrator issued a 30-day public notice of the intent to issue the Letter of Legitimization on April 15, 2013. The public notice also included a draft letter for review, and was sent to 1) all owners of property within 300 feet of the subject property, 2) all current tenants of the subject property, and 3) all individuals and neighborhood associations that had requested to receive such notice. Additionally, notice was posted on the site during the notification period. The notification period expired on May 15, 2013.

Eligibility

The land use proposed for legitimization is deemed eligible if it meets the following criteria:

i. The land use existed as of the date of the application;

Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the entirety of the subject building has been used as an "Internet Services Exchange" (d.b.a. RCN Telecom Services and Astound) since approximately May 30, 2000.

documented on the submitted plans on file with this request, prior to the approval of a site or building permit establishing such Internet Services Exchange. This determination is not a project approval, or in any way a substitute for the Building Permit Application for the change of use to Internet Services Exchange.

Please note that a Conditional Use Authorization and subsequent Building Permit Application must be approved to legally convert the subject gross floor area to Internet Services Exchange. Additionally, the relevant impact fees outlined in Section 179.1(g), and elsewhere in the Municipal Code, shall be assessed as part of the Building Permit Application.

APPEAL: If you believe this determination represents an error in interpretation of the Planning Code or abuse in discretion by the Zoning Administrator, an appeal may be filed with the Board of Appeals within 15 days of the date of the Letter of Legitimization. For information regarding the appeals process, please contact the Board of Appeals located at 1650 Mission Street, Room 304, San Francisco, or call (415) 575-6880.

Sincerely,

Scott F. Sanchez
Zoning Administrator

cc: Corey Teague, Planner
Philip Blix, Property Owner
William Spencer
Planning Commissioners
All Parties on the Notification Request List ✓

I:Current Planning\SE Team\ EASTERN NEIGHBORHOODS\EN Legitimization\435 Potrero Ave\Draft LoL.doc

B4083

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Plant# 21731 Page: 1 Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

Arman Khalili
ICDC LLC
One Sansome St, 15th floor
San Francisco, CA 94104

Location: 437 Potrero Street
San Francisco, CA 94110

S#	DESCRIPTION	[Schedule]	PAID
1	Standby Diesel engine, 519 hp, Caterpillar S/N 4ZRD6880 Generator Emissions at: P1 Stack	[B,1096 days]	559

1 Permit Source, 0 Exempt Sources

*** See attached Permit Conditions ***

The operating parameters described above are based on information supplied by permit holder and may differ from the limits set forth in the attached conditions of the Permit to Operate. The limits of operation in the permit conditions are not to be exceeded. Exceeding these limits is considered a violation of District regulations subject to enforcement action.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Plant# 21731 Page: 2 Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

*** PERMIT CONDITIONS ***

==========

COND# 22820 *applies to S# 1*

1. The owner/operator shall not exceed 20 hours per year per engine for reliability-related testing. Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

2. The owner/operator shall operate each emergency standby engine only for the following purposes: to mitigate emergency conditions, for emission testing to demonstrate compliance with a District, State or Federal emission limit, or for reliability-related activities (maintenance and other testing, but excluding emission testing). Operating while mitigating emergency conditions or while emission testing to show compliance with District, State or Federal emission limits is not limited.
[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

3. The owner/operator shall operate each emergency standby engine only when a non-resettable totalizing meter (with a minimum display capability of 9,999 hours) that measures the hours of operation for the engine is installed, operated and properly maintained.
[Basis: Title 17, California Code ofRegulations, section 93115, ATCM for Stationary CI Engines]

4. Records: The owner/operator shall maintain the following monthly records in a District-approved log for at least 36 months from the date of entry (60 months if the facility has been issued a Title V Major Facility Review Permit or a Synthetic Minor Operating Permit). Log entries shall be retained on-site, either at a central location or at the engine's location, and made immediately available to the District staff upon request.
   a. Hours of operation for reliability-related activities (maintenance and testing).
   b. Hours of operation for emission testing to show compliance with emission limits.
   c. Hours of operation (emergency).
   d. For each emergency, the nature of the emergency condition.
   e. Fuel usage for each engine(s).

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

*** PERMIT CONDITIONS ***

==========

[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

5. At School and Near-School Operation:
If the emergency standby engine is located on school grounds or within 500 feet of any school grounds, the following requirements shall apply:

The owner/operator shall not operate each stationary emergency standby diesel-fueled engine for non-emergency use, including maintenance and testing, during the following periods:

a. Whenever there is a school sponsored activity (ifthe engine is located on school grounds)

b. Between 7:30 a.m. and 3:30 p.m. on days when school is in session.

"School" or "School Grounds" means any public or private school used for the purposes of the education of more than 12 children in kindergarten or any of grades 1 to 12, inclusive, but does not include any private school in which education is primarily conducted in a private home(s). "School" or "School Grounds" includes any building or structure, playground, athletic field, or other areas of school property but does not include unimproved school property.

[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

~~~~~~~~~~ END OF CONDITIONS ~~~~~~~~~~
~~~~~~~~~~

Bay Area Air Quality Management District

** SOURCE EMISSIONS **

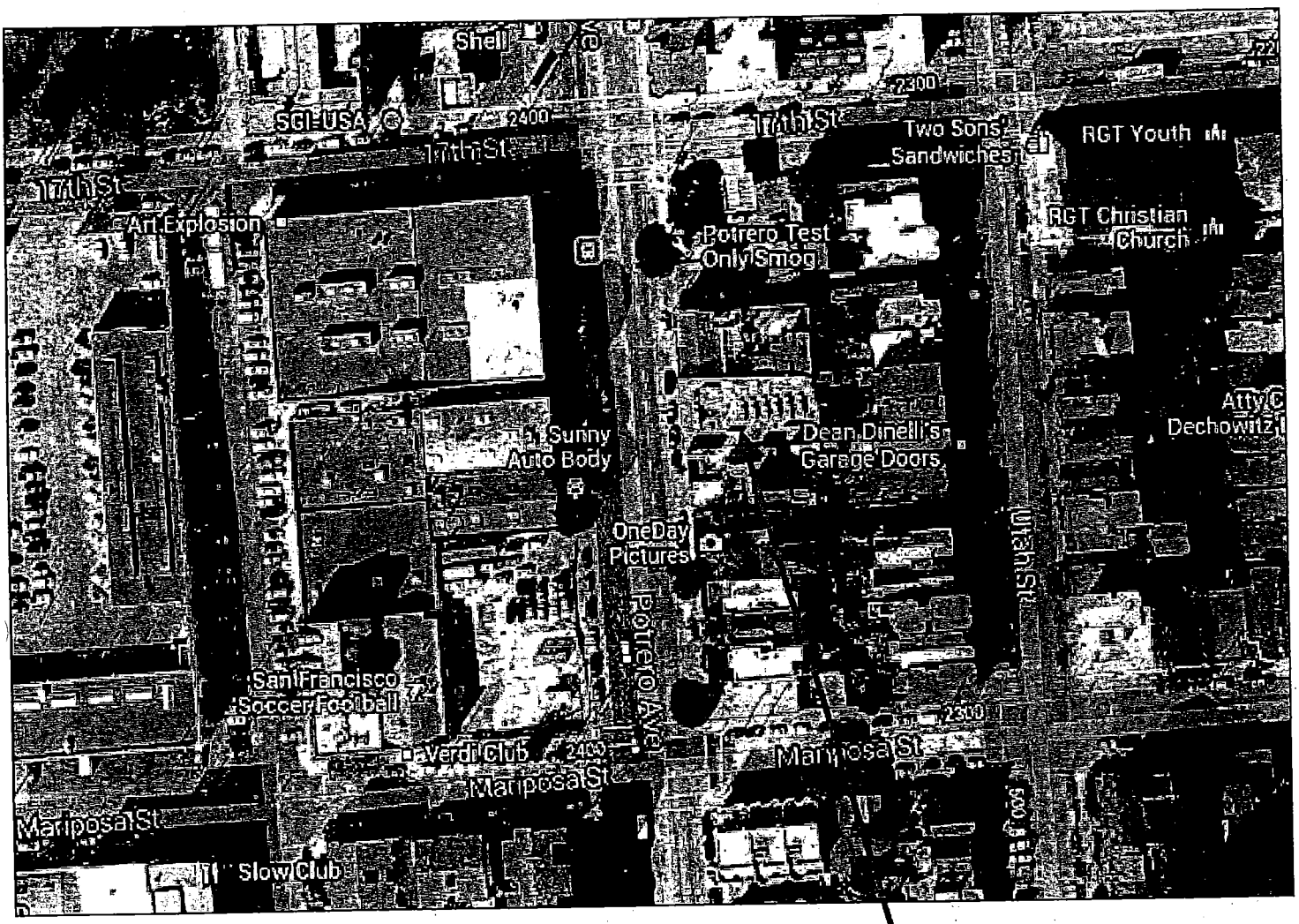
PLANT #21731
Mar 14, 2013

S#	Source Description	Annual Average lbs/day PART	ORG	NOx	SO2	CO
1	Generator	-	-	.08	-	.02
	T O T A L S			.08		.02

Site Photo

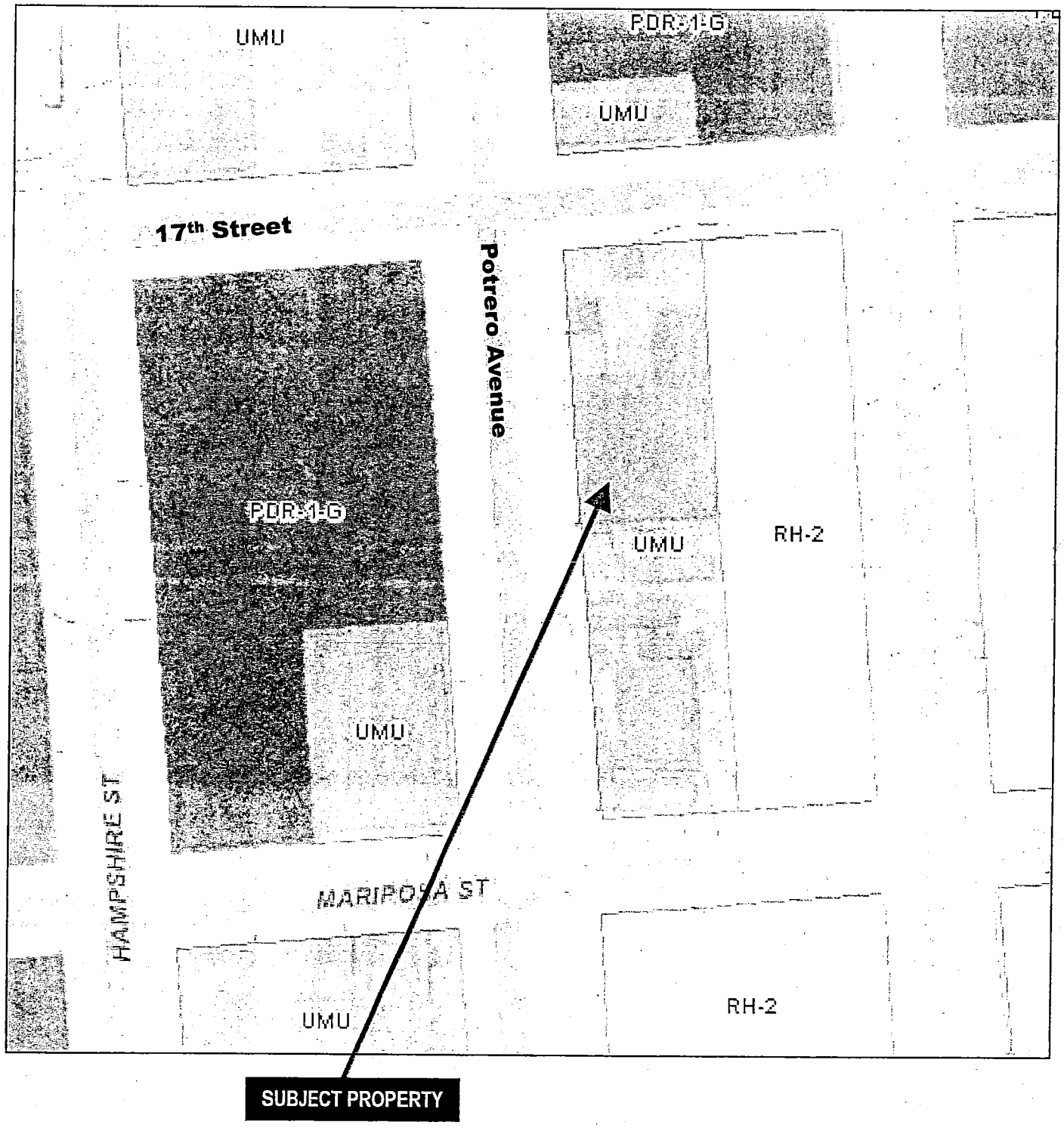


Aerial Photo



Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

Zoning Map



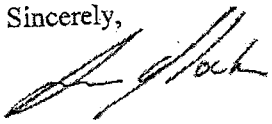
Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

SAN FRANCISCO
PLANNING DEPARTMENT

To whom it may concern:

Fastmetrics and its customers are pleased to learn of the new proposed datacenter at 435 Potrero Ave, San Francisco, CA. This new datacenter will greatly enhance the entrepreneurial options in San Francisco and address the requirement for many Startups of low cost high capacity facility. Industry Capital has put tougher a first rate team, with many years of experience running data centers, and we expect the center to be of great success and benefit to the City business Community.

Sincerely,



Andreas Glocker
CEO
Fastmetrics, Inc.
415-778-5100

CITY AND COUNTY OF SAN FRANCISCO

DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

MARLENA G. BYRNE
Deputy City Attorney

DIRECT DIAL: (415) 554-4620
E-MAIL: marlena.byrne@sfgov.org

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2013 AUG 16 PM 4:22
AK

MEMORANDUM

TO: Angela Calvillo
Clerk of the Board of Supervisors

FROM: Marlena G. Byrne
Deputy City Attorney

DATE: August 16, 2013

RE: Appeal of Determination of Exemption from Environmental Review for a Project Located at 435-437 Potrero Avenue

You have asked for our advice on the timeliness of an appeal to the Board of Supervisors, received by the Clerk's Office on August 12, 2013, by Mica I. Ringel, of the Planning Department's determination that a project located at 435-437 Potrero Avenue is exempt from environmental review under the California Environmental Quality Act ("CEQA"). The proposed work involves establishment of an internet services exchange to occupy the entirety of an existing 10,000 square foot building ("proposed project").

The Appellant provided a copy of the Planning Commission's Motion No. 18921, dated July 11, 2013, approving a conditional use application for the proposed project, which motion found that the proposed project was exempt under Class 1 of the CEQA Guidelines as a minor alteration to an existing facility (14 Cal. Code Reg. §15301 *et seq.*). Accordingly, the appeal is ripe because an approval action has been taken for the project.

Conditional use approvals are subject to a 30-day appeal period, which generally would have run on August 10. (Please see Planning Code section 308.1(b).) But, because August 10 fell on a Saturday this year, the Board of Supervisors Clerk's Office would have accepted such an appeal of the conditional use approval as timely filed until August 12, 2013. Accordingly, it is our view that the appeal of this categorical exemption determination is timely, and the appeal should be calendared before the Board of Supervisors. We recommend that you so advise the Appellant.

Please let me know if I may be of further assistance.

MGB

cc: Rick Caldeira, Deputy Director, Clerk of the Board
Joy Lamug, Board Clerk's Office
Erica Dayrit, Board Clerk's Office
Jon Givner, Deputy City Attorney
Kate Stacy, Deputy City Attorney
Scott Sanchez, Zoning Administrator, Planning Department
Sarah Jones, Environmental Review Officer, Planning Department
AnMarie Rodgers, Planning Department
Nannie Turrell, Planning Department
Tina Tam, Planning Department
Corey Teague, Planning Department

BOARD of SUPERVISORS

City Hall
Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No. 554-5184
Fax No. 554-5163
TDD/TTY No. 544-5227

August 13, 2013

To: Jon Givner
Deputy City Attorney

From: Rick Caldeira
Legislative Deputy Director

Subject: Appeal of Determination of Exemption from Environmental Review for 435-437 Potrero Avenue - Block No. 3974, Lot No. 022

An appeal of Determination of Exemption from Environmental Review for 435-437 Potrero Avenue (Assessor's Block No. 3974, Lot No. 022) was filed with the Office of the Clerk of the Board on August 12, 2013, by Mica I. Ringel.

Pursuant to the Interim Procedures of Appeals for Negative Declaration and Categorical Exemptions No. 5, I am forwarding this appeal, with attached documents, to the City Attorney's Office to determine if the appeal has been filed in a timely manner. The City Attorney's determination should be made within three working days of receipt of this request.

If you have any questions, you can contact me at (415) 554-7711.

(A Conditional Use Appeal was also filed on August 12, 2013, along with this appeal; the Conditional Use Appeal was referred to the Director of Public Works for verification of signatures.)

c: Angela Calvillo, Clerk of the Board
Kate Stacy, Deputy City Attorney
Marlena Byrne, Deputy City Attorney
Scott Sanchez, Zoning Administrator, Planning Department
Sarah Jones, Acting Environmental Review Officer, Planning Department
AnMarie Rodgers, Planning Department
Andrea Contreras, Planning Department
Corey Teague, Planning Department
Jonas Ionin, Acting Planning Commission Secretary
Victor Pacheco, Board of Appeals
Cynthia Goldstein, Board of Appeals

BOARD OF SUPERVISORS
CITY & COUNTY OF SAN FRANCISCO

---o0o---

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2013 AUG 12 PM 4:55
BY _____

APPEAL OF THE

EXEMPTION DETERMINATION

&

CONDITIONAL USE PERMIT

INTERNET SERVICES EXCHANGE

435-437 POTRERO AVENUE

CASE NO. 2013.0477C

MICA I. RINGEL
485 Potrero Avenue, Unit C
San Francisco, CA 94110

415.519.7523

supermica@gmail.com

MICA I. RINGEL
485 Potrero Avenue, Unit C
San Francisco, CA 94110
415.519.7523
supermica@gmail.com

August 12, 2013

Board President David Chiu
and Members of the Board of Supervisors
c/o Angela Calvillo,
Clerk of the Board of Supervisors
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94110

BY HAND DELIVERY

Re: Appeal of Categorical Exemption Determination
Appeal of Conditional Use Permit
435-437 Potrero Avenue
Case No. 2013.0477C
Legitimized Internet Services Exchange

Dear President Chiu and Supervisors:

I am appealing a determination made by the Planning Department and Commission (hereinafter collectively "Planning") that a Conditional Use (CU) Permit to establish an Internet Services Exchange (ISE) at 435-437 Potrero Avenue is somehow exempt from the provisions of the California Environmental Quality Act (CEQA) by "stamp" of a Class 1 categorical exemption.

BACKGROUND

On July 11th 2013, the Planning Commission took action and approved Motion No. 18921 adopting findings relating to the approval of CU Authorization pursuant to Planning Code § 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of ISE on the entirety of both floors at 435-437 Potrero Avenue, in an existing two-story building within an Urban Mixed Use (UMU) zoning district bordering Residential (RH-2).

An ISE is a prohibited use within a UMU zoning district, and the Commission's authorization was contingent on approval of a Letter of Legitimization (LOL) signed by the Zoning Administrator (ZA) on June 4th 2013.

I filed a Jurisdiction Request (JR) with the Board of Appeals (BOA) on July 25th to challenge the LOL determination. The JR will be heard on August 14th.

It is my contention that Planning has (1) abused its discretion in its determination that this project is categorically exempt and (2) failed to make the required findings that would support an exemption.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

CEQA is not to be stretched beyond the "reasonable scope of the statutory language." [1]

Class 1 categorical exemption is applicable to the "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." [2]

SIGNIFICANT CHANGE OF USE

435-437 Potrero Avenue had been without a tenant for a minimum of 3 years on July 11th, 2013 when the Commission took action and granted the CUP. By definition, an unoccupied property is empty, vacant, and without an active use. Any subsequent use beyond that which existed at the time of project approval, which was nothing, would have to be considered a clear expansion of use.

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[1] CCR § 15003(f); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 563-564; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110

[2] CCR. § 15301.

The former tenant [RCN/Astound] had used the site to house an ancillary hub for the broadcast and transmission of their digital cable franchise[3].

The Project Sponsor's submittal in support of the CUP outlines the framework for the site to become a public Data Center serving "local retail business customers." It will be "much like a local print shop" or a Kinko's. "At any given time there will be 4-6 people employed at the facility with 2-4 employees of customers rotating on and off-site at any given time." Whereas, the commerce element had never previously existed at the site before, it becoming a commercial web host would again have be considered as a clear expansion of use.

In their quest to compete with the Tier V [top rated] data centers at 365 Main Street and 200 Paul Avenue, the Project Sponsor's submittal states this project will "represent a local choice for the San Francisco Small Business Community". It will "help attract and retain small businesses and start-up companies" and in turn, that will "promote further job growth in San Francisco." They believe they can "provide a higher degree of service than the larger national and multi-national platforms" as long as it will "not require construction of a new facility."

An ISE would have been principally permitted under the site's previous M-1 (Light Industrial) zoning, however pursuant to Eastern Neighborhoods rezoning to UMU, Data Centers are prohibited in UMU. The Project Sponsor admits that the site had been vacant since 2010 and that in that time RCN/Astound had not secured the appropriate permits to establish an ISE at 435-437 Potrero Avenue. It is my contention that they did not provide Internet Services from this site, but rather from their Data Center at 200 Paul, and that pursuant to their Franchise agreement Utility Permit, the Potrero hub is considered a "facility" and thus not regulated by Planning.

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[3] "RCN has a principal headend and hub site located at 200 Paul Avenue, San Francisco, California 94124. RCN utilizes an ancillary hub site at the following location: 437 Potrero Avenue, San Francisco, CA, 94110. This hub site is served by and technically integrated with the principal headend. RCN serves the general population within this OVS service area."
www.fcc.gov/bureaus/mb/ovs/rcnsfnoi.doc

This calls into question the lack of due diligence. Why wasn't this assessed as a new project for CU approval, rather than "legitimized" as an existing business that could forego environmental review? In this context, CEQA analysis becomes very important. If the project fails to meet the Class 1 guidelines of an "existing facility" it is not categorically exempt. The facility exists, yes... but it is no longer an ancillary hub for digital cable. RCN/Astound abandoned the utility use of 435-437 Potrero in 2010 when their lease expired. The pending use is predicated by what it has sought entitlement to become, a commercial web host.

Negligible refers to a quantity *so* small it *can* be ignored; something *so* insignificant it is neither important, nor worthy of consideration. The planned expansion of use is neither insignificant nor negligible... and even if it was it's still not categorically exempt.

The exception to the exemption is that a project with the potential of causing significant cumulative impacts, or which otherwise has a reasonable possibility of resulting in significant effects does not qualify for exemptions.

PUBLIC HEALTH AND SAFETY

The following statement from the Project Sponsor's Submittal is not true: "the CU Authorization will not be detrimental to the health, safety or general welfare of the persons or the businesses in the vicinity."

There is an industrial sized 4,000 KW Generator on-site and the emissions "stack" is located directly in our back yards. The health risks associated with Toxic Air Contaminant [TAC] areare quantified by ones distance to the source. TAC's are directly related to Asthma, Heart Attacks, Strokes, Hypertension and shorter life spans. Potrero Ave has very poor Air Quality and Noise Levels, both which measure parallel to Highway 101, which is two blocks away.

San Francisco Municipal Code § 2001[4] states:

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[4] (Added by Ord. 202-02, File No. 012186, App. 9/27/2002)

The Board of Supervisors finds and declares the following:

(a) Diesel Backup Generators emit large amounts of smog-forming nitrogen oxides (NOx), particulate matter with a diameter of 10 microns or less (PM10), sulfur oxides and hydrocarbons contributing to ground-level ozone, and reduced visibility.

(b) Diesel exhaust is linked to short and long-term adverse health effects in humans, which include lung cancer, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, and chronic bronchitis and decreased lung function.

(c) In August of 1998, the California Air Resource Board listed diesel exhaust, specifically particulate emissions from diesel fueled engines, as a "toxic air contaminant."

(d) According to the Bay Area Air Quality Management District (BAAQMD), Diesel Backup Generators tend to emit more pollutants than a new well-controlled power plant. In fact, even a clean diesel backup generator may emit more than 20 times as much NOx per kilowatt-hour as a new well-controlled power plant. Older dirtier Diesel Backup Generators may emit 200 times as much NOx.

(e) The Bay Area is currently designated nonattainment for the national ozone standards by the United States Environmental Protection Agency.

(f) The Bay Area is currently designated nonattainment for the state ozone and PM10 standards by the California Air Resource Board.

(g) The City and County of San Francisco is concerned about the health hazards posed by diesel emissions polluting the air, and wishes to impose limitations on Diesel Backup Generators to reduce the emission of diesel exhaust.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT (BAAQMD)

Although the permit to operate the generator had expired during vacancy, the Bay Area Air Quality Management District (BAAQMD) has already issued a new permit for the new use. As part of the exhibits is the new permit and for your comparison are the old permits emissions report which details 19 of a hundred plus toxins this generator emitted into my backyard under

the previous permit. Please note that the toxins are measured in **.lbs per day** (yearly emissions divided by 365 days).

Generator's are *not* just for emergency use. Generators have to be regularly tested and maintained. Anytime there is interruption in power the engine fires on. There will not always be staff at the facility, and sometimes problems can't be immediately fixed. Is my neighborhood expected to shelter in-place? Indeed, we are, and due to the "mission critical" nature of a data center, this allows for the potential of hours upon hours of industrial strength diesel emissions in this increasingly residential neighborhood.

Several adjacent neighbors on Utah Street and Potrero Avenue have testified that the old generator would emit visible plumes of black "smoke" – which is not smoke at all, it is actually carcinogenic soot; emitted into our backyards and into the air for we breathe; and the vibrations could be felt whenever the generator was in use.

The problems are not just attributed to the generator, but also to noise from the rooftop fans. One neighbors describes a constant electrical hum that emanated from the building that could be prominently heard in the evening. Two neighbors who live directly behind 435-437 Potrero describe the period after the former tenants left as being relief from the audible static they had endured for years.

The Project Sponsor states that the existing HVAC meets noise standards. They also propose specific mitigation measures (e.g. Mufflers) to reduce sound. The motion adopted by the Planning Commission recognizes that a noise study is underway-but not yet completed. Under CEQA, you have to complete the environmental analysis prior to project approval. Neither the CEQA checklist, nor any other environmental documents exist.

This project is not exempt from environmental review, but rather is a prime candidate for environmental review.

Not only did the former tenant not obtain permits with Planning for an ISE, but also they never finalized any permits with DBI throughout their entire lease, including the electrical. They were tenants who officially terminated use when they left and now the landlord is trying continue use years later, thus the "legitimization".

There has been no disclosure of the adverse environmental and health effects to the surrounding neighborhood from the project sponsor or by Planning. This project has nearly escaped environmental review via "legitimization" and the CU process.

LAND USE STANDARDS

General Welfare Standard

- "The establishment, maintenance or conducting of the use for which a use permit is sought will not, under the particular case, be detrimental to the public welfare or injurious to property or improvements in the neighborhood" (*Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586).

Nuisance Standard

- "Any use found to be objectionable or incompatible with the character of the city and its environs due to noise, dust, odors or other undesirable characteristics may be prohibited" (*Snow v. City of Garden Grove* (1961) Cal.App.2d 496).

General Plan Consistency Standard

- "Although use permits are not explicitly made subject to a general plan meeting the requirement of state law, that condition is necessarily to be implied from the hierarchical relationship of land use laws. Thus, use permits are struck from the mold of the zoning law, the zoning law must comply with the adopted general plan, and the adopted general plan must conform with state law; the validity of the permit process derives from compliance with this hierarchy of planning laws (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176).

Zoning Consistency Standard

- "To obtain a use permit, the applicant must generally show that the contemplated use is compatible with the policies in terms of the zoning ordinances, and that such use would be essential or desirable to the public convenience or welfare, and will not impair the integrity and character of the zoned district or be detrimental to the public health, safety, morals or welfare" (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151).

CALL FOR RELIEF

I humbly request that the Board: (1) take peremptory action by issuing a permanent injunction of the CUP; (2) compel Planning to rescind its determination that the project is eligible to forego environmental review, and; (3) require that in the future Planning conduct a thorough environmental analysis for all proposed ISEs to determine whether they "may have a significant effect on the environment".

DECLARATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

MICA I. RINGEL

SAN FRANCISCO
PLANNING DEPARTMENT

Subject to: (Select only if applicable)

- ☐ Affordable Housing (Sec. 415)
- ☐ Jobs Housing Linkage Program (Sec. 413)
- ☐ Downtown Park Fee (Sec. 412)
- ☐ First Source Hiring (Admin. Code)
- ☐ Child Care Requirement (Sec. 414)
- ■ Other (TIDF – Sec. 411)

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Planning Commission Motion No. 18921

HEARING DATE: JULY 11, 2013

Date:	July 3, 2013
Case No.:	**2013.00477 C**
Project Address:	**435-437 Potrero Avenue**
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org

ADOPTING FINDINGS RELATING TO THE APPROVAL OF CONDITIONAL USE AUTHORIZATION PURSUANT TO PLANNING CODE SECTIONS 179.1, 227(R), 303, AND 303(H), TO ALLOW APPROXIMATELY 10,000 GROSS SQUARE FEET OF INTERNET SERVICES EXCHANGE ON THE ENTIRETY OF BOTH FLOORS OF THE EXISTING TWO-STORY BUILDING WITHIN A UMU (URBAN MIXED USE) ZONING DISTRICT AND 58-X HEIGHT AND BULK DISTRICT.

PREAMBLE

On April 18, 2013, David Silverman, on behalf of Industry Capital Internet Infrastructure, LLC (hereinafter "Project Sponsor"), filed an application with the Planning Department (hereinafter "Department") for Conditional Use Authorization under Planning Code Sections 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building within a UMU (Urban Mixed Use) Zoning District and 58-X Height and Bulk District.

On July 11, 2013, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Application No. 2013.0477C.

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

The Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of the applicant, Department staff, and other interested parties.

MOVED, that the Commission hereby authorizes the Conditional Use requested in Application No. 2013.0477C, subject to the conditions contained in "EXHIBIT A" of this motion, based on the following findings:

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. The above recitals are accurate and constitute findings of this Commission.

2. **Site Description and Present Use.** The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

3. **Surrounding Properties and Neighborhood.** The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

4. **Project Description.** The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

5. **Public Comment.** When the case report was issued on June 3, 2013, the Department had not received any comments from the public explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator. These concerns were based on their experiences

from previous operators of the building. Additionally, one neighbor on the subject block clarified that they are in fact opposed to the project. In response to these concerns, the current Project Sponsor held a meeting at the project site with a group of concerned neighbors on July 1st.

On July 10th and 11th, the Department received new emails of opposition from two neighbors on the subject block, one email of opposition from a resident living approximately 4 blocks away, and one email of opposition from a resident who didn't identify their address. The primary concerns in those emails stem from the potential noise, vibrations, and discharge from the backup generator in the building.

6. **Planning Code Compliance:** The Commission finds that the Project is consistent with the relevant provisions of the Planning Code in the following manner:

   A. **Legitimization.** Planning Code Section 179.1 established a time-limited program wherein existing uses in the Eastern Neighborhoods plan area that have operated without the benefit of required permits may seek those permits. Uses that could be "legitimized" under this Section are those uses which, under the current provisions of this Code and without this Section, could not otherwise seek the required permits.

   The proposed Internet Services Exchange (ISE) originally occupied the subject building in 2000. The subject property was zoned M-1 at that time, which permitted ISEs with a Conditional Use Authorization. The Zoning Administrator issued a Letter of Legitimization on June 4, 2013 for this project stating that the approximately 10,000 gross square feet of Internet Services Exchange occupying the entire existing building is eligible to be approved as a legal nonconforming use pursuant to Planning Code section 179.1. As such, the project is now seeking a Conditional Use Authorization under the provisions of the properties former M-1 zoning.

7. **Planning Code Section 303** establishes criteria for the Planning Commission to consider when reviewing applications for Conditional Use approval. On balance, the project does comply with said criteria in that:

   A. The proposed new uses and building, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable, and compatible with, the neighborhood or the community.

   The proposed Internet Services Exchange has already existed at the site for more than ten years without any reported complaints from surrounding businesses or residents. The low-intensity nature of the use, along with its relatively small size and scale, make it compatible with the existing mixed use surroundings. Additionally, the use provides a locally-owned, small-scale option for small businesses within the City for data and information storage.

   B. The proposed project will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity. There are no features of the project

that could be detrimental to the health, safety or convenience of those residing or working the area, in that:

i. Nature of proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;

The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

ii. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic or parking.

iii. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;

The existing HVAC equipment consists of seven fan units that will comply with the San Francisco Noise Ordinance the equipment and does not emit any dust or odors. The backup generator will only be used for testing and in emergencies like power outages.

iv. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs;

The existing building covers the entire site and includes no open space or landscaped areas. All lighting and signing will meet Planning Code requirements.

C. That the use as proposed will comply with the applicable provisions of the Planning Code and will not adversely affect the General Plan.

The Project complies with all relevant requirements and standards of the Planning Code and is consistent with objectives and policies of the General Plan as detailed below.

D. That the use as proposed would provide development that is in conformity with the purpose of the applicable Neighborhood Commercial District.

The project is not located within a Neighborhood Commercial District.

8. Planning Code Section 303(h) establishes additional criteria for the Planning Commission to consider when reviewing applications for Conditional Use Approval of Internet Services Exchanges. On balance, the project does comply with said criteria in that:

   a. The intensity of the use at this location and in the surrounding neighborhood is not such that allowing the use will likely foreclose the location of other needed neighborhood-serving uses in the area;

      The use has a low intensity and has existed in the building for more than ten years with no known negative impacts. Additionally, the existing building is not currently designed to easily accommodate a more active commercial use, and therefore is suitable for an Internet Services Exchange.

   b. The building in which the use is located is designed in discrete elements, which respect the scale of development in adjacent blocks, particularly any existing residential uses;

      The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

   c. Rooftop equipment on the building in which the use is located is screened appropriately;

      The project is required to provide adequate screening of rooftop equipment pursuant to Planning Code Section 141 and Condition of Approval No. 6 in this motion.

   d. The back-up power system for the proposed use will comply with all applicable federal state, regional and local air pollution controls;

      The existing backup generator complies with all relevant controls and is permitted by the Bay Area Air Quality Management District (Permit No. 21731).

   e. Fixed-source equipment noise does not exceed the decibel levels specified in the San Francisco Noise Control Ordinance;

      A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code). This requirement is also listed as Condition of Approval No. 11 of this motion.

f. The building is designed to minimize energy consumption, such as through the use of energy-efficient technology, including without limitation, heating, ventilating and air conditioning systems, lighting controls, natural ventilation and recapturing waste heat, and as such commercially available technology evolves;

The existing equipment at the site is fully operable. However, the project will also use the following energy saving techniques to reduce the total power consumption of the building:

1) *Energy efficient Toshiba G90000 UPS systems to increase the efficiency of the current uninterruptible power system from 80 percent efficiency to 96.5 percent efficiency.*
2) *Cold isle containment, which can reduce the power associated with mechanical cooling by 25 to 30 percent.*
3) *Air-side economization, which can reduce the cooling power consumption by an estimated 50 to 60 percent.*

g. The project sponsor has examined the feasibility of supplying and, to the extent feasible, will supply all or a portion of the building's power needs through on-site power generation, such as through the use of fuel cells or co-generation;

The project sponsor studied the feasibility of using on-site Co-generation and fuel cells. However, due to the limited lot size, such power generation is not possible.

h. The project sponsor shall have submitted design capacity and projected power use of the building as part of the conditional use application;

The building is served by PG&E with a 1.0 mega volt ampere ("MVA") dedicated underground feed transformer that is located inside the building. This translates into a serviced capacity of approximately 800kW of power per hour. Using a vacancy factor estimate of 7.5 percent, the projected maximum annual energy use is 6,500,000 KWh per year, or 540,000kWh per month.

The following table provides projected monthly energy use per year as the building is leased up over time:

Power Use per Month	*2013*	*2014*	*2015*	*2016*
Total Capacity (KWh)	*36,000*	*216,000*	*360,000*	*540,000*

9. **General Plan Compliance.** The Project is, on balance, consistent with the following Objectives and Policies of the General Plan:

COMMERCE AND INDUSTRY

Objectives and Policies

OBJECTIVE 1:

MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKINIG ENVIRONMENT.

Policy 1.1:
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development that has substantial undesirable consequences that cannot be mitigated.

The project will provided a much needed support service for other businesses within the City without producing undesirable consequences.

OBJECTIVE 3:
PROVIDE EXPANDED EMPLOYMENT OPPORTUNITIES FOR CITY RESIDENTS, PARTICULARLY THE UNEMPLOYED AND ECONOMICALLY DISADVANTAGED.

Policy 3.4:
Assist newly emerging economic activities.

OBJECTIVE 4:
IMPROVE THE VIABILITY OF EXISTING INDUSTRY IN THE CITY AND THE ATTRACTIVENESS OF THE CITY AS A LOCATION FOR NEW INDUSTRY.

Policy 4.1:
Maintain and enhance a favorable business climate in the city.

Policy 4.2:
Promote and attract those economic activities with potential benefit to the City.

The project will provided a much needed support service for other businesses to locate and grow within the City, especially businesses with technological support needs.

10. **Planning Code Section 101.1(b)** establishes eight priority-planning policies and requires review of permits for consistency with said policies. On balance, the project does comply with said policies in that:

A. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses be enhanced.

The proposal will not remove or otherwise impact any existing neighborhood-serving retail uses in the area.

B. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods.

The proposed use has existed within the subject building since 2000 (including periods of vacancy). Continuing the use at this location will not impact existing housing or neighborhood character.

C. That the City's supply of affordable housing be preserved and enhanced,

No housing is created or removed as part of this project.

D. That commuter traffic not impede MUNI transit service or overburden our streets or neighborhood parking.

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic, parking, or MUNI.

E. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced.

The Project will not displace any service or industry establishment, but will instead preserve and industrial service that has existed at this site since 2000.

F. That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake.

The project includes no significant changes to the existing building.

G. That landmarks and historic buildings be preserved.

The subject building was determined to not be a historic resource by the Showplace Square/Northeast Mission Historic Survey.

H. That our parks and open space and their access to sunlight and vistas be protected from development.

The project will have no impact on existing parks and open spaces.

11. The Project is consistent with and would promote the general and specific purposes of the Code provided under Section 101.1(b) in that, as designed, the Project would contribute to the character and stability of the neighborhood and would constitute a beneficial development.

12. The Commission hereby finds that approval of the Conditional Use authorization would promote the health, safety and welfare of the City.

DECISION

That based upon the Record, the submissions by the Applicant, the staff of the Department and other interested parties, the oral testimony presented to this Commission at the public hearings, and all other written materials submitted by all parties, the Commission hereby **APPROVES Conditional Use Application No. 2013.0477C** subject to the following conditions attached hereto as "EXHIBIT A" in general conformance with plans on file, dated May 30, 2013, and stamped "EXHIBIT B", which is incorporated herein by reference as though fully set forth.

APPEAL AND EFFECTIVE DATE OF MOTION: Any aggrieved person may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion No. 18921. The effective date of this Motion shall be the date of this Motion if not appealed (After the 30-day period has expired) OR the date of the decision of the Board of Supervisors if appealed to the Board of Supervisors. For further information, please contact the Board of Supervisors at (415) 554-5184, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

I hereby certify that the Planning Commission ADOPTED the foregoing Motion on July 11, 2013.

Jonas P. Ionin
Acting Commission Secretary

AYES: Commissioners Antonini, Borden, Fong, Moore, and Wu

NAYS: Commissioner Sugaya

ABSENT: Commissioner Hillis

ADOPTED: July 11, 2013

EXHIBIT A

AUTHORIZATION

This authorization is for a conditional use to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building located at 435-437 Potrero Avenue, Block 3972, and Lot 22, pursuant to Planning Code Section(s) 179.1, 227(r), 303, and 303(h) within the UMU District and a 58-X Height and Bulk District; in general conformance with plans, dated May 30, 2013, and stamped "EXHIBIT B" included in the docket for Case No. 2013.0477C and subject to conditions of approval reviewed and approved by the Commission on July 11, 2013 under Motion No. 18921. This authorization and the conditions contained herein run with the property and not with a particular Project Sponsor, business, or operator.

RECORDATION OF CONDITIONS OF APPROVAL

Prior to the issuance of the building permit or commencement of use for the Project the Zoning Administrator shall approve and order the recordation of a Notice in the Official Records of the Recorder of the City and County of San Francisco for the subject property. This Notice shall state that the project is subject to the conditions of approval contained herein and reviewed and approved by the Planning Commission on July 11, 2013 under Motion No 18921.

PRINTING OF CONDITIONS OF APPROVAL ON PLANS

The conditions of approval under the 'Exhibit A' of this Planning Commission Motion No. 18921 shall be reproduced on the Index Sheet of construction plans submitted with the Site or Building permit application for the Project. The Index Sheet of the construction plans shall reference to the Conditional Use authorization and any subsequent amendments or modifications.

SEVERABILITY

The Project shall comply with all applicable City codes and requirements. If any clause, sentence, section or any part of these conditions of approval is for any reason held to be invalid, such invalidity shall not affect or impair other remaining clauses, sentences, or sections of these conditions. This decision conveys no right to construct, or to receive a building permit. "Project Sponsor" shall include any subsequent responsible party.

CHANGES AND MODIFICATIONS

Changes to the approved plans may be approved administratively by the Zoning Administrator. Significant changes and modifications of conditions shall require Planning Commission approval of a new Conditional Use authorization.

Conditions of Approval, Compliance, Monitoring, and Reporting

PERFORMANCE

1. **Validity.** The authorization and right vested by virtue of this action is valid for three (3) years from the effective date of the Motion. The Department of Building Inspection shall have issued a Building Permit or Site Permit to construct the project and/or commence the approved use within this three-year period.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

2. **Expiration and Renewal.** Should a Building or Site Permit be sought after the three (3) year period has lapsed, the project sponsor must seek a renewal of this Authorization by filing an application for an amendment to the original Authorization or a new application for Authorization. Should the project sponsor decline to so file, and decline to withdraw the permit application, the Commission shall conduct a public hearing in order to consider the revocation of the Authorization. Should the Commission not revoke the Authorization following the closure of the public hearing, the Commission shall determine the extension of time for the continued validity of the Authorization.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

3. **Diligent pursuit.** Once a site or Building Permit has been issued, construction must commence within the timeframe required by the Department of Building Inspection and be continued diligently to completion. Failure to do so shall be grounds for the Commission to consider revoking the approval if more than three (3) years have passed since this Authorization was approved.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

4. **Extension.** All time limits in the preceding three paragraphs may be extended at the discretion of the Zoning Administrator where implementation of the project is delayed by a public agency, an appeal or a legal challenge and only by the length of time for which such public agency, appeal or challenge has caused delay.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

5. **Conformity with Current Law.** No application for Building Permit, Site Permit, or other entitlement shall be approved unless it complies with all applicable provisions of City Codes in effect at the time of such approval. *For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.*

DESIGN – COMPLIANCE AT PLAN STAGE

6. **Rooftop Mechanical Equipment.** Pursuant to Planning Code 141, the Project Sponsor shall submit a roof plan to the Planning Department prior to Planning approval of the building permit

application. Rooftop mechanical equipment, if any is proposed as part of the Project, is required to be screened so as not to be visible from any point at or below the roof level of the subject building.
For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

PROVISIONS

7. **Transit Impact Development Fee.** Pursuant to Planning Code Section 411 (formerly Chapter 38 of the Administrative Code), the Project Sponsor shall pay the Transit Impact Development Fee (TIDF) as required by and based on drawings submitted with the Building Permit Application. Prior to the issuance of a temporary certificate of occupancy, the Project Sponsor shall provide the Planning Director with certification that the fee has been paid.
For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

MONITORING

8. **Reporting.** As long as the use remains an Internet Services Exchange, the project sponsor shall submit to the Planning Department on an annual basis power use statements for the previous twelve-month period as provided by all suppliers of utilities and shall submit a written annual report to the Department of Environment and the Planning Department which shall state: (a) the annual energy consumption and fuel consumption of all tenants and occupants of the Internet Services Exchange; (b) the number of all diesel generators located at the site and the hours of usage, including usage for testing purposes; (c) evidence that diesel generators at the site are in compliance with all applicable local, regional, state and federal permits, regulations and laws; and (d) such other information as the Planning Commission may require.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

9. **Enforcement.** Violation of any of the Planning Department conditions of approval contained in this Motion or of any other provisions of Planning Code applicable to this Project shall be subject to the enforcement procedures and administrative penalties set forth under Planning Code Section 176 or Section 176.1. The Planning Department may also refer the violation complaints to other city departments and agencies for appropriate enforcement action under their jurisdiction.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

10. **Revocation due to Violation of Conditions.** Should implementation of this Project result in complaints from interested property owners, residents, or commercial lessees which are not resolved by the Project Sponsor and found to be in violation of the Planning Code and/or the specific conditions of approval for the Project as set forth in Exhibit A of this Motion, the Zoning Administrator shall refer such complaints to the Commission, after which it may hold a public hearing on the matter to consider revocation of this authorization.

For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

OPERATION

11. **Noise Control.** The premises shall be adequately soundproofed or insulated for noise and operated so that fixed-source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.
For information about compliance with the fixed mechanical objects such as rooftop air conditioning, restaurant ventilation systems, and motors and compressors with acceptable noise levels, contact the Environmental Health Section, Department of Public Health at (415) 252-3800, www.sfdph.org.

12. **Vibration.** The Project Sponsor shall attempt to reduce vibration from equipment within the building and on the roof through repair, retrofit, or replacement of the equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

13. **Backup Generator Operation.** The Project Sponsor shall attempt to reduce the emissions of the backup generator, such as use of biofuels instead of diesel fuel to operate the backup generator.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

14. **Sidewalk Maintenance.** The Project Sponsor shall maintain the main entrance to the building and all sidewalks abutting the subject property in a clean and sanitary condition in compliance with the Department of Public Works Streets and Sidewalk Maintenance Standards.
For information about compliance, contact Bureau of Street Use and Mapping, Department of Public Works, 415-695-2017, http://sfdpw.org.

15. **Community Liaison.** Prior to issuance of a building permit to construct the project and implement the approved use, the Project Sponsor shall appoint a community liaison officer to deal with the issues of concern to owners and occupants of nearby properties. The Project Sponsor shall provide the Zoning Administrator with written notice of the name, business address, and telephone number of the community liaison. Should the contact information change, the Zoning Administrator shall be made aware of such change. The community liaison shall report to the Zoning Administrator what issues, if any, are of concern to the community and what issues have not been resolved by the Project Sponsor.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

16. **Six-Month Report.** The Project Sponsor shall report back to the Planning Commission approximately six months after occupancy of the building. The report shall focus on the operation of the building during that time, especially regarding the generation of noise and emissions from the backup generator and other equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

SAN FRANCISCO PLANNING DEPARTMENT

Executive Summary
Conditional Use

HEARING DATE: JULY 11, 2013

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Date:	July 3, 2013
Case No.:	2013.00477 C
Project Address:	435-437 Potrero Avenue
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org
Recommendation:	**Approval with Conditions**

PROJECT DESCRIPTION

The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

SITE DESCRIPTION AND PRESENT USE

The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

SURROUNDING PROPERTIES AND NEIGHBORHOOD

The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

ENVIRONMENTAL REVIEW

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

HEARING NOTIFICATION

This project was originally scheduled and noticed for a public hearing on June 13, 2013. It was continued to July 11th because the notification poster on site was torn down and not replaced in a reasonable amount of time. The poster was replaced and advertised the new hearing date of July 11, 2013.

TYPE	REQUIRED PERIOD	REQUIRED NOTICE DATE	ACTUAL NOTICE DATE	ACTUAL PERIOD
Classified News Ad	20 days	May 24, 2013	May 22, 2013	22 days
Posted Notice	20 days	May 24, 2013	May 24, 2013	20 days
Mailed Notice	20 days	May 24, 2013	May 23, 2013	21 days

PUBLIC COMMENT

- The Department did not receive any comments from the project explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator.

ISSUES AND OTHER CONSIDERATIONS

- On June 4, 2013, the Zoning Administrator determined that the entire building is eligible to be legitimized as an ISE pursuant to Planning Code Section 179.1 because it had been used as an ISE from 2000 to 2010, and the building has not been used for any other use since 2010.

- A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code).

REQUIRED COMMISSION ACTION

In order for the proposed ISE to be approved, the Commission must grant conditional use authorization to allow the ISE under the site's previous M-1 Zoning District, pursuant to Planning Code Sections 179.1, 227(r), 303, and 303(h).

BASIS FOR RECOMMENDATION

- The existing building was used as an ISE from 2000 to 2010 without any formal complaints from the community.

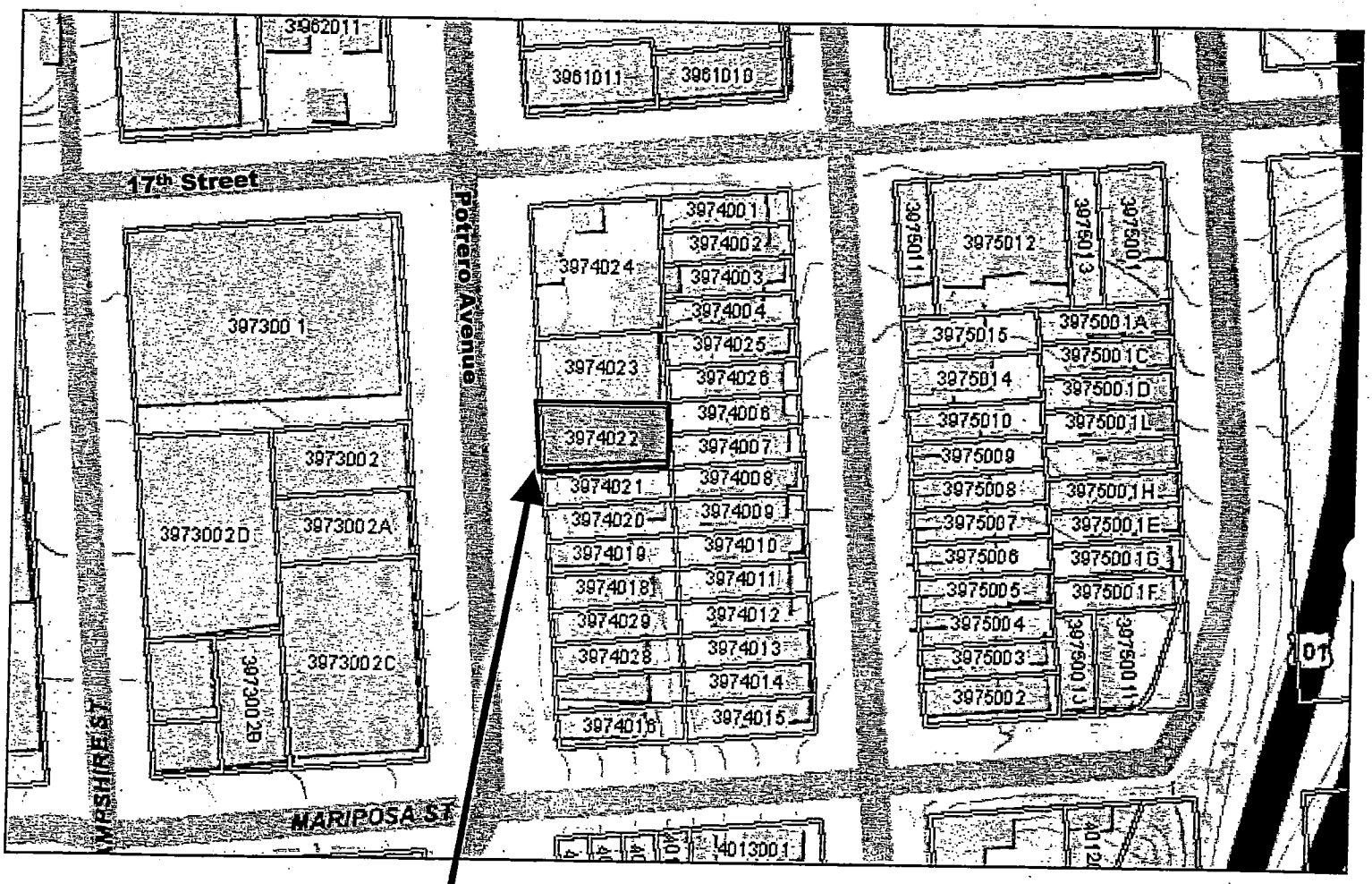
- The project will provide needed supportive technical services for businesses that are locating or growing in the City.
- The project is consistent with the Planning Code, Mission Area Plan, and the General Plan overall.

RECOMMENDATION:	Approval with Conditions

Attachments:
Parcel Map
Sanborn Map
Aerial Photographs
Site Photo
Zoning Map
Draft Motion
Sponsor Submittal
-Project Narrative
-Reduced Size Plans

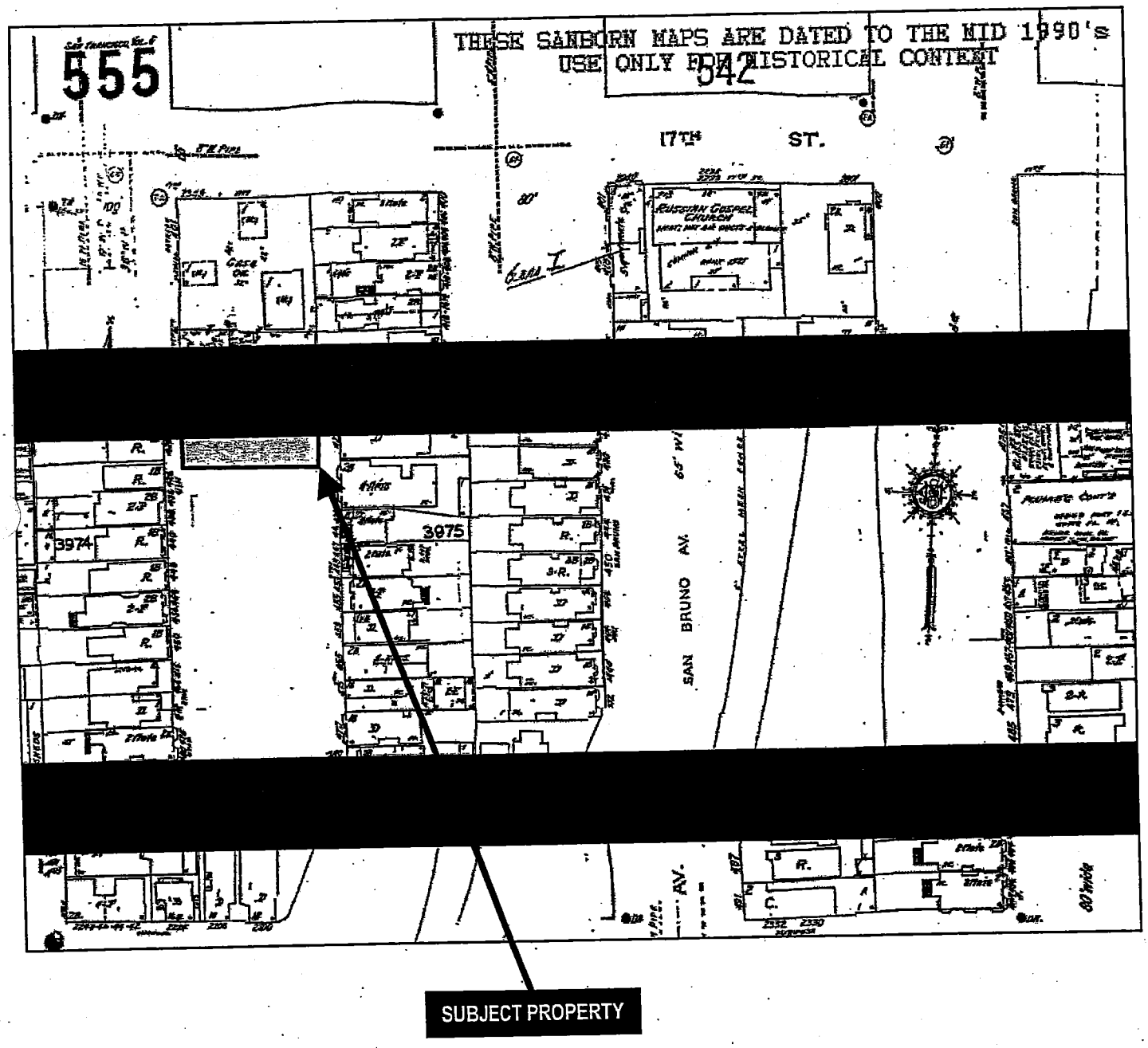
CT: G:\Documents\C\2012\435 Potrero Ave\Executive Summary.doc

Parcel Map



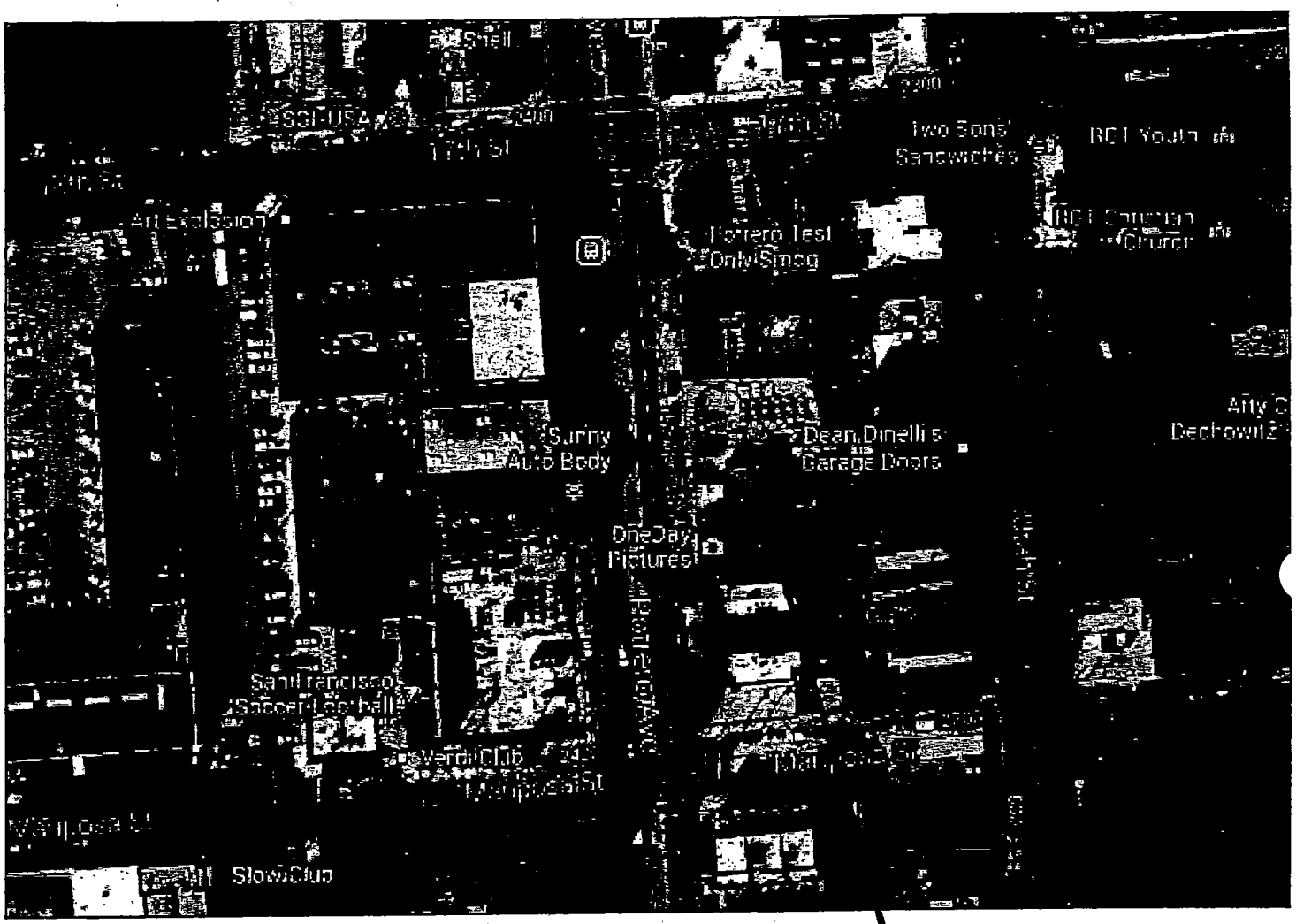
SUBJECT PROPERTY

Sanborn Map*



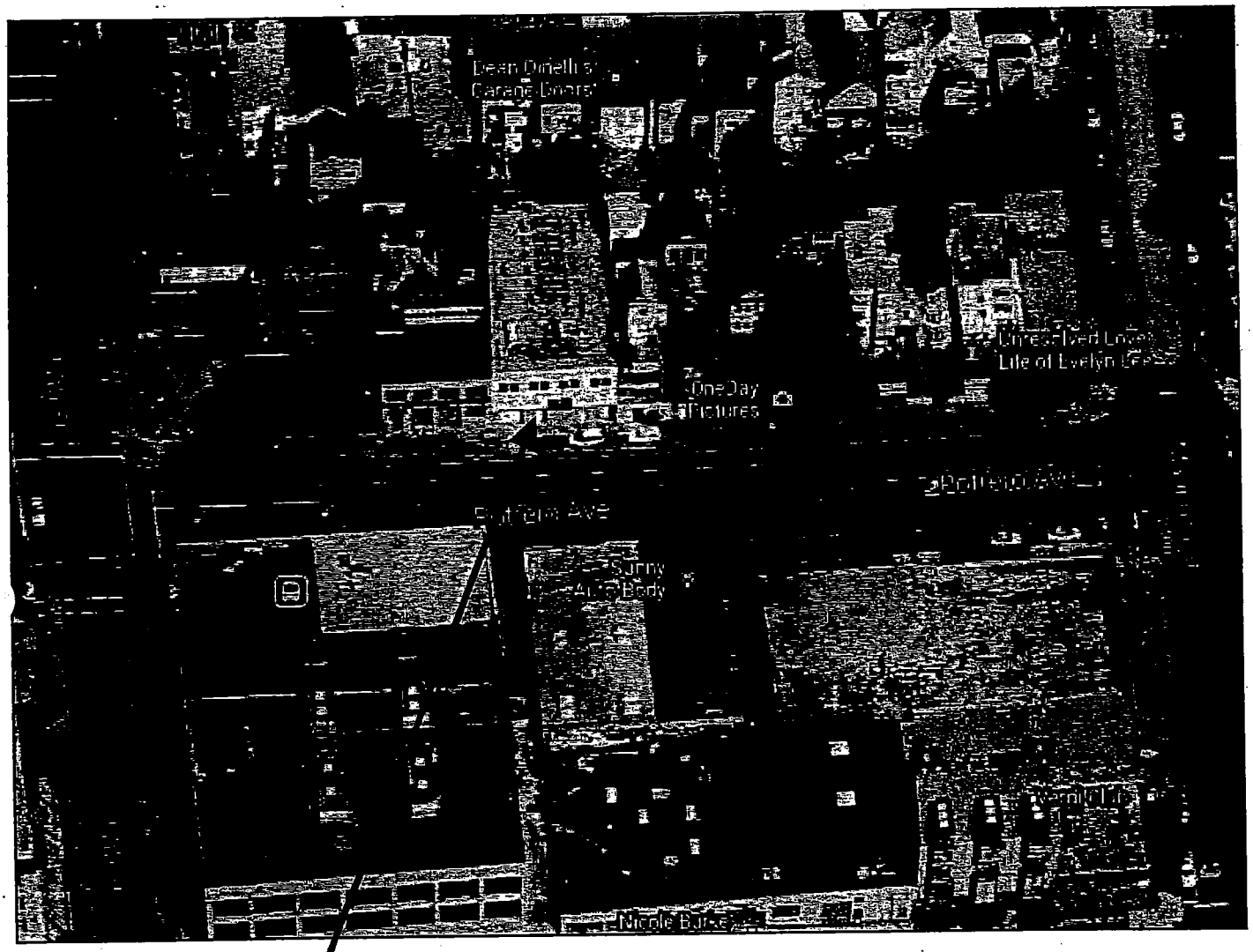
*The Sanborn Maps in San Francisco have not been updated since 1998, and this map may not accurately reflect existing conditions.

Aerial Photo



SUBJECT PROPERTY

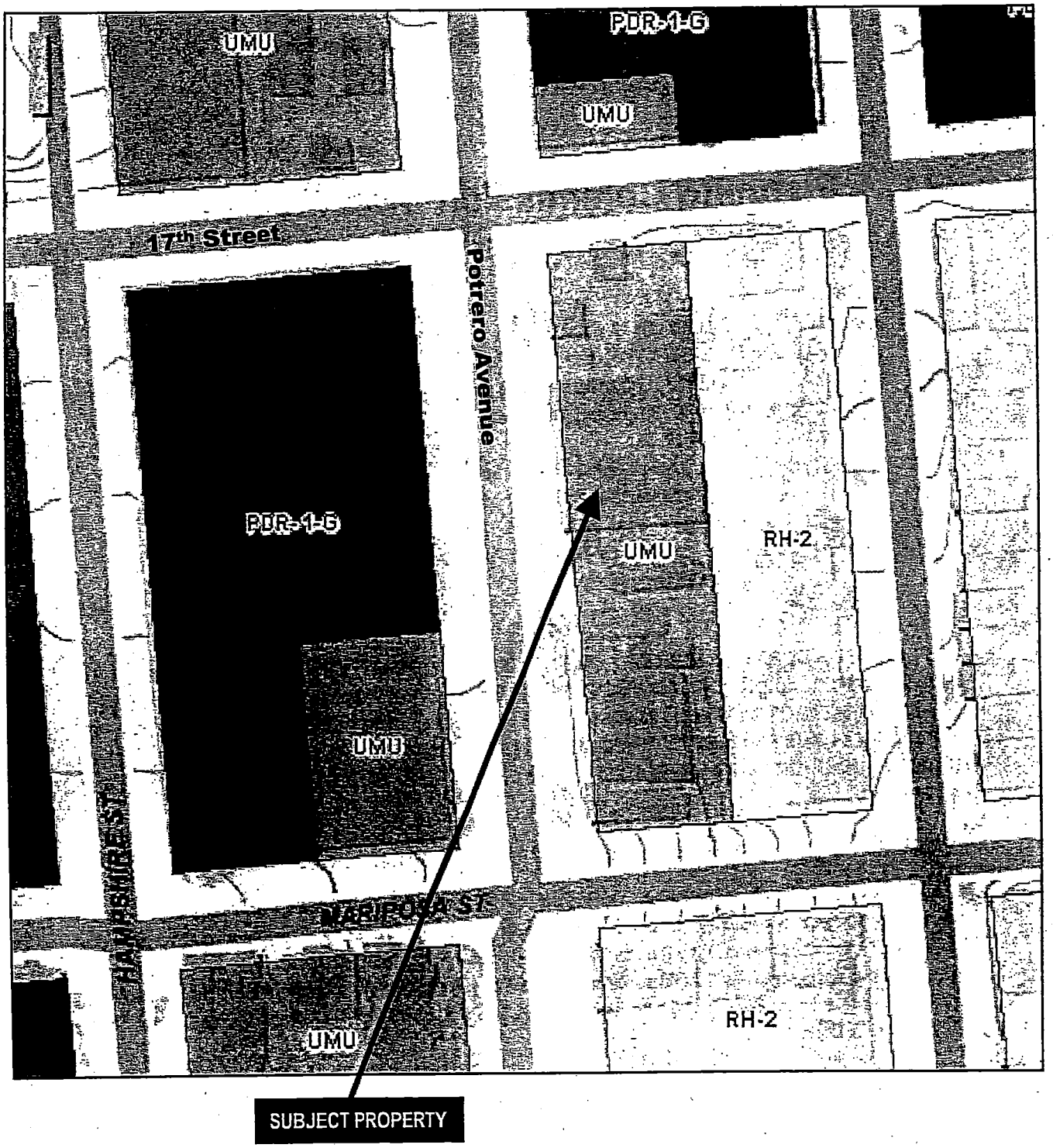
Aerial Photo



Site Photo



Zoning Map



Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

SAN FRANCISCO
PLANNING DEPARTMENT

Subject to: (Select only if applicable)

- ☐ Affordable Housing (Sec. 415)
- ☐ Jobs Housing Linkage Program (Sec. 413)
- ☐ Downtown Park Fee (Sec. 412)
- ☐ First Source Hiring (Admin. Code)
- ☐ Child Care Requirement (Sec. 414)
- ☐ Other (TIDF – Sec. 411)

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Planning Commission Draft Motion

HEARING DATE: JULY 11, 2013

Date:	July 3, 2013
Case No.:	2013.00477 C
Project Address:	**435-437 Potrero Avenue**
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org

ADOPTING FINDINGS RELATING TO THE APPROVAL OF CONDITIONAL USE AUTHORIZATION PURSUANT TO PLANNING CODE SECTIONS 179.1, 227(R), 303, AND 303(H), TO ALLOW APPROXIMATELY 10,000 GROSS SQUARE FEET OF INTERNET SERVICES EXCHANGE ON THE ENTIRETY OF BOTH FLOORS OF THE EXISTING TWO-STORY BUILDING WITHIN A UMU (URBAN MIXED USE) ZONING DISTRICT AND 58-X HEIGHT AND BULK DISTRICT.

PREAMBLE

On April 18, 2013, David Silverman, on behalf of Industry Capital Internet Infrastructure, LLC (hereinafter "Project Sponsor"), filed an application with the Planning Department (hereinafter "Department") for Conditional Use Authorization under Planning Code Sections 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building within a UMU (Urban Mixed Use) Zoning District and 58-X Height and Bulk District.

On July 11, 2013, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Application No. 2013.0477C.

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

The Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of the applicant, Department staff, and other interested parties.

MOVED, that the Commission hereby authorizes the Conditional Use requested in Application No. 2013.0477C, subject to the conditions contained in "EXHIBIT A" of this motion, based on the following findings:

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. The above recitals are accurate and constitute findings of this Commission.

2. **Site Description and Present Use.** The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

3. **Surrounding Properties and Neighborhood.** The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

4. **Project Description.** The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

5. **Public Comment.** The Department did not receive any comments from the project explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator.

6. **Planning Code Compliance:** The Commission finds that the Project is consistent with the relevant provisions of the Planning Code in the following manner:

   A. **Legitimization.** Planning Code Section 179.1 established a time-limited program wherein existing uses in the Eastern Neighborhoods plan area that have operated without the benefit of required permits may seek those permits. Uses that could be "legitimized" under this Section are those uses which, under the current provisions of this Code and without this Section, could not otherwise seek the required permits.

   The proposed Internet Services Exchange (ISE) originally occupied the subject building in 2000. The subject property was zoned M-1 at that time, which permitted ISEs with a Conditional Use Authorization. The Zoning Administrator issued a Letter of Legitimization on June 4, 2013 for this project stating that the approximately 10,000 gross square feet of Internet Services Exchange occupying the entire existing building is eligible to be approved as a legal nonconforming use pursuant to Planning Code section 179.1. As such, the project is now seeking a Conditional Use Authorization under the provisions of the properties former M-1 zoning.

7. **Planning Code Section 303** establishes criteria for the Planning Commission to consider when reviewing applications for Conditional Use approval. On balance, the project does comply with said criteria in that:

   A. The proposed new uses and building, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable, and compatible with, the neighborhood or the community.

   The proposed Internet Services Exchange has already existed at the site for more than ten years without any reported complaints from surrounding businesses or residents. The low-intensity nature of the use, along with its relatively small size and scale, make it compatible with the existing mixed use surroundings. Additionally, the use provides a locally-owned, small-scale option for small businesses within the City for data and information storage.

   B. The proposed project will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity. There are no features of the project that could be detrimental to the health, safety or convenience of those residing or working the area, in that:

      i. Nature of proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;

      The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

ii. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time, and there is a two-space tandem parking garage in the building. Therefore, the project will not create issues for traffic or parking.

iii. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;

The existing HVAC equipment consists of seven fan units that will comply with the San Francisco Noise Ordinance the equipment and does not emit any dust or odors. The backup generator will only be used for testing and in emergencies like power outages.

iv. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs;

The existing building covers the entire site and includes no open space or landscaped areas. All lighting and signing will meet Planning Code requirements.

C. That the use as proposed will comply with the applicable provisions of the Planning Code and will not adversely affect the General Plan.

The Project complies with all relevant requirements and standards of the Planning Code and is consistent with objectives and policies of the General Plan as detailed below.

D. That the use as proposed would provide development that is in conformity with the purpose of the applicable Neighborhood Commercial District.

The project is not located within a Neighborhood Commercial District.

8. Planning Code Section 303(h) establishes additional criteria for the Planning Commission to consider when reviewing applications for Conditional Use Approval of Internet Services Exchanges. On balance, the project does comply with said criteria in that:

a. The intensity of the use at this location and in the surrounding neighborhood is not such that allowing the use will likely foreclose the location of other needed neighborhood-serving uses in the area;

The use has a low intensity and has existed in the building for more than ten years with no known negative impacts. Additionally, the existing building is not currently designed to easily

accommodate a more active commercial use, and therefore is suitable for an Internet Services Exchange.

b. The building in which the use is located is designed in discrete elements, which respect the scale of development in adjacent blocks, particularly any existing residential uses;

The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

c. Rooftop equipment on the building in which the use is located is screened appropriately;

The project is required to provide adequate screening of rooftop equipment pursuant to Planning Code Section 141 and Condition of Approval No. 6 in this motion.

d. The back-up power system for the proposed use will comply with all applicable federal state, regional and local air pollution controls;

The existing backup generator complies with all relevant controls and is permitted by the Bay Area Air Quality Management District (Permit No. 21731).

e. Fixed-source equipment noise does not exceed the decibel levels specified in the San Francisco Noise Control Ordinance;

A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code). This requirement is also listed as Condition of Approval No. 11 of this motion.

f. The building is designed to minimize energy consumption, such as through the use of energy-efficient technology, including without limitation, heating, ventilating and air conditioning systems, lighting controls, natural ventilation and recapturing waste heat, and as such commercially available technology evolves;

The existing equipment at the site is fully operable. However, the project will also use the following energy saving techniques to reduce the total power consumption of the building:

1) *Energy efficient Toshiba G90000 UPS systems to increase the efficiency of the current uninterruptible power system from 80 percent efficiency to 96.5 percent efficiency.*

2) *Cold isle containment, which can reduce the power associated with mechanical cooling by 25 to 30 percent.*
3) *Air-side economization, which can reduce the cooling power consumption by an estimated 50 to 60 percent.*

g. The project sponsor has examined the feasibility of supplying and, to the extent feasible, will supply all or a portion of the building's power needs through on-site power generation, such as through the use of fuel cells or co-generation;

The project sponsor studied the feasibility of using on-site Co-generation and fuel cells. However, due to the limited lot size, such power generation is not possible.

h. The project sponsor shall have submitted design capacity and projected power use of the building as part of the conditional use application;

The building is served by PG&E with a 1.0 mega volt ampere ("MVA") dedicated underground feed transformer that is located inside the building. This translates into a serviced capacity of approximately 800kW of power per hour. Using a vacancy factor estimate of 7.5 percent, the projected maximum annual energy use is 6,500,000 KWh per year, or 540,000kWh per month.

The following table provides projected monthly energy use per year as the building is leased up over time:

Power Use per Month	*2013*	*2014*	*2015*	*2016*
Total Capacity (KWh)	*36,000*	*216,000*	*360,000*	*540,000*

9. **General Plan Compliance.** The Project is, on balance, consistent with the following Objectives and Policies of the General Plan:

COMMERCE AND INDUSTRY

Objectives and Policies

OBJECTIVE 1:
MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKINIG ENVIRONMENT.

Policy 1.1:
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development that has substantial undesirable consequences that cannot be mitigated.

The project will provided a much needed support service for other businesses within the City without producing undesirable consequences.

OBJECTIVE 3:
PROVIDE EXPANDED EMPLOYMENT OPPORTUNITIES FOR CITY RESIDENTS, PARTICULARLY THE UNEMPLOYED AND ECONOMICALLY DISADVANTAGED.

Policy 3.4:
Assist newly emerging economic activities.

OBJECTIVE 4:
IMPROVE THE VIABILITY OF EXISTING INDUSTRY IN THE CITY AND THE ATTRACTIVENESS OF THE CITY AS A LOCATION FOR NEW INDUSTRY.

Policy 4.1:
Maintain and enhance a favorable business climate in the city.

Policy 4.2:
Promote and attract those economic activities with potential benefit to the City.

The project will provided a much needed support service for other businesses to locate and grow within the City, especially businesses with technological support needs.

10. **Planning Code Section 101.1(b)** establishes eight priority-planning policies and requires review of permits for consistency with said policies. On balance, the project does comply with said policies in that:

A. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses be enhanced.

The proposal will not remove or otherwise impact any existing neighborhood-serving retail uses in the area.

B. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods.

The proposed use has existed within the subject building since 2000 (including periods of vacancy). Continuing the use at this location will not impact existing housing or neighborhood character.

C. That the City's supply of affordable housing be preserved and enhanced,

No housing is created or removed as part of this project.

D. That commuter traffic not impede MUNI transit service or overburden our streets or neighborhood parking.

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time, and there is a two-space tandem parking garage in the building. Therefore, the project will not create issues for traffic, parking, or MUNI.

E. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced.

The Project will not displace any service or industry establishment, but will instead preserve and industrial service that has existed at this site since 2000.

F. That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake.

The project includes no significant changes to the existing building.

G. That landmarks and historic buildings be preserved.

The subject building was determined to not be a historic resource by the Showplace Square/Northeast Mission Historic Survey.

H. That our parks and open space and their access to sunlight and vistas be protected from development.

The project will have no impact on existing parks and open spaces.

11. The Project is consistent with and would promote the general and specific purposes of the Code provided under Section 101.1(b) in that, as designed, the Project would contribute to the character and stability of the neighborhood and would constitute a beneficial development.

12. The Commission hereby finds that approval of the Conditional Use authorization would promote the health, safety and welfare of the City.

DECISION

That based upon the Record, the submissions by the Applicant, the staff of the Department and other interested parties, the oral testimony presented to this Commission at the public hearings, and all other written materials submitted by all parties, the Commission hereby APPROVES Conditional Use Application No. 2013.0477C subject to the following conditions attached hereto as "EXHIBIT A" in general conformance with plans on file, dated May 30, 2013, and stamped "EXHIBIT B", which is incorporated herein by reference as though fully set forth.

APPEAL AND EFFECTIVE DATE OF MOTION: Any aggrieved person may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion No. XXXXX. The effective date of this Motion shall be the date of this Motion if not appealed (After the 30-day period has expired) OR the date of the decision of the Board of Supervisors if appealed to the Board of Supervisors. For further information, please contact the Board of Supervisors at (415) 554-5184, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

I hereby certify that the Planning Commission ADOPTED the foregoing Motion on July 11, 2013.

Jonas P. Ionin
Acting Commission Secretary

AYES:

NAYS:

ABSENT:

ADOPTED: July 11, 2013

EXHIBIT A

AUTHORIZATION

This authorization is for a conditional use to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building located at 435-437 Potrero Avenue, Block 3972, and Lot 22, pursuant to Planning Code Section(s) 179.1, 227(r), 303, and 303(h) within the UMU District and a 58-X Height and Bulk District; in general conformance with plans, dated May 30, 2013, and stamped "EXHIBIT B" included in the docket for Case No. 2013.0477C and subject to conditions of approval reviewed and approved by the Commission on July 11, 2013 under Motion No. XXXXXX. This authorization and the conditions contained herein run with the property and not with a particular Project Sponsor, business, or operator.

RECORDATION OF CONDITIONS OF APPROVAL

Prior to the issuance of the building permit or commencement of use for the Project the Zoning Administrator shall approve and order the recordation of a Notice in the Official Records of the Recorder of the City and County of San Francisco for the subject property. This Notice shall state that the project is subject to the conditions of approval contained herein and reviewed and approved by the Planning Commission on July 11, 2013 under Motion No XXXXXX.

PRINTING OF CONDITIONS OF APPROVAL ON PLANS

The conditions of approval under the 'Exhibit A' of this Planning Commission Motion No. XXXXXX shall be reproduced on the Index Sheet of construction plans submitted with the Site or Building permit application for the Project. The Index Sheet of the construction plans shall reference to the Conditional Use authorization and any subsequent amendments or modifications.

SEVERABILITY

The Project shall comply with all applicable City codes and requirements. If any clause, sentence, section or any part of these conditions of approval is for any reason held to be invalid, such invalidity shall not affect or impair other remaining clauses, sentences, or sections of these conditions. This decision conveys no right to construct, or to receive a building permit. "Project Sponsor" shall include any subsequent responsible party.

CHANGES AND MODIFICATIONS

Changes to the approved plans may be approved administratively by the Zoning Administrator. Significant changes and modifications of conditions shall require Planning Commission approval of a new Conditional Use authorization.

Conditions of Approval, Compliance, Monitoring, and Reporting

PERFORMANCE

1. **Validity.** The authorization and right vested by virtue of this action is valid for three (3) years from the effective date of the Motion. The Department of Building Inspection shall have issued a Building Permit or Site Permit to construct the project and/or commence the approved use within this three-year period.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

2. **Expiration and Renewal.** Should a Building or Site Permit be sought after the three (3) year period has lapsed, the project sponsor must seek a renewal of this Authorization by filing an application for an amendment to the original Authorization or a new application for Authorization. Should the project sponsor decline to so file, and decline to withdraw the permit application, the Commission shall conduct a public hearing in order to consider the revocation of the Authorization. Should the Commission not revoke the Authorization following the closure of the public hearing, the Commission shall determine the extension of time for the continued validity of the Authorization.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

3. **Diligent pursuit.** Once a site or Building Permit has been issued, construction must commence within the timeframe required by the Department of Building Inspection and be continued diligently to completion. Failure to do so shall be grounds for the Commission to consider revoking the approval if more than three (3) years have passed since this Authorization was approved.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

4. **Extension.** All time limits in the preceding three paragraphs may be extended at the discretion of the Zoning Administrator where implementation of the project is delayed by a public agency, an appeal or a legal challenge and only by the length of time for which such public agency, appeal or challenge has caused delay.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

5. **Conformity with Current Law.** No application for Building Permit, Site Permit, or other entitlement shall be approved unless it complies with all applicable provisions of City Codes in effect at the time of such approval. *For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.*

DESIGN – COMPLIANCE AT PLAN STAGE

6. **Rooftop Mechanical Equipment.** Pursuant to Planning Code 141, the Project Sponsor shall submit a roof plan to the Planning Department prior to Planning approval of the building permit

application. Rooftop mechanical equipment, if any is proposed as part of the Project, is required to be screened so as not to be visible from any point at or below the roof level of the subject building.
For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

PROVISIONS

7. **Transit Impact Development Fee.** Pursuant to Planning Code Section 411 (formerly Chapter 38 of the Administrative Code), the Project Sponsor shall pay the Transit Impact Development Fee (TIDF) as required by and based on drawings submitted with the Building Permit Application. Prior to the issuance of a temporary certificate of occupancy, the Project Sponsor shall provide the Planning Director with certification that the fee has been paid.
For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

MONITORING

8. **Reporting.** As long as the use remains an Internet Services Exchange, the project sponsor shall submit to the Planning Department on an annual basis power use statements for the previous twelve-month period as provided by all suppliers of utilities and shall submit a written annual report to the Department of Environment and the Planning Department which shall state: (a) the annual energy consumption and fuel consumption of all tenants and occupants of the Internet Services Exchange; (b) the number of all diesel generators located at the site and the hours of usage, including usage for testing purposes; (c) evidence that diesel generators at the site are in compliance with all applicable local, regional, state and federal permits, regulations and laws; and (d) such other information as the Planning Commission may require.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

9. **Enforcement.** Violation of any of the Planning Department conditions of approval contained in this Motion or of any other provisions of Planning Code applicable to this Project shall be subject to the enforcement procedures and administrative penalties set forth under Planning Code Section 176 or Section 176.1. The Planning Department may also refer the violation complaints to other city departments and agencies for appropriate enforcement action under their jurisdiction.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

10. **Revocation due to Violation of Conditions.** Should implementation of this Project result in complaints from interested property owners, residents, or commercial lessees which are not resolved by the Project Sponsor and found to be in violation of the Planning Code and/or the specific conditions of approval for the Project as set forth in Exhibit A of this Motion, the Zoning Administrator shall refer such complaints to the Commission, after which it may hold a public hearing on the matter to consider revocation of this authorization.

For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

OPERATION

11. **Noise Control.** The premises shall be adequately soundproofed or insulated for noise and operated so that fixed-source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.
For information about compliance with the fixed mechanical objects such as rooftop air conditioning, restaurant ventilation systems, and motors and compressors with acceptable noise levels, contact the Environmental Health Section, Department of Public Health at (415) 252-3800, www.sfdph.org.

12. **Sidewalk Maintenance.** The Project Sponsor shall maintain the main entrance to the building and all sidewalks abutting the subject property in a clean and sanitary condition in compliance with the Department of Public Works Streets and Sidewalk Maintenance Standards.
For information about compliance, contact Bureau of Street Use and Mapping, Department of Public Works, 415-695-2017, http://sfdpw.org.

13. **Community Liaison.** Prior to issuance of a building permit to construct the project and implement the approved use, the Project Sponsor shall appoint a community liaison officer to deal with the issues of concern to owners and occupants of nearby properties. The Project Sponsor shall provide the Zoning Administrator with written notice of the name, business address, and telephone number of the community liaison. Should the contact information change, the Zoning Administrator shall be made aware of such change. The community liaison shall report to the Zoning Administrator what issues, if any, are of concern to the community and what issues have not been resolved by the Project Sponsor.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

PROJECT SPONSOR'S SUBMITTAL
IN SUPPORT OF CONDITIONAL USE APPLICATION
(Planning Code Section 303(h))

for

PRE-EXISTING LEGITIMIZED INTERNET SERVICES USE AT 435-437 POTRERO AVENUE (BLOCK 3974, LOT 022)

APPLICANT:
INDUSTRY CAPITAL INTERNET INFRASTRUCTURE, LLC

PLANNING DEPARTMENT CASE NO. 2013.0477C
HEARING DATE: June 13, 2013

Attorneys for Applicant:

REUBEN, JUNIUS & ROSE, LLP
One Bush Street, Suite 600, San Francisco, CA 94104
Tel No.: (415) 567-9000 Fax No.: (415) 399-9480

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A. INTRODUCTION

Industry Capital Internet Infrastructure, LLC ("Applicant") received a Letter of Legitimization from the Zoning Administrator ("ZA Legitimization Letter")") for the pre-existing Internet Services Use at 435-437 Potrero Avenue, Block 3974/Lot 022 ("Property"). A copy of the ZA Legitimization Letter is attached to the Staff Report. The ZA Legitimization noted that a Conditional Use Authorization was also required for continuation of the use. The Applicant seeks Conditional Use Authorization ("Authorization") pursuant to the ZA Legitimization Letter. The Property is located at the east side of Highway 101 between 17th and Mariposa Streets, and is within the UMU Zoning District, and the 58-X Height and Bulk District.

The Conditional Use criteria are set forth in Planning Code Sections 303(c) and 303(h). The existing use supports and addresses the continued need for Internet Services for San Francisco's small business and start-up community by providing convenient, affordable access to the existing data center. The existing use meets all requirements of San Francisco's General Plan and Planning Code.

B. SITE INFORMATION

Street Address:	435-437 Potrero Avenue
Cross Streets:	17th Street and Mariposa Street
Assessor's Block/Lot:	3974/022
Zoning District:	UMU
Height/Bulk District:	58-X
Other Planning Areas:	None
Parcel Area Size:	4,996 square feet
Existing Improvements:	Two-story structure improved with electrical and other upgrades for existing Internet Services use
Existing Use:	Internet Services

C. PROJECT SUMMARY

Proposed Use:	Continuation of existing Internet Services Use
Building Height:	30 feet
Gross Square Footage:	10,000 square feet
Number of Stories:	2 stories

D. DESCRIPTION OF THE BUILDING AND EXISTING USE

The building is located on a rectangular lot on the east side of Potrero Avenue between 17th Street and Mariposa Streets. The Site is within the UMU Zoning District. Plans of the existing building are attached as **Exhibit A.**

The building was constructed in 1950 and significantly improved in 2000 for use as an Internet Services Center operated by RCN (which later became Astound Networks). The building is fully equipped for this use. No changes to the exterior of the building are proposed, except for additional screening on the roof to cover the existing mechanical equipment.

In contrast to the larger Internet Services centers that are in existence in San Francisco, this site is ideally suited to serve small customers in the City – much like a print shop or a similar light industrial use but with a 21st century application. In the City, there is currently no independent provider of Internet Service data center except for Digital Realty, a multi-billion dollar development company, which owns two large facilities at 365 Main Street and 200 Paul Street. The Property represents a local choice for the San Francisco small business community. The building's central location is ideal for local businesses. Additionally, by continuing the existing use with its infrastructure intact, the business will not require construction of a new facility.

The Applicant will focus on local retail business customers whereas some of the larger facilities that have been built in the City are focused on much larger, wholesale clients. The size of the facility is small compared to the others operating the City. The proximity of this facility to the city center will help attract and retain small businesses and start-up companies.

We expect this data center to promote further job growth in San Francisco as the business users will have a platform to grow their businesses with a local data center provider, which we believe can provide a higher degree of service than the larger national and multi-national platforms.

E. COMPLIANCE WITH SECTION 303 (CONDITIONAL USE) CRITERIA

Under Planning Code section 303(c), the Planning Commission shall approve the application and authorize a conditional use if the facts presented establish the following:

1. Desirability and Compatibility of Project

Planning Code section 303(c) (1) requires that facts be established which demonstrate the following:

> **That the proposed use or feature, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable for, and compatible with, the neighborhood or the community.**

The existing use is compatible with the neighborhood and the community. The Applicant plans to use the existing building (built in 1950). No exterior changes are proposed except a roof screen upgrade. The height and scale of this building are in line with the adjacant

properties. Additionally, at 10,000 sq. ft., the data center is in scale with many of the surrounding small businesses.

The Applicant proposes to use the existing facility to serve the small business community of San Francisco with co-location services. Co-location services means that servers and communications equipment which are either housed at the customer's premises or which would be housed in other facilities would be located inside the 435-437 Potrero building. Co-location has the benefit of increasing the energy efficiency of the equipment. Much of the equipment would otherwise be spread out among offices and basements.

Typically, the customers who choose to maintain a presence in the City do so because of a real need to be close to the location of their servers and back-up computers. The customers are typically small-to-medium sized businesses who cannot afford to build dedicated data centers.

At any given time there will be 4-6 people employed at the facility with 2-4 employees of customers rotating on and off-site at any given time.

2. Effect of Project on Health, Safety, Convenience or General Welfare

Planning Code section 303(c)(2) requires that facts be established which demonstrate the following:

That such use or feature as proposed will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity, or injuries to property, improvements or potential development in the vicinity, with respect to aspects including but not limited to the following:

(a) The nature of the proposed site, including its size and shape, and the proposed size, shape and arrangement of the structure.

The CU Authorization will not be detrimental to the health, safety or general welfare of the persons or business in the vicinity. The use has been in operation at the site for 13 years.

(b) The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading

The 4-6 employees and the customers are expected to arrive by foot, bicycle, or public transit. Given the central location of the building and proximity to public transit, we do not expect any traffic issues.

(c) The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor.

The HVAC equipment consists of seven fan units that comply with the San Francisco Noise Ordinance. The HVAC equipment does not emit any dust or odors. The backup generator is located in the basement, and is used only in emergencies such as power outages.

(d) Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs.

An awning will be added to improve the entrance. Rooftop screening will be upgraded.

3. Compliance with the General Plan

Planning Code Section 303(c)(3) requires that facts be established that demonstrate the following:

That such use or feature as proposed will comply with the applicable provisions of this code and will not adversely affect the Master Plan.

The Project will affirmatively promote, is consistent with, and will not adversely affect the General Plan, as follows:

The objectives and policies of the Commerce Element of the General Plan are based on the premise that economic development activities in San Francisco must be designed to achieve economic vitality, among other things.

POLICY 4.11
Maintain an adequate supply of space appropriate to the needs of incubator industries.

Small, emerging industries in the City, many utilizing new technologies, are dependent on relatively inexpensive space accessible to prospective markets. Examples of these "incubator" type industries include electronic data processing firms, business services, apparel manufacturing and design, crafts manufacturing, etc. During the early stages of developments, while markets are being established, fixed costs such as rent and transportation must be kept at minimal levels. The South of Market area is currently serving as a functional area containing a supply of such spaces needed by new businesses. The maintenance of a reservoir of such spaces, which can fulfill these needs, is needed.

Economic Vitality

The first goal is to maintain and expand a healthy, vital and diverse economy which will provide jobs essential to personal well-being and revenues to pay for the services essential to the quality of life in the city.

POLICY 1.1
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development which has substantial undesirable consequences that cannot be mitigated.

In situations where proposed developments have no significant adverse environmental effects and will result in positive fiscal and employment benefits for residents, and where the developments otherwise meet planning objectives, they should be encouraged.

POLICY 2.1
Seek to retain existing commercial and industrial activity and to attract new such activity to the City.

POLICY 3.4
Assist newly emerging economic activities.

POLICY 4.1
Maintain and enhance a favorable business climate in the city.

The creation and maintenance of a positive relationship between city government and private industry is an important factor for many industries in choosing to stay or relocate.

F. COMPLIANCE WITH ADDITIONAL CONDITIONAL USE CRITERIA (SECTION 303(h))

The Planning Commission shall, in addition to the criteria set forth in Section 303(c) above, find that:

1) **The intensity of the use at this location and in the surrounding neighborhood is not such that allowing the use will likely foreclose the location of other needed neighborhood-serving uses in the area.**

The building is already constructed and has been in use for more than 13 years for Internet Services Use. We do not anticipate that the current use will preclude other uses in the area.

2) **The building in which the use is located is designed in discrete elements, which respect the scale of development in adjacent blocks, particularly any existing residential uses.**

The existing building is within the physical dimensions and scale of the surrounding neighborhood, and the design and layout is consistent with the surrounding architecture for commercial buildings on Potrero Avenue.

3) **Rooftop equipment on the building in which the use is located is screened appropriately.**

The rooftop equipment is not visible from street level (see **Exhibit B**). The equipment screen will be improved.

4) **The back-up power system for the proposed use will comply with all applicable federal state, regional and local air pollution controls.**

The building's backup generator complies with and is permitted by Bay Area Air Quality Management District permit number 21731.

5) **Fixed-source equipment noise does not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.**

The building's air cooled fans located on the roof will comply with the ambient noise levels, by utilizing the following technologies and methods to meet and exceed the noise control Ordinance:

i. Mufflers and Variable Frequency Drive fans and pumps.

ii. Sound wall / noise absorption

6) **The building is designed to minimize energy consumption, such as through the use of energy-efficient technology, including without limitation, heating, ventilating and air conditioning systems, lighting controls, natural ventilation and recapturing waste heat, and as such commercially available technology evolves.**

The equipment at the site is functioning well and can continue to be used as is. However, the Applicant, as part of its commitment to energy efficiency, will deploy the following energy saving technologies:

i. Energy efficient Toshiba G9000 UPS systems increases the efficiency of the current uninterruptible power system from 80% efficiency to 96.5% (reduces energy usage).

ii. Deployment of cold isle containment, reducing the power associated with mechanical cooling by 25-30%.

iii. Deployment of air-side economization will reduce the cooling power consumption by an estimated 50-60%.

In aggregate, the above will reduce power consumption by approximately 45% relative to the existing use.

7) **The Applicant has examined the feasibility of supplying and, to the extent feasible, will supply all or a portion of the building's power needs through on-site power generation, such as through the use of fuel cells or co-generation.**

The Applicant has studied the feasibility of utilizing onsite Co-gen and fuel cells. Due to the limited lot size, such power generation is not possible.

8) **The Applicant shall have submitted design capacity and projected power use of the building as part of the conditional use application.**

The building is served by PG&E with a 1,000 mega volt amperes ("MVA") dedicated underground feed transformer that is located inside the building. The maximum capacity shall not exceed 800 KW. The following is the estimated power use for the building

Power Use	2013	2014	2015	2016
Total capacity in KWh	36,000	216,000	360,000	540,000

As a condition of approval, and so long as the use remains an Internet Services Exchange, the Applicant shall submit to the Planning Department on an annual basis power use statements for the previous twelve-month period as provided by all suppliers of utilities and shall submit a written annual report to the Department of Environment and the Planning Department which shall state: (a) the annual energy consumption and fuel consumption of all tenants and occupants of the Internet Services Exchange; (b) the number of all diesel generators located at the site and the hours of usage, including usage for testing purposes; (c) evidence that diesel generators at the site are in compliance with all applicable local, regional, state and federal permits, regulations and laws; and (d) such other information as the Planning Commission may require.

The building is only 10,000 square feet in size, with 800 KWh of dedicated power and a single 400 KWh diesel standby backup generator.

G. MASTER PLAN PRIORITY POLICIES

Planning Code Section 101.1 establishes the following eight priority planning policies and requires review of permits for consistency with said policies. The Project and this Section 329 Application are consistent with each of these policies as follows:

1. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced.

The continuance of the existing use will benefit existing neighborhood-serving retail uses by keeping employees and customers in the neighborhood.

2. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods.

The Applicant will not have any effect on housing. The existing use is a part of the neighborhood character.

3. That the City's supply of affordable housing be preserved and enhanced.

The application will have no effect on affordable housing.

4. That commuter traffic not impede Muni transit service or overburden our streets or neighborhood parking.

The application will have no effect on commuter traffic or Muni.

5. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced.

No commercial office development is proposed.

6. That the City achieves the greatest possible preparedness to protect against injury and loss of life in an earthquake.

The application is consistent with this policy.

7. That landmarks and historic buildings be preserved.

The Property is not a landmark or historically rated building and the Property is not located within a historic district. The Project will have no impact on landmarks or historic buildings.

8. That our parks and open space and their access to sunlight and vistas be protected from development.

The Property is not adjacent to any parks or public open space, and will therefore have no impact on access to sunlight or vistas.

H. CONCLUSION

The application satisfies the objectives and policies of the General Plan, the Planning Code, and the ZA Legitimization Letter, and should be approved.

Dated: May 29, 2013

REUBEN, JUNIUS & ROSE, LLP
Attorneys for Owner and Applicant

By: _____
David Silverman

LIST OF EXHIBITS

Exhibit A – Floor Plans

ABBREVIATIONS

&	AND	HOR.	HORIZONTAL
@	AT	HT.	HEIGHT
℄	CENTERLINE	HM.	HOLLOW METAL
ACOUS.	ACOUSTICAL	I.D.	INSIDE DIAMETER
ADJ.	ADJACENT	I.G.	INSULATED GLASS
A.F.F.	ABOVE FINISH FLOOR	INSUL.	INSULATION
A.F.G.	ABOVE FINISH GRADE	INT.	INTERIOR
AL.	ALUMINUM	LAM.	LAMINATE
APPROX.	APPROXIMATE	LAV.	LAVATORY
ARCH.	ARCHITECTURAL	LT.	LIGHT
BD.	BOARD	K.E.C.	KITCHEN EQUIPMENT CONTRACTOR
BLDG.	BUILDING	MAX.	MAXIMUM
BK.	BLOCK	M.C.	MECHANICAL CONTRACTOR
BLKG.	BLOCKING	MECH.	MECHANICAL
BM.	BEAM	M.E.P.	MECHANICAL, ELECTRICAL, PLUMBING
B.O.	BOTTOM OF	MFR.	MANUFACTURER
C.B.	CATCH BASIN	MGR.	MANAGER
CEM.	CEMENT	MIN.	MINIMUM
CER.	CERAMIC	MISC.	MISCELLANEOUS
CL.	CLOSET	MTD.	MOUNTED
CLR.	CLEAR	MTL.	METAL
CLG.	CEILING	N.I.C.	NOT IN CONTRACT
COL.	COLUMN	N.I.K.E.C.	NOT IN KITCHEN EQUIP. CONTRACT
CONC.	CONCRETE	N.T.S.	NOT TO SCALE
CONN.	CONNECTION	O.C.	ON CENTER
CONST.	CONSTRUCTION	O.D.	OUTSIDE DIAMETER
CONT.	CONTINUOUS	OPP.	OPPOSITE
CONTR.	CONTRACTOR	P.C.	PLUMBING CONTRACTOR
CNTR.	COUNTER	PL.	PLATE
CTR.	CENTER	PLAM.	PLASTIC LAMINATE
D.F.	DOUGLAS FIR	PLAS.	PLASTER
DBL.	DOUBLE	PLYWD.	PLYWOOD
DEPT.	DEPARTMENT	PR.	PAIR
DET.	DETAIL	P.T.	PRESSURE TREATED
DIA.	DIAMETER	PTD.	PAINTED
DIM.	DIMENSION	R.	RADIUS
DISP.	DISPENSER	R.D.	ROOF DRAIN
DN.	DOWN	REF.	REFRIGERATOR
D.S.	DOWN SPOUT	RM.	ROOM
DWG.	DRAWING	RWD.	REDWOOD
(E)	EXISTING	R.W.L.	RAINWATER LEADER
EA.	EACH	S.A.	SMOKE ALARM
E.C.	ELECTRICAL CONTRACTOR	S.C.	SOLID CORE
EL.	ELEVATION	SCHED.	SCHEDULE
ELEC.	ELECTRICAL	SECT.	SECTION
ELEV.	ELEVATOR	SHT.	SHEET
EMER.	EMERGENCY	SIM.	SIMILAR
ENCL.	ENCLOSURE	SPEC.	SPECIFICATION
EQ.	EQUAL	SQ.	SQUARE
EQP.	EQUIPMENT	S&R	SHELF AND ROD
EXT.	EXTERIOR	S.S.	STAINLESS STEEL
F.A.	FIRE ALARM	STD.	STANDARD
F.D.	FLOOR DRAIN	STL.	STEEL
F.F.	FINISH FACE	STR.	STRUCTURE
F.R.P.	FIBER REINFORCED PANEL	SUSP.	SUSPENDED
F.T.	FIRE TREATED	T.V.	TELEVISION
FDN.	FOUNDATION	T.O.	TOP OF
FIN. FL.	FINISH FLOOR	TRAN.	TRANSOM
FLUOR.	FLUORESCENT	TYP.	TYPICAL
FPRF.	FIRE PROOF	U.O.N.	UNLESS OTHERWISE NOTED
FT.	FOOT/ FEET	V.I.F.	VERIFY IN FIELD
FTG.	FOOTING	VERT.	VERTICAL
GA.	GAUGE	W	WITH
GALV.	GALVANIZED	W.C.	WATER CLOSET
G.B.	GRAB BAR	WD.	WOOD
G.C.	GENERAL CONTRACTOR	W/O	WITHOUT
GL.	GLASS	W.R.	WATER RESISTANT
GND.	GROUND	WT.	WEIGHT
GYP.	GYPSUM	WWM	WELDED WIRE MESH

SYMBOLS

- DOOR NUMBER
- WINDOW NUMBER
- REFERENCE TO FINISH
- DETAIL REFERENCE / SHEET NUMBER
- ELEVATION REFERENCE / SHEET NUMBER
- NOTATION
- DISCONTINUITY
- REFERENCE TO LIGHT FIXTURE
- REFERENCE TO FIXTURE / FURNITURE
- DATUM POINT
- SECTION REFERENCE
- REVISION
- DIMENSION TO FACE OF STUD AND BUILDING (U.O.N.)
- ALIGN FINISH SURFACES

GENERAL NOTES

1. SCOPE DOCUMENTS: THESE DRAWINGS INCLUDE THE GENERAL SCOPE OF THE PROJECT IN TERMS OF THE GENERAL CONCEPT, THE DIMENSIONS OF THE BUILDING, THE MAJOR ARCHITECTURAL ELEMENTS AND THE TYPE OF STRUCTURAL, MECHANICAL, ELECTRICAL SYSTEMS, ON THE BASIS OF THE GENERAL SCOPE INDICATED ON DRAWINGS, THE CONTRACTOR SHALL PURSUE ALL THE WORK REQUIRED FOR THE PROPER EXECUTION AND COMPLETION OF THE WORK. APPROVAL OF THE CITY INSPECTOR DOES NOT CONSTITUTE AUTHORITY TO DEVIATE FROM THE PLANS AND SPECIFICATIONS.

2. DRAWINGS INDICATE GENERAL AND TYPICAL DETAILS OF CONSTRUCTION. WHERE CONDITIONS ARE NOT SPECIFICALLY INDICATED BUT ARE OF SIMILAR CHARACTER TO DETAILS SHOWN, DETAILS OF CONSTRUCTION SHALL BE USED SUBJECT TO THE REVIEW AND APPROVAL OF THE ARCHITECT.

3. THE CONTRACTOR SHALL PERFORM IN A MANNER CONFORMING TO APPLICABLE REGULATIONS, AND REQUIREMENTS OF ALL GOVERNING AGENCIES AS WELL AS STANDARD INDUSTRY PRACTICES.

4. IT SHALL BE THE RESPONSIBILITY OF THE CONTRACTOR SHALL VERIFY ALL DIMENSIONS AND SITE CONDITIONS BEFORE STARTING WORK. SHOULD A DISCREPANCY APPEAR IN THE SPECIFICATIONS OR DRAWINGS, OR IN THE WORK DONE BY OTHERS FROM THE CONTRACT DOCUMENTS, OR SHALL A FACT ANY DOUBT, NOTIFY THE ARCHITECT AND OWNER IN WRITING AT ONCE FOR INSTRUCTIONS TO PROCEED. IF THE CONTRACTOR PROCEEDS WITH THE WORK AFFECTED WITHOUT INSTRUCTIONS FROM THE ARCHITECT, THE CONTRACTOR SHALL HAVE GOOD FAITH RESPONSIBILITY FOR ANY AND ALL COSTS RESULTING FROM THE CONTRACTOR'S FAILURE TO REPORT SUCH DISCREPANCIES. IF A CONFLICT OCCURS IN OR BETWEEN THE DRAWINGS AND SPECIFICATIONS, OR WHERE DETAIL INFORMATION ON THE CONTRACT DRAWINGS HAVE BEEN OMITTED, THE CONTRACTOR IS DEEMED TO HAVE ESTIMATED THE MOST EXPENSIVE MATERIALS AND CONSTRUCTION METHODS INVOLVED, UNLESS A WRITTEN DECISION FROM THE ARCHITECT / OWNER HAS BEEN OBTAINED WHICH DESCRIBES ANOTHER METHOD AND/OR MATERIALS ON WHICH THE ORIGINAL BID IS APPROPRIATELY BASED.

5. THE CONTRACTOR SHALL CONFINE UNUSUAL OPERATIONS ON THE SITE TO AREAS PERMITTED BY THE OWNER. THE JOB SITE SHALL BE MAINTAINED IN A CLEAN, ORDERLY CONDITION FREE OF DEBRIS AND LITTER, AND IT SHALL NOT BE UNNECESSARILY ENCUMBERED WITH ANY MATERIALS OR EQUIPMENT. EACH SUBCONTRACTOR SHALL PROMPTLY UPON COMPLETION OF EACH PHASE OF WORK WHICH SHALL REMOVE ALL TRASH AND DEBRIS AS A RESULT OF HIS/HER OPERATION.

6. ALL MATERIALS STORED ON THE SITE SHALL BE PROPERLY STACKED AND PROTECTED TO PREVENT DAMAGE AND DETERIORATION UNTIL USE. FAILURE TO PROTECT MATERIALS MAY BE CAUSE FOR REJECTION OF WORK.

7. PROVIDE ALL NECESSARY BLOCKING, BRACING AND FRAMING FOR LIGHT FIXTURES, ELECTRICAL UNITS, PANELS, HANDRAILS AND ALL OTHER ITEMS AS REQUIRED SAME.

8. ALL MATERIALS SHALL BE HANDLED AND INSTALLED PER THE MANUFACTURER'S SPECIFICATIONS AND RECOMMENDATIONS.

9. STORAGE OR DISPENSING OR USE OF ANY FLAMMABLE OR COMBUSTIBLE LIQUIDS, FLAMMABLE GASES AND HAZARDOUS MATERIALS SHALL STRICTLY WITH THE FIRE CODE REGULATIONS.

10. NO MATERIALS SHALL BE STORED ON PUBLIC PROPERTY UNLESS AN ENCROACHMENT PERMIT IS FIRST OBTAINED FROM THE PUBLIC WORKS DEPARTMENT.

11. THE CONTRACTOR SHALL DO ALL CUTTING, FITTING, OR PATCHING OF WORK THAT MAY BE REQUIRED TO MAKE ITS SEVERAL PARTS FIT TOGETHER PROPERLY AND SHALL NOT ENDANGER ANY OTHER WORK BY CUTTING, EXCAVATING, OR OTHERWISE ALTERING THE TOTAL WORK OR ANY PART OF IT. ALL PATCHING, REPAIRING, AND REPLACING MAY PART OF IT. ALL PATCHING, REPAIRING, AND REPLACING OF MATERIALS AND SURFACES, BUT OR DAMAGED IN EXECUTION OF WORK SHALL BE DONE WITH APPLICABLE MATERIALS SO THAT SURFACES REPLACED WILL UPON COMPLETION MATCH SURROUNDING SIMILAR SURFACES.

12. SHOP DRAWINGS: SHOP DRAWINGS ARE TO BE PREPARED BY PERSONS SUITABLY TRAINED AND EXPERIENCED IN THE TYPE OF WORK INVOLVED. ALL SHOP DRAWINGS SHALL BE REVIEWED AND APPROVED BY THE CONTRACTOR PRIOR TO SUBMISSION TO THE ARCHITECT. THE CONTRACTOR SHALL DETERMINE AND VERIFY ALL QUANTITIES, DIMENSIONS, SPECIFICATIONS, CATALOG NUMBERS AND SIMILAR DATA WITH RESPECT THERETO. THE CONTRACTOR SHALL ALSO COORDINATE EACH SHOP DRAWING WITH THE REQUIREMENTS OF THE WORK AND ALL OTHER SHOP DRAWINGS. THE CONTRACTOR SHALL SUBMIT TO THE ARCHITECT FOR REVIEW ONE COMPLETE SET OF ALL SHOP DRAWINGS. THE ARCHITECT'S REVIEW OF SHOP DRAWINGS SHALL BE ONLY FOR GENERAL CONFORMANCE WITH THE DESIGN CONCEPT OF THE PROJECT AND COMPLIANCE WITH THE INFORMATION GIVEN IN THE CONTRACT DOCUMENTS. THE CONTRACTOR SHALL BE RESPONSIBLE FOR DIMENSIONS TO BE CONFIRMED AND CORRELATED AT THE JOB SITE, FOR INFORMATION THAT PERTAINS SOLELY TO THE FABRICATION PROCESSES OR TECHNIQUES OF CONSTRUCTION AND INSTALLATION, AND FOR COORDINATION OF THE WORK OF ALL SUBCONTRACTS. REVIEW OF A SPECIFIC ITEM SHALL NOT INDICATE THAT THE ARCHITECT HAS REVIEWED THE ENTIRE ASSEMBLY OF WHICH THE ITEM IS A COMPONENT. THE CONTRACTOR SHALL BE RESPONSIBLE FOR ANY DEVIATIONS FROM THE CONTRACT DOCUMENTS NOT BROUGHT TO THE ATTENTION OF THE ARCHITECT IN WRITING BY THE CONTRACTOR. THE CONTRACTOR SHALL NOT BE RELIEVED OF RESPONSIBILITY FOR ERRORS OR OMISSIONS IN SHOP DRAWINGS BY THE ARCHITECT'S REVIEW OF THEM. THE CONTRACTOR SHALL MAKE ANY CORRECTIONS REQUIRED BY THE ARCHITECT AND RESUBMIT UNTIL REVIEWED. THE CONTRACTOR SHALL DIRECT SPECIFIC ATTENTION, IN WRITING OR ON RESUBMITTED SHOP DRAWINGS, TO REVISIONS OTHER THAN THE CORRECTIONS REQUESTED BY THE ARCHITECT ON PREVIOUS SUBMISSIONS. THE CONTRACTOR SHALL MAKE NO PORTION OF THE WORK REQUIRING SHOP DRAWINGS OR SAMPLES SUBMISSION UNTIL THE SHOP DRAWINGS OR SAMPLES HAVE BEEN REVIEWED BY THE ARCHITECT. ALL SUCH PORTIONS OF THE WORK SHALL BE IN ACCORDANCE WITH APPROVED SHOP DRAWINGS AND SAMPLES. NO PRODUCTS OF SHALL NOT PROCEED WITH THE INSTALLATION OF ANY SHOP DRAWING FOR A SPECIFIC SECTION OF SPECIFICATIONS UNLESS THE SHOP DRAWING FOR THAT SECTION AND ALL RELATED SHOP DRAWINGS HAVE BEEN SUBMITTED TO THE ARCHITECT AND CONSIDERED SATISFACTORILY. THE REVIEW AND ACCEPTANCE OF ANY SHOP DRAWING SHALL NOT BE CONSTRUED AS A RELEASE OF THE CONTRACTOR'S OBLIGATIONS UNDER THE CONTRACT DOCUMENTS.

13. DIMENSIONS:
   A. ALL DIMENSIONS SHALL BE VERIFIED IN THE FIELD.
   B. ALL DIMENSIONS SHOWN ARE TO THE CENTERS OF COLUMNS AND GRIDS, FACE OF CONCRETE / STONE / BRICK WALLS, EDGE OF SLAB, FACE OF FINISH UNLESS OTHERWISE NOTED.
   C. SILL AND HEADER DIMENSIONS ARE FROM FINISHED FLOOR OR SLAB TO THE FINISHED FACE OF CEILING.
   D. DIMENSIONS AND ELEVATIONS ARE TO THE TOP OF CONCRETE SLAB OR OTHER HARD SURFACE MATERIALS, NOT TO THE TOP OF FLOOR COVERINGS OR FLOORING U.O.N.
   E. DO NOT SCALE DRAWINGS - FOLLOW DIMENSIONS.

14. THE CONTRACTOR SHALL BE RESPONSIBLE FOR COORDINATING THE WORK OF ALL THE TRADES.

15. THE BUILDING INSPECTOR SHALL BE NOTIFIED PRIOR TO START OF CONSTRUCTION.

16. FLOOR ELEVATIONS INDICATED ARE TO THE TOP OF STRUCTURAL TOPPING SLAB OR SLAB SLAB UNLESS OTHERWISE NOTED.

17. IDENTIFICATION OR POSTING OF REQUIRED FIRE LOCKS SHALL BE PROVIDED AS DIRECTED BY THE FIRE DEPARTMENT.

18. THE CONTRACTOR SHALL PROVIDE TEMPORARY EXIT SIGNS TO ASSURE A MEANS OF EGRESS DURING CONSTRUCTION.

19. PROVIDE SIGNAGE AS REQUIRED ON DRAWINGS AND/OR REQUIRED BY CODE.

20. AT LEAST ONE FIRE EXTINGUISHER WITH A MINIMUM RATING OF 4-A:40-B:C SHALL BE PROVIDED OUTSIDE OF EACH MECHANICAL, ELECTRICAL, OR BOILER ROOM.

APPLICABLE CODES

2019 CALIFORNIA BUILDING CODE WITH OAKLAND AMENDMENTS
2019 CALIFORNIA RESIDENTIAL CODE WITH OAKLAND AMENDMENTS
2019 CALIFORNIA MECHANICAL CODE WITH OAKLAND AMENDMENTS
2019 CALIFORNIA PLUMBING CODE WITH OAKLAND AMENDMENTS
2019 CALIFORNIA ELECTRICAL CODE WITH OAKLAND AMENDMENTS
2019 CALIFORNIA ENERGY CODE WITH OAKLAND AMENDMENTS
2019 CALIFORNIA GREEN BUILDING STANDARDS CODE

SCOPE OF WORK

TWO-STORY STRUCTURE IMPROVED WITH ELECTRICAL AND OTHER UPGRADES FOR EXISTING INTERNET SERVICE USE

PROJECT INFORMATION

LOCATION:	435 POTRERO AVE. SAN FRANCISCO, CA 94110
LOT DIMENSIONS:	25 FT. X 100 FT.
LOT AREA:	2,500 S.F.
APN:	3974022
ZONING DISTRICT:	UMU - URBAN MIXED USE
CONSTRUCTION TYPE:	V
# OF STORIES:	2
BUILDING HEIGHT PROPOSED:	30'-0"

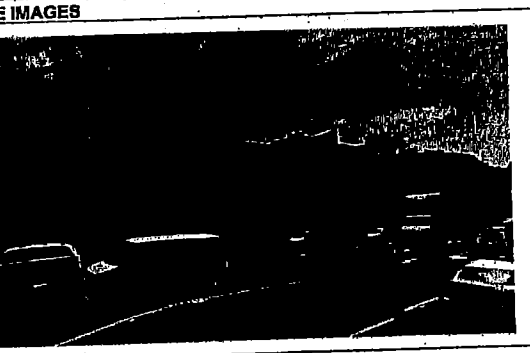
GROSS BUILDING AREA

Level	Area
Level 1	4999 SF
Level 2	5000 SF
	9999 SF

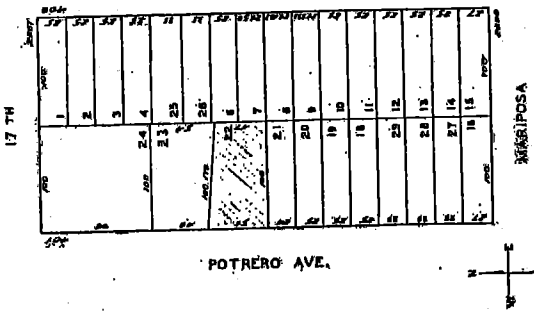
SHEET INDEX

A_0.0 COVER
A_1.0 SITE PLAN
A_2.0 FLOORPLAN
A_3.0 ELEVATION

SITE IMAGES



VICINITY MAP



architecture

435 POTRERO AVE.
SAN FRANCISCO, CA 94110

No.	Description	Date

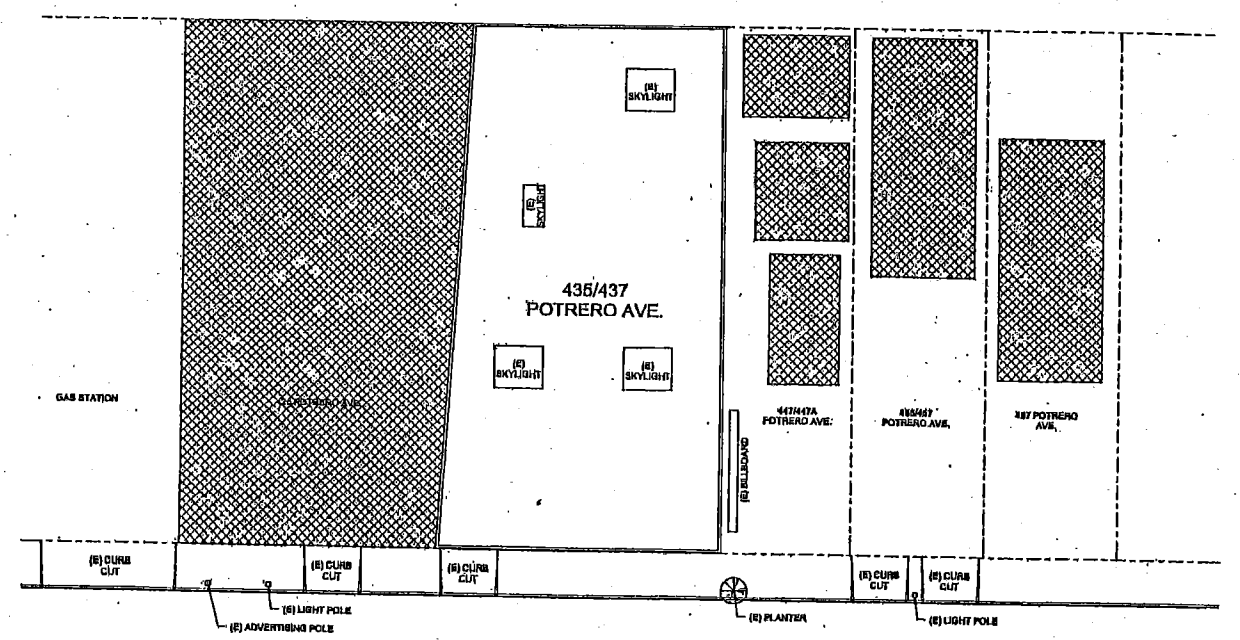
PROJECT INFORMATION

Project number	4590813
Date	2019.08.30
Drawn by	CKO
Checked by	MB

A_0.0

Scale: 12" = 1'-0"

887



1 Site
1" = 10'-0"

architecture

435 POTRERO AVE.
SAN FRANCISCO, CA 94110

No.	Description	Date

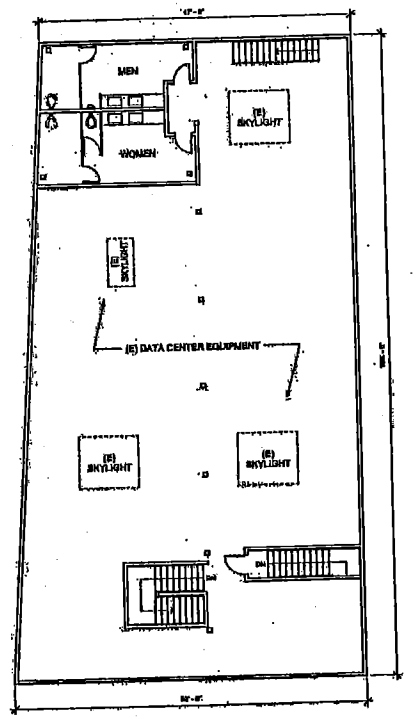
SITE PLAN

Project number	435/2013
Date	2013.05.28
Drawn by	CKC
Checked by	MB

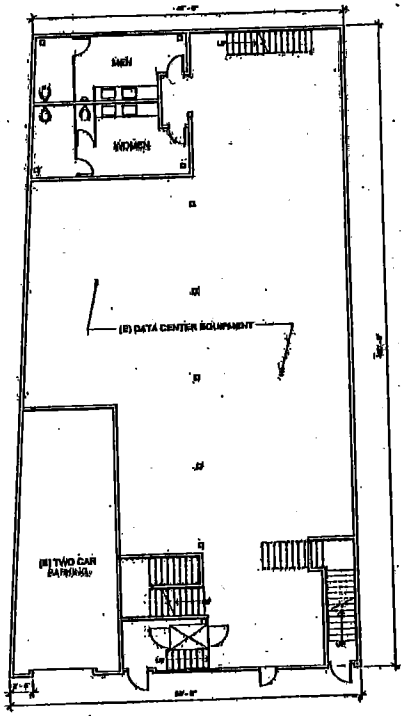
A_1.0

Scale 1" = 10'-0"

888



② Level 2
1/8" = 1'-0"



① Level 1
1/8" = 1'-0"

WALL LEGEND
EXISTING WALL
DEMOLISH WALL
NEW WALL
OBJECT ABOVE

architecture

435 POTRERO AVE.
SAN FRANCISCO, CA 94110

No.	Description	Date

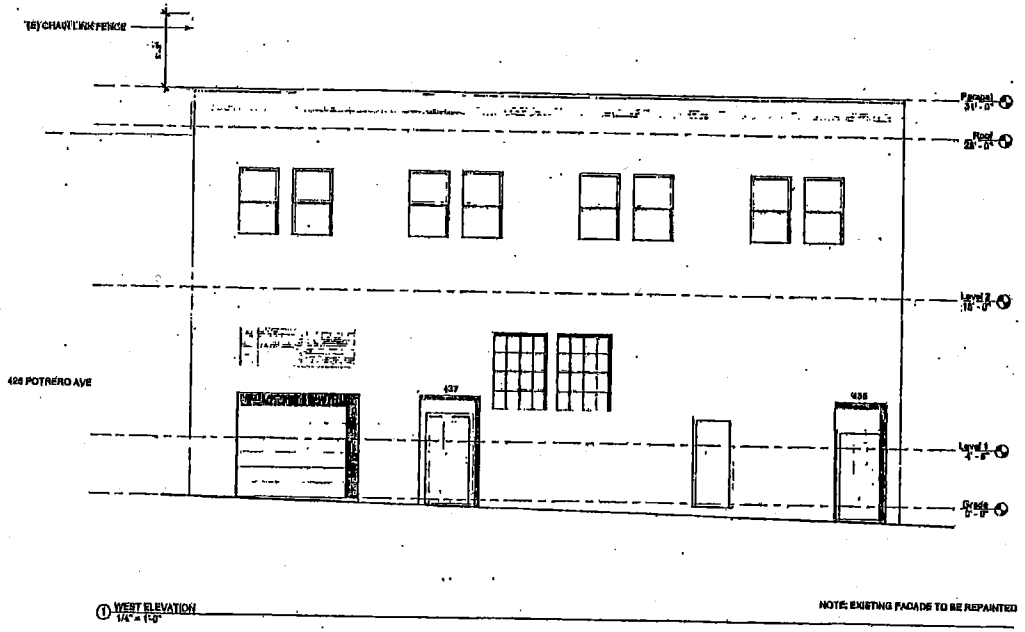
PROPOSED FLOORPLANS - NO CHANGES

Project number	4503015
Date	2013.05.29
Drawn by	CHO
Checked by	MR

A 2.0

Scale: As Indicated

889



① WEST ELEVATION
1/4" = 1'-0"

architecture

435 POTRERO AVE.
SAN FRANCISCO, CA 94110

No.	Description	Date

EXISTING ELEVATION - NO CHANGES

Project number	4352013
Date	2013.05.28
Drawn by	MB
Checked by	CKC

A_3.0

Scale 1/4" = 1'-0"

890

SAN FRANCISCO
PLANNING DEPARTMENT

Letter of Legitimization

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

June 4, 2013

David Silverman
Reuben, Junius & Rose LLP
1 Bush Street, Suite 600
San Francisco, CA 94104

Site Address:	435-437 Potrero Avenue
Assessor's Block/Lot:	3974/022
Zoning District:	UMU
Staff Contact:	Corey Teague, (415) 575-9081 or corey.teague@sfgov.org

Dear Mr. Silverman:

This letter is in response to your request for a Letter of Legitimization per Planning Section 179.1 regarding the property at 435-437 Potrero Avenue. This parcel is located in the UMU Zoning District and a 58-X Height and Bulk District. The request is to legitimize the existing "Internet Services Exchange" use on the entirety of both floors in the existing two-story building totaling approximately 10,000 gross square feet.

Procedural Background

The Department received the request for legitimization of office space at 435-437 Potrero Avenue on October 15, 2012. Staff reviewed the request and associated materials and the Zoning Administrator issued a 30-day public notice of the intent to issue the Letter of Legitimization on April 15, 2013. The public notice also included a draft letter for review, and was sent to 1) all owners of property within 300 feet of the subject property, 2) all current tenants of the subject property, and 3) all individuals and neighborhood associations that had requested to receive such notice. Additionally, notice was posted on the site during the notification period. The notification period expired on May 15, 2013.

Eligibility

The land use proposed for legitimization is deemed eligible if it meets the following criteria:

i. The land use existed as of the date of the application;

Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the entirety of the subject building has been used as an "Internet Services Exchange" (d.b.a. RCN Telecom Services and Astound) since approximately May 30, 2000.

ii. The land use would have been principally permitted or permitted with conditional use authorization under provisions of the Planning Code that were effective on April 17, 2008;

Prior to the Eastern Neighborhoods rezoning, the subject property was located in the M-1 Zoning District, which permitted an Internet Services Exchange with a Conditional Use Authorization.

iii. The land use would not be permitted under current provisions of the Planning Code;

The subject property is located in the UMU Zoning District, which prohibits an Internet Services Exchange.

iv. The land use either has been (1) regularly operating or functioning on a continuous basis for no less than 2 years prior to the effective date of Planning Code Section 179.1, or (2) functioning in the space since at least April 17, 2008, and is associated with an organization, entity or enterprise which has been located in this space on a continuous basis for no less than 2 years prior to the effective date of Planning Code Section 179.1;

Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the entirety of the subject building has been used as an "Internet Services Exchange" (d.b.a. RCN Telecom Services and Astound) since approximately May 30, 2000.

v. The land use is not accessory to any other use;

The subject Internet Services Exchange is the principal use and is not accessory to any other uses within the building.

vi. The land use is not discontinued and abandoned pursuant to the provisions of Planning Code Section 183 that would otherwise apply to nonconforming uses.

Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the building remained occupied until June 2010. Since that time, no new use was established in the building, and it has been actively marketed as an Internet Services Exchange. Therefore, the Internet Services Exchange use was not discontinued and abandoned pursuant to the provisions of Planning Code Section 183.

Determination

It is my determination that the request for legitimization of the existing approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors in the existing two-story building as shown on the submitted plans meet all the required criteria of Planning Code Section 179.1. Therefore, the subject gross floor area is deemed to be a legitimate Internet Services Exchange space as defined in Planning Code Section 209.6(c). A Notice of Special Restrictions shall be filed on the subject property documenting the specific building area legitimized as Internet Services Exchange in this letter and

documented on the submitted plans on file with this request, prior to the approval of a site or building permit establishing such Internet Services Exchange. This determination is not a project approval, or in any way a substitute for the Building Permit Application for the change of use to Internet Services Exchange.

Please note that a Conditional Use Authorization and subsequent Building Permit Application must be approved to legally convert the subject gross floor area to Internet Services Exchange. Additionally, the relevant impact fees outlined in Section 179.1(g), and elsewhere in the Municipal Code, shall be assessed as part of the Building Permit Application.

APPEAL: If you believe this determination represents an error in interpretation of the Planning Code or abuse in discretion by the Zoning Administrator, an appeal may be filed with the Board of Appeals within 15 days of the date of the Letter of Legitimization. For information regarding the appeals process, please contact the Board of Appeals located at 1650 Mission Street, Room 304, San Francisco, or call (415) 575-6880.

Sincerely,

Scott F. Sanchez
Zoning Administrator

cc: Corey Teague, Planner
Philip Blix, Property Owner
William Spencer
Planning Commissioners
All Parties on the Notification Request List

I:Current Planning\SE Team\ EASTERN NEIGHBORHOODS\EN Legitimization\435 Potrero Ave\Draft LoL.doc

REUBEN & JUNIUS, LLP

Eastern Neighborhoods Legitimization Application §179.1

October 15, 2012

ID #10741 (SE) J BANALES
CK # 20855 $586 -
NEEDS $13 MORE

By Hand Delivery

Mr. Scott Sanchez
Zoning Administrator
1650 Mission Street, 4th floor
San Francisco, CA 94103

Re: Eastern Neighborhood Legitimization Application
Planning Code Section 179.1
435-437 Potrero Avenue (Block 3974, Lot 022)
Our File No.: 7424.01

Dear Mr. Sanchez:

Enclosed please find the application and supporting materials, including two additional copies, for an Eastern Neighborhoods ("EN") Legitimization request under Planning Code Section 179.1 for the property located at 435-437 Potrero Avenue ("Property"). We are filing this application on behalf of F.W. Spencer & Son, Inc., the owner of the Property.

A. Introduction and Background.

The Property is located at 435-437 Potrero Avenue, midblock between Mariposa and 17th Street, approximately two blocks from the Bayshore Freeway/Route 101. The building covers the full lot. The Property is improved with a 2-story, 10,000-square foot building used as an Internet Services Exchange since May 30, 2000 by RCN Telecom Services of California, Inc., which was purchased by Astound in 2005 but continued the same use. After a brief vacancy, during which marketing took place for the same use, the Property will be occupied by Industry Capital Data Centers for the identical use, immediately after this application is approved.

James A. Reuben | Andrew J. Junius | Kevin H. Rose | Sheryl Reuben[1] | David Silverman | Thomas P. Tunny | Jay F. Drake
Daniel A. Frattin | Lindsay M. Petrone | John Kevlin | Jared Eigerman[2] | John McInerney III[3]

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

B. Floor Plans, Photographs, and Upgrades.

Floor plans for the Property are attached as **Exhibit A**. Interior and exterior photographs are attached as **Exhibit B**. The building comprises approximately 10,000 gross square feet of Internet Services Exchange area that is the subject of this request for legitimization.

C. Evidence Supporting Eligibility.

i. The land use existed as of the date of the application;

The entire building has been used since May 2000 by RCN Telecom Services of California Inc. (RCN) as an Internet Services Exchange. The lease between F.W. Spencer and Son, Inc., and RCN dated May 30, 2000 describes the "permitted uses" at the Property as follows:

> "Telecommunications hub site for cable, internet and telephony, internet routing facility and other telecommunication uses and other related uses for Tenant's telecommunications business."

(See Triple Net Lease with RCN dated May 30, 2009, and First Amendment to Triple Net Lease dated June 2004, attached as **Exhibit C.**)

The owners significantly upgraded the building in 2000 at a cost exceeding $1,000,000 to serve as an Internet Services Exchange for RCN. The building was seismically strengthened and mechanically upgraded to house a PG&E transformer vault to provide 400 kilowatts of power, including a diesel generator backup and related infrastructure for the Internet Services Exchange.

Continued use as an Internet Services Exchange will provide a vital and indispensable service to Internet startups and related small businesses in the South of Market neighborhood. Nearby businesses will access the Property to service and maintain their Internet servers on a continuing basis. Continuance of this Internet Services Exchange use will provide a significant benefit to the City as a whole and especially to the many Internet and technology companies located within walking distance to the Property. The Property has been upgraded to meet all current ADA requirements in connection with the seismic, electrical, and other other upgrades to the building conducted in May 2000.

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

This is a unique building that was outfitted with specialized electrical and mechanical upgrades to accommodate the Internet Services Exchange use twelve years ago, at the commencement of the boom of Internet startups. We are unaware of any other Internet Services Exchange in the neighborhood, and the use clearly provides an indispensable service for the most recent boom in the South of Market tech industry, which has been the primary creator of new employment opportunities for San Franciscans over the past several years, and a primary growth center in the San Francisco economy.

ii. The land use would have been principally permitted or permitted with conditional use authorization under provisions of the Planning Code that were effective on April 17, 2008;

Prior to the EN rezoning, the Property was located in the M-1 (Light Industrial) Zoning District, which principally permitted "Commercial wireless transmitting, receiving or relay facility, including towers, antennae, and related equipment for the transmission, reception, or relay of radio, television, or other electronic signals" pursuant to Planning Code Section 227(h). "Internet Services Exchange" was not created as a separate land use category until May 13, 2002 by Ordinance No. 77-02. At that date, Sections 209.6, 790.80, and 890.80 were amended to define "Internet Services Exchange" as a new use within the "utility installation" use category. Had the use category for Internet Services Exchange existed at the time of the original permitting, it would have been permitted as Internet Use Exchange.

The land use would not be permitted under current provisions of the Planning Code;

Upon the conclusion of the EN rezoning process, the zoning district classification was changed from M-1 to Urban Mixed Use ("UMU"). Internet Services Exchanges are not permitted in the UMU zoning district. (Planning Code Section 843.14.)

The new zoning, UMU (Urban Mixed Use), was not adopted until June 11, 2008.

iii. The land use either has been (1) regularly operating or functioning on a continuous basis for no less than 2 years prior to the effective date of Planning Code Section 179.1, or (2) functioning in the space since at least April 17, 2008, and is associated with an organization, entity or enterprise which has been

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

located in this space on a continuous basis for no less than 2 years prior to the effective date of Planning Code Section 179.1;

The Internet Services Exchange use has occupied the entire building since May 2000, well in excess of the two-year requirement for the EN Legitimization program under §179.1(2)(D)(1). The use has continued without interruption up to the present, except for a one-year period of marketing to find a replacement Internet Services Exchange. The new occupant will be Industry Capital Data Centers, and it will occupy the entire Property for Internet Services Exchange use as soon as this application is approved.

iv. *The land use is not accessory to any other use;*

The Internet Services Exchange use that is being requested for legitimization comprises the entire current use, which occupies the entire Property. The use that is the request of this legitimization is not accessory to any other use, but instead is the principal use of the building.

v. *The land use is not discontinued and abandoned pursuant to the provisions of Planning Code Section 183 that would otherwise apply to nonconforming uses.*

The Property has been under continuous, uninterrupted occupancy by RCN (purchased by Astound in 2005) for Internet Services Exchange use since May 2000. The use has not been discontinued or abandoned for a period of three years. (See Planning Code Section 183.) After a recent period of marketing for a new Internet Services Exchange, the new occupant, Industry Capital Data Centers, is awaiting approval of this application to commence its occupancy.

D. Notification Materials.

Mailing labels, 300-foot radius map and a list of owners within 300-foot radius are enclosed with this application.

E. Fees.

In addition to the evidence and other information and documents identified above, I have enclosed a check in the amount of $588.00 made to the order of the Planning Department for the Department's filing fee.

REUBEN & JUNIUS LLP

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

www.reubenlaw.com

Please do not hesitate to contact me or if you need any additional information or have any questions.

Very truly yours,

REUBEN & JUNIUS, LLP

David Silverman

Enclosures

Exhibit A – Floor plans
Exhibit B – Photographs, Exterior and Interior
Exhibit C – Lease and First Amendment to Lease
Mailing labels, map and list of owners for 300-foot radius
Check for $588.00 for the Planning Department determination fee

cc: F.W. Spencer & Son, Inc. (w/o encls.)

REUBEN & JUNIUS

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

FIRST AMENDMENT TO TRIPLE NET LEASE

This First Amendment to Triple Net Lease ("Amendment") is made and entered into as of the ___ day of June, 2004, between F.W. Spencer & Son, Inc., a California corporation with an address of 99 South Hill Drive, Brisbane, California 94005 ("Landlord"), and RCN Telecom Services, Inc., a Pennsylvania corporation, successor by merger to RCN Telecom Services of California, Inc., having an address at 105 Carnegie Center, Princeton, New Jersey 08540 ("Tenant").

A. Landlord and Tenant have entered into a triple net lease dated as of May 30, 2000 (the "Lease") pursuant to which Landlord has leased to Tenant and Tenant has leased from Landlord certain Premises located at 437 Potrero Avenue, San Francisco, California.

B. Landlord and Tenant have agreed to amend the Lease to provide for an adjustment of the Fixed Rent payable under the Lease for the remainder of the Term.

C. Terms not otherwise defined herein shall have the same meaning as set forth in the Lease.

Now, therefore, in consideration of the mutual premises set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant agree as follows:

1. Section 1.2, Reference Data, "Fixed Rent" is deleted in its entirety from the Lease and the following is substituted in its place:

"Fixed Rent:	At an annual rental rate of Twenty-Nine Dollars Ninety-Four Cents ($29.94) per square foot for the period from July 1, 2004 through July 31, 2004. Beginning on August 1, 2004 and on each August 1 thereafter through the expiration of the Term, Fixed Rent shall be adjusted annually by an amount equal to Three and One-Half Percent (3.5%) over the then prevailing Fixed rent for the Premises. Fixed Rent shall be payable in advance on the first day of each month."

2. Except as otherwise expressly amended by this Amendment, the terms of the Lease are ratified and affirmed.

In witness whereof, Landlord and Tenant have caused this Amendment to be executed by their duly authorized officers as of the date first above referenced.

LANDLORD:
F.W. Spencer & Son, Inc.

By: _____
Its: CEO

TENANT:
RCN Telecom Services, Inc.

By: _____
Its:

RCN Corporation, the Guarantor under that Guarantee dated May 30, 2000, joins in this Amendment for the limited purpose of consenting to the Amendment and reaffirming its obligations under the Guarantee.

RCN Corporation

By: _____
Its:
James Howell
VP of Real Estate

TRIPLE NET LEASE

ARTICLE 1

1.1 Parties. This Triple Net Lease ("Lease") is executed this 30th day of May, 2000, between F. W. SPENCER & SON, INC., a California corporation with an address of 99 South Hill Drive, Brisbane, California 94005 ("Landlord") and RCN TELECOM SERVICES OF CALIFORNIA, INC., a California corporation having an office at 105 Carnegie Center, Princeton, New Jersey 08540 ("Tenant").

1.2 Reference Data. Each reference in this Lease to any of the following shall have the meaning set forth below:

Building:	The building known as 437 Potrero Avenue, San Francisco, California, as more specifically described on the plan attached hereto as Exhibit "A". The Building is located on the Land.
Land:	The parcel of land on which the Building is located, which portion is more specifically shown on the plan attached hereto as Exhibit "A".
Premises:	Approximately 10,000 square feet of gross leasable area located in the Building, as shown on the plan attached hereto as Exhibit "B".
Term:	Ten (10) years.
Option:	Tenant shall have the option and right to renew this Lease for one (1) additional term of ten (10) years. The renewal term shall commence on the day following the termination of the initial term. Fixed Rent for the renewal term shall be at 3.5% over the then prevailing Fixed Rent for the Premises and shall be adjusted annually on each anniversary of the Rent Commencement by an amount equal to 3.5% over the then prevailing Fixed Rent for the Premises.
Commencement Date:	The date upon which Landlord and Tenant have executed this Lease. If Landlord is unable to deliver the Premises on or before July 10, 2000 ("Possession Date"), Landlord or Tenant may cancel this Lease without penalty by written notice to the other party, delivered to the other party prior to delivery of the Premises. If delivery of the Premises is delayed beyond the Possession Date, the Rent Commencement Date and the Expiration Date shall be adjusted to account for such delay.
Expiration Date:	July 31, 2010

Rent Commencement Date:	August 1, 2000.
Fixed Rent:	Thirty-Six Dollars ($36.00) per square foot for the first year of the Lease Term commencing on the Rent Commencement Date. Fixed Rent shall be adjusted annually on each anniversary of the Rent Commencement by an amount equal to 3.5% over the then prevailing Fixed Rent for the Premises. Fixed Rent shall be payable in advance on the first day of each month.
Permitted Uses:	Telecommunications hub site for cable, internet and telephony, internet routing facility and other telecommunication uses and other related uses for Tenant's telecommunications business.
Public Liability Insurance Limits:	$1,000,000.00 combined single limit
Security Deposit:	RCN Corporation, a Delaware corporation, shall provide Landlord with a corporate guaranty in the form of **Exhibit "F"** attached hereto at the time of execution of the Lease securing Tenant's performance hereunder.
Premises Delivery Fee:	On or before June 1, 2000, Tenant shall deposit the sum of Sixty-Five Thousand Dollars ($65,000.00) ("**Premises Delivery Fee**") into an attorney trust account pursuant to escrow instructions in the form attached hereto as **"Exhibit "G."** The Premises Delivery Fee is for the reimbursement of Landlord's costs and expenses associated with facilitating the delivery of the Premises to Tenant on or before July 10, 2000. The Premises Delivery Fee and any accrued interest shall be released from the attorney trust account and paid to Landlord at the time the existing tenant vacates the Premises, which is anticipated by the parties to be on or before the Possession Date. If Landlord fails to deliver the Premises to Tenant on the Possession Date described above and Tenant elects to cancel the Lease as set forth herein, the Premises Delivery Fee shall be paid to Tenant within two (2) days after receipt of the cancellation notice.

1.3 Exhibits. The exhibits listed below in this Section are incorporated in this Lease by reference and are to be construed as a part of this Lease:

Exhibit A - Legal Description and Plan Showing Building and Land
Exhibit B Plan Showing Premises
Exhibit C - Co-Location Agreement
Exhibit D Tenant Improvements Agreement
Exhibit E - Form of Estoppel Certificate
Exhibit F Form of Guaranty
Exhibit G – Premises Delivery Fee Escrow Instructions

ARTICLE II

2.1 Premises. Landlord hereby leases to Tenant and Tenant hereby leases from Landlord, subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, the Premises, as is. Landlord represents and warrants that it owns, manages, controls and/or operates the Building and the Premises and has the individual or corporate authority to enter into this Lease.

2.2 Term. Tenant shall hold the Premises for a term beginning with the Rent Commencement Date, and continuing for the Term, unless sooner terminated as hereinafter provided. Upon execution of this Lease, Tenant may take occupancy of the Premises prior to the scheduled Possession Date, in which event all of the terms and conditions of this Lease (with the exception of the rent provisions) shall be applicable from and after such earlier date. Such early occupancy by Tenant shall not affect the Term of this Lease.

2.3 Option to Extend. Tenant shall have the right, by notice given to Landlord at least six (6) months prior to the expiration of the Term or any prior extension term, to extend this Lease for one additional term of ten (10) years each, upon the same terms and conditions provided in the Lease ("**Option**"). The Fixed Rent during each such extension term shall be determined in accordance with Section 1.2 above. The Option shall be void if Tenant has breached any material term of the Lease, after receipt of written notice and an opportunity to cure such breach, prior to Tenant's submission of Tenant's written notice of its intent to exercise the Option.

2.4 Offsite Customers. Landlord acknowledges that Tenant's Permitted Use requires the installation in the Premises of certain communications equipment by certain licensees and customers of Tenant that do not occupy space in the Building (collectively, "**Offsite Customers**") in order for such Offsite Customers to interconnect with Tenant's Equipment or to permit Tenant to manage or operate such Offsite Customers' equipment, all in compliance with all applicable laws, covenants or restrictions of record, regulations and ordinances in effect on the Commencement Date ("**Applicable Requirements**"). Notwithstanding anything to the contrary contained in this Lease, Landlord has approved Tenant's use of the Co-Location Agreement attached to this Lease as **Exhibit "C"** ("**Co-Location Agreement**"), without material modification, for the limited purpose of permitting such arrangements as described above. A fully executed copy of such Co-Location Agreement shall be delivered to Landlord prior to the installation of an Offsite Customer's equipment. Tenant's right to co-locate the equipment of Offsite Customers is a right to site the Offsite Customer's equipment within, around, over and under the Premises, subject to Section 1.a. of the Co-Location Agreement.

ARTICLE III

3.1 Rent. Tenant covenants to pay to Landlord, at the address of Landlord set forth above, or at such other place or to such other person or entity as Landlord may by notice in writing to Tenant from time to time direct, during the Term hereof and so long thereafter as Tenant or anyone claiming under Tenant occupies the Premises, the following rent:

3.1.1 Fixed Rent. The Fixed Rent set forth in Section 1.2, in equal monthly installments in advance on the first day of each month of the Term, and pro rata for any fraction of a month at the beginning or end of the Term, any fraction payable with respect to a portion of a month at the beginning of the Term is to be paid on the Commencement Date.

3.1.2 Additional Rent. Tenant shall pay to Landlord, as Additional Rent, the following (collectively, "**Operating Expenses**"):

(a) 100% of real estate taxes and assessments by governmental authorities payable with respect to the rentable square footage of the Premises; and

(b) 100% of all operating costs incurred by Landlord in the operation of the Building.

Tenant shall pay the aforesaid Additional Rent in monthly installments, based on Landlord's reasonable estimate of such amounts for the current calendar year. Not later than 30 days after the end of the calendar year, Landlord shall deliver to Tenant a statement detailing the actual Operating Expenses for the preceding calendar year together with copies of actual invoices and bills respecting said Operating Expenses, to the extent such bills are requested by Tenant. In the event Landlord's estimate of Operating Expenses exceeds the actual Operating Expenses for the preceding year, Tenant shall receive a credit against Additional Rent next due (or, if the Term has expired, a refund of such overpayment); in the event the actual Operating Expenses exceed Landlord's estimate, Tenant shall pay the difference to Landlord together with the next monthly installment of Fixed Rent.

If the real estate taxes for any tax year shall be reduced, whether as a result of a reduction in the tax rate or an appeal by Landlord of the real estate tax assessment, Landlord shall credit to Tenant, Tenant's proportionate share of such reduction minus the costs of such appeal to Landlord, against Tenant's Pro Rata Share of real estate taxes. If any reduction shall occur after the expiration of the Lease Term but shall apply to periods prior to such expiration, Tenant's proportionate share of such reduction shall be promptly refunded to Tenant.

3.1.3 Late Payments of Rent. If any installment of rent is paid more than ten (10) days after the date the same was due, it shall bear interest at the rate of ten percent (10%) per annum from the due date, but in no event more than the maximum rate of interest allowed by law, which shall be Additional Rent. In addition to such interest, for each installment of rent paid more than ten (10) days after the due date, Tenant shall pay to Landlord an amount equal to five (5%) percent of such installment to defer Landlord's costs of collection and administrative expenses relating to such late payment. If Tenant shall fail to pay three or more installments of rent on a timely basis within any consecutive twelve (12) month period, then, in lieu of the due date for payment of Fixed Rent set forth in Section 3.1.1, above, Tenant shall pay Fixed Rent on or before the 15th day of the month preceding the month to which such Fixed Rent applies, and payments made more than ten (10) days after such payment date shall be subject to all of the penalties for late payment set forth in this Section 3.1.3.

3.1.4 Tenant's Insurance. Tenant shall at its sole cost and expense obtain and maintain throughout the Term with reputable insurance companies qualified to do business in California, the following insurance, designating Landlord as a named insured:

(a) Commercial General Liability insurance indemnifying Landlord and Tenant against all claims and demands for any injury to person or property which may be claimed to have occurred in the Premises, in amounts which, at the beginning of the Term, shall be not less than the amounts set forth in Section 1.2, and, from time to time during the Term, may be for such higher amounts as Landlord may require, taking into account the region in which the Premises are located and similar properties used for similar purposes;

(b) So-called "all-risk" property insurance in the amount of the full replacement cost of all Tenant's property and fixtures and Landlord's property and fixtures;

(c) Workmen's compensation and any other insurance required by law or the nature of Tenant's business;

(d) Insurance against such other hazards as may from time to time be required by Landlord, or any bank, insurance company or other lending institution holding a first mortgage on the Premises, provided that such insurance is customarily carried in the region in which the Premises are located, on property similar to the Premises and used for similar purposes.

(e) If Tenant's use or occupancy of the Premises causes any increase in insurance premiums for the Building or Premises, Tenant will pay such additional cost.

Tenant shall furnish Landlord with certificates evidencing all such insurance prior to the beginning of the Term and of each renewal policy at least twenty (20) days prior to the expiration of the policy being renewed. Tenant's use and occupancy of the Premises shall conform to and comply with all requirements of Landlord's insurers, as such requirements may be amended or modified from time to time.

3.1.5 Utilities. Tenant shall pay directly to the proper authorities charged with the collection thereof all charges for the consumption of water use, sewer, electricity, gas, telephone and other services separately metered or billed to Tenant for the Premises, all such charges to be paid as the same from time to time become due. Tenant shall make its own arrangements for such utilities, and Landlord shall be under no obligation to furnish any utilities to the Premises and shall not be liable for any interruption or failure in the supply of any such utilities to the Premises. Landlord shall cooperate with Tenant in making any necessary utility connections available to Tenant.

3.1.6 Permits and Approvals. Tenant shall at its sole cost and expense obtain and maintain throughout the Term all of the authorizations, permits, approvals and licenses required for the construction of the improvements to the Premises and the conduct of Tenant's business

operations therein.

3.2 Audit Rights. In the event any dispute arises between Landlord and Tenant as to Operating Expenses, Tenant shall have the right, upon reasonable notice and at Landlord's offices, to inspect and photocopy, if desired, Landlord's records concerning the Operating Expenses of the Building. If, after such inspection, Tenant continues to dispute Operating Expenses, Tenant shall be entitled to retain an independent accountant or accountancy firm that has a specialty in auditing operating expenses to conduct an audit; provided that in no event shall Tenant conduct an audit more than one time in any twelve (12) month period. If any specific issue with respect to Operating Expenses is raised by Tenant and the same issue has been raised by any other Tenant and a change with respect to such issue has been granted to such other Tenant or if Tenant's audit reveals that Landlord has overcharged Tenant, after Landlord has been afforded an opportunity to explain any contrary position on the matter to Tenant's accounting firm (with any disputes being resolved in good faith by the parties), then Tenant shall receive a credit against the next month's Rent in the amount of such overcharge. If the audit reveals that Tenant was undercharged, then, within thirty (30) days after the results of such audit are made available to Tenant, Tenant shall reimburse Landlord for the amount of such undercharge. Tenant shall pay the cost of any audits requested by Tenant, unless any audit reveals that Landlord's determination of the Operating Expenses was in error by more than five percent (5%), in which case Landlord shall pay the cost of such audit. Landlord shall be required to maintain records of the Operating Expenses for the two-year period following each Operating Expense statement. Except in the event of fraud by Landlord, failure on the part of Tenant to object to the Operating Expense statement within one (1) year after its receipt thereof shall be conclusively deemed Tenant's approval of such Operating Expense statement.

ARTICLE IV

Tenant further covenants and agrees:

4.1 Repair and Maintenance. To keep the Premises in good order and repair, and in at least as good order and repair as they are in on the Commencement Date, reasonable use and wear and damage by fire or casualty insured against only excepted; and to keep all glass, fixtures and equipment now or hereafter on the Premises, including, without limitation, all heating, plumbing, electrical, air-conditioning, and mechanical fixtures and equipment serving the Premises, in good order and repair, and in at least as good order and repair as they are in on the Commencement Date, damage by fire or casualty only excepted; and to make all repairs and replacements and to do all other work necessary for the foregoing purposes. It is further agreed that the exception of reasonable use and wear shall not apply so as to permit Tenant to keep the Premises in anything less than suitable, efficient and usable condition, considering the nature of the Premises and the use reasonably made thereof, or in less than good order, repair, and condition.

4.2 Damage to the Premises. To pay the cost of all repairs to the Building including, without limitation, the roof, exterior walls and all structural components, if any damage thereto is caused by Tenant's improper use thereof.

4.3 Indemnity. To indemnify and save Landlord harmless from all claims, actions, damages, liability, cost or expense whatsoever arising or resulting from (i) any injury or damage to any person or property on the Premises or sidewalks or ways adjacent thereto, or otherwise arising directly or resulting directly from the use and maintenance and occupancy of the Premises, or any part thereof, by Tenant, (ii) any violation of this Lease by Tenant; or (iii) any act, omission or misconduct of Tenant, its agents, contractors, employees, licensees, subtenants or invitees.

4.4 Personal Property at Tenant's Risk. To the extent permitted by law, all merchandise, furniture, fixtures, effects and property of every kind, nature and description belonging to Tenant or to any persons claiming through or under Tenant, which may be on the Premises at any time, shall be at the sole risk and hazard of Tenant, and if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, by theft or from any other cause, no part of said loss or damage is to be charged to or be borne by Landlord, except, however, in the event said loss or damage is attributable to Landlord's gross negligence or willful misconduct.

4.5 Assignment and Subletting. Not to assign or sublet this Lease, except to an "**Affiliate**" (as hereinafter defined), without first obtaining on each occasion the written consent of Landlord, which shall not be unreasonably withheld. No assignment or subletting shall in any way impair the continuing primary liability of Tenant hereunder, and no consent to any assigning or subletting in a particular instance shall be deemed to be a waiver of the obligation to obtain the Landlord's approval in the case of any other assignment or subletting. Notwithstanding the foregoing, Tenant may assign this Lease or sublet all or any part of the Premises to an Affiliate without Landlord's prior consent, but Tenant shall give Landlord prompt written notice of such assignment or subletting. For purposes of this Lease, an "Affiliate" of Tenant shall be a person (i) controlled by, controlling or under common control with Tenant, (ii) with whom or into whom Tenant is merged (regardless of whether Tenant is the surviving person after such merger), or (iii) acquiring all or substantially all of Tenant's assets and business operations for which the facilities located in the Premises are used by Tenant. An equipment collocation agreement with one or more carriers will not be considered an assignment or subletting by Tenant.

4.6 Compliance with Law. At Tenant's sole cost and expense, to conform to and comply with all zoning, building, environmental, fire, health and other codes, regulations, ordinances or laws.

4.7 Landlord's Right to Enter. To permit Landlord and Landlord's representatives to enter into and examine the Premises and show them to prospective purchasers, tenants and mortgagees at any reasonable time upon prior notice, subject, however, to Tenant's right to require that any such person entering the Premises be accompanied by a representative of Tenant as a condition of permitting entry into any secured area, except in the event of an emergency.

4.8 Expiration. At the expiration of the Term or upon earlier termination of this Lease:

(i) to remove such of Tenant's goods and effects as are not permanently affixed to the Premises;

(ii) to repair any damage caused by such removal; and

(iii) peaceably to yield up the Premises and all previously approved alterations and additions thereto in the same order and repair as they were in at the beginning of the Term of this Lease or were put in during the Term hereof, reasonable use and wear and damage by fire or casualty insured against only excepted.

Tenant shall indemnify and hold Landlord harmless against any loss, cost or damage resulting from the failure and delay of Tenant or anyone claiming by or through it to surrender the Premises as provided in this Section.

4.9 Use. To use the Premises only for the Permitted Uses, and not to cause, permit or suffer the emission of objectionable odors, fumes, noise or vibration from the Premises. Landlord makes no representation or warranty that the use of the Premises for the Permitted Uses is allowed by local zoning or other bylaws, and any permits for such use shall be the exclusive responsibility of Tenant.

4.10 Additions or Alterations. Not to make or permit any installations, alterations or additions in, to or on the Premises over Twenty-Five Thousand Dollars ($25,000.00) without the prior written consent of Landlord in each instance. Landlord expressly consents to Tenant's initial alterations and improvements to the Premises required for the Permitted Use, at Tenant's sole expense, including, without limitation, build out of the Premises and installation of Tenant's fixtures and equipment required for the Permitted Use, increasing the electric service to the Building to 2000 amps, installation of an FM200/Preaction fires suppression system in the Premises, installation by Tenant of an emergency generator and fuel source for the support of Tenant's Premises only, and placement of redundant fiber optic connections from the Premises to the public right of way.

4.11 Signs. Not to place or paint on the Premises or anywhere in the Building any placard or sign which is visible from the exterior of the Premises.

4.12 Loading and Nuisance. Not to injure, overload, deface, or permit to be injured, overloaded or defaced, the Premises or the Building, and not to permit, allow or suffer any waste or any unlawful, improper or offensive use of, or the accumulation of trash or debris on the Premises, or any occupancy thereof that shall be injurious to any person or property, or invalidate or increase the premiums for any insurance on the Building.

4.13 Tenant's Work. To procure at Tenant's sole expense all necessary permits and licenses before undertaking any work on the Premises expressly permitted by Landlord hereunder; to do all such work in a good and workmanlike manner, employing materials of good quality and so as to conform with all applicable zoning, building, environmental, fire, health and other codes, regulations, ordinances and laws; to pay promptly when due the entire cost of any work on the Premises undertaken by Tenant, so that the Premises shall at all times be free of liens of labor and materials; to employ for such work one or more responsible contractors; to

save Landlord harmless and indemnified from all injury, loss, claims or damage to any person or property occasioned by or growing out of such work; and to provide copies of as built plans of such work to Landlord upon completion. If any construction of tenant improvements is necessary for the continued occupancy of the Premises, such construction shall be accomplished and the cost of such construction shall be borne by Tenant in accordance with a separate "Leasehold Improvements Agreement" (herein so called) between Landlord and Tenant, set forth as Exhibit "D" and made a part hereof. Landlord shall have the right to post notices of non-responsibility in or on the Premises as provided by law. Notwithstanding the foregoing, Landlord shall be responsible for any structural latent defects in the Premises, at Landlord's expense. Landlord, at Landlord's expense, shall maintain or cause to be maintained, repaired and replaced in good order, condition and repair, structure, exterior walls and load-bearing columns of the Building.

4.14 Condition of the Premises. Landlord is not obligated to and shall not make any improvements to the Premises. Notwithstanding the foregoing, Landlord agrees to replace the roof and to construct and perform all necessary seismic work and repairs to the Building to render the Building and the Premises structurally sound in accordance with applicable building and safety codes at Landlord's sole cost and expense on or before August 31, 2000. In addition, Landlord represents and warrants that the roof is in good order and repair and the roof structure is sound. After completion of Landlord's work, Tenant understands and acknowledges that the Premises are lease I without any further improvements or alterations thereto and in "as-is" condition. Except as set forth above, Tenant has inspected the Premises and has found the Premises' current state of repair, condition and maintenance to be acceptable to Tenant without further improvements by Landlord and, subject to the completion of Tenant's Work, to be sufficient for Tenant's use and occupancy.

4.15 Personal Property Taxes. Tenant shall pay prior to delinquency all taxes assessed against and levied upon Tenant owned alterations and utility installations, trade fixtures, furnishings, equipment and all personal property to be assessed and billed separately from the real property of Landlord. If any such of Tenant's property shall be assessed with Landlord's real property, Tenant shall pay Landlord the taxes attributable to Tenant's property within 10 days after receipt of a written statement setting forth the taxes applicable to Tenant's property.

4.16 Hazardous Substances. Tenant shall not manufacture, store, use, handle or dispose of any substance which is designated as a hazardous or toxic substance or waste under applicable federal or state law at the Premises, except in accordance with the statutes, rules and regulations governing the manufacture, storage, use, handling or disposition of such substance. Tenant shall be responsible for any and all costs, losses, damages, fines, penalties and other expenses relating to the manufacture, storage, use, handling or disposition of any such hazardous or toxic substance at the Premises by Tenant or any employee, agent or contractor of Tenant.

ARTICLE V

5.1 Casualty or Taking; Termination. In the event that the Premises, or any part thereof, shall be taken by any public authority or for any public use, or shall be destroyed or

damaged by fire or casualty, or by the action of any public authority, and Landlord elects not to restore the Building or the Premises and so notifies Tenant, then either Landlord or Tenant may elect to terminate this Lease. Such election shall be made by the electing party giving written notice of its election to the other party within ninety (90) days after the right of election accrues.

5.2 Restoration. If this Lease is not terminated pursuant to Section 5.1 above, this Lease shall continue in force and a just proportion of the rent reserved, according to the nature and extent of the damages sustained by the Premises shall be abated until the Premises, or what may remain thereof, shall be put by Landlord in proper condition for use to the extent permitted by the net proceeds of insurance recovered or damages awarded for such taking, destruction or damage, and subject to zoning and building laws and ordinances then in existence. "Net proceeds of insurance recovered or damages awarded" refers to the gross amount of such insurance or damages less the reasonable expenses of Landlord in connection with the collection of the same, including without limitation, fees and expenses for legal and appraisal services.

5.3 Award. Irrespective of the form in which recovery may be had by law, all rights to damages or compensation for the Premises shall belong to Landlord in all cases. Tenant hereby grants to Landlord all of Tenant's rights to such damages and covenants to deliver such further assignments or endorsements as Landlord may from time to time request. Notwithstanding the foregoing, Tenant may seek a separate award from the condemning authority for Tenant's relocation damages.

ARTICLE VI

6.1 Events of Default; Remedies. If (a) Tenant shall default in the performance of any of its monetary obligations under this Lease, and if such default shall continue for ten (10) days after written notice from Landlord to Tenant or (b) if within fifteen (15) days after written notice from Landlord to Tenant specifying any other default or defaults, Tenant has not commenced diligently to correct such default or has not thereafter diligently pursued such correction to completion, or (c) if any assignment shall be made by Tenant for the benefit of creditors, or if a petition is filed by or against Tenant under any provision of the Bankruptcy Code and, in the case of an involuntary petition, such petition is not dismissed within ninety (90) days, or (d) if the Tenant's leasehold interest shall be taken on execution or by other process of law, attached or subjected to any other involuntary encumbrance, then and in any of such cases Landlord and its agents and servants may lawfully, immediately or at any time thereafter, and without further notice or demand, and without prejudice to any other remedies available to Landlord for arrearages of rent or otherwise, either (i) enter into and upon the Premises or any part thereof, in the name of the whole, and repossess the same as of Landlord's former estate or (ii) mail a notice of termination addressed to Tenant at the Premises, and upon such entry or mailing this Lease shall terminate. In the event that this Lease is terminated under any of the foregoing provisions, or otherwise for breach of Tenant's obligations hereunder, Tenant covenants to pay forthwith to Landlord as compensation the total rent reserved for the residue of the Term. In calculating the rent reserved there shall be included the value of all other consideration agreed to be paid or performed by Tenant for such residue of the Term.

Tenant further covenants as an additional and cumulative obligation after any such

termination or entry to pay punctually to Landlord all the sums and perform all the obligations which Tenant covenants in this Lease to pay and to perform in the same manner and to the same extent and at the same times as if this Lease had not been terminated. In calculating the amounts to be paid by Tenant under the foregoing covenant, Tenant shall be credited with any amount actually paid to Landlord as compensation as hereinbefore provided and also with any additional rent actually obtained by Landlord by reletting the Premises, after deducting the expenses of collecting the same.

Nothing herein contained shall, however, limit or prejudice the right of Landlord to prove for and obtain in proceedings for bankruptcy or insolvency or reorganization or arrangement with creditors as liquidated damages by reason of such determination an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, such damages are to be proved, whether or not such amount be greater than, equal to, or less than the amounts referred to above.

6.2 Landlord's Right to Cure. If Tenant remains in default at the expiration of the time periods specified in Section 6.1(a) or 6.1(b), Landlord shall have the right to perform such obligation. All sums so paid by Landlord and all necessary incidental costs and expenses in connection with the performance of any such act by Landlord shall be deemed to be Additional Rent under this Lease and shall be payable to Landlord immediately on demand. Landlord may exercise the foregoing rights without waiving or releasing Tenant from any of its obligations under this Lease.

ARTICLE VII

7.1 Effect of Waivers of Default. Any consent or permission by Landlord to any act or omission which otherwise would be a breach of any covenant or condition herein, or any waiver by Landlord of the breach of any covenant or condition herein, shall not in any way be construed to operate so as to impair the continuing obligation of any covenant or condition herein.

7.2 No Accord and Satisfaction. No acceptance by Landlord of a lesser sum than the Fixed Rent, Additional Rent and any other charge then due shall be deemed to be other than on account of the earliest installment of rent then due, and Landlord may accept such payment without prejudice to Landlord's right to recover the balance of such installment or pursue any other remedy available to Landlord.

7.3 Subordination; Non-Disturbance. This Lease shall be subordinate to any mortgage now or hereafter placed upon the Premises by Landlord, and to each advance made or to be made under any such mortgage. Tenant agrees to execute and deliver any appropriate instruments necessary to confirm such subordination. Tenant's agreement to subordinate to any future mortgage is conditioned upon Tenant receiving from the holder of the lien of such mortgage assurances (a "non-disturbance agreement") that Tenant's possession and this Lease, including any options to extend the term thereof, shall not be disturbed so long as Tenant is not in breach hereof and attorns to the record holder of the Premises. Landlord agrees to use its best efforts to obtain from any existing a non-disturbance agreement from such mortgagee in favor of Tenant.

7.4 Successors and Assigns. This Lease shall be binding upon Landlord and Tenant and their respective successors and permitted assigns. Tenant agrees that the Landlord named herein and any subsequent Landlord shall be liable hereunder only for obligations accruing while owner of the Premises. No holder of a mortgage of the Landlord's interest shall be deemed to be the owner of the Premises until such holder shall have acquired indefeasible title to the Premises.

7.5 Quiet Enjoyment. Landlord agrees that upon Tenant's paying the rent and performing and observing the agreements and conditions herein on its part to be performed and observed, Tenant shall and may peaceably and quietly have, hold and enjoy the Premises during the Term hereof without any manner of hindrance or molestation from Landlord or anyone claiming under Landlord, subject, however, to the terms of this Lease.

7.6 Notices. All notices for Landlord shall be addressed to Landlord at the address of Landlord set forth above, or to such other place as may be designated by written notice to Tenant; and all notices for Tenant shall be addressed to Tenant at the Premises, with a copy in each instance addressed to RCN Corporation, 105 Carnegie Center, Princeton, New Jersey 08540, Attn: General Counsel, or to such other place as may be designated by written notice to Landlord. Any notice shall be deemed duly given when mailed to such address postage prepaid registered or certified mail, return receipt requested, or when delivered to such address by hand or by national overnight courier service.

7.7 Broker. Landlord and Tenant represent and warrant each to the other that it has had no dealings, negotiations, or consultation with, nor employed any broker or other intermediary with respect to this Lease and each shall hold harmless the other from any claim for brokerage or other commission arising from any breach of or misrepresentation contained in the foregoing warranty.

7.14 Holding Over. In the event Tenant or anyone claiming through Tenant shall retain possession of the Premises or any portion thereof after the termination or expiration of this Lease, such holding over shall be as a tenant at sufferance at an occupancy and use charge equal to 150 percent (150%) of the Fixed Rent and any Additional Rent due hereunder for the last month of the Term, and otherwise subject to all of the covenants and conditions of this Lease. The period of holding over shall not exceed two (2) months.

7.9 Environmental Matters. Landlord represents and warrants that to its best knowledge, there are no "hazardous wastes" or "hazardous substances" on or under the Land or the Building or within the Premises. Landlord shall be responsible for and shall indemnify Tenant against any loss, cost or damage resulting from the presence of any such hazardous wastes or substances on or under the Land or Building or within the Premises on or before the date of execution of this Lease, or resulting from any act or omission of Landlord, its employees, agents or contractors after the date of such execution. Tenant shall indemnify and hold Landlord harmless against any loss, cost or damage resulting from presence of any such hazardous wastes or substances on or under the Land or Building or within the Premises after the date of execution of this Lease resulting from any act or omission of Tenant, its employees, agents or contractors.

7.10 Applicable Law. This Lease, and the rights and obligations of the parties hereto,

shall be construed and enforced in accordance with the laws of the State of California. The parties agree that the proper and exclusive venue for any legal disputes arising out of this Lease shall be the federal or state courts sitting in or having jurisdiction over San Francisco County, California. In the event of any legal dispute pertaining to this Lease, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees incurred in connection therewith.

7.11 Partial Invalidity. If any term of this Lease, or the application thereof to any person or circumstances, shall to any extent be invalid or unenforceable, the remainder of this Lease, or the application of such term to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term of this Lease shall be valid and enforceable to the fullest extent permitted by law.

7.12 All Agreements Contained. This Lease contains all the agreements of the parties with respect to the subject matter thereof and supersedes all prior dealings between them with respect to such subject matter.

7.13 Waiver of Subrogation. All insurance which is carried by either party with respect to the Premises or to furniture, furnishings, fixtures or equipment therein or alterations or improvements thereto, whether or not required, if either party so requests and it can be so written, and if it does not result in additional premium, or if the requesting party agrees to pay any additional premium, shall include provisions which either designate the requesting party as one of the insured or deny to the insurer acquisition by subrogation of rights of recovery against the requesting party to the extent such rights have been waived by the insured party prior to occurrence of loss or injury. The requesting party shall be entitled to have duplicates or certificates of any policies containing such provisions. Each party hereby waives all rights of recovery against the other for loss or injury against which the waiving party is protected by insurance containing said provisions, reserving, however, any rights with respect to any excess of loss or injury over the amount recovered by such insurance.

7.14 Keys. Tenant agrees to notify Landlord if Tenant replaces or changes the lock on any exterior door to the Premises and to provide Landlord with copies of keys to any such lock prior to or upon its installation.

7.15 Estoppel Certificate. From time to time, upon prior written request by Landlord, Tenant shall execute, acknowledge and deliver to Landlord a statement in writing certifying that this Lease is unmodified and in full force and effect and that Tenant has no defenses, offsets or counterclaims against its obligations to pay the Rent and any other charges and to perform its other covenants under this Lease, except as otherwise disclosed in such writing.

7.16 Sale by Landlord. If Landlord sells or conveys the Premises and/or the Building, the same shall operate to release Landlord from any future liability upon any of the covenants or conditions, express or implied, herein contained in favor of Tenant, and in such event, Tenant agrees to look solely to the responsibility of the successor in interest of Landlord in and to this Lease, but such relief shall not extend to obligations of Landlord arising prior to such transfer or assignment unless the successor landlord specifically undertakes to perform such obligations in a

writing provided to Tenant in form and substance reasonably satisfactory to Tenant. Notwithstanding the foregoing, if Landlord sells or conveys the Premises and/or Building, this Lease shall not be terminated nor shall the rights and possession of Tenant hereunder be disturbed if Tenant shall not then be in default in the payment of rental or other sums or be otherwise in default under the terms of this Lease. Upon a sale of the Premises and/or Building by Landlord, Tenant agrees to attorn to the purchaser or assignee, such attornment to be effective and self-operative without the execution of any further instruments by the parties to this Lease.

7.17 Authority. If Tenant signs as a corporation or partnership, each of the persons executing this Lease on behalf of Tenant does hereby covenant and warrant that Tenant is a duly authorized and existing entity, that Tenant has and is qualified to do business in California, that Tenant has full right and authority to enter into this Lease, and that each and both of the persons signing on behalf of Tenant are authorized to do so. Upon Landlord's request, Tenant shall provide Landlord with evidence reasonably satisfactory to Landlord confirming the foregoing covenants and warranties.

7.18 Surrender Not Merger. The voluntary or other surrender of this Lease by Tenant, or a mutual cancellation thereof, shall not work a merger, and shall, at the option of Landlord, terminate all or any existing subleases or subtenancies, or may, at the option of Landlord, operate as an assignment to it of any or all such subleases or subtenancies.

7.19 Nonrecourse. The obligations of Landlord under this Lease and any liability resulting therefrom are not personal obligations of Landlord, its officers, agents or employees and Tenant shall look solely to Landlord's interest in the Premises for satisfaction of any liability arising out of or relating to such obligations.

7.20 Attorneys' Fees. If any action or proceeding is commenced by either party to enforce their rights under this Lease or to collect damages as a result of the breach of any of the provisions of this Lease, the prevailing party in such action or proceeding, including any bankruptcy, insolvency or appellate proceedings, shall be entitled to recover all reasonable costs and expenses, including, without limitation, reasonable attorneys' fees and court costs, in addition to any other relief awarded by the court.

7.21 Captions. Captions are for convenience only and do not constitute a part of this Lease.

EXECUTED as a sealed instrument as of the day and year first above written.

Landlord:

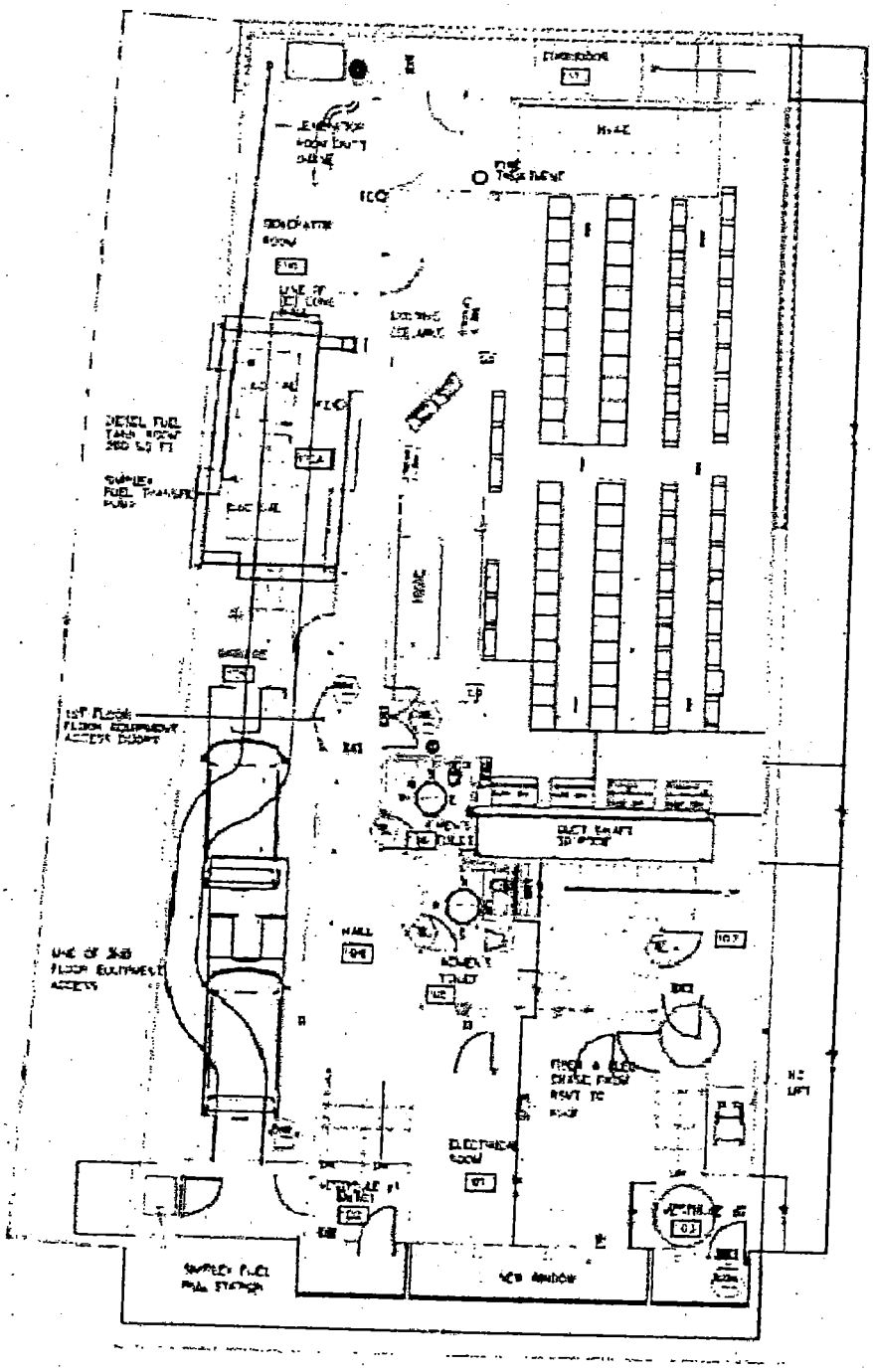
F. W. Spencer & Son, Inc., a California corporation

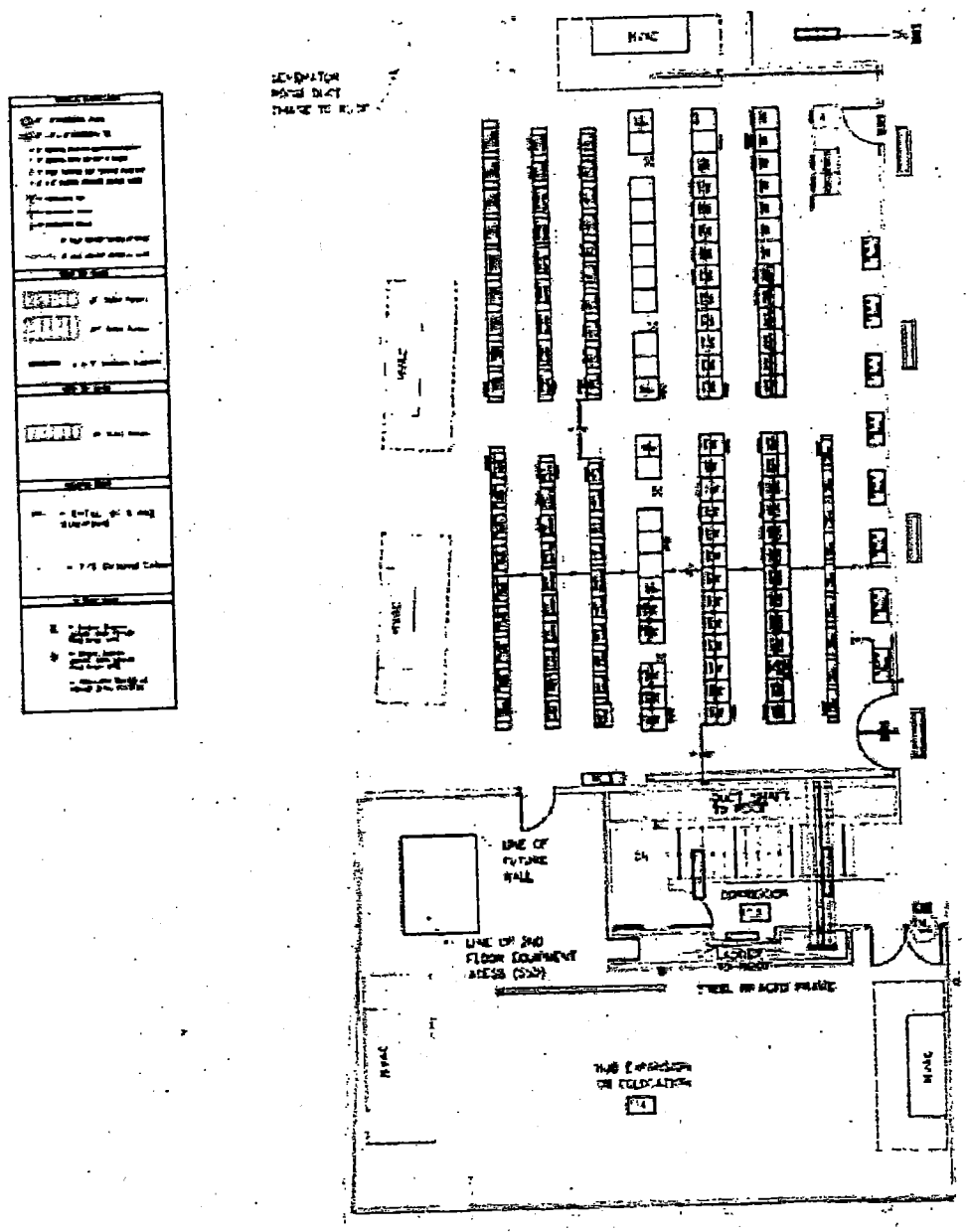
By: _____
Name: W. SPENCER
Title: PRESIDENT

Tenant:

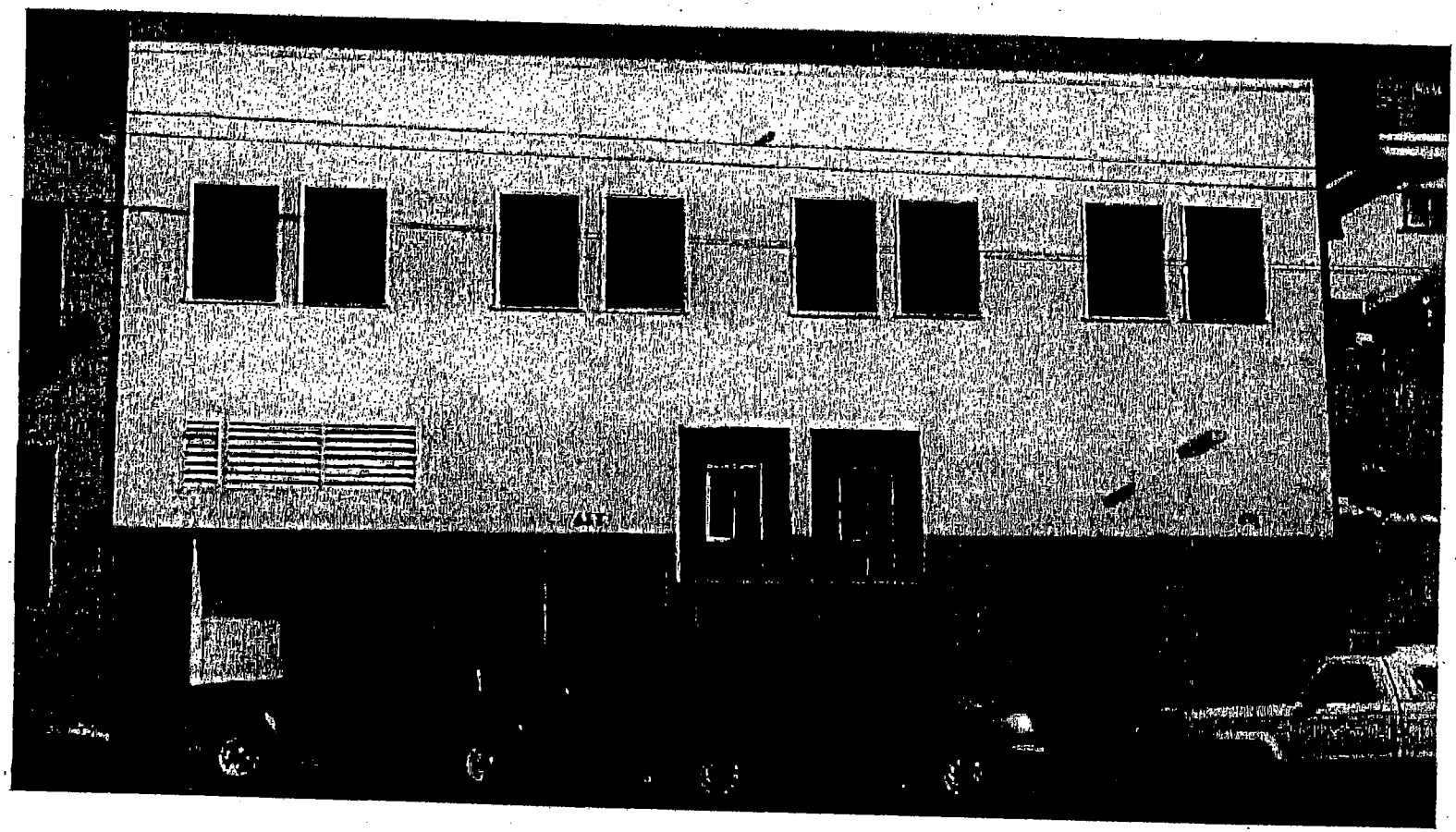
RCN Telecom Services of California, Inc.

By: _____
Name: Timothy J Stoklosa
Title: Exec Vice President & CFO

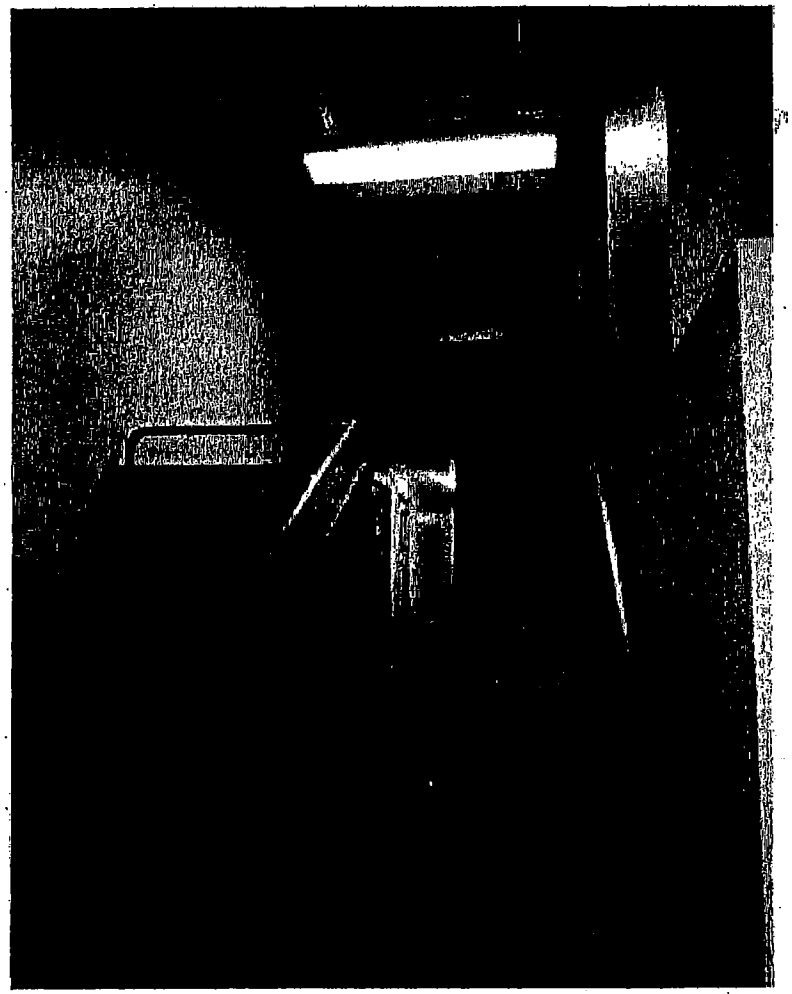



LINE OF FUTURE WALL
LINE OF 2ND FLOOR EQUIPMENT ACCESS (SSD)
CORRIDOR
LADDER
HUB EXPANSION OR COLOCATION

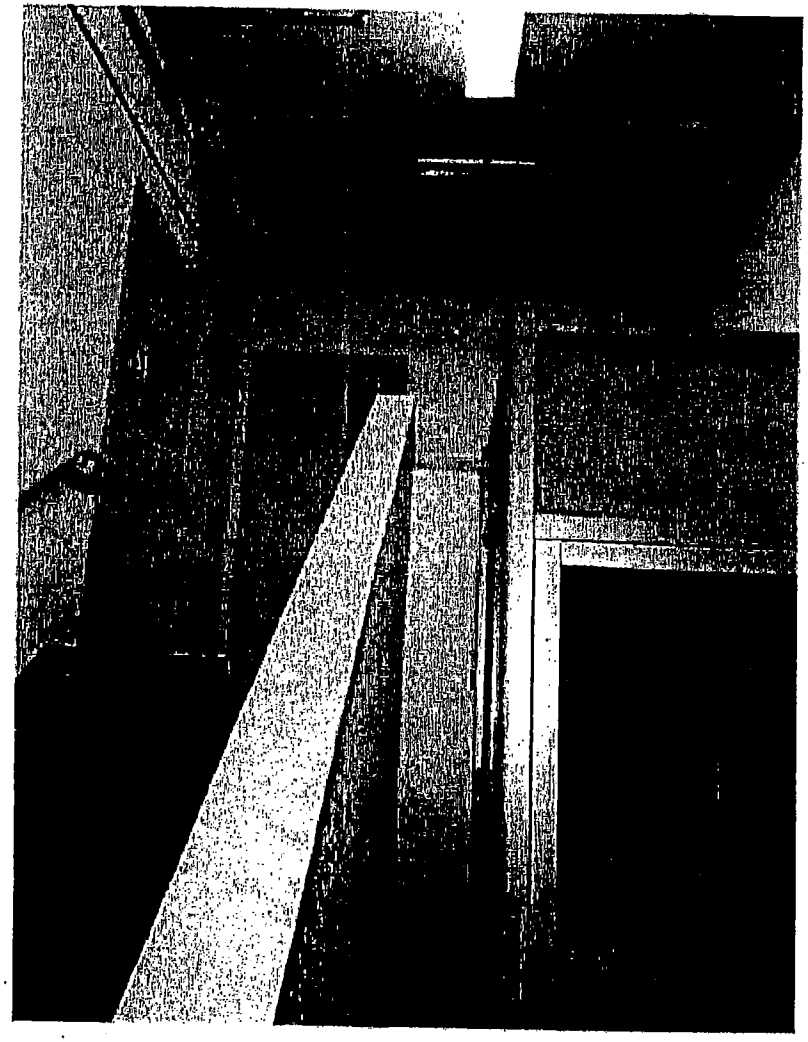
Exterior



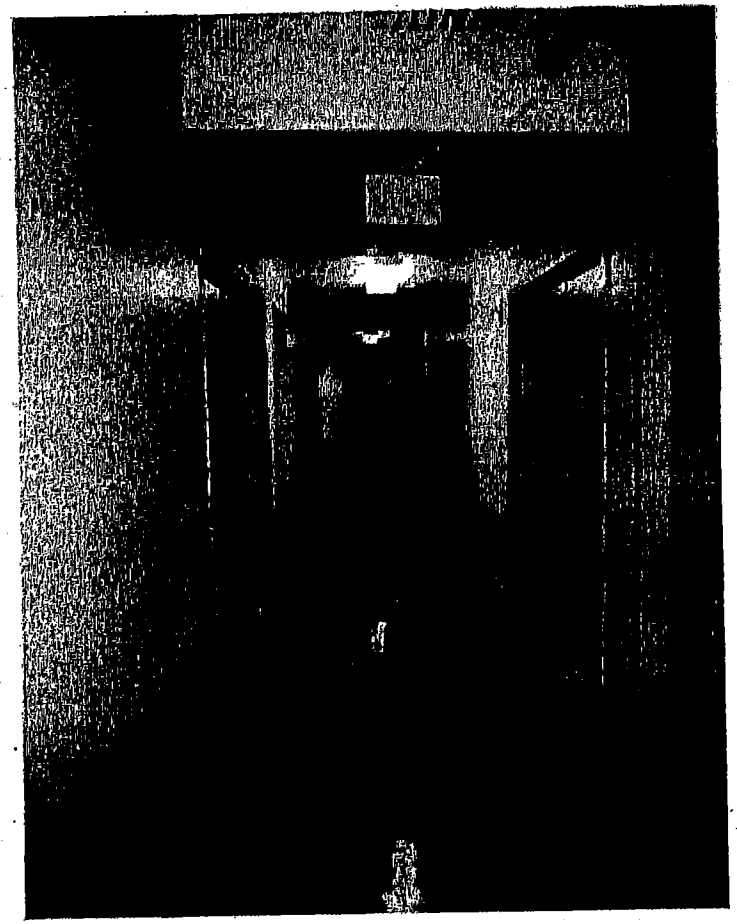
437 Potrero Interior Entrance



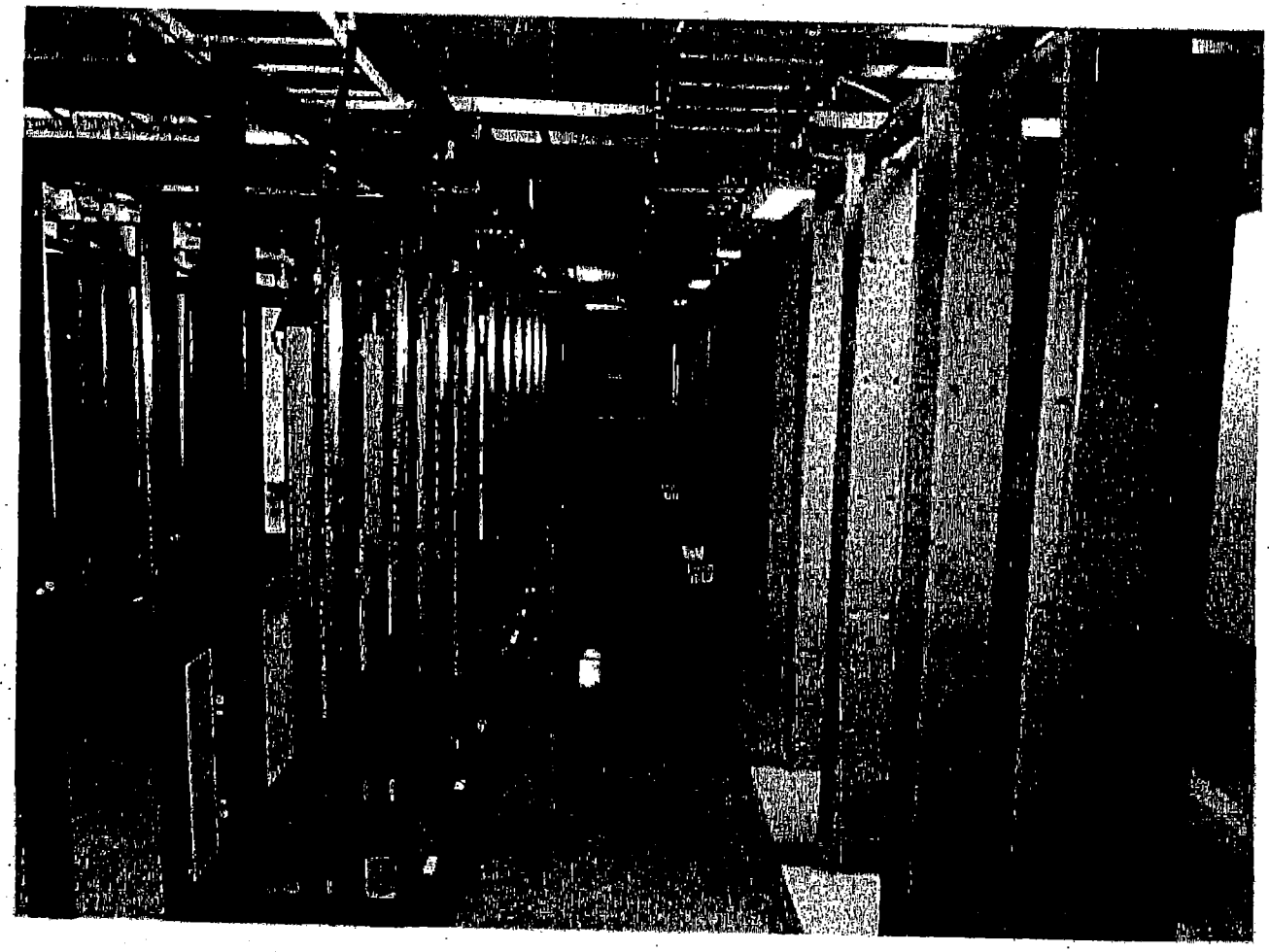
435 Potrero Interior Entrance



435 Potrero Interior Entrance



First Floor Data Room



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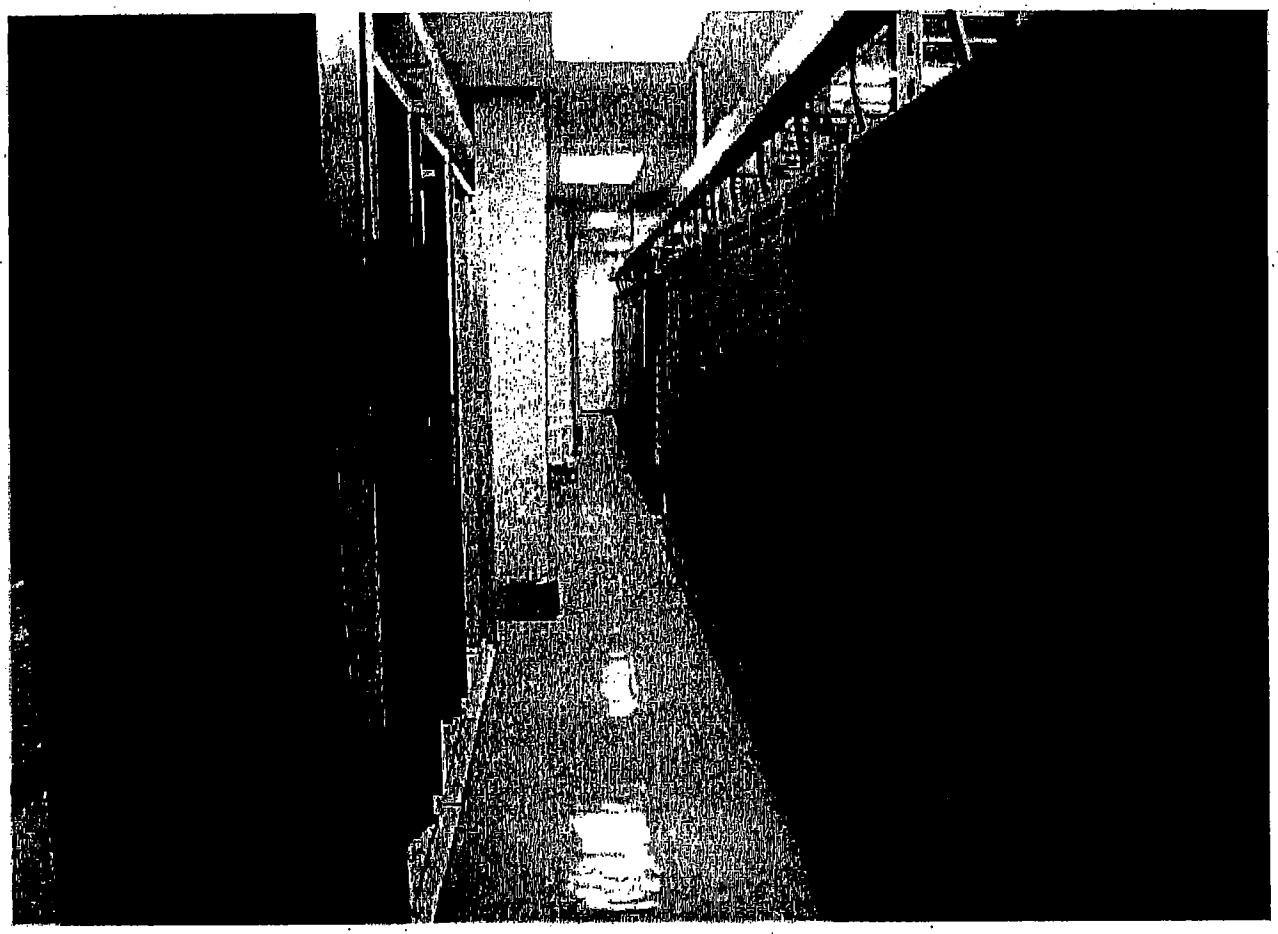
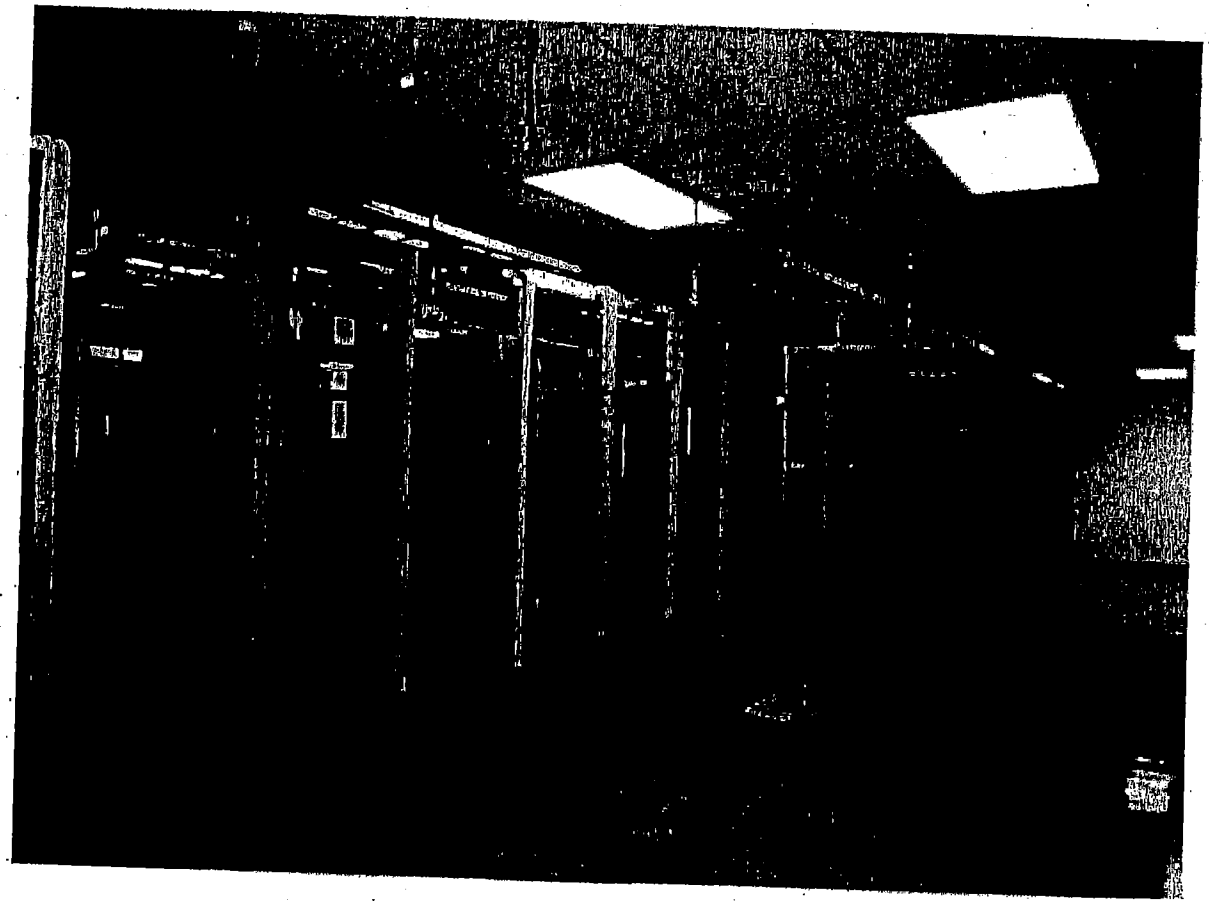


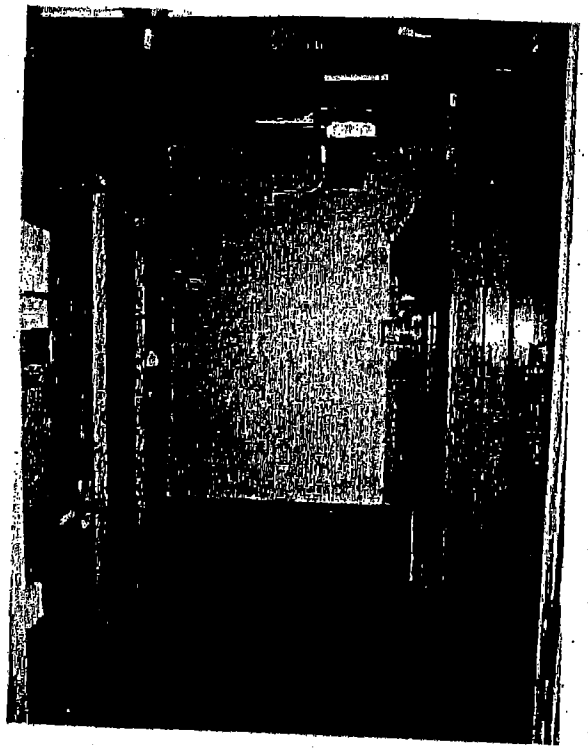
Second Floor Data Room

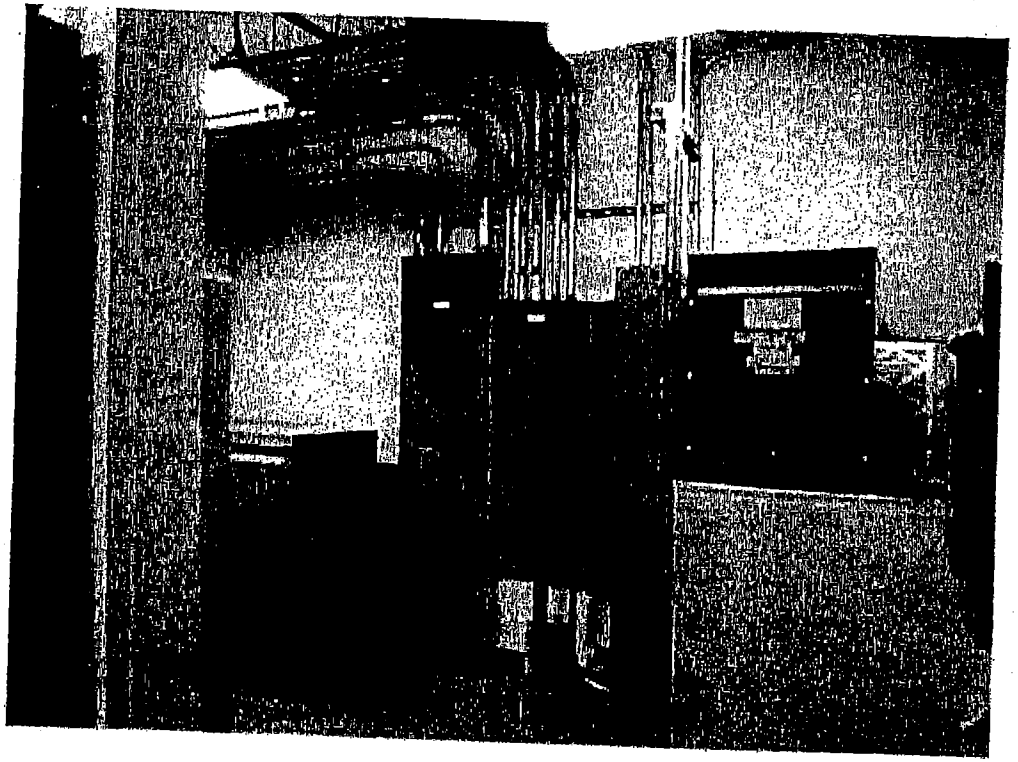


PG&E Transformer



Electrical Room





Date Filed: BOARD OF APPEALS

JUL 25 2013

APPEAL # JR

City & County of San Francisco
BOARD OF APPEALS

JURISDICTION REQUEST

Date of request: **July 25, 2013.**

Mica Ringel, (requestor(s)) hereby seeks a new appeal period for the following departmental action: **ISSUANCE** of **LETTER OF LEGIMIZATION** by **Zoning Administrator,** issued to: **F.W. Spencer & Son Incorporated c/o David Silverman @ Reuben, Junius & Rose LLP,** for property at **435-437 Potrero Avenue,** that was issued or became effective on **June 04, 2013,** and for which the appeal period ended at close of business on **June 19, 2013.**

Your **Jurisdiction Request** will be considered by the Board of Appeals on Wednesday, **August 14, 2013** at **5:00 p.m. City Hall, Room 416,** One Dr. Carlton B. Goodlett Place.

Pursuant to Article V, § 10 of the Board Rules, the **RESPONSE** to the written request for jurisdiction must be submitted by the permit, variance, or determination holder(s) and/or department(s) no later than Letter of Legitimization Holde **days from the date of filing, on or before August 05, 2013,** and must not exceed 6 pages in length (double-spaced), with unlimited exhibits. An original and 10 copies shall be submitted to the Board office with additional copies delivered to the opposing parties the same day.

You or your representative **MUST** be present at the hearing. It is the general practice of the Board that only up to three minutes of testimony from the requestor, the permit holder, and the department(s) will be allowed. Your testimony should focus on the reason(s) you did not file on time, and why the Board should allow a late filing in your situation.

Based upon the evidence submitted and the testimony, the Board will make a decision to either grant or deny your Jurisdiction Request. Four votes are necessary to grant jurisdiction. If your request is denied, an appeal may not be filed and the decision of the department(s) is final. If your request is granted, **a new five (5) day appeal period shall be created which ends on the following Monday,** and an appeal may be filed during this time.

Please Print:

Name: Mica Ringel

Address: 485 Potrero Ave #C

Phone: 415 519 7529

Email: supermica@gmail.com

Signature of Requestor or Agent

City and County of San Francisco **Board of Appeals**

July 25, 2013

F.W. Spencer & Son Inc., Subject Prop. Owner
c/o David Silverman, Attorney for Subject Prop. Owner
One Bush Street #600
San Francisco, CA 94104

Re: **JURISDICTION REQUEST**
Date Filed: **July 25, 2013**
Departmental Action: **Issuance of Letter of Legitimization by ZA**
Subject Property: **435-437 Potrero Avenue**

Dear Sir or Madam:

The Board of Appeals has received the enclosed letter requesting that it take jurisdiction beyond the fifteen (15)-day appeal period for the matter(s) referenced above. This ***JURISDICTION REQUEST*** has been scheduled for consideration on ***Aug. 14, 2013*** ***at City Hall, Room 416, at 5:00 pm***; One Dr. Carlton B. Goodlett Place.

Please note that the filing of a Jurisdiction Request ***DOES NOT*** suspend the above-referenced departmental action. However, if the Board grants the Jurisdiction Request on the above – referenced date of consideration (4 out of 5 votes required), ***a new five (5) - day appeal period shall be created which ends on the following Monday***, and the subject departmental action shall then be suspended upon the filing of a formal appeal, and until the Board of Appeals decides the matter and releases a notice of decision and order.

Pursuant to Article V, § 10 of the Board Rules, the **RESPONSE** to the written request for jurisdiction must be submitted by the permit/variance/determination holder(s) or Department no later than 10 days from the date of filing, on or before Aug. 05, 2013, and must not exceed 6 pages in length, with unlimited exhibits. An original and 10 copies shall be submitted to the Board office by 4:30pm, with additional copies delivered to the opposing parties the same day. It is the general practice of the Board that only up to three (3) minutes of testimony for each party will be allowed. If you have any questions, please call (415) 575-6880.

Sincerely,

BOARD STAFF

cc: ZA Scott Sanchez, Staff Planner & Requestor(s) w/o enclosures

Mica Ringel, Requestor
485 Potrero Ave, Unit C
San Francisco, CA 94110

(415) 575-6880 Fax (415) 575-6885

B4083

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Plant# 21731 Page: 1 Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

Arman Khalili
ICDC LLC
One Sansome St, 15th floor
San Francisco, CA 94104

Location: 437 Potrero Street
San Francisco, CA 94110

S#	DESCRIPTION	[Schedule]	PAID
1	Standby Diesel engine, 519 hp, Caterpillar S/N 4ZRD6880 Generator Emissions at: P1 Stack	[B,1096 days]	559

1 Permit Source, 0 Exempt Sources

*** See attached Permit Conditions ***

The operating parameters described above are based on information supplied by permit holder and may differ from the limits set forth in the attached conditions of the Permit to Operate. The limits of operation in the permit conditions are not to be exceeded. Exceeding these limits is considered a violation of District regulations subject to enforcement action.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

*** PERMIT CONDITIONS ***

==========

COND# 22820 *applies to S# 1*

1. The owner/operator shall not exceed 20 hours per year per engine for reliability-related testing. Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

2. The owner/operator shall operate each emergency standby engine only for the following purposes: to mitigate emergency conditions, for emission testing to demonstrate compliance with a District, State or Federal emission limit, or for reliability-related activities (maintenance and other testing, but excluding emission testing). Operating while mitigating emergency conditions or while emission testing to show compliance with District, State or Federal emission limits is not limited.
[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

3. The owner/operator shall operate each emergency standby engine only when a non-resettable totalizing meter (with a minimum display capability of 9,999 hours) that measures the hours of operation for the engine is installed, operated and properly maintained.
[Basis: Title 17, California Code ofRegulations, section 93115, ATCM for Stationary CI Engines]

4. Records: The owner/operator shall maintain the following monthly records in a District-approved log for at least 36 months from the date of entry (60 months if the facility has been issued a Title V Major Facility Review Permit or a Synthetic Minor Operating Permit). Log entries shall be retained on-site, either at a central location or at the engine's location, and made immediately available to the District staff upon request.
   a. Hours of operation for reliability-related activities (maintenance and testing).
   b. Hours of operation for emission testing to show compliance with emission limits.
   c. Hours of operation (emergency).
   d. For each emergency, the nature of the emergency condition.
   e. Fuel usage for each engine(s).

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

This document does not permit the holder to violate any District regulation or other law.

*** PERMIT CONDITIONS ***

==========

[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

5. At School and Near-School Operation:
If the emergency standby engine is located on school grounds or within 500 feet of any school grounds, the following requirements shall apply:

The owner/operator shall not operate each stationary emergency standby diesel-fueled engine for non-emergency use, including maintenance and testing, during the following periods:

a. Whenever there is a school sponsored activity (ifthe engine is located on school grounds)

b. Between 7:30 a.m. and 3:30 p.m. on days when school is in session.

"School" or "School Grounds" means any public or private school used for the purposes of the education of more than 12 children in kindergarten or any of grades 1 to 12, inclusive, but does not include any private school in which education is primarily conducted in a private home(s). "School" or "School Grounds" includes any building or structure, playground, athletic field, or other areas of school property but does not include unimproved school property.

[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

~~~~~~~~~~~~~~~~~~~~~~~~~~ END OF CONDITIONS ~~~~~~~~~~~~~~~~~~~~~~~~~~
~~~~~~~~~~~~~~~~~~~~~~~~~~

Bay Area Air Quality Management District

** SOURCE EMISSIONS **

PLANT #21731
Mar 14, 2013

S#	Source Description	Annual Average lbs/day PART	ORG	NOx	SO2	CO
1	Generator	-	-	.08	-	.02
	T O T A L S			.08		.02

BAY AREA AIR QUALITY MANAGEMENT DISTRICT Printed: DEC 23, 2011
DETAIL POLLUTANTS - ABATED
MOST RECENT P/O APPROVED (2010)

Astound Broadband (P# 19489)

S# SOURCE NAME / MATERIAL / THROUGHPUT	SOURCE CODE / DATE	POLLUTANT	CODE	LBS/DAY
1. Generator	C22AG098			
		Benzene	41	1.09E-04
		Formaldehyde	124	6.85E-04
		Organics (part not spec el	990	5.29E-03
		Arsenic (all)	1030	9.53E-08
		Beryllium (all) pollutant	1040	5.59E-08
		Cadmium	1070	2.38E-07
		Chromium (hexavalent)	1095	4.93E-09
		Lead (all) pollutant	1140	2.02E-07
		Manganese	1160	3.17E-07
		Nickel pollutant	1180	3.86E-06
		Mercury (all) pollutant	1190	6.74E-08
		Diesel Engine Exhaust Part	1359	5.51E-03
		PAH's (non-speciated)	1840	5.03E-07
		Nitrous Oxide (N2O)	2030	2.93E-05
		Nitrogen Oxides (part not	2990	7.71E-02
		Sulfur Dioxide (SO2)	3990	8.58E-05
		Carbon Monoxide (CO) pollu	4990	1.68E-02
		Carbon Dioxide, non-biogen	6969	3.67E+00
		Methane (CH4)	6970	1.47E-04

print this search?: [L]ocal or s[Y]stem printer (6th flr), [N]o, [E]xit:

Mica I. Ringel
485 Potrero Avenue, Unit C
San Francisco, California 94110
415-519-7523
supermica@gmail.com

September 16, 2013

Board President David Chiu
and Members of the Board of Supervisors
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2013 SEP 17 PM 12: 32

Re: Appeal of Categorical Exemption Determination
Internet Services Exchange
435-437 Potrero Avenue

Dear President Chiu and Supervisors:

I am appealing a determination made by the Planning Department and Commission (hereinafter collectively "Planning") that a Conditional Use (CU) Permit to establish an Internet Services Exchange (ISE) at 435-437 Potrero Avenue is somehow exempt from the provisions of the California Environmental Quality Act (CEQA) by "stamp" of a Class 1 categorical exemption.

BACKGROUND

On July 11th 2013, the Planning Commission took action and approved Motion No. 18921 adopting findings relating to the approval of CU Authorization pursuant to Planning Code § 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of ISE on the entirety of both floors at 435-437 Potrero Avenue, in an existing two-story building within an Urban Mixed Use (UMU) zoning district bordering Residential (RH-2).

An ISE is a prohibited use within a UMU zoning district, and the Commission's authorization was contingent on approval of a Letter of Legitimization (LOL) signed by the Zoning Administrator (ZA) on June 4th 2013.

It is my contention that Planning has (1) abused its discretion in its determination that this project is categorically exempt and (2) failed to make the required findings that would support an exemption.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

Under CEQA, "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects...." (Pub. Res. Code, § 21002.) Human beings are an integral part of the "environment." An agency is required to find that a "project may have a 'significant effect on the environment'" if, among other things, "[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly[.]" (Pub. Res. Code, § 21083, subd. (b)(3); see also CEQA Guidelines, § 15126.2 [noting that a project may cause a significant effect by bringing people to hazards].)

CEQA'S PURPOSES

The importance of a healthy environment for all of California's residents is reflected in CEQA's purposes. In passing CEQA, the Legislature wisely determined:

- "The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern." (Pub. Res. Code, § 21000, subd. (a).)
- We must "identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds from being reached." (*Id.* at subd. (d).)
- "[M]ajor consideration [must be] given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." (Id. at subd. (g).)

- We must "[t]ake all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise." (Pub. Res. Code, § 21001, subd. (b).)

Specific provisions of CEQA and its Guidelines require that local lead agencies consider how the environmental and public health burdens of a project might specially affect certain communities. Several examples follow.

ENVIRONMENTAL SETTING AND CUMULATIVE IMPACTS

There are a number of different types of projects that have the potential to cause physical impacts. One example is a project that will emit pollution. Where a project will cause pollution, the relevant question under CEQA is whether the environmental effect of the pollution is significant. In making this determination, two long- standing CEQA considerations that may relate to environmental justice are relevant – setting and cumulative impacts.

It is well established that "[t]he significance of an activity depends upon the setting." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718 [citing CEQA Guidelines, § 15064, subd. (b)]; see also *id.* at 721; CEQA Guidelines, § 15300.2, subd. (a) [noting that availability of listed CEQA exceptions "are qualified by consideration of where the project is to be located – a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant."]) For example, a proposed project's particulate emissions might not be significant if the project will be located far from populated areas, but may be significant if the project will be located in the air shed of a community whose residents may be particularly sensitive to this type of pollution, or already are experiencing higher-than-average asthma rates. A lead agency therefore should take special care to determine whether the project will expose "sensitive receptors" to pollution (see, e.g., CEQA Guidelines, App. G); if it will, the impacts of that pollution are more likely to be significant

In addition, CEQA requires a lead agency to consider whether a project's effects, while they might appear limited on their own, are "cumulatively considerable" and therefore significant. (Pub. Res. Code, § 21083, subd. (b)(3).) "'[C]umulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future

projects." (*Id.*) This requires a local lead agency to determine whether pollution from a proposed project will have significant effects on any nearby communities, when considered together with any pollution burdens those communities already are bearing, or may bear from probable future projects. Accordingly, the fact that an area already is polluted makes it *more likely* that any additional, unmitigated pollution will be significant. Where there already is a high pollution burden on a community, the "relevant question" is "whether any additional amount" of pollution "should be considered significant in light of the serious nature" of the existing problem. (*Hanford, supra*, 221 Cal.App.3d at 661; see also *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025 [holding that "the relevant issue ... is not the relative amount of traffic noise resulting from the project when compared to existing traffic noise, but whether any additional amount of traffic noise should be considered significant in light of the serious nature of the traffic noise problem already existing around the schools."])

ALTERNATIVES AND MITIGATION

CEQA's "substantive mandate" prohibits agencies from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that would substantially lessen or avoid those effects. (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134.) Where a local agency has determined that a project may cause significant impacts to a particular community or sensitive subgroup, the alternative and mitigation analyses should address ways to reduce or eliminate the project's impacts to that community or subgroup. (See CEQA

Guidelines, § 15041, subd. (a) [noting need for "nexus" between required changes and project's impacts].)

Depending on the circumstances of the project, the local agency may be required to consider alternative project locations (see *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404) or alternative project designs (see *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1183) that could reduce or eliminate the effects of the project on the affected community.

CATEGORICAL EXEMPTIONS

In *McQueen v. Mid-Peninsula Regional Open Space* (1988) 202 Cal. App. 3d 1136, the court reiterated that categorical exemptions are construed strictly, shall not be unreasonably expanded beyond their terms, and may not be used where there is substantial evidence that there are unusual circumstances (including future activities) resulting in (or which might reasonably result in) significant impacts which threaten the environment.

Class 1 categorical exemption is applicable to the "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (Guidelines, § 15301.)

This section describes the class of projects wherein the proposed activity will involve negligible or no expansion of the use existing at the time the exemption is granted. Application of this exemption, as all categorical exemptions, is limited by the factors described in section 15300.2. Accordingly, a project with significant cumulative impacts or which otherwise has a reasonable possibility of resulting in a significant effect does not quality for a Class 1 exemption.

SIGNIFICANT CHANGE OF USE

435-437 Potrero Avenue had been without a tenant for a minimum of 3 years on July 11th, 2013 when the Commission took action and granted the CUP. By definition, an unoccupied property is empty, vacant, and without an active use. Any subsequent use beyond that which existed at the time of project approval, which was nothing, would have to be considered a clear expansion of use.

The former tenant [RCN/Astound] had used the site to house an ancillary hub for the broadcast and transmission of their digital cable franchise [1].

The Project Sponsor's submittal in support of the CUP outlines the framework for the site to become a public Data Center serving "local retail business customers." It will be "much like a local print shop" or a Kinko's. "At any given time there will be 4-6 people employed at the facility with 2-4 employees of customers rotating on and off-site at any given time." Whereas, the commerce element had not previously existed at this site before, it becoming a commercial web host would again, have to be considered a clear expansion of use.

In their quest to compete with the Tier V [top rated] data centers at 365 Main Street and 200 Paul Avenue, the Project Sponsor's submittal states this project will "represent a local choice for the San Francisco Small Business Community". It will "help attract and retain small businesses and start-up companies" and in turn, that will "promote further job growth in San Francisco." They believe they can "provide a higher degree of service than the larger national and multi-national platforms" as long as it will "not require construction of a new facility."

---

[1] "RCN has a principal headend and hub site located at 200 Paul Avenue, San Francisco, California 94124. RCN utilizes an ancillary hub site at the following location: 437 Potrero Avenue, San Francisco, CA, 94110. This hub site is served by and technically integrated with the principal headend. RCN serves the general population within this OVS service area." **www.fcc.gov/bureaus/mb/ovs/rcnsfnoi.doc**

An ISE would have been principally permitted under the site's previous M-1 (Light Industrial) zoning, however pursuant to Eastern Neighborhoods rezoning to UMU, Data Centers are prohibited in UMU.

The Project Sponsor admits that the site had been vacant since 2010 and in that time, RCN/Astound had not secured the appropriate permits to establish an ISE at 435-437 Potrero Avenue. It is my contention that they never provided Internet Services from 435-437, but rather from their Data Center at 200 Paul. Pursuant to their Franchise agreement and Utility Permit, the Potrero hub site was considered a "facility" and thus was unregulated by Planning.

This calls into question the lack of due diligence by the Department.

Why wasn't this assessed as a new project for CU approval, rather than "legitimized" as an existing business that could forego environmental review?

In this context, CEQA analysis becomes very important. If the project fails to meet the Class 1 guidelines of an "existing facility" it is not categorically exempt. The facility exists, yes... but it is no longer an ancillary hub for digital cable. RCN/Astound abandoned the utility use of 435-437 Potrero in 2010 when their lease expired. The pending use is predicated by what it has sought entitlement to become, a commercial web host.

Negligible refers to a quantity *so* small it *can* be ignored; something *so* insignificant it is neither important, nor worthy of consideration. The planned expansion of use is neither insignificant nor negligible... and even if it was, it's still not categorically exempt.

The exception to the exemption is that a project with the *potential* of causing significant cumulative impacts, or which otherwise has a reasonable *possibility* of resulting in significant effects, precludes eligibility for exemptions.

PUBLIC HEALTH AND SAFETY

The following statement from the Project Sponsor's Submittal is not true: "the CU Authorization *will not be* detrimental to the health, safety or general welfare of the persons or the businesses in the vicinity."

There is an industrial sized 4,000 KW Diesel Generator on-site and the emission "stack" vents directly into our back yards. The health risks associated from exposure to Toxic Air Contaminants [TAC] are quantified by ones distance from the source. TAC's are directly related to asthma, heart attacks, strokes, hypertension and a shorter life span. Potrero Avenue has very poor air quality[2] and noise levels[3] measuring comparable to Highway 101.

SUBSTANTIAL EVIDENCE

From this neighborhoods past experience this use at this location will harm the environment. See Attached Letter to the Commission from David Wurtman, MD who concurs a Class 1 Categorical Exemption does not apply to this project.

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[2] http://www.sf-planning.org/ftp/files/legislative_changes/new_code_summaries/080934_Air_Quality_for_Urban_Infill.pdf

[3] http://www.sf-planning.org/ftp/files/publications_reports/library_of_cartography/Noise.pdf

San Francisco Municipal Code § 2001 states:

The Board of Supervisors finds and declares the following: [4]

(a) Diesel Backup Generators emit large amounts of smog-forming nitrogen oxides (NOx), particulate matter with a diameter of 10 microns or less (PM10), sulfur oxides and hydrocarbons contributing to ground-level ozone, and reduced visibility.

(b) Diesel exhaust is linked to short and long-term adverse health effects in humans, which include lung cancer, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, and chronic bronchitis and decreased lung function.

(c) In August of 1998, the California Air Resource Board listed diesel exhaust, specifically particulate emissions from diesel fueled engines, as a "toxic air contaminant."

(d) According to the Bay Area Air Quality Management District (BAAQMD), Diesel Backup Generators tend to emit more pollutants than a new well-controlled power plant. In fact, even a clean diesel backup generator may emit more than 20 times as much NOx per kilowatt-hour as a new well-controlled power plant. Older dirtier Diesel Backup Generators may emit 200 times as much NOx.

(e) The Bay Area is currently designated nonattainment for the national ozone standards by the United States Environmental Protection Agency.

(f) The Bay Area is currently designated nonattainment for the state ozone and PM10 standards by the California Air Resource Board.

(g) The City and County of San Francisco is concerned about the health hazards posed by diesel emissions polluting the air, and wishes to impose limitations on Diesel Backup Generators to reduce the emission of diesel exhaust.

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[4] (Added by Ord. 202-02, File No. 012186, App. 9/27/2002)

NUISANCE

Although the permit to operate the generator had expired during vacancy, the BAAQMD has already issued a new permit for the new use. As part of the exhibits attached is a copy of the new permit. For your comparison is also an emissions report which details 19 of a hundred plus toxins this generator emitted into my backyard under the previous permit. Please note that the toxins are measured in **.lbs per day** (yearly emissions divided by 365 days).

Generator's are *not* just for emergency use. Generators have to be regularly tested and maintained. Anytime there is interruption in power the engine fires on. There is not always staff at the facility and sometimes problems can't be immediately fixed.

Is my neighborhood expected to shelter in-place? Indeed, we are. They have 1,500 Gallons of fuel reserves on-site and due to the "mission critical" nature of a data center there is a very real potential for hours upon hours of industrial strength diesel emissions bellowing into our increasingly residential neighborhood.

From experience: several adjacent neighbors on Utah Street and Potrero Avenue have testified that the old generator would emit visible plumes of black "smoke" – which is not smoke at all, it is carcinogenic soot being emitted directly into our backyards and the air we breathe; vibrations could be felt whenever the generator was in operation.

The problems are not just attributed to the generator, but also to noise from the rooftop fans. One neighbor described a constant electrical hum that emanated from the building that could be heard prominently in the evenings. Two neighbors who live directly behind 435-437 Potrero describe the period after the former tenants left as being "a relief from the audible static" they had endured for years.

The Project Sponsor assured Planning that the existing HVAC meets noise standards. They also propose specific mitigation measures (e.g. Mufflers) to reduce sound. The motion adopted by the Commission recognizes that a noise study is underway, yet not

completed. Under CEQA, you have to complete the environmental analysis prior to project approval. There is not a CEQA checklist, nor any environmental documents in the case files.

PROJECT CONDITIONS CANNOT SUPPORT A CATEGORICAL EXEMPTION

Categorical Exemptions only apply to projects that exemptions only apply to projects that have no potential environmental impacts and require no mitigation measures.
As held by the First District Court of Appeal In *Salmon Protection And Watershed Network v. County Of Marin* (2004) 125 Cal.App.4th 1098, any project that requires mitigation measures cannot be approved via categorical exemption:

> Only those projects having no significant effect on the environment are categorically exempt from CEQA review. (Pub. Resources Code, §§ 21080, subd. (b)(9), 21084, subd. (a).) If a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1199-2000.) *Mitigation measures may support a negative declaration but not a categorical exemption.* (*Id.* at 1102, italics added.)

This project is *not* exempt from environmental review, but rather this project is a *prime candidate* for environmental review.

Not only did the former tenant fail to obtain permits with Planning for an ISE, but throughout their entire lease they never finalized a single permit with DBI, not even the electrical. They were tenants who officially terminated use when they left and now the landlord is attempting to continue use years later, thus the so-called "legitimization".

There has (still) been no disclosure of any adverse environmental or health effects to the surrounding neighborhood from the Project Sponsor or from Planning.

This project has nearly escaped environmental review via "legitimization" and the CU process, thus my appeal to you.

LAND USE STANDARDS

GENERAL WELFARE STANDARD

- "The establishment, maintenance or conducting of the use for which a use permit is sought will not, under the particular case, be detrimental to the public welfare or injurious to property or improvements in the neighborhood" (*Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586).

NUISANCE STANDARD

- "Any use found to be objectionable or incompatible with the character of the city and its environs due to noise, dust, odors or other undesirable characteristics may be prohibited" (*Snow v. City of Garden Grove* (1961) Cal.App.2d 496).

GENERAL PLAN CONSISTENCY STANDARD

- "Although use permits are not explicitly made subject to a general plan meeting the requirement of state law, that condition is necessarily to be implied from the hierarchical relationship of land use laws. Thus, use permits are struck from the mold of the zoning law, the zoning law must comply with the adopted general plan, and the adopted general plan must conform with state law; the validity of the permit process derives from compliance with this hierarchy of planning laws (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176).

ZONING CONSISTENCY STANDARD

- "To obtain a use permit, the applicant must generally show that the contemplated use is compatible with the policies in terms of the zoning ordinances, and that such use would be essential or desirable to the public convenience or welfare, and will not impair the integrity and character of the zoned district or be detrimental to the public health, safety, morals or welfare" (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151).

CALL FOR RELIEF

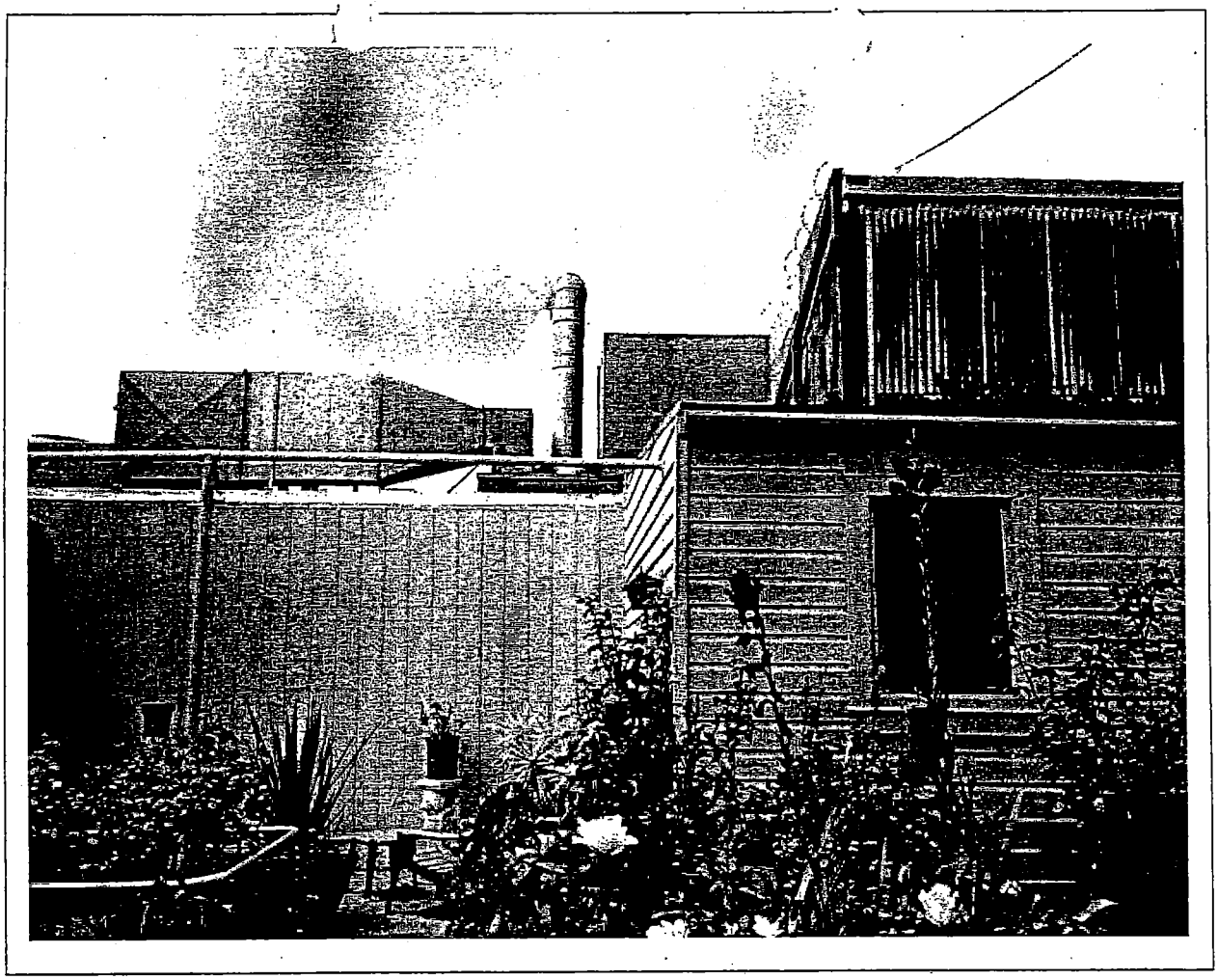
Please grant this appeal, and require Environmental review and compliance with San Francisco's plans and ordinances following submission of a revised project application.

All newly provided information will be put to good use to assist City Decision makers in making discretionary land use decisions that protect the integrity of a livable neighborhood.

An EIR will analyze impacts, explore the feasibility of project alternatives, and "demonstrate to an apprehensive citizenry" that the City has analyzed and considered the environmental implications of its actions. (Guideline § 15003, subd. (d).)

Thank you very much for your consideration.

MICA I. RINGEL



View of 435-437 Potrero Avenue from
Mrs. Dinelli's Backyard on Utah Street

This project will allow Toxic Air Contaminants In Our Backyards

Gmail by Google

Mica Ringel <supermica@gmail.com>

re 435-437 Potrero Av - Internet Services Exchange - Conditional Use Permit

David Wurtman <dwurtman@yahoo.com> Wed, Jul 10, 2013 at 9:27 PM
To: commissions.secretary@sfgov.org, corey.teague@sfgov.org
Cc: supermica@gmail.com

Dear Commissioners,

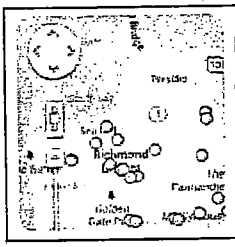
You are in receipt of a letter from Mica Ringel articulating his reasons to oppose the granting of this permit. I live at 2009 17th St, in the neighborhood, and I wholeheartedly agree with the points Mr. Ringel has presented to you. The soot/microparticulate levels in the air in Potrero Hill, due to proximity to 101 and 280, are already unhealthy, alarming, and inconsistent with what the City of San Francisco, a most environmentally progressive city, stands for. While the freeways are what they are and are not at issue here, adding to these pollution levels by allowing a diesel generator on premises of this building, and taking the position that a proposed Conditional Use of an Internet Services Exchange at 435-437 Potrero Avenue is eligible for a Class I Categorical Exemption from the California Environmental Quality Act, is not consistent with the responsibility you have to safeguard the public from unnecessary hazardous exposure to pollutants and toxins. "Progress at any price" is not progress.

Thank you,
David Wurtman, MD

"The Department, pursuant to Title 14 of the California Code of Regulations §15000 et seq. (CEQA Guidelines), issued a Categorical Exemption for 435-437 Potrero Avenue on July 3, 2013 finding that the proposed project is exempt from the California Environmental Quality Act (CEQA) as a Class 1 categorical exemption under CEQA Guidelines Section 15301."

--Planning Department

- On July 1st the Department launched an interactive CEQA Exemptions Map[1] and 435-437 Potrero Avenue is not listed, nor is the project listed on the Exemptions Archive[2] page either.



New! July 2013

CEQA Categorical, Statutory and Community Plan Exemptions Map

Google Map showing all CEQA exemptions issued since 1 July 2013.

- My first email to City Planner Corey Teague on May 24, 2013

Hello, Corey Teague:

A few questions about 2013.0477C / 435-437 Potrero Ave.

- For those of us who live in the community, is there the possibility of any health or environmental concerns from this use at this address?
- Are there any technical studies in process or have any reports been filed for the proposed project?
- Is CEQA applicable to the Conditional Use Authorization?

Thank you.

--M. Ringel

- There is not a CEQA checklist in the case files.
- There are no environmental findings.
- There was no exemption issued.

[1] http://www.sf-planning.org/index.aspx?page=3447
[2] http://www.sf-planning.org/index.aspx?page=2412

Division 13. California Public Resources Code
Division 13. California Environmental Quality Act

Article 19. Categorical Exemptions

§ 15300. Categorical Exemptions

Section 21084 of the Public Resources Code requires these Guidelines to include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall, therefore, be exempt from the provisions of CEQA.

In response to that mandate, the Secretary for Resources has found that the following classes of projects listed in this article do not have a significant effect on the environment, and they are declared to be categorically exempt from the requirement for the preparation of environmental documents.

Note: Authority cited: Section 21083, Public Resources Code; Reference: Section 21084, Public Resources Code.

§ 15300.2. Exceptions

(a) Location. Classes 3, 4, 5, 6, and 11 are qualified by consideration of where the project is to be located -- a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant. Therefore, these classes are considered to apply all instances, except where the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies.

(b) Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.

(c) Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

(f) Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.

Note: Authority cited: Section 21083, Public Resources Code; References: Sections 21084 and 21084.1, Public Resources Code; *Wildlife Alive v. Chickering* (1977) 18 Cal.3d 190; *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896; *Citizens for Responsible Development in West Hollywood v. City of West Hollywood* (1995) 39 Cal.App.4th 925;*City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810; *Association for the Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720; and *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464

Discussion: In *McQueen v. Mid-Peninsula Regional Open Space* (1988) 202 Cal. App. 3d 1136, the court reiterated that categorical exemptions are construed strictly, shall not be unreasonably expanded beyond their terms, and may not be used where there is substantial evidence that there are unusual circumstances (including future activities) resulting in (or which might reasonably result in) significant impacts which threaten the environment.

§ 15301. Existing Facilities

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project involves negligible or no expansion of an existing use.

Examples include but are not limited to:

(a) Interior or exterior alterations involving such things as interior partitions, plumbing, and electrical conveyances;

(b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services;

(c) Existing highways and streets, sidewalks, gutters, bicycle and pedestrian trails, and similar facilities (this includes road grading for the purpose of public safety).

(d) Restoration or rehabilitation of deteriorated or damaged structures, facilities, or mechanical equipment to meet current standards of public health and safety, unless it is determined that the damage was substantial and resulted from an environmental hazard such as earthquake, landslide, or flood;

(e) Additions to existing structures provided that the addition will not result in an increase of more than:

(1) 50 percent of the floor area of the structures before the addition, or 2,500 square feet, whichever is less; or

(2) 10,000 square feet if:

(A) The project is in an area where all public services and facilities are available to allow for maximum development permissible in the General Plan and

(B) The area in which the project is located is not environmentally sensitive.

(f) Addition of safety or health protection devices for use during construction of or in conjunction with existing structures, facilities, or mechanical equipment, or topographical features including navigational devices;

(g) New copy on existing on and off-premise signs;

(h) Maintenance of existing landscaping, native growth, and water supply reservoirs (excluding the use of pesticides, as defined in Section 12753, Division 7, Chapter 2, Food and Agricultural Code);

(i) Maintenance of fish screens, fish ladders, wildlife habitat areas, artificial wildlife waterway devices, streamflows, springs and waterholes, and stream channels (clearing of debris) to protect fish and wildlife resources;

(j) Fish stocking by the California Department of Fish and Game;

(k) Division of existing multiple family or single-family residences into common-interest ownership and subdivision of existing commercial or industrial buildings, where no physical changes occur which are not otherwise exempt;

(l) Demolition and removal of individual small structures listed in this subdivision;

(1) One single-family residence. In urbanized areas, up to three single-family residences may be demolished under this exemption.

(2) A duplex or similar multifamily residential structure. In urbanized areas, this exemption applies to duplexes and similar structures where not more than six dwelling units will be demolished.

(3) A store, motel, office, restaurant, or similar small commercial structure if designed for an occupant load of 30 persons or less. In urbanized areas, the exemption also applies to the demolition of up to three such commercial buildings on sites zoned for such use.

(4) Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences.

(m) Minor repairs and alterations to existing dams and appurtenant structures under the supervision of the Department of Water Resources.

(n) Conversion of a single family residence to office use.

(o) Installation, in an existing facility occupied by a medical waste generator, of a steam sterilization unit for the treatment of medical waste generated by that facility provided that the unit is installed and operated in accordance with the Medical Waste Management Act (Section 117600, et seq., of the Health and Safety Code) and accepts no offsite waste.

(p) Use of a single-family residence as a small family day care home, as defined in Section 1596.78 of the Health and Safety Code.

Note: Authority cited: Section 21083, Public Resources Code; References: Sections 21084, Public Resources Code; *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307.

Discussion: This section describes the class of projects wherein the proposed activity will involve negligible or no expansion of the use existing at the time the exemption is granted. Application of this exemption, as all categorical exemptions, is limited by the factors described in section 15300.2. Accordingly, a project with significant cumulative impacts or which otherwise has a reasonable possibility of resulting in a significant effect does not quality for a Class 1 exemption.

Open Video System
Notice of Intent

Attention:
Media Bureau

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
RCN Telecom Services, Inc.	)	
	)	**File No.** _____
	)	
Notice of Intent to Establish an Open Video System	)	
	)	

NOTICE OF INTENT TO ESTABLISH AN OPEN VIDEO SYSTEM

RCN Telecom Services, Inc. ("RCN"), pursuant to Section 651 of the Telecommunications Act of 1996 and Section 76.1503(b)(1) of the Commission's Rules, hereby submits its "Notice of Intent," ("Notice") to establish an open video system ("OVS"). As required by Section 76.1503(b)(1), RCN respectfully submits the following information:

1. The OVS operator is RCN Telecom Services, Inc., with its principal offices located at 1400 Fashion Island Blvd., Suite 100, San Mateo, California 94404. The contact person for the operator, David Hankin, is located at 1400 Fashion Island Blvd., Suite 100, San Mateo, California 94404, and may be reached at (650) 212-8010.

2. RCN's service area is located in the City and County of San Francisco, California. The boundaries of RCN's service area are located within the neighborhoods of Amazon Crocker, Castro, Corona Heights, Dolores Heights, Eureka Valley, Excelsior, Glen Park, Mission District, Noe Valley, North Bernal Heights, Outer Mission, Portola, and Potrero Hill. RCN has a principal headend and hub site located at 200 Paul Avenue, San Francisco, California 94124. RCN utilizes an ancillary hub site at the following location:

437 Potrero Avenue, San Francisco, CA, 94110

This hub site is served by and technically integrated with the principal headend. RCN serves the general population within this OVS service area.

3. The anticipated maximum analog capacity of the OVS is 330 analog channels, each consisting of 6-MHz analog capacity. The anticipated maximum digital capacity of the OVS is 678 digital channels.

4. Video Programming Providers ("VPPs") interested in carriage on RCN's OVS may obtain additional information about the system by completing the OVS Information Request Form (Attachment 1) and submitting it to:

David Hankin
1400 Fashion Island Blvd., Suite 100
San Mateo, California 94404

Pursuant to 47 C.F.R. § 76.1503(b)(2) of the FCC's rules, within five business days of RCN's receipt of a request for information, RCN will provide the VPP with additional information regarding the OVS to enable the VPP to make an enrollment decision. With this information, the VPP also will be provided with additional forms and instructions necessary for carriage on RCN's OVS. If a VPP decides to seek carriage on RCN's OVS after receipt of the additional information, the VPP must submit the required forms, a non-refundable application processing fee, and a channel reservation deposit no later than 30 days after the end of the enrollment period.

5. One third of the system's maximum capacity will be set aside for RCN and/or its affiliates. In addition, RCN will reserve approximately seventeen (17) channels to carry public programs, educational programs, governmental programs and those "must-carry" stations

entitled to demand carriage pursuant to 47 C.F.R. § 76.56 and §76.1506 of the FCC's rules. The remaining channels will be available for interested VPPs. No VPP will be assigned more than the capacity set aside for RCN and its affiliates.

6. The enrollment period for VPPs seeking carriage on RCN's open video system will commence on the date the Commission releases its Public Notice of this Notice of Intent and will expire ninety days after the Public Notice release date. In order to allow for contract finalization, ensure orderly channel allocation and allow timely systems allocation to occur, RCN encourages VPPs to submit their preliminary enrollment requests as soon as possible within this ninety-day period. Allocation of capacity in the event demand exceeds system capacity will occur as described in Attachment 2.

7. Attached is a certification that RCN has complied with all relevant requirements under the FCC's open video system regulations concerning must-carry and retransmission consent (47 C.F.R. §§76.64, 76.1506) (Attachment 3). Also attached is a certificate of service showing that RCN's Notice of Intent has been served on the applicable local franchising authority (Attachment 4).

Respectfully submitted,

RCN Telecom Services, Inc.

Kathy L. Cooper
Danielle C. Burt
SWIDLER BERLIN LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel)
(202) 424-7643 (Fax)

Dated: July 8, 2005

Network Topology

There are five major parts to a traditional coaxial cable system: 1) the headend, 2), the trunk cable, 3) the distribution (or feeder) cable in the neighborhood, 4) the drop cable to the home and in-house wiring, and 5) the terminal equipment (consumer electronics). Since the beginning of CATV systems, HFC (Hybrid Fiber Coax) networks have taken over among cable systems. HFC added fiber optic cable to the system and drastically shortened the trunk cable in the cable plant.

Headend

The headend or central office is the location where all the cable system originates from. It usually contains one building with one 100ft tall tower for antennas and about six large satellite dishes. In the headend, the signals from the tower with the local TV channels and the satellite dishes feed into the building. Also fiber optic cables usually from the local phone company bring in the Internet and PSTN (Public Switched Telephone Network). Within the headend, there are over a hundred separate pieces of signaling equipment which control and combine the TV, Internet, and phone service signals. From here multiple fiber optic cables leave the headend to a few hubsites with the signals on this fiber.

Hubsite

The hubsite is a small building with a generator for backup power. Here at the hubsite the fiber comes into the building from the headend. The hubs are about 20 miles geographically spread apart. Inside the hub, the fibers are spliced and sent out to many dozens of neighborhoods. Some cable systems are small enough that the hubsites do not exist and the fiber go right from the headend out to the neighborhoods.

Fiber Optic Node

The fiber from the hubsite or headend now enters the node in your neighborhood. The node is the location where the fiber optic cable ends and the coaxial cable begins. In other words, this is where the light signal on the fiber changes to an electrical RF (radio frequency) on the coax cable. The node also contains the first amplifier inside it. From here, the trunk cable leaves down the street.

Trunk Cable

The trunk cable is the main coax cable that runs down the street between the amplifiers. No customers receive their signal from this distribution cable. Since HFC technology, the amount of trunk cable used has decreased. It is meant to feed the bridger amplifiers which have the feeder cable exiting from them.

Feeder Cable

The feeder cable is the cable which have taps every 150ft on average. Out of the taps comes the flexible RG6 cable which we are all so familiar with feeding our TVs. The taps can be closer together than 150ft. Some are only 100ft apart or up to 200ft apart. This is the cable though that feeds our homes and businesses.

© 2012 Forest Hill Networks, Forest Hill, MD 21050

The site is in close proximity to major transit and highway routes. Both the San Francisco Municipal Transportation Agency (SFMTA) Muni Metro T Third Street light rail vehicle line and Caltrain regional rail service lines are located to the east of the project site, 500 and 0 feet respectively. The Gilman/ Paul station at the intersection of Paul and Gilman avenues is the closest station to the project site on the SFMTA's T Third light rail line. The Bayshore Caltrain Station is one mile to the southwest of the project site. Highway 101 is located 400 feet to the west with access via Bayshore Boulevard and San Bruno Avenue. The project site is within the Bayview Hunters Point Area Plan (BVHP Area Plan), formerly the South Bayshore Area Plan, and was amended in 2006 by the Bayview Hunters Point Redevelopment Projects and Rezoning amendment.[3] The program-level Bayview Hunters Point Redevelopment Projects and Rezoning Final Environmental Impact Report (BVHP FEIR)[4] was certified on March 2, 2006, and analyzed proposed rezoning and other changes to the BVHP Area Plan.

Currently, there are four buildings on the project site as shown on Figure 3 on p. 10. In the early 2000s, the project sponsor acquired the property and began operation of the ISE in the front two buildings, Buildings D and F. The project sponsor uses Buildings A and B for storage of materials and leases the remaining space to various tenants.

Presently, all four buildings are at least partially occupied. The two warehouse buildings are being used for the storage of construction materials by the project sponsor, as well as a utility meter installation contractor. There are two subcategories of uses operating within the existing ISE facility: colocation[5] and telco[6] uses. In the approximately 425,000-square-foot ISE facility (Buildings D and F), tenants providing telco services occupy approximately 55,000 square feet of building area, colocation tenants occupy approximately 212,000 square feet, and a tenant offering both colocation and telco services occupies 60,000 square feet. Additionally, approximately 38,000 square feet of building area are used for office and support functions and another approximately 60,000 square feet are leased, but not occupied.

The ISE is an energy-dependent facility due to the need for the continued operation of a large number of rooftop cooling units that maintain an acceptable temperature and humidity range for the computer equipment, and to power the computer equipment itself. The data center industry strives to meet 100 percent uptime[7] and any interruption to the power supply can take the computers off-line. Power is supplied to the facility by Pacific Gas and Electric (PG&E) via overhead power lines. Seventeen diesel generators are

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[3] Bayview Hunters Point Area Plan. Accessed on June 25, 2013. http://www.sf-planning.org/ftp/general_plan/Bayview_Hunters_Point.htm

[4] *Bayview Hunters Point Redevelopment Projects and Rezoning Final EIR* (Case 1996.546E; State Clearinghouse No. 2003062094), certified by the San Francisco Planning Commission on March 2, 2006. This document is available for review at 1650 Mission Street, Suite 400, San Francisco, CA.

[5] Colocation, or data center use, is a use in which a tenant provides the mechanical cooling, backup power supply, and communications connections and leases smaller portions of its tenant space, such as racks, cabinets, and cages with multiple racks and cabinets, to colocation customers who install their own network servers and other computer hardware.

[6] Telco tenants provide telecommunication carrier services to support land-based telephone lines and/ or wireless phone service. Much of the leased space for telco services is used as a physical hub for the voice and data communications network and requires less energy use than a concentration of Internet computer servers, or a data center use. However, due to the telecommunication industry's growth in "voice over Internet protocol (IP) services" (VOIP), telco tenants are revising their facilities to handle VOIP services that require the use of Internet computer servers to provide an IP networking system. The transition to VOIP services requires the need for a backup power supply for the computer servers.

[7] Uptime refers to the state in which the computer servers are running and available for processing data.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
DETAIL POLLUTANTS - ABATED
MOST RECENT P/O APPROVED (2010)

Printed: DEC 23, 2011

Astound Broadband (P# 19489)

S#	SOURCE NAME / MATERIAL	SOURCE CODE / DATE	POLLUTANT	CODE	LBS/DAY
	THROUGHPUT				
1	Generator	C22AG098	Benzene	41	1.09E-04
			Formaldehyde	124	6.85E-04
			Organics (part not spec el	990	5.29E-03
			Arsenic (all)	1030	9.53E-08
			Beryllium (all) pollutant	1040	5.59E-08
			Cadmium	1070	2.38E-07
			Chromium (hexavalent)	1095	4.93E-09
			Lead (all) pollutant	1140	2.02E-07
			Manganese	1160	3.17E-07
			Nickel pollutant	1180	3.86E-06
			Mercury (all) pollutant	1190	6.74E-08
			Diesel Engine Exhaust Part	1350	5.51E-03
			PAH's (non-speciated)	1840	5.03E-07
			Nitrous Oxide (N2O)	2030	2.93E-05
			Nitrogen Oxides (part not	2990	7.71E-02
			Sulfur Dioxide (SO2)	3990	3.58E-05
			Carbon Monoxide (CO) pollu	4990	1.68E-02
			Carbon Dioxide, non-biogen	6960	3.67E+00
			Methane (CH4)	6970	1.47E-04

print this search?: [L]ocal or s[Y]stem printer (6th flr), [N]o, [E]xit:

9/17/2002

ORDINANCE NO. 202-02
FILE NO. 012186

[Regulation of Diesel Backup Generators.]

Ordinance amending the San Francisco Health Code by adding a new Article 30 to: (1) establish a registration program within the Department of Public Health for diesel backup generators used by facilities in the City and County of San Francisco; (2) require new backup diesel generators to have air emission control technologies; (3) limit the operation of diesel backup generators during non-emergency situations; (4) establish a recordkeeping requirement for the operation of diesel backup generators; (5) provide for an enforcement mechanism for violations of the requirements of this Ordinance.

The Board of Supervisors finds and declares the following:

(a) Diesel Backup Generators emit large amounts of smog-forming nitrogen oxides (NOx), particulate matter with a diameter of 10 microns or less (PM10), sulfur oxides and hydrocarbons contributing to ground-level ozone, and reduced visibility.

(b) Diesel exhaust is linked to short and long-term adverse health effects in humans, which include lung cancer, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, and chronic bronchitis and decreased lung function.

(c) In August of 1998, the California Air Resource Board listed diesel exhaust, specifically particulate emissions from diesel fueled engines, as a "toxic air contaminant."

(d) According to the Bay Area Air Quality Management District (BAAQMD), Diesel Backup Generators tend to emit more pollutants than a new well-controlled power plant. In fact, even a clean diesel backup generator may emit more than 20 times as much NOx per kilowatt-hour as a new well-controlled power plant. Older dirtier Diesel Backup Generators may emit 200 times as much NOx.

(e) The Bay Area is currently designated nonattainment for the national ozone standards by the United States Environmental Protection Agency.

(f) The Bay Area is currently designated nonattainment for the state ozone and PM10 standards by the California Air Resource Board.

(g) The City and County of San Francisco is concerned about the health hazards posed by diesel emissions polluting the air, and wishes to impose limitations on Diesel Backup Generators to reduce the emission of diesel exhaust.

- RCN/Astound never registered their Diesel Generator under SF Health Code Article 30.
- The generator was a menace to the neighborhood.
- The documents shown to the Planning Commission for Project Approval state the generator is in the basement, which is a "material misrepresentation" of the truth. The generator "lives" on the first floor.
- The picture of the generator was omitted from the Commission packet

Section 1. Definitions

(ss) "Facilities" includes any physical element of the System used in connection with, or designed to be used in connection with, the provision of Services or Telecommunication Services, whether or not located in the Public Rights-of-Way, including, without limitation, Hubs, Nodes, the Hub Ring, the Headend, pedestals, cabinets, ducts and conduits (whether empty or occupied), transformers, equipment, drains, hand holds, lines, manholes, poles, power supplies and generators, splice boxes, surface location markers, vaults, tunnels, amplifiers, power guards, coaxial cables, and fiber strands (whether active or dark).

(ggg) "Hazardous Material" means any material that, because of its quantity, concentration or physical or chemical characteristics, is deemed by any federal, state or local governmental authority to pose a present or potential hazard to human health or safety or to the environment. Hazardous Material includes, without limitation, any material or substance defined as a "hazardous substance," or "pollutant" or "contaminant" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ('CERCLA", also commonly known as the "Superfund" law), as amended, (42 U.S.C. Sections 9601 et seq.) or pursuant to Section 25281 of the California Health &Safety Code; any "hazardous waste" as defined in Section 25117 or listed pursuant to Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of any Facilities to be constructed on the Public Rights-of-Way by or on behalf of Grantee, or are naturally occurring substances on, in or about the Public Rights-of-Way, and petroleum, including crude oil or any fraction thereof, and natural gas or natural gas liquids.

(hhh) "Headend" means the point in the System where all Signals are collected and formatted for transmission on the System.

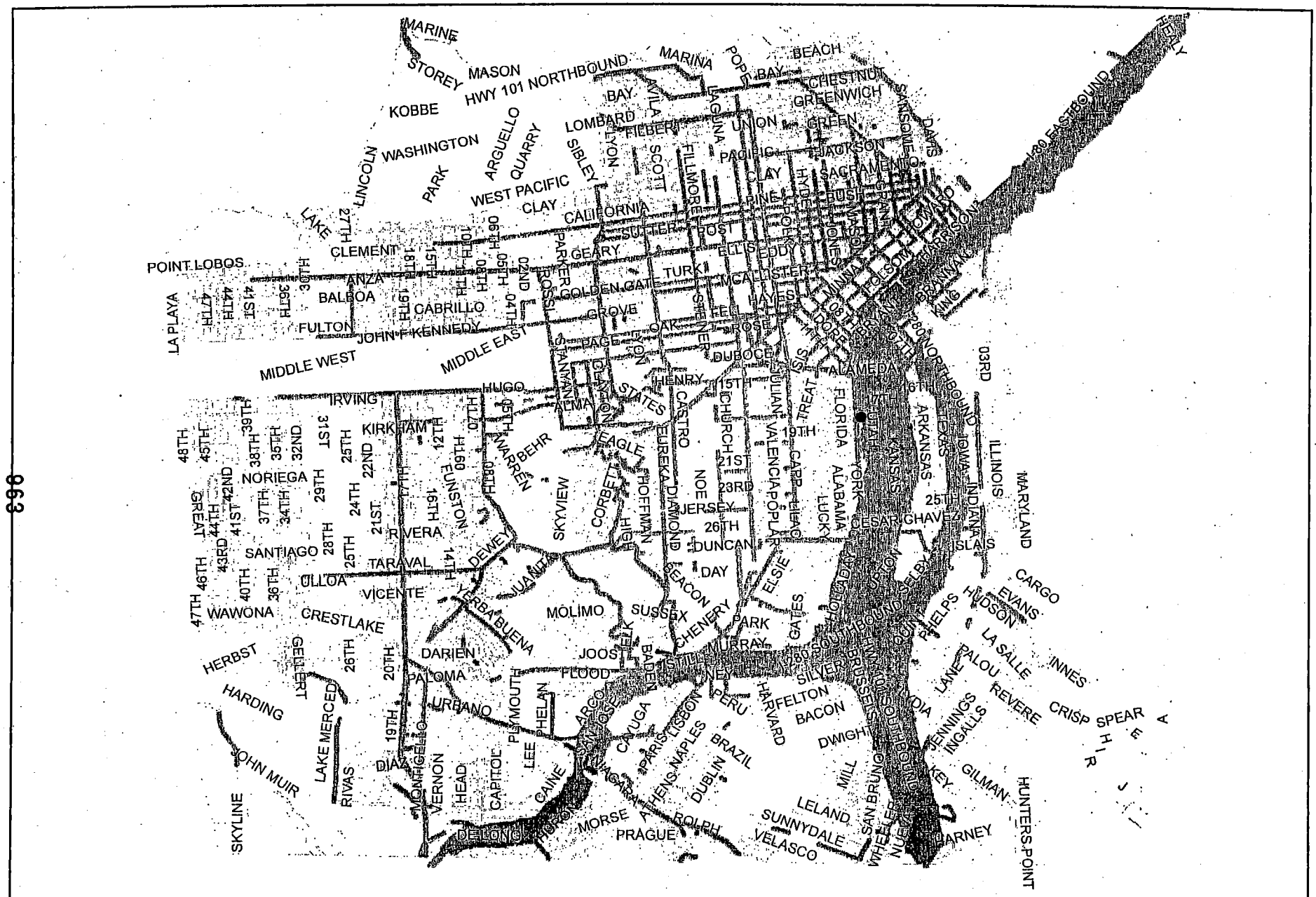
(iii) "Hub" means the equipment in the distribution system that receives Signals from the Headend for transmission to a number of Nodes.

Section 43. SYSTEM CHARACTERISTICS. The System shall, at all times during the Franchise term, meet or exceed the following requirements:

(g) Stand-By Power. Grantee shall provide standby power generating capacity for the Headend, Hubs, Nodes, and distribution Facilities comprising its System meeting the following specifications:

(1) **Headend.** Grantee shall maintain motorized standby power generators capable of maintaining all Services at the Headend for at least twenty four (24) hours duration after loss of normal commercial power.

(2) **Hubs.** Grantee shall provide battery standby power capable of maintaining all services at each Hub for at least twenty-four (24) hours duration after loss of normal commercial power, with automatic response systems to alert the Headend when commercial power is interrupted. Grantee shall maintain portable generators to deploy to each Hub in the event that the duration of a power disruption is



Potential Roadway Exposure Map

Parcels that are within the Potential Roadway Exposure Zone require review by the Department of Public Health

0 1,3752,750 5,500 Feet

Potential Roadway Exposure Zone

City Blocks

Date: December 18, 2008

For questions concerning this map please contact Jessica Range

File 130805

REUBEN, JUNIUS & ROSE, LLP

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2013 SEP 16 PM 2:09

September 16, 2013

By Messenger

Angela Calvillo
Clerk of the Board
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102

Re: Appeal of Determination of Exemption from Environmental Review
435-437 Potrero Avenue
Board of Supervisors Hearing Date: September 24, 2013 at 3:00 p.m.
Our File No.: 7424.01

Dear Ms. Calvillo:

Please find enclosed 18 copies of the Owner's Response to Appeal of CEQA Determination, along with a CD containing the same, for the project located at 435-437 Potrero Avenue.

Please distribute a copy to each of the Board Members.

Thank you for your helpful assistance.

Very truly yours,

REUBEN, JUNIUS & ROSE, LLP

David Silverman

Enclosures:

(1) 18 hard copies of Owner's Response to Appeal of CEQA Determination
(2) One CD for electronic file

James A. Reuben | Andrew J. Junius | Kevin H. Rose | Daniel A. Frattin
Sheryl Reuben[1] | David Silverman | Thomas Tunny | Jay F. Drake | John Kevlin
Lindsay M. Petrone | Melinda A. Sarjapur | Kenda H. McIntosh | Jared Eigerman[2,3] | John McInerney III[2]
1. Also admitted in New York 2. Of Counsel 3. Also admitted in Massachusetts

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

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2013 SEP 16 PM 2:00

REUBEN, JUNIUS & ROSE, LLP

September 16, 2013

By Messenger

Honorable David Chiu, President
Board of Supervisors
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Re: Response to Appeal of CEQA Determination
435 Potrero Avenue
Board of Supervisors Hearing Date: September 24, 2013
Planning Department Case No.: 2013.0477
Our File No.: 7424.01

Dear President Chiu and Members of the Board:

On behalf of F.W. Spencer & Son, owner of 435 Potrero Avenue ("Property" or "Building"), we are writing to oppose the appeal of the California Environmental Quality Act ("CEQA") exemption adopted by the Planning Commission with respect to a pre-existing use at 435 Potrero Avenue. The approval does not involve any new development or expansion of use, but only a change of operators operating the same type of business, which is providing Internet servers and storage capacity. The Appeal was filed by Mica Ringel ("Appellant") on August 12, 2013. The appeal is meritless, and must be dismissed.

A. Project History

The Planning Commission approved a Conditional Use Authorization ("CU") for a new tenant to operate a pre-existing Internet Services Exchange use in an existing building at 435 Potrero Avenue, and adopted a CEQA exemption for continuation of the pre-existing use by a new tenant on July 11, 2013, on 5-1 vote (Commissioner Hillis absent). See Planning Commission Approval Motion No. 18921 attached as **Exhibit A.** The Conditional Use approval followed a Zoning Administrator Determination of Legitimization pursuant to Planning Code Section 179.1 for the pre-existing use, issued on June 4, 2013, attached as **Exhibit B.** The Conditional Use does not include any expansion of the business.

James A. Reuben | Andrew J. Junius | Kevin H. Rose | Daniel A. Frattin
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fax: 415-399-9480

www.reubenlaw.com

The Planning Commission determined that the CU is exempt from CEQA as it falls within the Class I categorical exemption (CEQA Guidelines Section 15301 – minor alteration of an existing structure involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination).

B. CEQA Process and Standards of Review

1. Standard of Review Under CEQA.

In reviewing the validity of a CEQA exemption, the test is whether "substantial evidence" exists to support the exemption. (Public Resources Code sections 21168, 21168.5.) As stated by the court in Calbeach Advocates v. City of Solana Beach (2002) 103 Cal.App.4th 529, 535-536, 217 Cal. Rptr. 2d 1, 5:

> *'Substantial evidence' . . . means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made is to be determined by examining the entire record. Mere uncorroborated opinion or rumor does not constitute substantial evidence.*

To constitute substantial evidence, statements made by members of the public must be supported by adequate factual foundation. If this foundation is not established, the agency must disregard the comments. (Gabric v. City of Rancho Palo Verdes, 73 Cal.App. 3rd 183, 199 (1977).) In addition, argument, speculation, unsubstantiated opinion or narrative, clearly inaccurate or erroneous evidence, and evidence of social or economic impacts that do not contribute to, and are not caused by, physical impacts on the environment do not constitute substantial evidence. (Public Resources Code sections 21080(e) and 21082.2(c).) Substantial evidence means facts, reasonable assumptions predicated on facts, and expert opinions supported by facts. (Id.). The existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report. (Public Resources Code Section 21082.2(b).) Appellant has failed to submit any evidence in support of his claim that the Internet Services use is not a pre-existing use or that the use is expanding. If the use is pre-existing, as the Planning Commission determined it was, then the CEQA Exemption must stand.

2. Appellant has Failed to Establish the Threshold Requirements for Additional Environmental Review.

Appellant claims, without any evidentiary support, that the Planning Commission action requires further environmental review due to a turnover of tenants or operators. The Appellant's conception of how the Planning Department treats a tenant turnover or an operator turnover is at odds with Planning Department policy and practice.

The Zoning Administrator's Letter of Legitimization (**Exhibit B**) examined six criteria set forth in Planning Code Section 179.1, and found, after a seven month review of extensive documentary evidence, that "Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the entirety of the subject Building has been used as an "Internet Services Exchange" (dba RCN Telecom Services, and Astound) since approximately May 30, 2000."

"Since that time, no new use was established in the Building, and it has been actively marketed as an Internet Services Exchange. Therefore, the Internet Services Exchange Use was not discontinued and abandoned pursuant to the provisions of Planning Code Section 183" **(Exhibit B).**

The Zoning Administrator thereby affirmed longstanding Planning Department policy and practice that a use is not considered to be abandoned every time there is a turnover of operators or tenants, with a gap in between, as long as the owner of the Building actively markets the Property for the same use during the interim period between the two tenants or operators. The Planning Commission affirmed the Zoning Administrator's findings in its approval Motion No. 18921 (**Exhibit A**).

Appellant does not dispute the facts of the case:

1. The Internet Services use commenced on May 30, 2000.

2. The previous tenant vacated the premises in June 2010. The new operator entered into a contract with the owner in August 2012. The remainder of the time period from August 2012 to the present has been consumed by the City's permit process.

3. The Property was actively and continuously marketed by the owner for the same use until a new operator was found in August 2012. Since that time, the owner has diligently pursued City permits for the new operator to re-occupy the Property.

Accordingly, the Appellant has misunderstood the applicable CEQA exemption and therefore incorrectly analyzed the exemption as applied to the facts of this case.

3. Applicable Case Law Firmly Supports the Class I Exemption for the Existing Structure and Use at the Property

Reinstatement of higher capacity for an existing wastewater treatment plant that was approved by the Regional Water Board was upheld on appeal as an exempt existing facility. Committee for a Progressive Gilroy v. State Water Resources Control Board, 192 Cal.App.3d 847 (1987). The Court held that, "Since the project was originally built and approved for 6.1 mgd. in full compliance with CEQA, the order restoring that capacity related to an existing facility and was exempt from CEQA." Committee for a Progressive

Gilroy, 192 Cal.App.3d, 847, 864. Thus, the Court determined that there was no significant change or alteration to the operation or intended use of the facility and it upheld the exemption determination.

The Court in Bloom v. McGurk, 26 Cal.App.4th 1307 (1994) upheld the determination by the permitting agency that the extension of the terms of an expired permit for medical waste treatment facility pending review of a new permit application fell within the "existing facilities" exemption. The Court found that the project in question was merely the ongoing operation of a medical waste treatment facility under a new regulatory scheme and, because there was no change in operations incident to renewal of a medical waste permit, the project "fell squarely within the highlighted language of the Class 1 categorical exemption." Bloom, 26 Cal.App.4th 1307, 1312. The project involved only the continued operation of existing private facilities and mechanical equipment. The Court concluded, "We presume that thousands of permits are renewed each year for the ongoing operation of regulated facilities, and we discern no legislative or regulatory directive to make each such renewal an occasion to examine past CEQA compliance at every facility built in the last 24 years." Bloom, 26 Cal.App.4th 1307, 1315.

In Turlock Irrigation District v. Zanker, 140 Cal.App.4th 1047 (2006), the water districts and the trial court found that implementation of water conservation rules by the districts was exempt from CEQA and that no exception to that exemption applied. The town disagreed with both of those conclusions and contended that the implementation of water use rules does not fall under the Class 1 exemption for the "operation, repair, maintenance, ... or minor alteration of existing public ... structures, facilities, mechanical equipment or topographical features, involving negligible or no expansion of use...." It also contended that if this exclusion were otherwise applicable, the current project was excepted from the exclusion because there was a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances and because the project may cause a substantial adverse change in the significance of a historical resource."

The appellate court disagreed with the town and held that the water use rules "involve operation of an existing facility with only minor alteration of the facilities (installation of meter mechanisms on existing meter connectors) and the water rules do not permit expansion of previous use. (In fact, they seek reduction of individual use and limit growth of the system as a whole.)" Turlock,140 Cal.App.4th 1047, 1066. The appellate court also disagreed with the town's contention that there was a reasonable possibility that the activity will have a significant effect on the environment because the "unusual circumstances" that the town listed – "the unusual relationship of the districts and the town concerning the water system ... [and] the evidence concerning sufficiency of the water supply for firefighting" – are not shown to be unusual. Turlock,140 Cal.App.4th 1047, 1067. Finally, the court disagreed with the town's argument regarding historical resources.

The court affirmed the trial court's decision and denied the town's CEQA appeal.

In Santa Monica Chamber of Commerce v. City of Santa Monica, 101 Cal.App.4th 786 (2002), the appellate court found applicable the Class 1 exemption for a parking ordinance that allocated free, on-street parking to neighborhood residents who obtained a permit. The court held that the ordinance "involves the 'operation' of such existing facilities (in the sense that curbside parking is 'operated' by using parking permits, enforcement personnel and ticketing as a form of enforcing the legislatively prescribed use), the 'minor alteration of existing public or private structures, facilities, mechanical equipment or topographical features' (i.e., the signage needed to identify particular curbside spots as permitted parking or not), and 'negligible or no expansion of use beyond that previously existing,' because no additional parking spaces or structures are being added to the parking stock in the relevant area." Santa Monica, 101 Cal.App.4th 786, 793.

In Martin v. City and County of San Francisco, 135 Cal.App.4th 392 (2005), in this case, the appellate court held that although a municipality has very broad statutory discretion to grant or deny a required building permit, that authority does not extend to imposing CEQA review upon an interior home project, even where the residence is listed as a city landmark and is located within an area registered as a state and a national historic district. What an owner plans to do to the private interior of his or her home does not implicate a significant adverse effect on the environment. 135 Cal.App.4th 392, 396.

The court stated that the proposed modifications, being to the interior of an existing single-family residence and not perceptible to others, "lack the potential for causing a significant effect on the environment and are beyond the reach of CEQA. For all intents and purposes, what was visible before will be no different than what will be visible if the modifications are completed. The modifications here in issue would constitute a substantial adverse change neither to the environment nor to a historical resource. In fact, environmentally speaking, it is no change at all." Martin, 135 Cal.App.4th 392, 405. Thus, the court denied the CEQA appeal and concluded that CEQA review of a proposed interior building project was not required.

Accordingly, case law indicates that the Courts will uphold Planning Commission findings that projects fall within the Categorical Exemption for ongoing uses or existing facilities so long as there will be no significant changes to the operation of an existing facility. "Significant changes" cited by the Courts have included the disposal of an additional 3.2 million additional tons of municipal waste in a landfill and the replacement of reactors, a cooling tower, storage tank, and compressor, installation of new pipelines and pumps, and a substantial increase in the operation of an existing cogeneration plant and four boilers. In contrast, no increase is proposed in the operations of the 435 Potrero Internet servers.

C. Bay Area Air Quality Management District Air Quality Regulations Govern the Back-Up Generator

Although not relevant to the CEQA exemption, the Appellant raised a question about the back-up generator, and we will respond. The Building's back-up generator is regulated by Bay Area Air Quality Management District ("BAAQMD") and operates under Permit No. 21731, attached as **Exhibit D**. Back-up generators are ubiquitous throughout the City, and indeed are required by the Building Code for many different types of structures, including public facilities, police stations, office buildings, hospitals, and any other building or use that relies on a continuous stream of power. Back-up generators are used only in the event of a power outage emergency, and then only during the period in which the power outage continues. Back-up generators are heavily regulated by the BAAQMD, which limits the use of back-up generators to 20 hours per year for reliability-related testing, and to mitigate conditions in the event of an emergency. Detailed records of the use of back-up generators are required to be maintained in a BAAQMD-approved log. These limitations are described in more detail in the attached BAAQMD permit. (**Exhibit C**). BAAQMD regulations are more stringent than any applicable City and County regulations relative to air quality controls or generators.

In summary, back-up generators are not used except in the event of an emergency, and for testing purposes. The Building's back-up generator meets and exceeds all air quality regulations and restrictions, and its use is heavily restricted by its BAAQMD permit conditions. Any potential air emissions are regulated and mitigated in accordance with local law and conditions placed on the BAAQMD permit.

D. Fixed Source Equipment (HVAC) is Regulated by the San Francisco Noise Control Ordinance

The San Francisco Noise Control Ordinance limits noise levels that can be generated by stationary noise sources such as mechanical equipment. For commercial properties, Section 2909.B of the Police Code limits the noise that can be generated to no more than 8dBA above the ambient noise level at any point outside of the property. The Building's air cooled fans located on the roof will comply with the noise ordinance by utilizing mufflers and variable frequency drive fans and pumps, along with sound walls. Any failure to comply would result in the shutdown of the fans.

Planning Commission Approval Motion No. 18921 adopted Condition of Approval No. 11 which provides that the "The premises shall be adequately sound proofed or insulated for noise and operated so that fixed source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance" (**Exhibit A**). Therefore, the Planning Commission has already restricted any potential noise to the maximum extent allowed by local law.

E. Conclusion

The Building is a relatively small (10,000 square feet) office-type building that will house Internet servers. This modest office-type Building shares the block with commercial uses such as Sunny Auto Body, Potrero Test-Only Smog, One Day Pictures, and Dean Denelli's Garage Doors. (See photos and Zoning Map attached as **Exhibit E**). Nearly the entire block facing the Building is zoned PDR-1-G, which principally permits production, distribution and repair activities, and prohibits residential use in any form. The use of the Building has continued uninterrupted since May 2000, except for a turnover in operators and the period of marketing for same. The CEQA exemption for a pre-existing use has been extensively reviewed by the Planning Department, the Zoning Administrator, and the Planning Commission, who were unanimous in their conclusion that the CEQA Class 1 exemption applies in this case. Appellant's disappointment at the City's policy decision to approve the pre-existing use for a new operator does not justify overturning the CEQA exemption.

The Appellant has failed to establish any evidence that is contrary to the Planning Commission's findings pertaining to CEQA, or any evidence of an expansion of operations at the Building. Accordingly, we respectfully request that the appeal be denied.

Thank you for your consideration.

Very truly yours,

RUBEN, JUNIUS & ROSE, LLP

David Silverman

Attachments:

Exhibit A - Planning Commission Approval Resolution No. 18921
Exhibit B - Zoning Administrator Determination of Legitimization
Exhibit C - BAAQMD Permit No. 21731
Exhibit D - Photos and Zoning Map
Exhibit E - Letter of Endorsement

cc: Supervisor Malia Cohen
Supervisor Eric Mar
Supervisor Mark Farrell
Supervisor Katy Tang
Supervisor London Breed
Supervisor Jane Kim
Supervisor Norman Yee
Supervisor Scott Wiener
Supervisor David Campos
Supervisor John Avalos
Angela Cavillo, Clerk of the Board of Supervisors
Nannie Turrell, Environmental Planner
Corey Teague, Neighborhood Planner
Mica Ringel, Appellant

(all with attachments)

Exhibit A

SAN FRANCISCO
PLANNING DEPARTMENT

Subject to: (Select only if applicable)

- ☐ Affordable Housing (Sec. 415)
- ☐ Jobs Housing Linkage Program (Sec. 413)
- ☐ Downtown Park Fee (Sec. 412)
- ☐ First Source Hiring (Admin. Code)
- ☐ Child Care Requirement (Sec. 414)
- ■ Other (TIDF – Sec. 411)

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Planning Commission Motion No. 18921

HEARING DATE: JULY 11, 2013

Date:	July 3, 2013
Case No.:	**2013.00477 C**
Project Address:	**435-437 Potrero Avenue**
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org

ADOPTING FINDINGS RELATING TO THE APPROVAL OF CONDITIONAL USE AUTHORIZATION PURSUANT TO PLANNING CODE SECTIONS 179.1, 227(R), 303, AND 303(H), TO ALLOW APPROXIMATELY 10,000 GROSS SQUARE FEET OF INTERNET SERVICES EXCHANGE ON THE ENTIRETY OF BOTH FLOORS OF THE EXISTING TWO-STORY BUILDING WITHIN A UMU (URBAN MIXED USE) ZONING DISTRICT AND 58-X HEIGHT AND BULK DISTRICT.

PREAMBLE

On April 18, 2013, David Silverman, on behalf of Industry Capital Internet Infrastructure, LLC (hereinafter "Project Sponsor"), filed an application with the Planning Department (hereinafter "Department") for Conditional Use Authorization under Planning Code Sections 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building within a UMU (Urban Mixed Use) Zoning District and 58-X Height and Bulk District.

On July 11, 2013, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Application No. 2013.0477C.

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

The Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of the applicant, Department staff, and other interested parties.

MOVED, that the Commission hereby authorizes the Conditional Use requested in Application No. 2013.0477C, subject to the conditions contained in "EXHIBIT A" of this motion, based on the following findings:

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. The above recitals are accurate and constitute findings of this Commission.

2. **Site Description and Present Use.** The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

3. **Surrounding Properties and Neighborhood.** The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

4. **Project Description.** The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

5. **Public Comment.** When the case report was issued on June 3, 2013, the Department had not received any comments from the public explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator. These concerns were based on their experiences

from previous operators of the building. Additionally, one neighbor on the subject block clarified that they are in fact opposed to the project. In response to these concerns, the current Project Sponsor held a meeting at the project site with a group of concerned neighbors on July 1st.

On July 10th and 11th, the Department received new emails of opposition from two neighbors on the subject block, one email of opposition from a resident living approximately 4 blocks away, and one email of opposition from a resident who didn't identify their address. The primary concerns in those emails stem from the potential noise, vibrations, and discharge from the backup generator in the building.

6. **Planning Code Compliance:** The Commission finds that the Project is consistent with the relevant provisions of the Planning Code in the following manner:

   A. **Legitimization.** Planning Code Section 179.1 established a time-limited program wherein existing uses in the Eastern Neighborhoods plan area that have operated without the benefit of required permits may seek those permits. Uses that could be "legitimized" under this Section are those uses which, under the current provisions of this Code and without this Section, could not otherwise seek the required permits.

   The proposed Internet Services Exchange (ISE) originally occupied the subject building in 2000. The subject property was zoned M-1 at that time, which permitted ISEs with a Conditional Use Authorization. The Zoning Administrator issued a Letter of Legitimization on June 4, 2013 for this project stating that the approximately 10,000 gross square feet of Internet Services Exchange occupying the entire existing building is eligible to be approved as a legal nonconforming use pursuant to Planning Code section 179.1. As such, the project is now seeking a Conditional Use Authorization under the provisions of the properties former M-1 zoning.

7. **Planning Code Section 303** establishes criteria for the Planning Commission to consider when reviewing applications for Conditional Use approval. On balance, the project does comply with said criteria in that:

   A. The proposed new uses and building, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable, and compatible with, the neighborhood or the community.

   The proposed Internet Services Exchange has already existed at the site for more than ten years without any reported complaints from surrounding businesses or residents. The low-intensity nature of the use, along with its relatively small size and scale, make it compatible with the existing mixed use surroundings. Additionally, the use provides a locally-owned, small-scale option for small businesses within the City for data and information storage.

   B. The proposed project will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity. There are no features of the project

that could be detrimental to the health, safety or convenience of those residing or working the area, in that:

i. Nature of proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;

The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

ii. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic or parking.

iii. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;

The existing HVAC equipment consists of seven fan units that will comply with the San Francisco Noise Ordinance the equipment and does not emit any dust or odors. The backup generator will only be used for testing and in emergencies like power outages.

iv. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs;

The existing building covers the entire site and includes no open space or landscaped areas. All lighting and signing will meet Planning Code requirements.

C. That the use as proposed will comply with the applicable provisions of the Planning Code and will not adversely affect the General Plan.

The Project complies with all relevant requirements and standards of the Planning Code and is consistent with objectives and policies of the General Plan as detailed below.

D. That the use as proposed would provide development that is in conformity with the purpose of the applicable Neighborhood Commercial District.

The project is not located within a Neighborhood Commercial District.

8. Planning Code Section 303(h) establishes additional criteria for the Planning Commission to consider when reviewing applications for Conditional Use Approval of Internet Services Exchanges. On balance, the project does comply with said criteria in that:

   a. The intensity of the use at this location and in the surrounding neighborhood is not such that allowing the use will likely foreclose the location of other needed neighborhood-serving uses in the area;

      The use has a low intensity and has existed in the building for more than ten years with no known negative impacts. Additionally, the existing building is not currently designed to easily accommodate a more active commercial use, and therefore is suitable for an Internet Services Exchange.

   b. The building in which the use is located is designed in discrete elements, which respect the scale of development in adjacent blocks, particularly any existing residential uses;

      The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

   c. Rooftop equipment on the building in which the use is located is screened appropriately;

      The project is required to provide adequate screening of rooftop equipment pursuant to Planning Code Section 141 and Condition of Approval No. 6 in this motion.

   d. The back-up power system for the proposed use will comply with all applicable federal state, regional and local air pollution controls;

      The existing backup generator complies with all relevant controls and is permitted by the Bay Area Air Quality Management District (Permit No. 21731).

   e. Fixed-source equipment noise does not exceed the decibel levels specified in the San Francisco Noise Control Ordinance;

      A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code). This requirement is also listed as Condition of Approval No. 11 of this motion.

f. The building is designed to minimize energy consumption, such as through the use of energy-efficient technology, including without limitation, heating, ventilating and air conditioning systems, lighting controls, natural ventilation and recapturing waste heat, and as such commercially available technology evolves;

The existing equipment at the site is fully operable. However, the project will also use the following energy saving techniques to reduce the total power consumption of the building:

1) *Energy efficient Toshiba G90000 UPS systems to increase the efficiency of the current uninterruptible power system from 80 percent efficiency to 96.5 percent efficiency.*
2) *Cold isle containment, which can reduce the power associated with mechanical cooling by 25 to 30 percent.*
3) *Air-side economization, which can reduce the cooling power consumption by an estimated 50 to 60 percent.*

g. The project sponsor has examined the feasibility of supplying and, to the extent feasible, will supply all or a portion of the building's power needs through on-site power generation, such as through the use of fuel cells or co-generation;

The project sponsor studied the feasibility of using on-site Co-generation and fuel cells. However, due to the limited lot size, such power generation is not possible.

h. The project sponsor shall have submitted design capacity and projected power use of the building as part of the conditional use application;

The building is served by PG&E with a 1.0 mega volt ampere ("MVA") dedicated underground feed transformer that is located inside the building. This translates into a serviced capacity of approximately 800kW of power per hour. Using a vacancy factor estimate of 7.5 percent, the projected maximum annual energy use is 6,500,000 KWh per year, or 540,000kWh per month.

The following table provides projected monthly energy use per year as the building is leased up over time:

Power Use per Month	*2013*	*2014*	*2015*	*2016*
Total Capacity (KWh)	*36,000*	*216,000*	*360,000*	*540,000*

9. **General Plan Compliance.** The Project is, on balance, consistent with the following Objectives and Policies of the General Plan:

COMMERCE AND INDUSTRY

Objectives and Policies

OBJECTIVE 1:

MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKINIG ENVIRONMENT.

Policy 1.1:
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development that has substantial undesirable consequences that cannot be mitigated.

The project will provided a much needed support service for other businesses within the City without producing undesirable consequences.

OBJECTIVE 3:
PROVIDE EXPANDED EMPLOYMENT OPPORTUNITIES FOR CITY RESIDENTS, PARTICULARLY THE UNEMPLOYED AND ECONOMICALLY DISADVANTAGED.

Policy 3.4:
Assist newly emerging economic activities.

OBJECTIVE 4:
IMPROVE THE VIABILITY OF EXISTING INDUSTRY IN THE CITY AND THE ATTRACTIVENESS OF THE CITY AS A LOCATION FOR NEW INDUSTRY.

Policy 4.1:
Maintain and enhance a favorable business climate in the city.

Policy 4.2:
Promote and attract those economic activities with potential benefit to the City.

The project will provided a much needed support service for other businesses to locate and grow within the City, especially businesses with technological support needs.

10. **Planning Code Section 101.1(b)** establishes eight priority-planning policies and requires review of permits for consistency with said policies. On balance, the project does comply with said policies in that:

    A. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses be enhanced.

    The proposal will not remove or otherwise impact any existing neighborhood-serving retail uses in the area.

    B. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods.

The proposed use has existed within the subject building since 2000 (including periods of vacancy). Continuing the use at this location will not impact existing housing or neighborhood character.

C. That the City's supply of affordable housing be preserved and enhanced,

No housing is created or removed as part of this project.

D. That commuter traffic not impede MUNI transit service or overburden our streets or neighborhood parking.

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic, parking, or MUNI.

E. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced.

The Project will not displace any service or industry establishment, but will instead preserve and industrial service that has existed at this site since 2000.

F. That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake.

The project includes no significant changes to the existing building.

G. That landmarks and historic buildings be preserved.

The subject building was determined to not be a historic resource by the Showplace Square/Northeast Mission Historic Survey.

H. That our parks and open space and their access to sunlight and vistas be protected from development.

The project will have no impact on existing parks and open spaces.

11. The Project is consistent with and would promote the general and specific purposes of the Code provided under Section 101.1(b) in that, as designed, the Project would contribute to the character and stability of the neighborhood and would constitute a beneficial development.

12. The Commission hereby finds that approval of the Conditional Use authorization would promote the health, safety and welfare of the City.

DECISION

That based upon the Record, the submissions by the Applicant, the staff of the Department and other interested parties, the oral testimony presented to this Commission at the public hearings, and all other written materials submitted by all parties, the Commission hereby **APPROVES Conditional Use Application No. 2013.0477C** subject to the following conditions attached hereto as "EXHIBIT A" in general conformance with plans on file, dated May 30, 2013, and stamped "EXHIBIT B", which is incorporated herein by reference as though fully set forth.

APPEAL AND EFFECTIVE DATE OF MOTION: Any aggrieved person may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion No. 18921. The effective date of this Motion shall be the date of this Motion if not appealed (After the 30-day period has expired) OR the date of the decision of the Board of Supervisors if appealed to the Board of Supervisors. For further information, please contact the Board of Supervisors at (415) 554-5184, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

I hereby certify that the Planning Commission ADOPTED the foregoing Motion on July 11, 2013.

Jonas P. Ionin
Acting Commission Secretary

AYES: Commissioners Antonini, Borden, Fong, Moore, and Wu

NAYS: Commissioner Sugaya

ABSENT: Commissioner Hillis

ADOPTED: July 11, 2013

EXHIBIT A

AUTHORIZATION

This authorization is for a conditional use to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building located at 435-437 Potrero Avenue, Block 3972, and Lot 22, pursuant to Planning Code Section(s) **179.1, 227(r), 303, and 303(h)** within the UMU District and a **58-X** Height and Bulk District; in general conformance with plans, dated **May 30, 2013**, and stamped "EXHIBIT B" included in the docket for Case No. **2013.0477C** and subject to conditions of approval reviewed and approved by the Commission on **July 11, 2013** under Motion No. **18921**. This authorization and the conditions contained herein run with the property and not with a particular Project Sponsor, business, or operator.

RECORDATION OF CONDITIONS OF APPROVAL

Prior to the issuance of the building permit or commencement of use for the Project the Zoning Administrator shall approve and order the recordation of a Notice in the Official Records of the Recorder of the City and County of San Francisco for the subject property. This Notice shall state that the project is subject to the conditions of approval contained herein and reviewed and approved by the Planning Commission on **July 11, 2013** under Motion No **18921**.

PRINTING OF CONDITIONS OF APPROVAL ON PLANS

The conditions of approval under the 'Exhibit A' of this Planning Commission Motion No. **18921** shall be reproduced on the Index Sheet of construction plans submitted with the Site or Building permit application for the Project. The Index Sheet of the construction plans shall reference to the Conditional Use authorization and any subsequent amendments or modifications.

SEVERABILITY

The Project shall comply with all applicable City codes and requirements. If any clause, sentence, section or any part of these conditions of approval is for any reason held to be invalid, such invalidity shall not affect or impair other remaining clauses, sentences, or sections of these conditions. This decision conveys no right to construct, or to receive a building permit. "Project Sponsor" shall include any subsequent responsible party.

CHANGES AND MODIFICATIONS

Changes to the approved plans may be approved administratively by the Zoning Administrator. Significant changes and modifications of conditions shall require Planning Commission approval of a new Conditional Use authorization.

Conditions of Approval, Compliance, Monitoring, and Reporting

PERFORMANCE

1. **Validity.** The authorization and right vested by virtue of this action is valid for three (3) years from the effective date of the Motion. The Department of Building Inspection shall have issued a Building Permit or Site Permit to construct the project and/or commence the approved use within this three-year period.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

2. **Expiration and Renewal.** Should a Building or Site Permit be sought after the three (3) year period has lapsed, the project sponsor must seek a renewal of this Authorization by filing an application for an amendment to the original Authorization or a new application for Authorization. Should the project sponsor decline to so file, and decline to withdraw the permit application, the Commission shall conduct a public hearing in order to consider the revocation of the Authorization. Should the Commission not revoke the Authorization following the closure of the public hearing, the Commission shall determine the extension of time for the continued validity of the Authorization.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

3. **Diligent pursuit.** Once a site or Building Permit has been issued, construction must commence within the timeframe required by the Department of Building Inspection and be continued diligently to completion. Failure to do so shall be grounds for the Commission to consider revoking the approval if more than three (3) years have passed since this Authorization was approved.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

4. **Extension.** All time limits in the preceding three paragraphs may be extended at the discretion of the Zoning Administrator where implementation of the project is delayed by a public agency, an appeal or a legal challenge and only by the length of time for which such public agency, appeal or challenge has caused delay.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

5. **Conformity with Current Law.** No application for Building Permit, Site Permit, or other entitlement shall be approved unless it complies with all applicable provisions of City Codes in effect at the time of such approval. *For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.*

DESIGN – COMPLIANCE AT PLAN STAGE

6. **Rooftop Mechanical Equipment.** Pursuant to Planning Code 141, the Project Sponsor shall submit a roof plan to the Planning Department prior to Planning approval of the building permit

application. Rooftop mechanical equipment, if any is proposed as part of the Project, is required to be screened so as not to be visible from any point at or below the roof level of the subject building.
For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

PROVISIONS

7. **Transit Impact Development Fee.** Pursuant to Planning Code Section 411 (formerly Chapter 38 of the Administrative Code), the Project Sponsor shall pay the Transit Impact Development Fee (TIDF) as required by and based on drawings submitted with the Building Permit Application. Prior to the issuance of a temporary certificate of occupancy, the Project Sponsor shall provide the Planning Director with certification that the fee has been paid.
For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

MONITORING

8. **Reporting.** As long as the use remains an Internet Services Exchange, the project sponsor shall submit to the Planning Department on an annual basis power use statements for the previous twelve-month period as provided by all suppliers of utilities and shall submit a written annual report to the Department of Environment and the Planning Department which shall state: (a) the annual energy consumption and fuel consumption of all tenants and occupants of the Internet Services Exchange; (b) the number of all diesel generators located at the site and the hours of usage, including usage for testing purposes; (c) evidence that diesel generators at the site are in compliance with all applicable local, regional, state and federal permits, regulations and laws; and (d) such other information as the Planning Commission may require.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

9. **Enforcement.** Violation of any of the Planning Department conditions of approval contained in this Motion or of any other provisions of Planning Code applicable to this Project shall be subject to the enforcement procedures and administrative penalties set forth under Planning Code Section 176 or Section 176.1. The Planning Department may also refer the violation complaints to other city departments and agencies for appropriate enforcement action under their jurisdiction.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

10. **Revocation due to Violation of Conditions.** Should implementation of this Project result in complaints from interested property owners, residents, or commercial lessees which are not resolved by the Project Sponsor and found to be in violation of the Planning Code and/or the specific conditions of approval for the Project as set forth in Exhibit A of this Motion, the Zoning Administrator shall refer such complaints to the Commission, after which it may hold a public hearing on the matter to consider revocation of this authorization.

For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

OPERATION

11. **Noise Control.** The premises shall be adequately soundproofed or insulated for noise and operated so that fixed-source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.
For information about compliance with the fixed mechanical objects such as rooftop air conditioning, restaurant ventilation systems, and motors and compressors with acceptable noise levels, contact the Environmental Health Section, Department of Public Health at (415) 252-3800, www.sfdph.org.

12. **Vibration.** The Project Sponsor shall attempt to reduce vibration from equipment within the building and on the roof through repair, retrofit, or replacement of the equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

13. **Backup Generator Operation.** The Project Sponsor shall attempt to reduce the emissions of the backup generator, such as use of biofuels instead of diesel fuel to operate the backup generator.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

14. **Sidewalk Maintenance.** The Project Sponsor shall maintain the main entrance to the building and all sidewalks abutting the subject property in a clean and sanitary condition in compliance with the Department of Public Works Streets and Sidewalk Maintenance Standards.
For information about compliance, contact Bureau of Street Use and Mapping, Department of Public Works, 415-695-2017, http://sfdpw.org.

15. **Community Liaison.** Prior to issuance of a building permit to construct the project and implement the approved use, the Project Sponsor shall appoint a community liaison officer to deal with the issues of concern to owners and occupants of nearby properties. The Project Sponsor shall provide the Zoning Administrator with written notice of the name, business address, and telephone number of the community liaison. Should the contact information change, the Zoning Administrator shall be made aware of such change. The community liaison shall report to the Zoning Administrator what issues, if any, are of concern to the community and what issues have not been resolved by the Project Sponsor.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

16. **Six-Month Report.** The Project Sponsor shall report back to the Planning Commission approximately six months after occupancy of the building. The report shall focus on the operation of the building during that time, especially regarding the generation of noise and emissions from the backup generator and other equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

David Silverman

From: Teague, Corey [corey.teague@sfgov.org]
Sent: Tuesday, July 16, 2013 3:57 PM
To: Mica
Cc: Darius Contractor; Dean Dinelli; Sanchez, Scott; David Silverman
Subject: RE: Notice of Intent to File an Appeal: 435-437 Potrero Av.
Attachments: 18921.pdf

Mica,
The final Motion No. 18921 for this case is attached. Please let me know if you have any questions.

Corey A. Teague, AICP, LEED AP
City Planner
1650 Mission Street, Suite 400
San Francisco, CA 94103

corey.teague@sfgov.org

(415) 575-9081 (phone)
(415) 558-6409 (fax)

From: Teague, Corey
Sent: Friday, July 12, 2013 3:34 PM
To: 'Mica'
Cc: Darius Contractor; Dean Dinelli; Sanchez, Scott; David Silverman (dsilverman@reubenlaw.com)
Subject: RE: Notice of Intent to File an Appeal: 435-437 Potrero Av.

Mica,
I have to work with the Zoning Administrator to finalize the wording for the additional conditions of approval that were added by the Commissioners yesterday before the motion can be finalized. He is out of the office today, so that will happen sometime early next week. Once it is finalized I will send you a copy.

You may already be aware, but here is the link to Board of Supervisors information on Conditional Use appeals:

http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=28246

Corey A. Teague, AICP, LEED AP
City Planner
1650 Mission Street, Suite 400
San Francisco, CA 94103

corey.teague@sfgov.org

(415) 575-9081 (phone)
(415) 558-6409 (fax)

From: Mica [mailto:supermica@gmail.com]
Sent: Friday, July 12, 2013 2:41 PM
To: Teague, Corey

Exhibit B

SAN FRANCISCO
PLANNING DEPARTMENT

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Letter of Legitimization

June 4, 2013

David Silverman
Reuben, Junius & Rose LLP
1 Bush Street, Suite 600
San Francisco, CA 94104

Site Address:	435-437 Potrero Avenue
Assessor's Block/Lot:	3974/022
Zoning District:	UMU
Staff Contact:	Corey Teague, (415) 575-9081 or corey.teague@sfgov.org

Dear Mr. Silverman:

This letter is in response to your request for a Letter of Legitimization per Planning Section 179.1 regarding the property at 435-437 Potrero Avenue. This parcel is located in the UMU Zoning District and a 58-X Height and Bulk District. The request is to legitimize the existing "Internet Services Exchange" use on the entirety of both floors in the existing two-story building totaling approximately 10,000 gross square feet.

Procedural Background

The Department received the request for legitimization of office space at 435-437 Potrero Avenue on October 15, 2012. Staff reviewed the request and associated materials and the Zoning Administrator issued a 30-day public notice of the intent to issue the Letter of Legitimization on April 15, 2013. The public notice also included a draft letter for review, and was sent to 1) all owners of property within 300 feet of the subject property, 2) all current tenants of the subject property, and 3) all individuals and neighborhood associations that had requested to receive such notice. Additionally, notice was posted on the site during the notification period. The notification period expired on May 15, 2013.

Eligibility

The land use proposed for legitimization is deemed eligible if it meets the following criteria:

i. The land use existed as of the date of the application;

Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the entirety of the subject building has been used as an "Internet Services Exchange" (d.b.a. RCN Telecom Services and Astound) since approximately May 30, 2000.

documented on the submitted plans on file with this request, prior to the approval of a site or building permit establishing such Internet Services Exchange. This determination is not a project approval, or in any way a substitute for the Building Permit Application for the change of use to Internet Services Exchange.

Please note that a Conditional Use Authorization and subsequent Building Permit Application must be approved to legally convert the subject gross floor area to Internet Services Exchange. Additionally, the relevant impact fees outlined in Section 179.1(g), and elsewhere in the Municipal Code, shall be assessed as part of the Building Permit Application.

APPEAL: If you believe this determination represents an error in interpretation of the Planning Code or abuse in discretion by the Zoning Administrator, an appeal may be filed with the Board of Appeals within 15 days of the date of the Letter of Legitimization. For information regarding the appeals process, please contact the Board of Appeals located at 1650 Mission Street, Room 304, San Francisco, or call (415) 575-6880.

Sincerely,

Scott F. Sanchez
Zoning Administrator

cc: Corey Teague, Planner
Philip Blix, Property Owner
William Spencer
Planning Commissioners
All Parties on the Notification Request List ✓

I:\Current Planning\SE Team\ EASTERN NEIGHBORHOODS\EN Legitimization\435 Potrero Ave\Draft LoL.doc

Exhibit C

B4083

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Plant# 21731 Page: 1 Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

Arman Khalili
ICDC LLC
One Sansome St, 15th floor
San Francisco, CA 94104

Location: 437 Potrero Street
San Francisco, CA 94110

S#	DESCRIPTION	[Schedule]	PAID
1	Standby Diesel engine, 519 hp, Caterpillar S/N 4ZRD6880 Generator Emissions at: P1 Stack	[B,1096 days]	559

1 Permit Source, 0 Exempt Sources

*** See attached Permit Conditions ***

The operating parameters described above are based on information supplied by permit holder and may differ from the limits set forth in the attached conditions of the Permit to Operate. The limits of operation in the permit conditions are not to be exceeded. Exceeding these limits is considered a violation of District regulations subject to enforcement action.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

*** PERMIT CONDITIONS ***

==========

COND# 22820 *applies to S# 1*

1. The owner/operator shall not exceed 20 hours per year per engine for reliability-related testing. [Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

2. The owner/operator shall operate each emergency standby engine only for the following purposes: to mitigate emergency conditions, for emission testing to demonstrate compliance with a District, State or Federal emission limit, or for reliability-related activities (maintenance and other testing, but excluding emission testing). Operating while mitigating emergency conditions or while emission testing to show compliance with District, State or Federal emission limits is not limited. [Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

3. The owner/operator shall operate each emergency standby engine only when a non-resettable totalizing meter (with a minimum display capability of 9,999 hours) that measures the hours of operation for the engine is installed, operated and properly maintained. [Basis: Title 17, California Code ofRegulations, section 93115, ATCM for Stationary CI Engines]

4. Records: The owner/operator shall maintain the following monthly records in a District-approved log for at least 36 months from the date of entry (60 months if the facility has been issued a Title V Major Facility Review Permit or a Synthetic Minor Operating Permit). Log entries shall be retained on-site, either at a central location or at the engine's location, and made immediately available to the District staff upon request.
   a. Hours of operation for reliability-related activities (maintenance and testing).
   b. Hours of operation for emission testing to show compliance with emission limits.
   c. Hours of operation (emergency).
   d. For each emergency, the nature of the emergency condition.
   e. Fuel usage for each engine(s).

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

This document does not permit the holder to violate any District regulation or other law.

*** PERMIT CONDITIONS ***

==========

[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

5. At School and Near-School Operation:
If the emergency standby engine is located on school grounds or within 500 feet of any school grounds, the following requirements shall apply:

The owner/operator shall not operate each stationary emergency standby diesel-fueled engine for non-emergency use, including maintenance and testing, during the following periods:

a. Whenever there is a school sponsored activity (ifthe engine is located on school grounds)
b. Between 7:30 a.m. and 3:30 p.m. on days when school is in session.

"School" or "School Grounds" means any public or private school used for the purposes of the education of more than 12 children in kindergarten or any of grades 1 to 12, inclusive, but does not include any private school in which education is primarily conducted in a private home(s). "School" or "School Grounds" includes any building or structure, playground, athletic field, or other areas of school property but does not include unimproved school property.

[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

---------- END OF CONDITIONS ----------

Bay Area Air Quality Management District

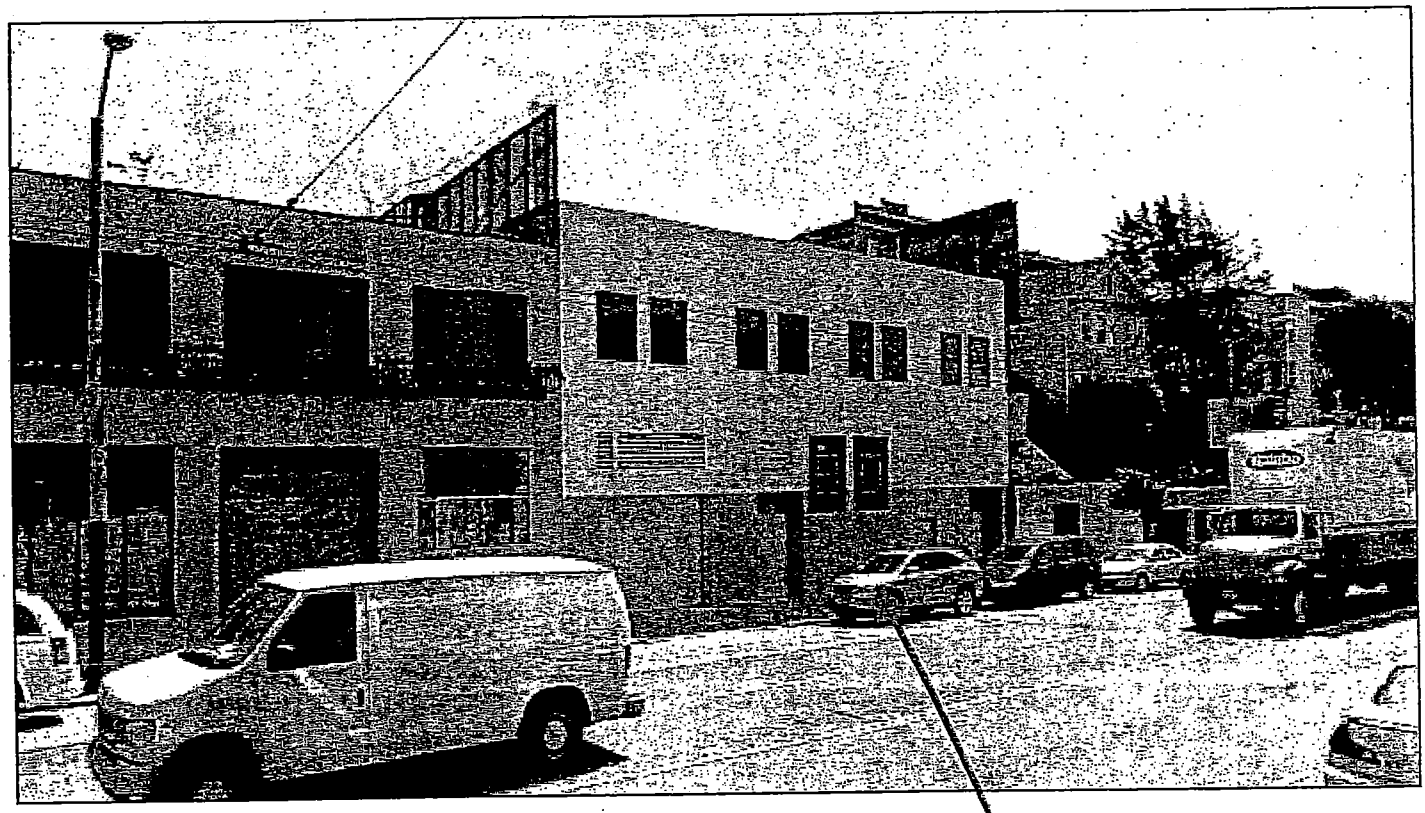
** SOURCE EMISSIONS **

PLANT #21731
Mar 14, 2013

S#	Source Description	Annual Average lbs/day PART	ORG	NOx	SO2	CO
1	Generator	-	-	.08	-	.02
	T O T A L S			.08		.02

Exhibit D

Site Photo



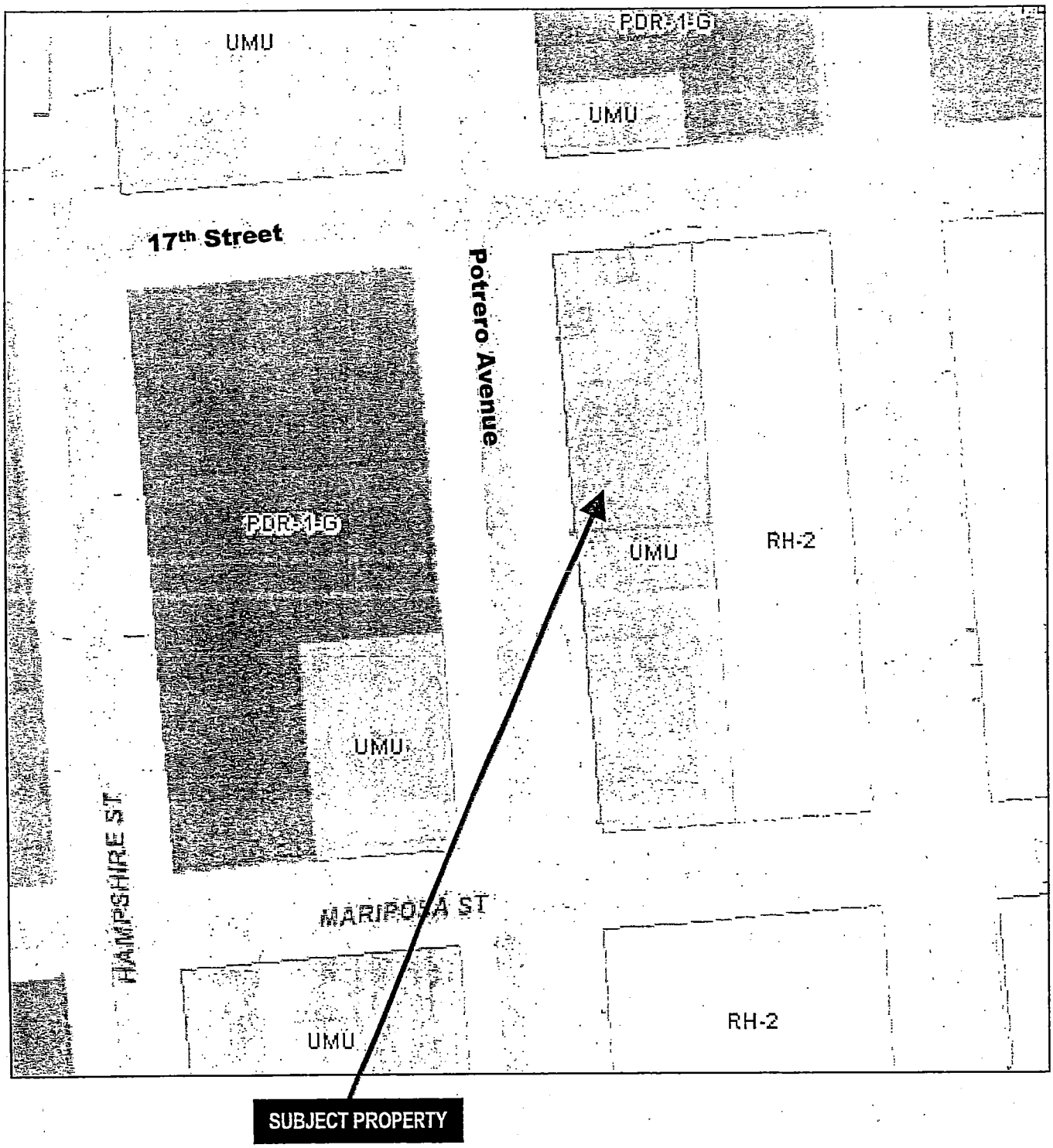
Aerial Photo



Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

SAN FRANCISCO
PLANNING DEPARTMENT

Zoning Map



Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

Exhibit E

fastmetrics™
BUSINESS NETWORKS & KNOWLEDGE

To whom it may concern:

Fastmetrics and its customers are pleased to learn of the new proposed datacenter at 435 Potrero Ave, San Francisco, CA. This new datacenter will greatly enhance the entrepreneurial options in San Francisco and address the requirement for many Startups of low cost high capacity facility. Industry Capital has put tougher a first rate team, with many years of experience running data centers, and we expect the center to be of great success and benefit to the City business Community.

Sincerely,

Andreas Glocker
CEO
Fastmetrics, Inc.
415-778-5100

SAN FRANCISCO
PLANNING DEPARTMENT

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2013 SEP 16 AM 11:58
BY Ak

MEM

Notice of Electronic Transmittal

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Planning Department Response to the Appeal of Categorical Exemption for 435 - 437 Potrero Avenue

DATE: September 16, 2013

TO: Angela Calvillo, Clerk of the Board of Supervisors

FROM: Sarah B. Jones, Environmental Review Officer – (415) 575-9034
Corey Teague, Case Planner – Planning Department (415) 575-9081

RE: BOS File No. 13-0805 [Planning/Building Case No. 2013.0477C]
Appeal of Categorical Exemption for 1653 Grant Avenue

HEARING DATE: September 24, 2013

In compliance with San Francisco's Administrative Code Section 8.12.5 "Electronic Distribution of Multi-Page Documents," the Planning Department has submitted a multi-page response to the Appeal of Categorical Exemption for 435-437 Potrero Avenue [BF 13-0802] in digital format. Hard copies of this response have been provided to the Clerk of the Board for distribution to the appellants and project sponsor by the Clerk of the Board. A hard copy of this response is available from the Clerk of the Board. Additional hard copies may be requested by contacting the Corey Teague of the Planning Department at 415-575-9081.

SAN FRANCISCO
PLANNING DEPARTMENT

MEMO

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Categorical Exemption Appeal

435 - 437 Potrero Avenue

DATE:	September 16, 2013
TO:	Angela Calvillo, Clerk of the Board of Supervisors
FROM:	Sarah B. Jones, Environmental Review Officer – (415) 558-9048
	Nannie Turrell, Senior Environmental Planner – (415) 575-9047
RE:	BOS File No. 13-0805 [Planning/Building Case No. 2013.0477C]
	Appeal of Categorical Exemption for 435-437 Potrero Avenue
HEARING DATE:	September 24, 2013
ATTACHMENTS:	A. Planning Commission Motion No. 18921
	B. Appeal Letter

PROJECT SPONSOR:	David Silverman, Reuben, Junius & Rose, LLP on behalf of Industry Capital Internet Infrastructure, LLC
APPELLANT:	Mica L. Ringel

INTRODUCTION

This memorandum and the attached documents are a response to the letter of appeal to the Board of Supervisors (the "Board") regarding the Planning Department's (the "Department") issuance of a Categorical Exemption under the California Environmental Quality Act ("CEQA Determination") for a project at 435-437 Potrero Avenue (the "Project").

The Department, pursuant to Title 14 of the California Code of Regulations §§15000 et seq. (CEQA Guidelines), issued a Categorical Exemption for 435-437 Potrero Avenue on July 3, 2013 finding that the proposed project is exempt from the California Environmental Quality Act (CEQA) as a Class 1 categorical exemption under CEQA Guidelines Section 15301.

The decision before the Board is whether to uphold the Department's decision to issue a categorical exemption and deny the appeal, or to overturn the Department's decision to issue a categorical exemption and return the project to the Department staff for additional environmental review.

SITE DESCRIPTION & PRESENT USE

The project site is located on the east side of Potrero Avenue between 17th and Mariposa streets. The irregularly shaped parcel is nearly 5,000 square feet in area and contains an approximately 10,000 square foot, two-story structure built in 1950. The building was occupied as an Internet Services Exchange (ISE) from 2000 to 2010 (most recently d.b.a. Astound Networks). The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district.

The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. It is surrounded by a mix of building types and sizes, and land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDG-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

PROJECT DESCRIPTION

The proposed project would establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 sq. ft. through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

BACKGROUND

On April 18, 2013, David Silverman, on behalf of Industry Capital Internet Infrastructure, LLC (hereinafter "Project Sponsor") filed an application with the Planning Department (hereinafter "Department") for Conditional Use authorization under Planning Code Sections 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet (gsf) of Internet Services Exchange on the entirety of both floors of the existing two-story building within a UMU Zoning District and 58-X Height and Bulk District.

On June 4, 2013, the Zoning Administrator determined that the entire building is eligible to be legitimized as an ISE pursuant to Planning Code Section 179.1, because it had been used as an ISE from 2000 to 2010, and the building has not been used for any other use since 2010.

When the case report was issued on July 3, 2013, the Department had not received any comments from the public explicitly supporting or opposing the project. Several neighbors did express concern about aspects of the project that were generally related to operation of the backup generator. These concerns were based on their experiences from previous operators of the building. One neighbor on the subject block clarified that they were opposed to the project. In response to these concerns, the current Project Sponsor held a meeting at the project site with a group of concerned neighbors on July 1st.

On July 10th and 11th, the Department received new emails from two neighbors on the project block, opposed to the project; one email was from a resident approximately four blocks away; and the other email was from a resident who did not identify their address. The primary concerns raised in the emails related to noise, vibrations, and discharge from the backup generator in the building.

On July 11, 2013, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Application No. 2013.0477C. The Commission approved Motion No. 18921 adopting findings relating to the approval of CU Authorization pursuant to Planning code Section 179, 227(r), 303, and 303(h), to allow approximately 10,000 gsf of ISE on the entirety of both floors at 435-437 Potrero Avenue.

On August 12, 2013, a timely appeal of the Categorical Exemption Determination was filed by Mica I. Ringel.

CEQA GUIDELINES

Section 21084 of the California Public Resources Code requires that the CEQA Guidelines identify a list of classes of projects that have been determined not to have a significant effect on the environment and are exempt from further environmental review.

In response to that mandate, the State Secretary of Resources found that certain classes of projects, which are listed in CEQA Guidelines Sections 15301 through 15333, do not have a significant impact on the environment, and therefore are categorically exempt from the requirement for the preparation of further environmental review.

CEQA State Guidelines Section 15301 (Existing Facilities), or Class 1, provides an exemption from environmental review for the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures , facilities, mechanical equipment, or topographic features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination.

APPELLANT ISSUES AND PLANNING DEPARTMENT RESPONSES

The concerns raised in the August 12, 2013 Appeal Letter are cited in a summary below and are followed by the Department's responses.

Issue 1: The appellant alleges that there has been no disclosure of the adverse environmental and health effects to the surrounding neighborhood from the project sponsor or by Planning. The appellant contends that there is a 4,000 KW generator on site, emitting toxins into neighboring backyards, and that adverse environmental and health effects have not been disclosed. The appellant contends that the generator on the subject property may be on during an interruption of power and run for many hours hours unattended, subjecting the neighborhood to industrial strength diesel emissions. The appellant contends that there is an electrical hum emanating from the building.

Response 1: The Planning Department appropriately considered baseline conditions and regulation of the onsite generator. The conditions identified by the appellant constitute baseline conditions for environmental review. They are not impacts of the project as proposed. Significant impacts under CEQA are defined as substantial adverse changes to the physical environment resulting from the project. Therefore, the categorical exemption for the project appropriately did not consider existing conditions on

the project site as impacts of the proposed project. The generator on the site is regulated through the Bay Area Air Quality Management District (BAAQMD) permit process and through the project Conditions of Approval as described below.

There is no evidence that the proposed project will have a significant effect on the environment. The on-site existing 400 KW (not 4,000 KW) backup generator complies with all relevant controls and is permitted by the BAAQMD (Permit No. 21731). BAAQMD Regulation 2.5 requires the applicant receiving a permit for a new source (in this case the existing generator) to install Best Available Control Technologies for toxics if the new source results in a cancer risk of one per million persons exposed. BAAQMD cannot permit any new source that results in an excess cancer risk of 10 per million persons exposed. Pursuant to the BAAQMD permit, the generator on site is not allowed to run for more than 20 hours per year and must keep a monthly log of the following:

- Hours of operation for maintenance and testing, emission testing, and for each emergency;
- Nature of any emergency; and
- Fuel usage.

As required by the Conditions of Approval, Compliance, Monitoring, and Reporting Performance "Conditions of Approval") attached to Conditional Use Permit 18921, the project sponsor shall submit an annual report to the Department of the environment and the Planning department, which contains the following;

- Annual energy and fuel consumption of all users at the project site;
- Number of diesel generators and hours of usage;
- Evidence that diesel generators are in compliance with all applicable local, regional, state and federal permits, regulations, and laws; and
- Other information as the Planning Commission may require.

The Conditions of Approval also require adequate soundproofing or insulation such that the fixed-source noise from the site will not exceed decibel levels specified in the San Francisco Noise Control Ordinance, and that the project sponsor shall attempt to reduce vibration from equipment within the building and on the roof through repair, retrofit, or replacement of equipment. The Department has addressed the conditions associated with the existing generator on the site through the approval of the project's conditional use authorization, which is not on appeal. Because the generator is an existing condition that is regulated through the BAAQMD process, there is no significant impact under CEQA and, therefore, no mitigation is required.

Issue 2: The appellant is concerned that the project site was vacant for three years, and contends that therefore the proposed project fails to meet the CEQA State Guidelines Section 15301, or Class 1 guidelines of an "existing facility." The Appellant contends that prior to 2010, internet services were not provided from the project site, but rather from the Data Center at 200 Paul Street, and that the project is an expansion of use. The Appellant maintains that the project should have been analyzed as a new project, rather than "legitimized" as an existing business, thus avoiding environmental review.

Response 2: The use on the project site is an existing use and the proposed project would not be an expansion of the existing use. The Department found that the ISE has existed at the site for 10 years, and that, according to lease documents, business tax, documents, building permits, utility bills, and insurance documents indicated that the building remained occupied until 2010; and that since that time no new use was established in the building, and it has been actively marketed as an Internet Services Exchange and that the use was not abandoned. The Department's determination was used to conclude, pursuant to CEQA Guidelines Section 15301, is that the proposed project is an existing facility and would involve negligible or no expansion of the existing use. The issue of eligibility for legitimization is not a CEQA issue, and consistency with zoning is not a requirement under the Class 1 exemption.

Issue 3: The appellant states that an ISE was principally permitted under the previous M-1 (Light Industrial) use, but is prohibited under the Eastern Neighborhoods rezoning to UMU and that the proposed use should have been analyzed as a new project rather than a "legitimization." The appellant contends that the former tenant did not obtain permits with Planning for an ISE, and never finalized any permits with the Building Department. The Appellant states that the former tenant terminated use when they left the building in 2010 that landlord is trying to continue the use through the "Legitimization" program.

Response 3: The issue of eligibility for legitimization is not a CEQA issue. The appellant's remarks are address below for informational purposes, but are not related to the appropriateness of issuing a Class 1 exemption for the project. The Zoning Administrator issued a Letter of Legitimization for this project on June 3, 2013, stating that the approximately 10,000 gross square foot ISE was eligible for legitimization pursuant to Planning Code Section 179.1. A land use must be found to be existing and active pursuant to the Planning Code in order to be eligible. By issuing the Letter of Legitimization, the Zoning Administrator made the determination that the ISE use was in fact still active. That letter was not appealed, and the appellant's Request for Jurisdiction at the Board of Appeals was denied.

The Planning Department established through Planning Code Section 179.1 a time limited program wherein existing uses in the Eastern Neighborhoods plan area that have operated without the benefit of required permits, may seek those permits. This Section of the Planning Code applies only to property located in the Eastern Neighborhoods Mixed Use Districts, the SLI District, or any PDR District which is located within the boundaries of the Eastern Neighborhoods Project Area.

To be eligible under this provision, the Zoning Administrator must determine that the land use;

- exists as of the date of the application;
- would have been principally permitted or permitted with conditional use authorization under provisions of the Planning Code that were effective on April 17, 2008;
- would not be permitted under current provisions of this Code;
- is a land use that either has been regularly operating or functioning on a continuous basis for no less than 2 years prior to the effective date of this Section; or has been functioning in the space since at least April 17, 2008, and is associated with an organization, entity or enterprise which has been located in this space on a continuous basis for no less than 2 years prior to the effective date of this Section;
- is not accessory to any other use; and

- is not discontinued and abandoned pursuant to the provisions of Section 183 that would otherwise apply to nonconforming uses.

The Zoning Administrator found that proposed ISE has existed at the site for 10 years, and that, according to relevant documents the building remained occupied until 2010; and that since that time no new use was established in the building, and it has been actively marketed as an Internet Services Exchange. The Zoning Administrator therefore determined that the ISE use was not discontinued or abandoned. Subsequent to this determination, a Conditional Use authorization was approved to legally convert the subject building to Internet Services Exchange.

The appellant is correct that the previous tenants at the project site did not obtain the required permits to legally establish the ISE use. However, that very fact supports the legitimization of this project because Section 179.1(a) states that "the purpose of this Section is to establish a time-limited program wherein existing uses that have operated without the benefit of required permits [emphasis added] may seek those permits."

A land use is not considered discontinued or abandoned simply through the vacating of a tenant. Section 183 states that "whenever a nonconforming use has been changed to a conforming use, or discontinued for a continuous period of three years, or whenever there is otherwise evident a clear intent on the part of the owner to abandon a nonconforming use, such use shall not after being so changed, discontinued or abandoned be reestablished, and the use of the property thereafter shall be in conformity with the use limitations of this Code for the district in which the property is located." The subject building was not converted to a different use (i.e. "changed to a conforming use") after the last tenant vacated in 2010. Additionally, there was a clear intent to continue the ISE use in the building by actively marketing it as an ISE site since that time. The Project Sponsor has also actively pursued the continuation of the use within that three year period by requesting legitimization of the ISE use.

CONCLUSION

No substantial evidence supporting a fair argument that a significant environmental effect may occur as a result of the project has been presented that would warrant preparation of further environmental review. The Department has found that the proposed project is an existing facility involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The Appellant has not provided any substantial evidence or expert opinion to refute the conclusions of the Department.

For the reasons stated above categorical exemption complies with the requirements of CEQA. The Department therefore recommends that the Board uphold the Determination of Exemption from Environmental Review and deny the appeal of the CEQA Determination.

SAN FRANCISCO
PLANNING DEPARTMENT

Subject to: (Select only if applicable)

- ☐ Affordable Housing (Sec. 415)
- ☐ Jobs Housing Linkage Program (Sec. 413)
- ☐ Downtown Park Fee (Sec. 412)
- ☐ First Source Hiring (Admin. Code)
- ☐ Child Care Requirement (Sec. 414)
- ■ Other (TIDF – Sec. 411)

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
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Planning Commission Motion No. 18921

HEARING DATE: JULY 11, 2013

Date:	July 3, 2013
Case No.:	2013.00477 C
Project Address:	435-437 Potrero Avenue
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org

ADOPTING FINDINGS RELATING TO THE APPROVAL OF CONDITIONAL USE AUTHORIZATION PURSUANT TO PLANNING CODE SECTIONS 179.1, 227(R), 303, AND 303(H), TO ALLOW APPROXIMATELY 10,000 GROSS SQUARE FEET OF INTERNET SERVICES EXCHANGE ON THE ENTIRETY OF BOTH FLOORS OF THE EXISTING TWO-STORY BUILDING WITHIN A UMU (URBAN MIXED USE) ZONING DISTRICT AND 58-X HEIGHT AND BULK DISTRICT.

PREAMBLE

On April 18, 2013, David Silverman, on behalf of Industry Capital Internet Infrastructure, LLC (hereinafter "Project Sponsor"), filed an application with the Planning Department (hereinafter "Department") for Conditional Use Authorization under Planning Code Sections 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building within a UMU (Urban Mixed Use) Zoning District and 58-X Height and Bulk District.

On July 11, 2013, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Application No. 2013.0477C.

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

The Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of the applicant, Department staff, and other interested parties.

MOVED, that the Commission hereby authorizes the Conditional Use requested in Application No. 2013.0477C, subject to the conditions contained in "EXHIBIT A" of this motion, based on the following findings:

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. The above recitals are accurate and constitute findings of this Commission.

2. **Site Description and Present Use.** The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

3. **Surrounding Properties and Neighborhood.** The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

4. **Project Description.** The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

5. **Public Comment.** When the case report was issued on June 3, 2013, the Department had not received any comments from the public explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator. These concerns were based on their experiences

from previous operators of the building. Additionally, one neighbor on the subject block clarified that they are in fact opposed to the project. In response to these concerns, the current Project Sponsor held a meeting at the project site with a group of concerned neighbors on July 1st.

On July 10th and 11th, the Department received new emails of opposition from two neighbors on the subject block, one email of opposition from a resident living approximately 4 blocks away, and one email of opposition from a resident who didn't identify their address. The primary concerns in those emails stem from the potential noise, vibrations, and discharge from the backup generator in the building.

6. **Planning Code Compliance:** The Commission finds that the Project is consistent with the relevant provisions of the Planning Code in the following manner:

   A. **Legitimization.** Planning Code Section 179.1 established a time-limited program wherein existing uses in the Eastern Neighborhoods plan area that have operated without the benefit of required permits may seek those permits. Uses that could be "legitimized" under this Section are those uses which, under the current provisions of this Code and without this Section, could not otherwise seek the required permits.

   The proposed Internet Services Exchange (ISE) originally occupied the subject building in 2000. The subject property was zoned M-1 at that time, which permitted ISEs with a Conditional Use Authorization. The Zoning Administrator issued a Letter of Legitimization on June 4, 2013 for this project stating that the approximately 10,000 gross square feet of Internet Services Exchange occupying the entire existing building is eligible to be approved as a legal nonconforming use pursuant to Planning Code section 179.1. As such, the project is now seeking a Conditional Use Authorization under the provisions of the properties former M-1 zoning.

7. **Planning Code Section 303** establishes criteria for the Planning Commission to consider when reviewing applications for Conditional Use approval. On balance, the project does comply with said criteria in that:

   A. The proposed new uses and building, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable, and compatible with, the neighborhood or the community.

   The proposed Internet Services Exchange has already existed at the site for more than ten years without any reported complaints from surrounding businesses or residents. The low-intensity nature of the use, along with its relatively small size and scale, make it compatible with the existing mixed use surroundings. Additionally, the use provides a locally-owned, small-scale option for small businesses within the City for data and information storage.

   B. The proposed project will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity. There are no features of the project

that could be detrimental to the health, safety or convenience of those residing or working the area, in that:

i. Nature of proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;

The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

ii. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic or parking.

iii. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;

The existing HVAC equipment consists of seven fan units that will comply with the San Francisco Noise Ordinance the equipment and does not emit any dust or odors. The backup generator will only be used for testing and in emergencies like power outages.

iv. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs;

The existing building covers the entire site and includes no open space or landscaped areas. All lighting and signing will meet Planning Code requirements.

C. That the use as proposed will comply with the applicable provisions of the Planning Code and will not adversely affect the General Plan.

The Project complies with all relevant requirements and standards of the Planning Code and is consistent with objectives and policies of the General Plan as detailed below.

D. That the use as proposed would provide development that is in conformity with the purpose of the applicable Neighborhood Commercial District.

The project is not located within a Neighborhood Commercial District.

8. Planning Code Section 303(h) establishes additional criteria for the Planning Commission to consider when reviewing applications for Conditional Use Approval of Internet Services Exchanges. On balance, the project does comply with said criteria in that:

   a. The intensity of the use at this location and in the surrounding neighborhood is not such that allowing the use will likely foreclose the location of other needed neighborhood-serving uses in the area;

      The use has a low intensity and has existed in the building for more than ten years with no known negative impacts. Additionally, the existing building is not currently designed to easily accommodate a more active commercial use, and therefore is suitable for an Internet Services Exchange.

   b. The building in which the use is located is designed in discrete elements, which respect the scale of development in adjacent blocks, particularly any existing residential uses;

      The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

   c. Rooftop equipment on the building in which the use is located is screened appropriately;

      The project is required to provide adequate screening of rooftop equipment pursuant to Planning Code Section 141 and Condition of Approval No. 6 in this motion.

   d. The back-up power system for the proposed use will comply with all applicable federal state, regional and local air pollution controls;

      The existing backup generator complies with all relevant controls and is permitted by the Bay Area Air Quality Management District (Permit No. 21731).

   e. Fixed-source equipment noise does not exceed the decibel levels specified in the San Francisco Noise Control Ordinance;

      A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code). This requirement is also listed as Condition of Approval No. 11 of this motion.

f. The building is designed to minimize energy consumption, such as through the use of energy-efficient technology, including without limitation, heating, ventilating and air conditioning systems, lighting controls, natural ventilation and recapturing waste heat, and as such commercially available technology evolves;

The existing equipment at the site is fully operable. However, the project will also use the following energy saving techniques to reduce the total power consumption of the building:

1) *Energy efficient Toshiba G90000 UPS systems to increase the efficiency of the current uninterruptible power system from 80 percent efficiency to 96.5 percent efficiency.*
2) *Cold isle containment, which can reduce the power associated with mechanical cooling by 25 to 30 percent.*
3) *Air-side economization, which can reduce the cooling power consumption by an estimated 50 to 60 percent.*

g. The project sponsor has examined the feasibility of supplying and, to the extent feasible, will supply all or a portion of the building's power needs through on-site power generation, such as through the use of fuel cells or co-generation;

The project sponsor studied the feasibility of using on-site Co-generation and fuel cells. However, due to the limited lot size, such power generation is not possible.

h. The project sponsor shall have submitted design capacity and projected power use of the building as part of the conditional use application;

The building is served by PG&E with a 1.0 mega volt ampere ("MVA") dedicated underground feed transformer that is located inside the building. This translates into a serviced capacity of approximately 800kW of power per hour. Using a vacancy factor estimate of 7.5 percent, the projected maximum annual energy use is 6,500,000 KWh per year, or 540,000kWh per month.

The following table provides projected monthly energy use per year as the building is leased up over time:

Power Use per Month	*2013*	*2014*	*2015*	*2016*
Total Capacity (KWh)	*36,000*	*216,000*	*360,000*	*540,000*

9. General Plan Compliance. The Project is, on balance, consistent with the following Objectives and Policies of the General Plan:

COMMERCE AND INDUSTRY

Objectives and Policies

OBJECTIVE 1:

MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKINIG ENVIRONMENT.

Policy 1.1:
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development that has substantial undesirable consequences that cannot be mitigated.

The project will provided a much needed support service for other businesses within the City without producing undesirable consequences.

OBJECTIVE 3:
PROVIDE EXPANDED EMPLOYMENT OPPORTUNITIES FOR CITY RESIDENTS, PARTICULARLY THE UNEMPLOYED AND ECONOMICALLY DISADVANTAGED.

Policy 3.4:
Assist newly emerging economic activities.

OBJECTIVE 4:
IMPROVE THE VIABILITY OF EXISTING INDUSTRY IN THE CITY AND THE ATTRACTIVENESS OF THE CITY AS A LOCATION FOR NEW INDUSTRY.

Policy 4.1:
Maintain and enhance a favorable business climate in the city.

Policy 4.2:
Promote and attract those economic activities with potential benefit to the City.

The project will provided a much needed support service for other businesses to locate and grow within the City, especially businesses with technological support needs.

10. **Planning Code Section 101.1(b)** establishes eight priority-planning policies and requires review of permits for consistency with said policies. On balance, the project does comply with said policies in that:

A. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses be enhanced.

The proposal will not remove or otherwise impact any existing neighborhood-serving retail uses in the area.

B. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods.

The proposed use has existed within the subject building since 2000 (including periods of vacancy). Continuing the use at this location will not impact existing housing or neighborhood character.

C. That the City's supply of affordable housing be preserved and enhanced,

No housing is created or removed as part of this project.

D. That commuter traffic not impede MUNI transit service or overburden our streets or neighborhood parking.

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic, parking, or MUNI.

E. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced.

The Project will not displace any service or industry establishment, but will instead preserve and industrial service that has existed at this site since 2000.

F. That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake.

The project includes no significant changes to the existing building.

G. That landmarks and historic buildings be preserved.

The subject building was determined to not be a historic resource by the Showplace Square/Northeast Mission Historic Survey.

H. That our parks and open space and their access to sunlight and vistas be protected from development.

The project will have no impact on existing parks and open spaces.

11. The Project is consistent with and would promote the general and specific purposes of the Code provided under Section 101.1(b) in that, as designed, the Project would contribute to the character and stability of the neighborhood and would constitute a beneficial development.

12. The Commission hereby finds that approval of the Conditional Use authorization would promote the health, safety and welfare of the City.

DECISION

That based upon the Record, the submissions by the Applicant, the staff of the Department and other interested parties, the oral testimony presented to this Commission at the public hearings, and all other written materials submitted by all parties, the Commission hereby APPROVES Conditional Use Application No. 2013.0477C subject to the following conditions attached hereto as "EXHIBIT A" in general conformance with plans on file, dated May 30, 2013, and stamped "EXHIBIT B", which is incorporated herein by reference as though fully set forth.

APPEAL AND EFFECTIVE DATE OF MOTION: Any aggrieved person may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion No. 18921. The effective date of this Motion shall be the date of this Motion if not appealed (After the 30-day period has expired) OR the date of the decision of the Board of Supervisors if appealed to the Board of Supervisors. For further information, please contact the Board of Supervisors at (415) 554-5184, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

I hereby certify that the Planning Commission ADOPTED the foregoing Motion on July 11, 2013.

Jonas P. Ionin
Acting Commission Secretary

AYES: Commissioners Antonini, Borden, Fong, Moore, and Wu

NAYS: Commissioner Sugaya

ABSENT: Commissioner Hillis

ADOPTED: July 11, 2013

EXHIBIT A

AUTHORIZATION

This authorization is for a conditional use to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building located at 435-437 Potrero Avenue, Block 3972, and Lot 22, pursuant to Planning Code Section(s) 179.1, 227(r), 303, and 303(h) within the UMU District and a 58-X Height and Bulk District; in general conformance with plans, dated May 30, 2013, and stamped "EXHIBIT B" included in the docket for Case No. 2013.0477C and subject to conditions of approval reviewed and approved by the Commission on July 11, 2013 under Motion No. 18921. This authorization and the conditions contained herein run with the property and not with a particular Project Sponsor, business, or operator.

RECORDATION OF CONDITIONS OF APPROVAL

Prior to the issuance of the building permit or commencement of use for the Project the Zoning Administrator shall approve and order the recordation of a Notice in the Official Records of the Recorder of the City and County of San Francisco for the subject property. This Notice shall state that the project is subject to the conditions of approval contained herein and reviewed and approved by the Planning Commission on July 11, 2013 under Motion No 18921.

PRINTING OF CONDITIONS OF APPROVAL ON PLANS

The conditions of approval under the 'Exhibit A' of this Planning Commission Motion No. 18921 shall be reproduced on the Index Sheet of construction plans submitted with the Site or Building permit application for the Project. The Index Sheet of the construction plans shall reference to the Conditional Use authorization and any subsequent amendments or modifications.

SEVERABILITY

The Project shall comply with all applicable City codes and requirements. If any clause, sentence, section or any part of these conditions of approval is for any reason held to be invalid, such invalidity shall not affect or impair other remaining clauses, sentences, or sections of these conditions. This decision conveys no right to construct, or to receive a building permit. "Project Sponsor" shall include any subsequent responsible party.

CHANGES AND MODIFICATIONS

Changes to the approved plans may be approved administratively by the Zoning Administrator. Significant changes and modifications of conditions shall require Planning Commission approval of a new Conditional Use authorization.

Conditions of Approval, Compliance, Monitoring, and Reporting

PERFORMANCE

1. **Validity.** The authorization and right vested by virtue of this action is valid for three (3) years from the effective date of the Motion. The Department of Building Inspection shall have issued a Building Permit or Site Permit to construct the project and/or commence the approved use within this three-year period.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

2. **Expiration and Renewal.** Should a Building or Site Permit be sought after the three (3) year period has lapsed, the project sponsor must seek a renewal of this Authorization by filing an application for an amendment to the original Authorization or a new application for Authorization. Should the project sponsor decline to so file, and decline to withdraw the permit application, the Commission shall conduct a public hearing in order to consider the revocation of the Authorization. Should the Commission not revoke the Authorization following the closure of the public hearing, the Commission shall determine the extension of time for the continued validity of the Authorization.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

3. **Diligent pursuit.** Once a site or Building Permit has been issued, construction must commence within the timeframe required by the Department of Building Inspection and be continued diligently to completion. Failure to do so shall be grounds for the Commission to consider revoking the approval if more than three (3) years have passed since this Authorization was approved.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

4. **Extension.** All time limits in the preceding three paragraphs may be extended at the discretion of the Zoning Administrator where implementation of the project is delayed by a public agency, an appeal or a legal challenge and only by the length of time for which such public agency, appeal or challenge has caused delay.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

5. **Conformity with Current Law.** No application for Building Permit, Site Permit, or other entitlement shall be approved unless it complies with all applicable provisions of City Codes in effect at the time of such approval. *For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.*

DESIGN – COMPLIANCE AT PLAN STAGE

6. **Rooftop Mechanical Equipment.** Pursuant to Planning Code 141, the Project Sponsor shall submit a roof plan to the Planning Department prior to Planning approval of the building permit

application. Rooftop mechanical equipment, if any is proposed as part of the Project, is required to be screened so as not to be visible from any point at or below the roof level of the subject building.

For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

PROVISIONS

7. **Transit Impact Development Fee.** Pursuant to Planning Code Section 411 (formerly Chapter 38 of the Administrative Code), the Project Sponsor shall pay the Transit Impact Development Fee (TIDF) as required by and based on drawings submitted with the Building Permit Application. Prior to the issuance of a temporary certificate of occupancy, the Project Sponsor shall provide the Planning Director with certification that the fee has been paid.

   For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

MONITORING

8. **Reporting.** As long as the use remains an Internet Services Exchange, the project sponsor shall submit to the Planning Department on an annual basis power use statements for the previous twelve-month period as provided by all suppliers of utilities and shall submit a written annual report to the Department of Environment and the Planning Department which shall state: (a) the annual energy consumption and fuel consumption of all tenants and occupants of the Internet Services Exchange; (b) the number of all diesel generators located at the site and the hours of usage, including usage for testing purposes; (c) evidence that diesel generators at the site are in compliance with all applicable local, regional, state and federal permits, regulations and laws; and (d) such other information as the Planning Commission may require.

   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

9. **Enforcement.** Violation of any of the Planning Department conditions of approval contained in this Motion or of any other provisions of Planning Code applicable to this Project shall be subject to the enforcement procedures and administrative penalties set forth under Planning Code Section 176 or Section 176.1. The Planning Department may also refer the violation complaints to other city departments and agencies for appropriate enforcement action under their jurisdiction.

   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

10. **Revocation due to Violation of Conditions.** Should implementation of this Project result in complaints from interested property owners, residents, or commercial lessees which are not resolved by the Project Sponsor and found to be in violation of the Planning Code and/or the specific conditions of approval for the Project as set forth in Exhibit A of this Motion, the Zoning Administrator shall refer such complaints to the Commission, after which it may hold a public hearing on the matter to consider revocation of this authorization.

For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

OPERATION

11. **Noise Control.** The premises shall be adequately soundproofed or insulated for noise and operated so that fixed-source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.
For information about compliance with the fixed mechanical objects such as rooftop air conditioning, restaurant ventilation systems, and motors and compressors with acceptable noise levels, contact the Environmental Health Section, Department of Public Health at (415) 252-3800, www.sfdph.org.

12. **Vibration.** The Project Sponsor shall attempt to reduce vibration from equipment within the building and on the roof through repair, retrofit, or replacement of the equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

13. **Backup Generator Operation.** The Project Sponsor shall attempt to reduce the emissions of the backup generator, such as use of biofuels instead of diesel fuel to operate the backup generator.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

14. **Sidewalk Maintenance.** The Project Sponsor shall maintain the main entrance to the building and all sidewalks abutting the subject property in a clean and sanitary condition in compliance with the Department of Public Works Streets and Sidewalk Maintenance Standards.
For information about compliance, contact Bureau of Street Use and Mapping, Department of Public Works, 415-695-2017, http://sfdpw.org.

15. **Community Liaison.** Prior to issuance of a building permit to construct the project and implement the approved use, the Project Sponsor shall appoint a community liaison officer to deal with the issues of concern to owners and occupants of nearby properties. The Project Sponsor shall provide the Zoning Administrator with written notice of the name, business address, and telephone number of the community liaison. Should the contact information change, the Zoning Administrator shall be made aware of such change. The community liaison shall report to the Zoning Administrator what issues, if any, are of concern to the community and what issues have not been resolved by the Project Sponsor.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

16. **Six-Month Report.** The Project Sponsor shall report back to the Planning Commission approximately six months after occupancy of the building. The report shall focus on the operation of the building during that time, especially regarding the generation of noise and emissions from the backup generator and other equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

SAN FRANCISCO
PLANNING DEPARTMENT

Executive Summary
Conditional Use

HEARING DATE: JULY 11, 2013

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Date:	July 3, 2013
Case No.:	2013.00477 C
Project Address:	435-437 Potrero Avenue
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org
Recommendation:	**Approval with Conditions**

PROJECT DESCRIPTION

The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

SITE DESCRIPTION AND PRESENT USE

The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

SURROUNDING PROPERTIES AND NEIGHBORHOOD

The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

ENVIRONMENTAL REVIEW

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

HEARING NOTIFICATION

This project was originally scheduled and noticed for a public hearing on June 13, 2013. It was continued to July 11th because the notification poster on site was torn down and not replaced in a reasonable amount of time. The poster was replaced and advertised the new hearing date of July 11, 2013.

TYPE	REQUIRED PERIOD	REQUIRED NOTICE DATE	ACTUAL NOTICE DATE	ACTUAL PERIOD
Classified News Ad	20 days	May 24, 2013	May 22, 2013	22 days
Posted Notice	20 days	May 24, 2013	May 24, 2013	20 days
Mailed Notice	20 days	May 24, 2013	May 23, 2013	21 days

PUBLIC COMMENT

- The Department did not receive any comments from the project explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator.

ISSUES AND OTHER CONSIDERATIONS

- On June 4, 2013, the Zoning Administrator determined that the entire building is eligible to be legitimized as an ISE pursuant to Planning Code Section 179.1 because it had been used as an ISE from 2000 to 2010, and the building has not been used for any other use since 2010.

- A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code).

REQUIRED COMMISSION ACTION

In order for the proposed ISE to be approved, the Commission must grant conditional use authorization to allow the ISE under the site's previous M-1 Zoning District, pursuant to Planning Code Sections 179.1, 227(r), 303, and 303(h).

BASIS FOR RECOMMENDATION

- The existing building was used as an ISE from 2000 to 2010 without any formal complaints from the community.

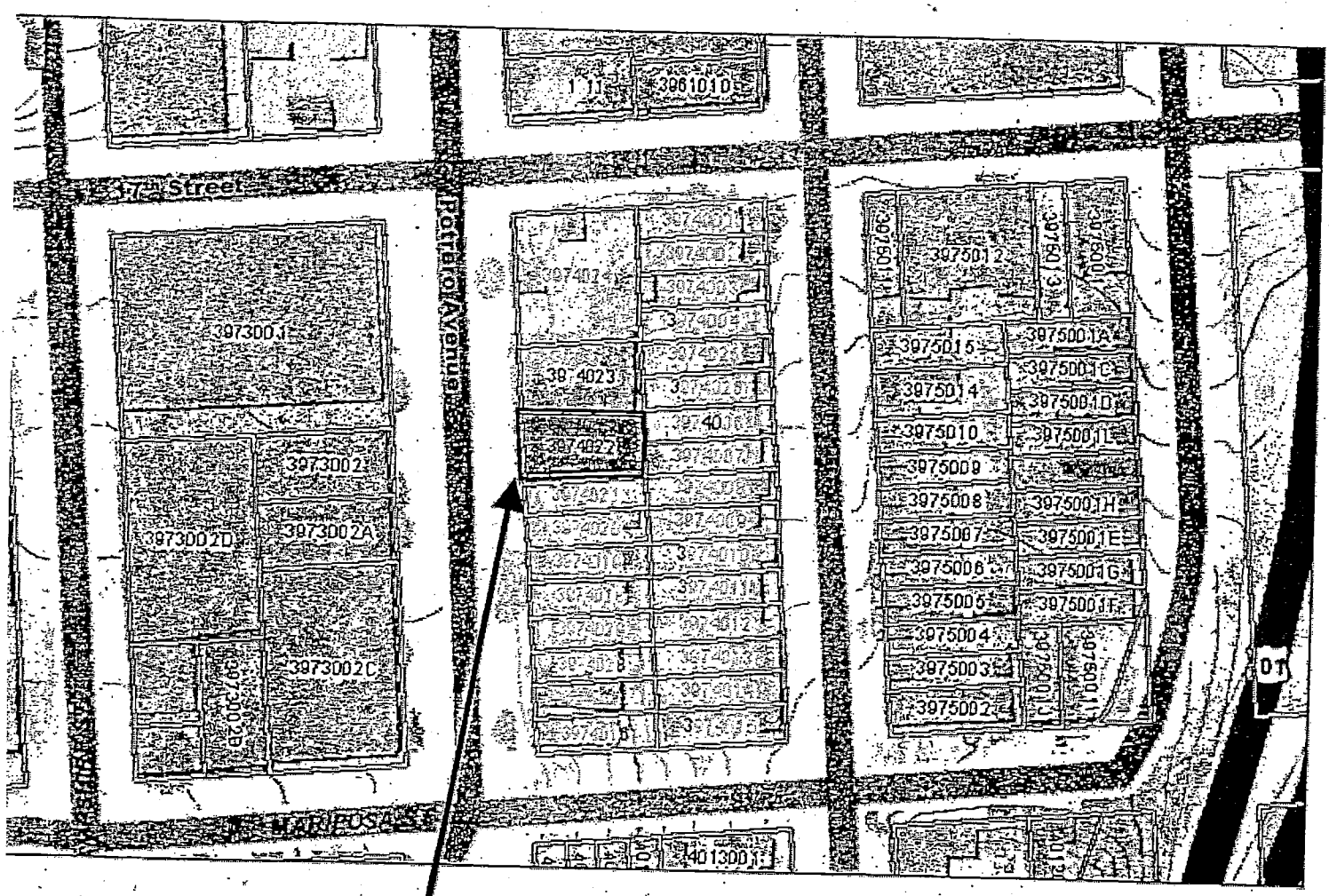
- The project will provide needed supportive technical services for businesses that are locating or growing in the City.
- The project is consistent with the Planning Code, Mission Area Plan, and the General Plan overall.

RECOMMENDATION:	Approval with Conditions

Attachments:
Parcel Map
Sanborn Map
Aerial Photographs
Site Photo
Zoning Map
Draft Motion
Sponsor Submittal
-Project Narrative
-Reduced Size Plans

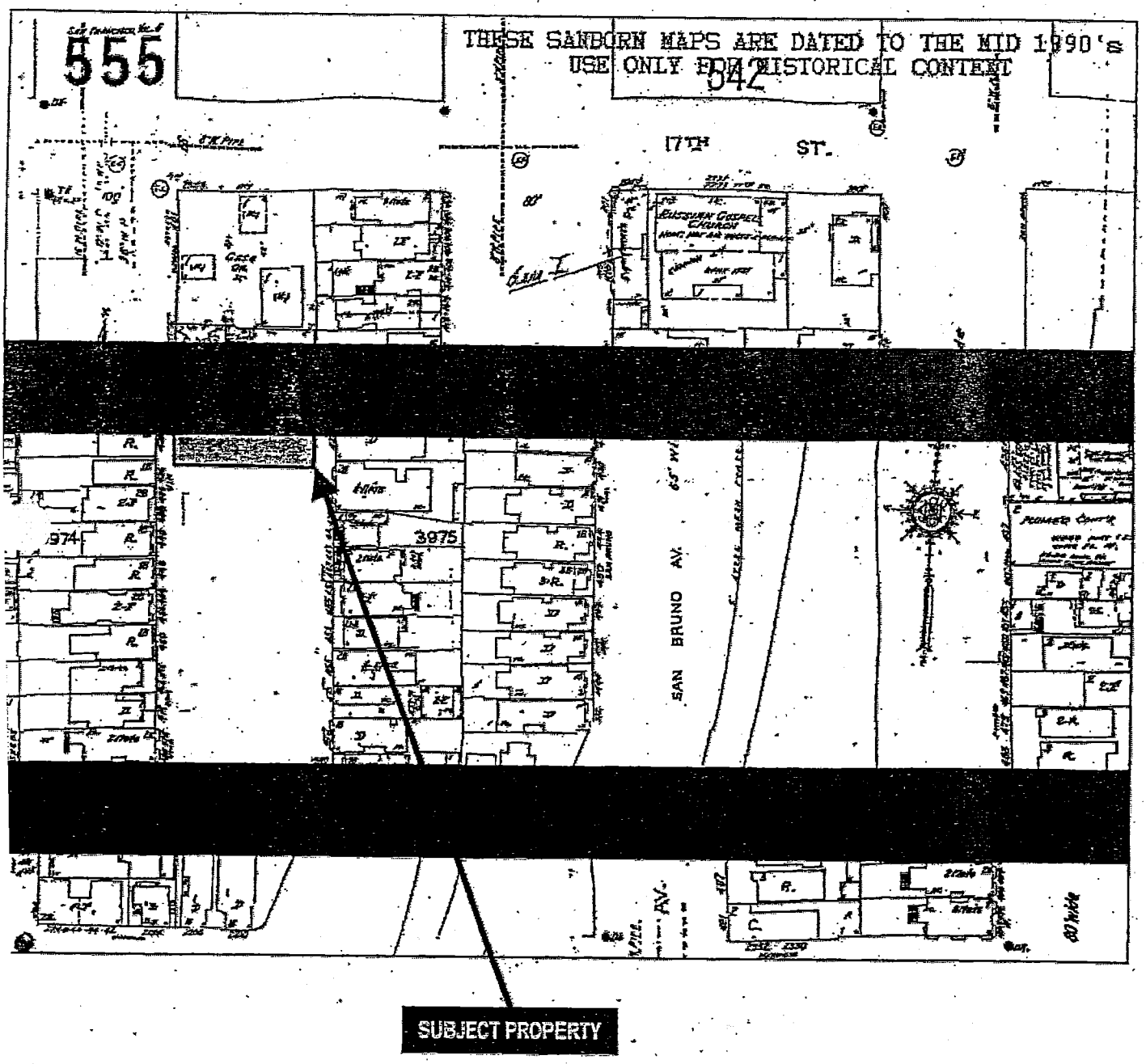
CT: G:\Documents\C\2012\435 Potrero Ave\Executive Summary.doc

Parcel Map



Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange

Sanborn Map*

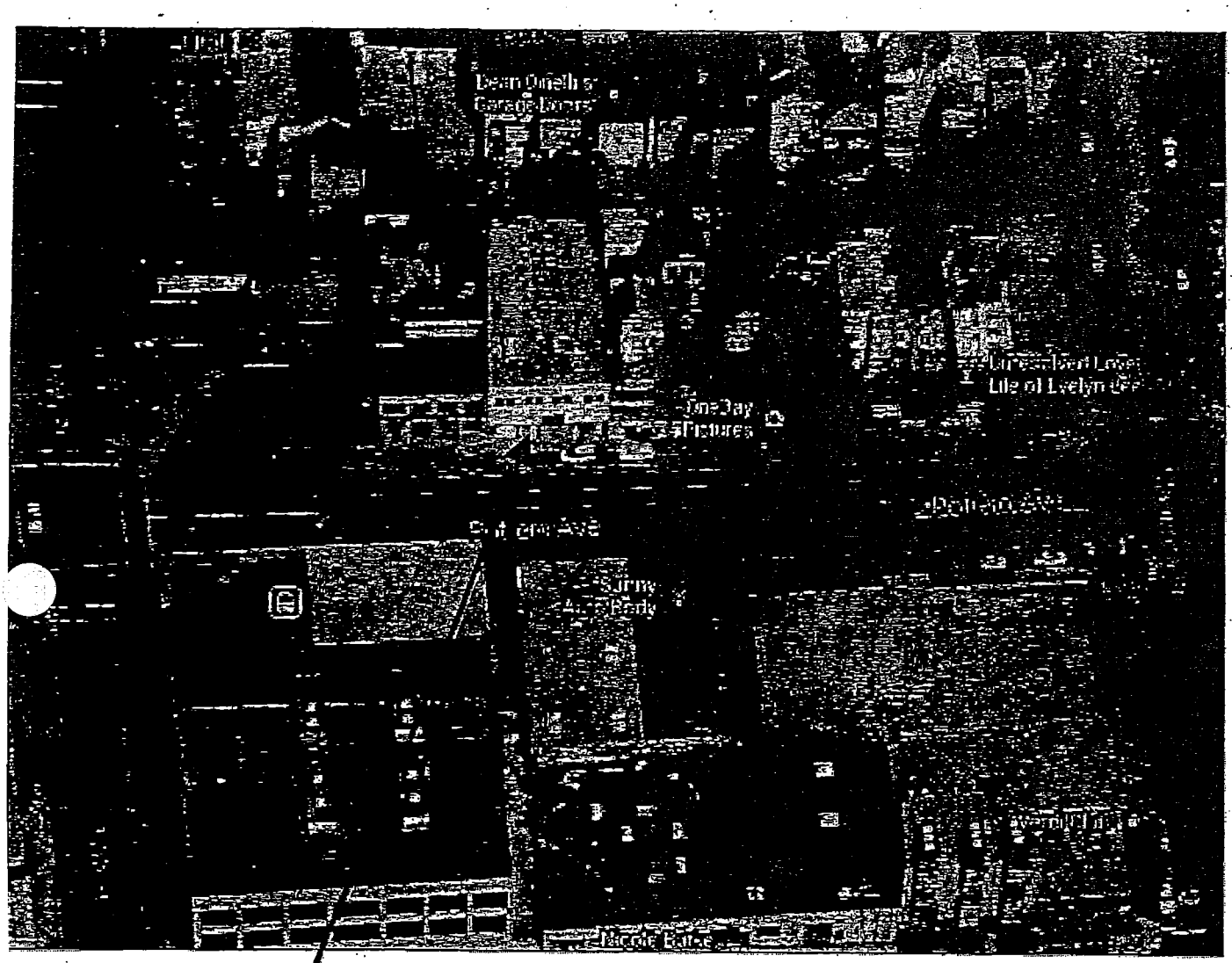


The Sanborn Maps in San Francisco have not been updated since 1998, and this map may not accurately reflect existing conditions.

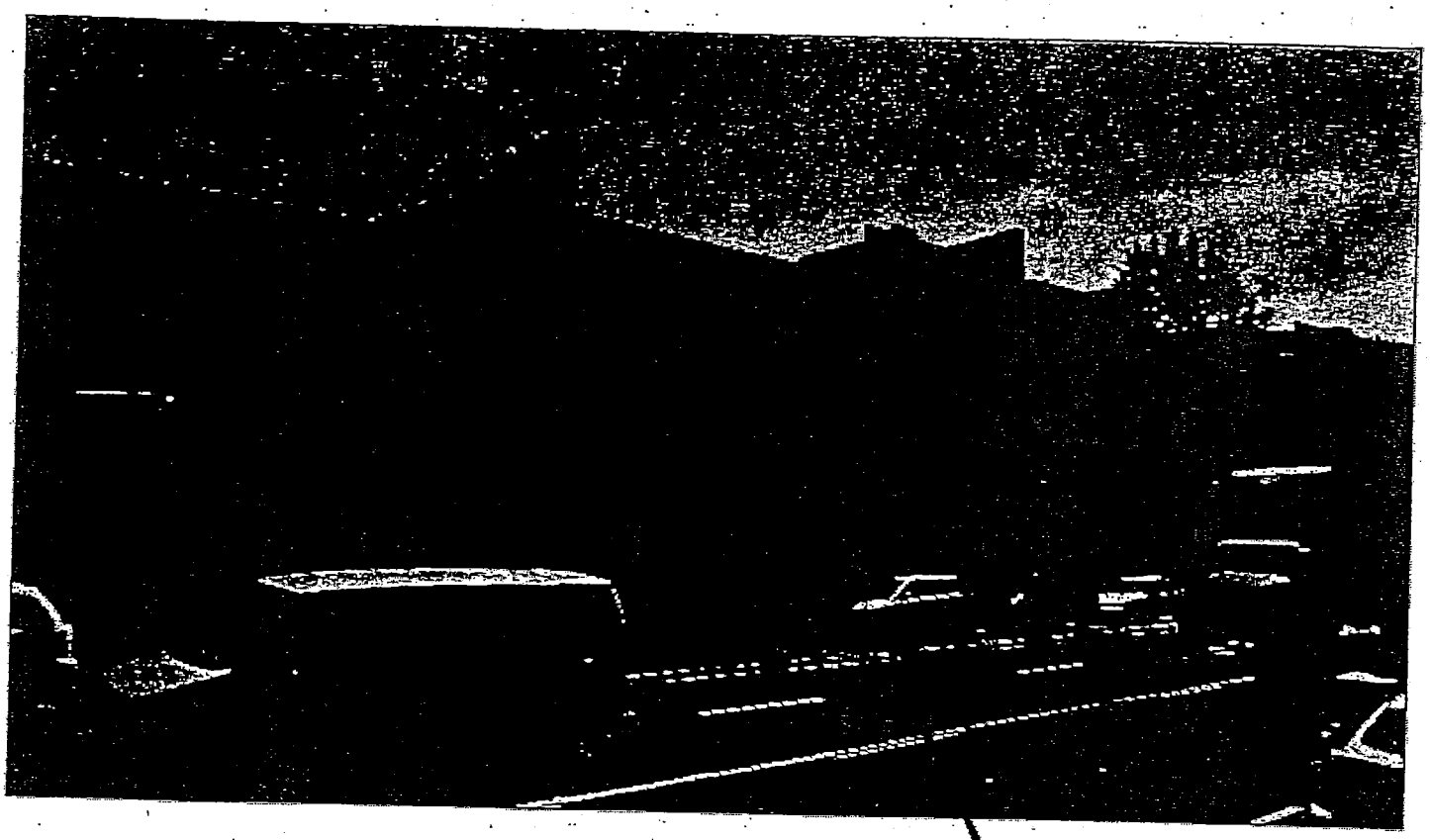
Aerial Photo



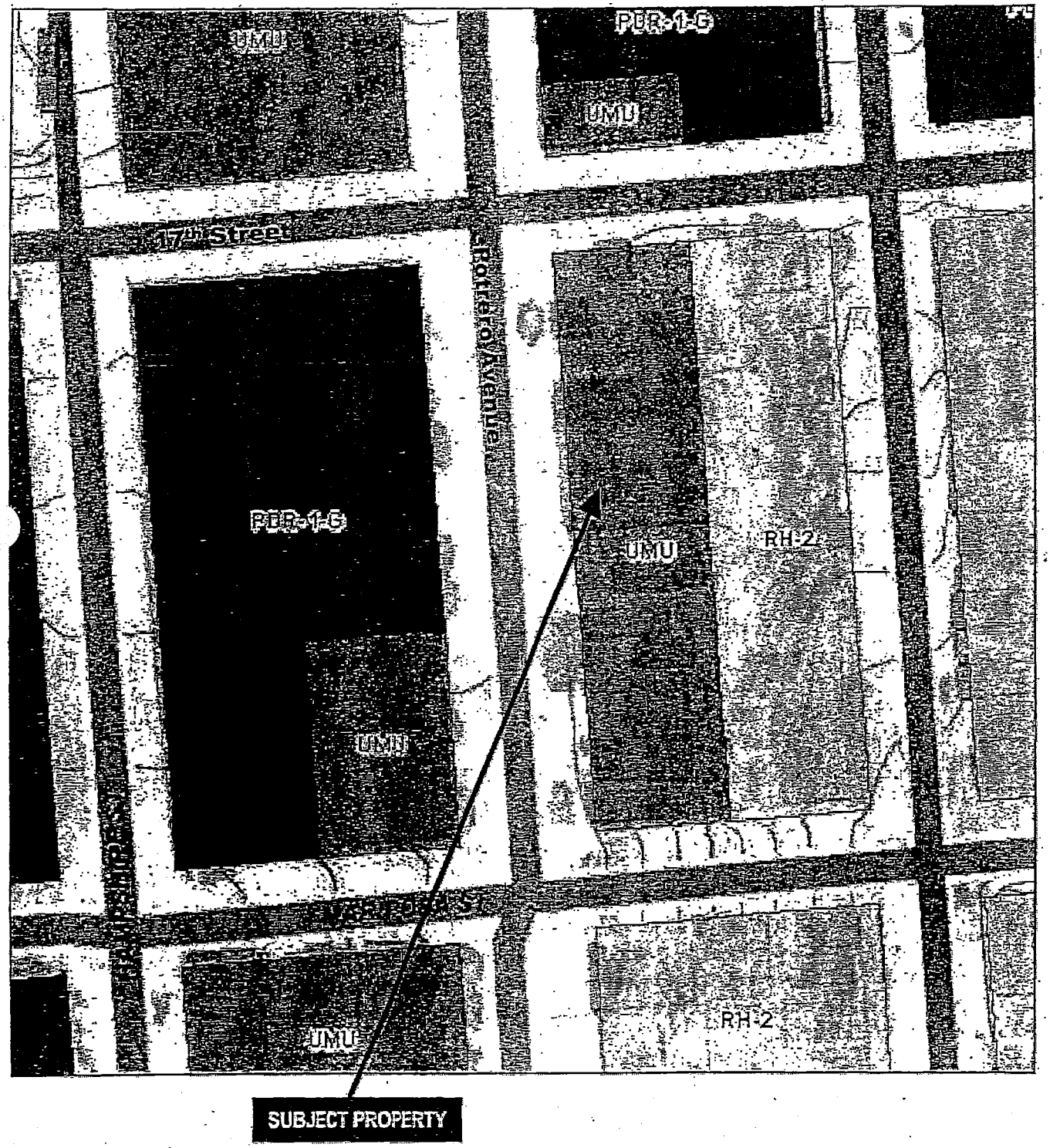
Aerial Photo



Site Photo



Zoning Map



Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

SAN FRANCISCO
PLANNING DEPARTMENT

ATTACHMENT B

Appeal Letter

BOARD OF SUPERVISORS

CITY & COUNTY OF SAN FRANCISCO

---o0o---

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2013 AUG 12 PM 4:55
BY

APPEAL OF THE

EXEMPTION DETERMINATION

&

CONDITIONAL USE PERMIT

INTERNET SERVICES EXCHANGE

435-437 POTRERO AVENUE

CASE NO. 2013.0477C

MICA I. RINGEL
485 Potrero Avenue, Unit C
San Francisco, CA 94110

415.519.7523

supermica@gmail.com

MICA I. RINGEL
485 Potrero Avenue, Unit C
San Francisco, CA 94110
415.519.7523
supermica@gmail.com

August 12, 2013

Board President David Chiu
and Members of the Board of Supervisors
c/o Angela Calvillo,
Clerk of the Board of Supervisors
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94110

BY HAND DELIVERY

Re: Appeal of Categorical Exemption Determination
Appeal of Conditional Use Permit
435-437 Potrero Avenue
Case No. 2013.0477C
Legitimized Internet Services Exchange

Dear President Chiu and Supervisors:

I am appealing a determination made by the Planning Department and Commission (hereinafter collectively "Planning") that a Conditional Use (CU) Permit to establish an Internet Services Exchange (ISE) at 435-437 Potrero Avenue is somehow exempt from the provisions of the California Environmental Quality Act (CEQA) by "stamp" of a Class 1 categorical exemption.

BACKGROUND

On July 11th 2013, the Planning Commission took action and approved Motion No. 18921 adopting findings relating to the approval of CU Authorization pursuant to Planning Code § 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of ISE on the entirety of both floors at 435-437 Potrero Avenue, in an existing two-story building within an Urban Mixed Use (UMU) zoning district bordering Residential (RH-2).

An ISE is a prohibited use within a UMU zoning district, and the Commission's authorization was contingent on approval of a Letter of Legitimization (LOL) signed by the Zoning Administrator (ZA) on June 4th 2013.

I filed a Jurisdiction Request (JR) with the Board of Appeals (BOA) on July 25th to challenge the LOL determination. The JR will be heard on August 14th.

It is my contention that Planning has (1) abused its discretion in its determination that this project is categorically exempt and (2) failed to make the required findings that would support an exemption.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

CEQA is not to be stretched beyond the "reasonable scope of the statutory language." [1]

Class 1 categorical exemption is applicable to the "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." [2]

SIGNIFICANT CHANGE OF USE

435-437 Potrero Avenue had been without a tenant for a minimum of 3 years on July 11th, 2013 when the Commission took action and granted the CUP. By definition, an unoccupied property is empty, vacant, and without an active use. Any subsequent use beyond that which existed at the time of project approval, which was nothing, would have to be considered a clear expansion of use.

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[1] CCR § 15003(f); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 563-564; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110

[2] CCR § 15301.

The former tenant [RCN/Astound] had used the site to house an ancillary hub for the broadcast and transmission of their digital cable franchise[3].

The Project Sponsor's submittal in support of the CUP outlines the framework for the site to become a public Data Center serving "local retail business customers." It will be "much like a local print shop" or a Kinko's. "At any given time there will be 4–6 people employed at the facility with 2-4 employees of customers rotating on and off-site at any given time." Whereas, the commerce element had never previously existed at the site before, it becoming a commercial web host would again have be considered as a clear expansion of use.

In their quest to compete with the Tier V [top rated] data centers at 365 Main Street and 200 Paul Avenue, the Project Sponsor's submittal states this project will "represent a local choice for the San Francisco Small Business Community". It will "help attract and retain small businesses and start-up companies" and in turn, that will "promote further job growth in San Francisco." They believe they can "provide a higher degree of service than the larger national and multi-national platforms" as long as it will "not require construction of a new facility."

An ISE would have been principally permitted under the site's previous M-1 (Light Industrial) zoning, however pursuant to Eastern Neighborhoods rezoning to UMU, Data Centers are prohibited in UMU. The Project Sponsor admits that the site had been vacant since 2010 and that in that time RCN/Astound had not secured the appropriate permits to establish an ISE at 435-437 Potrero Avenue. It is my contention that they did not provide Internet Services from this site, but rather from their Data Center at 200 Paul, and that pursuant to their Franchise agreement Utility Permit, the Potrero hub is considered a "facility" and thus not regulated by Planning.

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[3] "RCN has a principal headend and hub site located at 200 Paul Avenue, San Francisco, California 94124. RCN utilizes an ancillary hub site at the following location: 437 Potrero Avenue, San Francisco, CA, 94110. This hub site is served by and technically integrated with the principal headend. RCN serves the general population within this OVS service area."
www.fcc.gov/bureaus/mb/ovs/rcnsfnoi.doc

This calls into question the lack of due diligence. Why wasn't this assessed as a new project for CU approval, rather than "legitimized" as an existing business that could forego environmental review? In this context, CEQA analysis becomes very important. If the project fails to meet the Class 1 guidelines of an "existing facility" it is not categorically exempt. The facility exists, yes... but it is no longer an ancillary hub for digital cable. RCN/Astound abandoned the utility use of 435-437 Potrero in 2010 when their lease expired. The pending use is predicated by what it has sought entitlement to become, a commercial web host.

Negligible refers to a quantity *so* small it *can* be ignored; something *so* insignificant it is neither important, nor worthy of consideration. The planned expansion of use is neither insignificant nor negligible... and even if it was it's still not categorically exempt.

The exception to the exemption is that a project with the potential of causing significant cumulative impacts, or which otherwise has a reasonable possibility of resulting in significant effects does not qualify for exemptions.

PUBLIC HEALTH AND SAFETY

The following statement from the Project Sponsor's Submittal is not true: "the CU Authorization will not be detrimental to the health, safety or general welfare of the persons or the businesses in the vicinity."

There is an industrial sized 4,000 KW Generator on-site and the emissions "stack" is located directly in our back yards. The health risks associated with Toxic Air Contaminant [TAC] areare quantified by ones distance to the source. TAC's are directly related to Asthma, Heart Attacks, Strokes, Hypertension and shorter life spans. Potrero Ave has very poor Air Quality and Noise Levels, both which measure parallel to Highway 101, which is two blocks away.

San Francisco Municipal Code § 2001[4] states:

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[4] (Added by Ord. 202-02, File No. 012186, App. 9/27/2002)

The Board of Supervisors finds and declares the following:

(a) Diesel Backup Generators emit large amounts of smog-forming nitrogen oxides (NOx), particulate matter with a diameter of 10 microns or less (PM10), sulfur oxides and hydrocarbons contributing to ground-level ozone, and reduced visibility.

(b) Diesel exhaust is linked to short and long-term adverse health effects in humans, which include lung cancer, aggravation of respiratory and cardiovascular disease, aggravation of existing asthma, acute respiratory symptoms, and chronic bronchitis and decreased lung function.

(c) In August of 1998, the California Air Resource Board listed diesel exhaust, specifically particulate emissions from diesel fueled engines, as a "toxic air contaminant."

(d) According to the Bay Area Air Quality Management District (BAAQMD), Diesel Backup Generators tend to emit more pollutants than a new well-controlled power plant. In fact, even a clean diesel backup generator may emit more than 20 times as much NOx per kilowatt-hour as a new well-controlled power plant. Older dirtier Diesel Backup Generators may emit 200 times as much NOx.

(e) The Bay Area is currently designated nonattainment for the national ozone standards by the United States Environmental Protection Agency.

(f) The Bay Area is currently designated nonattainment for the state ozone and PM10 standards by the California Air Resource Board.

(g) The City and County of San Francisco is concerned about the health hazards posed by diesel emissions polluting the air, and wishes to impose limitations on Diesel Backup Generators to reduce the emission of diesel exhaust.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT (BAAQMD)

Although the permit to operate the generator had expired during vacancy, the Bay Area Air Quality Management District (BAAQMD) has already issued a new permit for the new use. As part of the exhibits is the new permit and for your comparison are the old permits emissions report which details 19 of a hundred plus toxins this generator emitted into my backyard under

the previous permit. Please note that the toxins are measured in **.lbs per day** (yearly emissions divided by 365 days).

Generator's are *not* just for emergency use. Generators have to be regularly tested and maintained. Anytime there is interruption in power the engine fires on. There will not always be staff at the facility, and sometimes problems can't be immediately fixed. Is my neighborhood expected to shelter in-place? Indeed, we are, and due to the "mission critical" nature of a data center, this allows for the potential of hours upon hours of industrial strength diesel emissions in this increasingly residential neighborhood.

Several adjacent neighbors on Utah Street and Potrero Avenue have testified that the old generator would emit visible plumes of black "smoke" – which is not smoke at all, it is actually carcinogenic soot; emitted into our backyards and into the air for we breathe; and the vibrations could be felt whenever the generator was in use.

The problems are not just attributed to the generator, but also to noise from the rooftop fans. One neighbors describes a constant electrical hum that emanated from the building that could be prominently heard in the evening. Two neighbors who live directly behind 435-437 Potrero describe the period after the former tenants left as being relief from the audible static they had endured for years.

The Project Sponsor states that the existing HVAC meets noise standards. They also propose specific mitigation measures (e.g. Mufflers) to reduce sound. The motion adopted by the Planning Commission recognizes that a noise study is underway-but not yet completed. Under CEQA, you have to complete the environmental analysis prior to project approval. Neither the CEQA checklist, nor any other environmental documents exist.

This project is not exempt from environmental review, but rather is a prime candidate for environmental review.

Not only did the former tenant not obtain permits with Planning for an ISE, but also they never finalized any permits with DBI throughout their entire lease, including the electrical. They were tenants who officially terminated use when they left and now the landlord is trying continue use years later, thus the "legitimization".

There has been no disclosure of the adverse environmental and health effects to the surrounding neighborhood from the project sponsor or by Planning. This project has nearly escaped environmental review via "legitimization" and the CU process.

LAND USE STANDARDS

General Welfare Standard

- "The establishment, maintenance or conducting of the use for which a use permit is sought will not, under the particular case, be detrimental to the public welfare or injurious to property or improvements in the neighborhood" (*Hawkins v. County of Marin* (1976) 54 Cal.App.3d 586).

Nuisance Standard

- "Any use found to be objectionable or incompatible with the character of the city and its environs due to noise, dust, odors or other undesirable characteristics may be prohibited" (*Snow v. City of Garden Grove* (1961) Cal.App.2d 496).

General Plan Consistency Standard

- "Although use permits are not explicitly made subject to a general plan meeting the requirement of state law, that condition is necessarily to be implied from the hierarchical relationship of land use laws. Thus, use permits are struck from the mold of the zoning law, the zoning law must comply with the adopted general plan, and the adopted general plan must conform with state law; the validity of the permit process derives from compliance with this hierarchy of planning laws (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176).

Zoning Consistency Standard

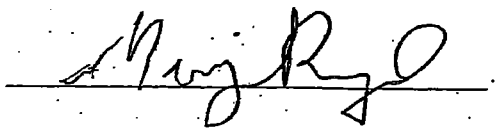
- "To obtain a use permit, the applicant must generally show that the contemplated use is compatible with the policies in terms of the zoning ordinances, and that such use would be essential or desirable to the public convenience or welfare, and will not impair the integrity and character of the zoned district or be detrimental to the public health, safety, morals or welfare" (*O'Hagen v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151).

CALL FOR RELIEF

I humbly request that the Board: (1) take peremptory action by issuing a permanent injunction of the CUP; (2) compel Planning to rescind its determination that the project is eligible to forego environmental review, and; (3) require that in the future Planning conduct a thorough environmental analysis for all proposed ISEs to determine whether they "may have a significant effect on the environment".

DECLARATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



MICA L. RINGEL

SAN FRANCISCO
PLANNING DEPARTMENT

Subject to: (Select only if applicable)

- ☐ Affordable Housing (Sec. 415)
- ☐ Jobs Housing Linkage Program (Sec. 413)
- ☐ Downtown Park Fee (Sec. 412)
- ☐ First Source Hiring (Admin. Code)
- ☐ Child Care Requirement (Sec. 414)
- ■ Other (TIDF – Sec. 411)

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Planning Commission Motion No. 18921

HEARING DATE: JULY 11, 2013

Date:	July 3, 2013
Case No.:	2013.00477 C
Project Address:	435-437 Potrero Avenue
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org

ADOPTING FINDINGS RELATING TO THE APPROVAL OF CONDITIONAL USE AUTHORIZATION PURSUANT TO PLANNING CODE SECTIONS 179.1, 227(R), 303, AND 303(H), TO ALLOW APPROXIMATELY 10,000 GROSS SQUARE FEET OF INTERNET SERVICES EXCHANGE ON THE ENTIRETY OF BOTH FLOORS OF THE EXISTING TWO-STORY BUILDING WITHIN A UMU (URBAN MIXED USE) ZONING DISTRICT AND 58-X HEIGHT AND BULK DISTRICT.

PREAMBLE

On April 18, 2013, David Silverman, on behalf of Industry Capital Internet Infrastructure, LLC (hereinafter "Project Sponsor"), filed an application with the Planning Department (hereinafter "Department") for Conditional Use Authorization under Planning Code Sections 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building within a UMU (Urban Mixed Use) Zoning District and 58-X Height and Bulk District.

On July 11, 2013, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Application No. 2013.0477C.

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

The Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of the applicant, Department staff, and other interested parties.

MOVED, that the Commission hereby authorizes the Conditional Use requested in Application No. 2013.0477C, subject to the conditions contained in "EXHIBIT A" of this motion, based on the following findings:

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. The above recitals are accurate and constitute findings of this Commission.

2. **Site Description and Present Use.** The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

3. **Surrounding Properties and Neighborhood.** The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

4. **Project Description.** The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

5. **Public Comment.** When the case report was issued on June 3, 2013, the Department had not received any comments from the public explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator. These concerns were based on their experiences

from previous operators of the building. Additionally, one neighbor on the subject block clarified that they are in fact opposed to the project. In response to these concerns, the current Project Sponsor held a meeting at the project site with a group of concerned neighbors on July 1st.

On July 10th and 11th, the Department received new emails of opposition from two neighbors on the subject block, one email of opposition from a resident living approximately 4 blocks away, and one email of opposition from a resident who didn't identify their address. The primary concerns in those emails stem from the potential noise, vibrations, and discharge from the backup generator in the building.

6. **Planning Code Compliance:** The Commission finds that the Project is consistent with the relevant provisions of the Planning Code in the following manner:

   A. **Legitimization.** Planning Code Section 179.1 established a time-limited program wherein existing uses in the Eastern Neighborhoods plan area that have operated without the benefit of required permits may seek those permits. Uses that could be "legitimized" under this Section are those uses which, under the current provisions of this Code and without this Section, could not otherwise seek the required permits.

   The proposed Internet Services Exchange (ISE) originally occupied the subject building in 2000. The subject property was zoned M-1 at that time, which permitted ISEs with a Conditional Use Authorization. The Zoning Administrator issued a Letter of Legitimization on June 4, 2013 for this project stating that the approximately 10,000 gross square feet of Internet Services Exchange occupying the entire existing building is eligible to be approved as a legal nonconforming use pursuant to Planning Code section 179.1. As such, the project is now seeking a Conditional Use Authorization under the provisions of the properties former M-1 zoning.

7. **Planning Code Section 303** establishes criteria for the Planning Commission to consider when reviewing applications for Conditional Use approval. On balance, the project does comply with said criteria in that:

   A. The proposed new uses and building, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable, and compatible with, the neighborhood or the community.

   The proposed Internet Services Exchange has already existed at the site for more than ten years without any reported complaints from surrounding businesses or residents. The low-intensity nature of the use, along with its relatively small size and scale, make it compatible with the existing mixed use surroundings. Additionally, the use provides a locally-owned, small-scale option for small businesses within the City for data and information storage.

   B. The proposed project will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity. There are no features of the project

that could be detrimental to the health, safety or convenience of those residing or working the area, in that:

i. Nature of proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;

The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

ii. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic or parking.

iii. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;

The existing HVAC equipment consists of seven fan units that will comply with the San Francisco Noise Ordinance the equipment and does not emit any dust or odors. The backup generator will only be used for testing and in emergencies like power outages.

iv. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs;

The existing building covers the entire site and includes no open space or landscaped areas. All lighting and signing will meet Planning Code requirements.

C. That the use as proposed will comply with the applicable provisions of the Planning Code and will not adversely affect the General Plan.

The Project complies with all relevant requirements and standards of the Planning Code and is consistent with objectives and policies of the General Plan as detailed below.

D. That the use as proposed would provide development that is in conformity with the purpose of the applicable Neighborhood Commercial District.

The project is not located within a Neighborhood Commercial District.

8. Planning Code Section 303(h) establishes additional criteria for the Planning Commission to consider when reviewing applications for Conditional Use Approval of Internet Services Exchanges. On balance, the project does comply with said criteria in that:

   a. The intensity of the use at this location and in the surrounding neighborhood is not such that allowing the use will likely foreclose the location of other needed neighborhood-serving uses in the area;

      The use has a low intensity and has existed in the building for more than ten years with no known negative impacts. Additionally, the existing building is not currently designed to easily accommodate a more active commercial use, and therefore is suitable for an Internet Services Exchange.

   b. The building in which the use is located is designed in discrete elements, which respect the scale of development in adjacent blocks, particularly any existing residential uses;

      The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

   c. Rooftop equipment on the building in which the use is located is screened appropriately;

      The project is required to provide adequate screening of rooftop equipment pursuant to Planning Code Section 141 and Condition of Approval No. 6 in this motion.

   d. The back-up power system for the proposed use will comply with all applicable federal state, regional and local air pollution controls;

      The existing backup generator complies with all relevant controls and is permitted by the Bay Area Air Quality Management District (Permit No. 21731).

   e. Fixed-source equipment noise does not exceed the decibel levels specified in the San Francisco Noise Control Ordinance;

      A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code). This requirement is also listed as Condition of Approval No. 11 of this motion.

f. The building is designed to minimize energy consumption, such as through the use of energy-efficient technology, including without limitation, heating, ventilating and air conditioning systems, lighting controls, natural ventilation and recapturing waste heat, and as such commercially available technology evolves;

The existing equipment at the site is fully operable. However, the project will also use the following energy saving techniques to reduce the total power consumption of the building:

1) *Energy efficient Toshiba G90000 UPS systems to increase the efficiency of the current uninterruptible power system from 80 percent efficiency to 96.5 percent efficiency.*
2) *Cold isle containment, which can reduce the power associated with mechanical cooling by 25 to 30 percent.*
3) *Air-side economization, which can reduce the cooling power consumption by an estimated 50 to 60 percent.*

g. The project sponsor has examined the feasibility of supplying and, to the extent feasible, will supply all or a portion of the building's power needs through on-site power generation, such as through the use of fuel cells or co-generation;

The project sponsor studied the feasibility of using on-site Co-generation and fuel cells. However, due to the limited lot size, such power generation is not possible.

h. The project sponsor shall have submitted design capacity and projected power use of the building as part of the conditional use application;

The building is served by PG&E with a 1.0 mega volt ampere ("MVA") dedicated underground feed transformer that is located inside the building. This translates into a serviced capacity of approximately 800kW of power per hour. Using a vacancy factor estimate of 7.5 percent, the projected maximum annual energy use is 6,500,000 KWh per year, or 540,000kWh per month.

The following table provides projected monthly energy use per year as the building is leased up over time:

Power Use per Month	*2013*	*2014*	*2015*	*2016*
Total Capacity (KWh)	*36,000*	*216,000*	*360,000*	*540,000*

9. General Plan Compliance. The Project is, on balance, consistent with the following Objectives and Policies of the General Plan:

COMMERCE AND INDUSTRY

Objectives and Policies

OBJECTIVE 1:

MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKINIG ENVIRONMENT.

Policy 1.1:
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development that has substantial undesirable consequences that cannot be mitigated.

The project will provided a much needed support service for other businesses within the City without producing undesirable consequences.

OBJECTIVE 3:
PROVIDE EXPANDED EMPLOYMENT OPPORTUNITIES FOR CITY RESIDENTS, PARTICULARLY THE UNEMPLOYED AND ECONOMICALLY DISADVANTAGED.

Policy 3.4:
Assist newly emerging economic activities.

OBJECTIVE 4:
IMPROVE THE VIABILITY OF EXISTING INDUSTRY IN THE CITY AND THE ATTRACTIVENESS OF THE CITY AS A LOCATION FOR NEW INDUSTRY.

Policy 4.1:
Maintain and enhance a favorable business climate in the city.

Policy 4.2:
Promote and attract those economic activities with potential benefit to the City.

The project will provided a much needed support service for other businesses to locate and grow within the City, especially businesses with technological support needs.

10. **Planning Code Section 101.1(b)** establishes eight priority-planning policies and requires review of permits for consistency with said policies. On balance, the project does comply with said policies in that:

A. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses be enhanced.

The proposal will not remove or otherwise impact any existing neighborhood-serving retail uses in the area.

B. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods.

The proposed use has existed within the subject building since 2000 (including periods of vacancy). Continuing the use at this location will not impact existing housing or neighborhood character.

C. That the City's supply of affordable housing be preserved and enhanced,

No housing is created or removed as part of this project.

D. That commuter traffic not impede MUNI transit service or overburden our streets or neighborhood parking.

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time. Therefore, the project will not create issues for traffic, parking, or MUNI.

E. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced.

The Project will not displace any service or industry establishment, but will instead preserve and industrial service that has existed at this site since 2000.

F. That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake.

The project includes no significant changes to the existing building.

G. That landmarks and historic buildings be preserved.

The subject building was determined to not be a historic resource by the Showplace Square/Northeast Mission Historic Survey.

H. That our parks and open space and their access to sunlight and vistas be protected from development.

The project will have no impact on existing parks and open spaces.

11. The Project is consistent with and would promote the general and specific purposes of the Code provided under Section 101.1(b) in that, as designed, the Project would contribute to the character and stability of the neighborhood and would constitute a beneficial development.

12. The Commission hereby finds that approval of the Conditional Use authorization would promote the health, safety and welfare of the City.

DECISION

That based upon the Record, the submissions by the Applicant, the staff of the Department and other interested parties, the oral testimony presented to this Commission at the public hearings, and all other written materials submitted by all parties, the Commission hereby APPROVES Conditional Use Application No. 2013.0477C subject to the following conditions attached hereto as "EXHIBIT A" in general conformance with plans on file, dated May 30, 2013, and stamped "EXHIBIT B", which is incorporated herein by reference as though fully set forth.

APPEAL AND EFFECTIVE DATE OF MOTION: Any aggrieved person may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion No. 18921. The effective date of this Motion shall be the date of this Motion if not appealed (After the 30-day period has expired) OR the date of the decision of the Board of Supervisors if appealed to the Board of Supervisors. For further information, please contact the Board of Supervisors at (415) 554-5184, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

I hereby certify that the Planning Commission ADOPTED the foregoing Motion on July 11, 2013.

Jonas P. Ionin
Acting Commission Secretary

AYES: Commissioners Antonini, Borden, Fong, Moore, and Wu

NAYS: Commissioner Sugaya

ABSENT: Commissioner Hillis

ADOPTED: July 11, 2013

EXHIBIT A

AUTHORIZATION

This authorization is for a conditional use to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building located at 435-437 Potrero Avenue, Block 3972, and Lot 22, pursuant to Planning Code Section(s) 179.1, 227(r), 303, and 303(h) within the UMU District and a 58-X Height and Bulk District; in general conformance with plans, dated May 30, 2013, and stamped "EXHIBIT B" included in the docket for Case No. 2013.0477C and subject to conditions of approval reviewed and approved by the Commission on July 11, 2013 under Motion No. 18921. This authorization and the conditions contained herein run with the property and not with a particular Project Sponsor, business, or operator.

RECORDATION OF CONDITIONS OF APPROVAL

Prior to the issuance of the building permit or commencement of use for the Project the Zoning Administrator shall approve and order the recordation of a Notice in the Official Records of the Recorder of the City and County of San Francisco for the subject property. This Notice shall state that the project is subject to the conditions of approval contained herein and reviewed and approved by the Planning Commission on July 11, 2013 under Motion No 18921.

PRINTING OF CONDITIONS OF APPROVAL ON PLANS

The conditions of approval under the 'Exhibit A' of this Planning Commission Motion No. 18921 shall be reproduced on the Index Sheet of construction plans submitted with the Site or Building permit application for the Project. The Index Sheet of the construction plans shall reference to the Conditional Use authorization and any subsequent amendments or modifications.

SEVERABILITY

The Project shall comply with all applicable City codes and requirements. If any clause, sentence, section or any part of these conditions of approval is for any reason held to be invalid, such invalidity shall not affect or impair other remaining clauses, sentences, or sections of these conditions. This decision conveys no right to construct, or to receive a building permit. "Project Sponsor" shall include any subsequent responsible party.

CHANGES AND MODIFICATIONS

Changes to the approved plans may be approved administratively by the Zoning Administrator. Significant changes and modifications of conditions shall require Planning Commission approval of a new Conditional Use authorization.

Conditions of Approval, Compliance, Monitoring, and Reporting

PERFORMANCE

1. **Validity.** The authorization and right vested by virtue of this action is valid for three (3) years from the effective date of the Motion. The Department of Building Inspection shall have issued a Building Permit or Site Permit to construct the project and/or commence the approved use within this three-year period.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

2. **Expiration and Renewal.** Should a Building or Site Permit be sought after the three (3) year period has lapsed, the project sponsor must seek a renewal of this Authorization by filing an application for an amendment to the original Authorization or a new application for Authorization. Should the project sponsor decline to so file, and decline to withdraw the permit application, the Commission shall conduct a public hearing in order to consider the revocation of the Authorization. Should the Commission not revoke the Authorization following the closure of the public hearing, the Commission shall determine the extension of time for the continued validity of the Authorization.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

3. **Diligent pursuit.** Once a site or Building Permit has been issued, construction must commence within the timeframe required by the Department of Building Inspection and be continued diligently to completion. Failure to do so shall be grounds for the Commission to consider revoking the approval if more than three (3) years have passed since this Authorization was approved.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

4. **Extension.** All time limits in the preceding three paragraphs may be extended at the discretion of the Zoning Administrator where implementation of the project is delayed by a public agency, an appeal or a legal challenge and only by the length of time for which such public agency, appeal or challenge has caused delay.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

5. **Conformity with Current Law.** No application for Building Permit, Site Permit, or other entitlement shall be approved unless it complies with all applicable provisions of City Codes in effect at the time of such approval. *For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.*

DESIGN – COMPLIANCE AT PLAN STAGE

6. **Rooftop Mechanical Equipment.** Pursuant to Planning Code 141, the Project Sponsor shall submit a roof plan to the Planning Department prior to Planning approval of the building permit

application. Rooftop mechanical equipment, if any is proposed as part of the Project, is required to be screened so as not to be visible from any point at or below the roof level of the subject building.

For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

PROVISIONS

7. **Transit Impact Development Fee.** Pursuant to Planning Code Section 411 (formerly Chapter 38 of the Administrative Code), the Project Sponsor shall pay the Transit Impact Development Fee (TIDF) as required by and based on drawings submitted with the Building Permit Application. Prior to the issuance of a temporary certificate of occupancy, the Project Sponsor shall provide the Planning Director with certification that the fee has been paid.

   For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

MONITORING

8. **Reporting.** As long as the use remains an Internet Services Exchange, the project sponsor shall submit to the Planning Department on an annual basis power use statements for the previous twelve-month period as provided by all suppliers of utilities and shall submit a written annual report to the Department of Environment and the Planning Department which shall state: (a) the annual energy consumption and fuel consumption of all tenants and occupants of the Internet Services Exchange; (b) the number of all diesel generators located at the site and the hours of usage, including usage for testing purposes; (c) evidence that diesel generators at the site are in compliance with all applicable local, regional, state and federal permits, regulations and laws; and (d) such other information as the Planning Commission may require.

   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

9. **Enforcement.** Violation of any of the Planning Department conditions of approval contained in this Motion or of any other provisions of Planning Code applicable to this Project shall be subject to the enforcement procedures and administrative penalties set forth under Planning Code Section 176 or Section 176.1. The Planning Department may also refer the violation complaints to other city departments and agencies for appropriate enforcement action under their jurisdiction.

   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

10. **Revocation due to Violation of Conditions.** Should implementation of this Project result in complaints from interested property owners, residents, or commercial lessees which are not resolved by the Project Sponsor and found to be in violation of the Planning Code and/or the specific conditions of approval for the Project as set forth in Exhibit A of this Motion, the Zoning Administrator shall refer such complaints to the Commission, after which it may hold a public hearing on the matter to consider revocation of this authorization.

For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

OPERATION

11. **Noise Control.** The premises shall be adequately soundproofed or insulated for noise and operated so that fixed-source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.
For information about compliance with the fixed mechanical objects such as rooftop air conditioning, restaurant ventilation systems, and motors and compressors with acceptable noise levels, contact the Environmental Health Section, Department of Public Health at (415) 252-3800, www.sfdph.org.

12. **Vibration.** The Project Sponsor shall attempt to reduce vibration from equipment within the building and on the roof through repair, retrofit, or replacement of the equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

13. **Backup Generator Operation.** The Project Sponsor shall attempt to reduce the emissions of the backup generator, such as use of biofuels instead of diesel fuel to operate the backup generator.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

14. **Sidewalk Maintenance.** The Project Sponsor shall maintain the main entrance to the building and all sidewalks abutting the subject property in a clean and sanitary condition in compliance with the Department of Public Works Streets and Sidewalk Maintenance Standards.
For information about compliance, contact Bureau of Street Use and Mapping, Department of Public Works, 415-695-2017, http://sfdpw.org.

15. **Community Liaison.** Prior to issuance of a building permit to construct the project and implement the approved use, the Project Sponsor shall appoint a community liaison officer to deal with the issues of concern to owners and occupants of nearby properties. The Project Sponsor shall provide the Zoning Administrator with written notice of the name, business address, and telephone number of the community liaison. Should the contact information change, the Zoning Administrator shall be made aware of such change. The community liaison shall report to the Zoning Administrator what issues, if any, are of concern to the community and what issues have not been resolved by the Project Sponsor.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

16. **Six-Month Report.** The Project Sponsor shall report back to the Planning Commission approximately six months after occupancy of the building. The report shall focus on the operation of the building during that time, especially regarding the generation of noise and emissions from the backup generator and other equipment.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

SAN FRANCISCO
PLANNING DEPARTMENT

Executive Summary
Conditional Use

HEARING DATE: JULY 11, 2013

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Date:	July 3, 2013
Case No.:	2013.00477 C
Project Address:	435-437 Potrero Avenue
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org
Recommendation:	Approval with Conditions

PROJECT DESCRIPTION

The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

SITE DESCRIPTION AND PRESENT USE

The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

SURROUNDING PROPERTIES AND NEIGHBORHOOD

The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

ENVIRONMENTAL REVIEW

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

HEARING NOTIFICATION

This project was originally scheduled and noticed for a public hearing on June 13, 2013. It was continued to July 11th because the notification poster on site was torn down and not replaced in a reasonable amount of time. The poster was replaced and advertised the new hearing date of July 11, 2013.

TYPE	REQUIRED PERIOD	REQUIRED NOTICE DATE	ACTUAL NOTICE DATE	ACTUAL PERIOD
Classified News Ad	20 days	May 24, 2013	May 22, 2013	22 days
Posted Notice	20 days	May 24, 2013	May 24, 2013	20 days
Mailed Notice	20 days	May 24, 2013	May 23, 2013	21 days

PUBLIC COMMENT

- The Department did not receive any comments from the project explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator.

ISSUES AND OTHER CONSIDERATIONS

- On June 4, 2013, the Zoning Administrator determined that the entire building is eligible to be legitimized as an ISE pursuant to Planning Code Section 179.1 because it had been used as an ISE from 2000 to 2010, and the building has not been used for any other use since 2010.

- A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code).

REQUIRED COMMISSION ACTION

In order for the proposed ISE to be approved, the Commission must grant conditional use authorization to allow the ISE under the site's previous M-1 Zoning District, pursuant to Planning Code Sections 179.1, 227(r), 303, and 303(h).

BASIS FOR RECOMMENDATION

- The existing building was used as an ISE from 2000 to 2010 without any formal complaints from the community.

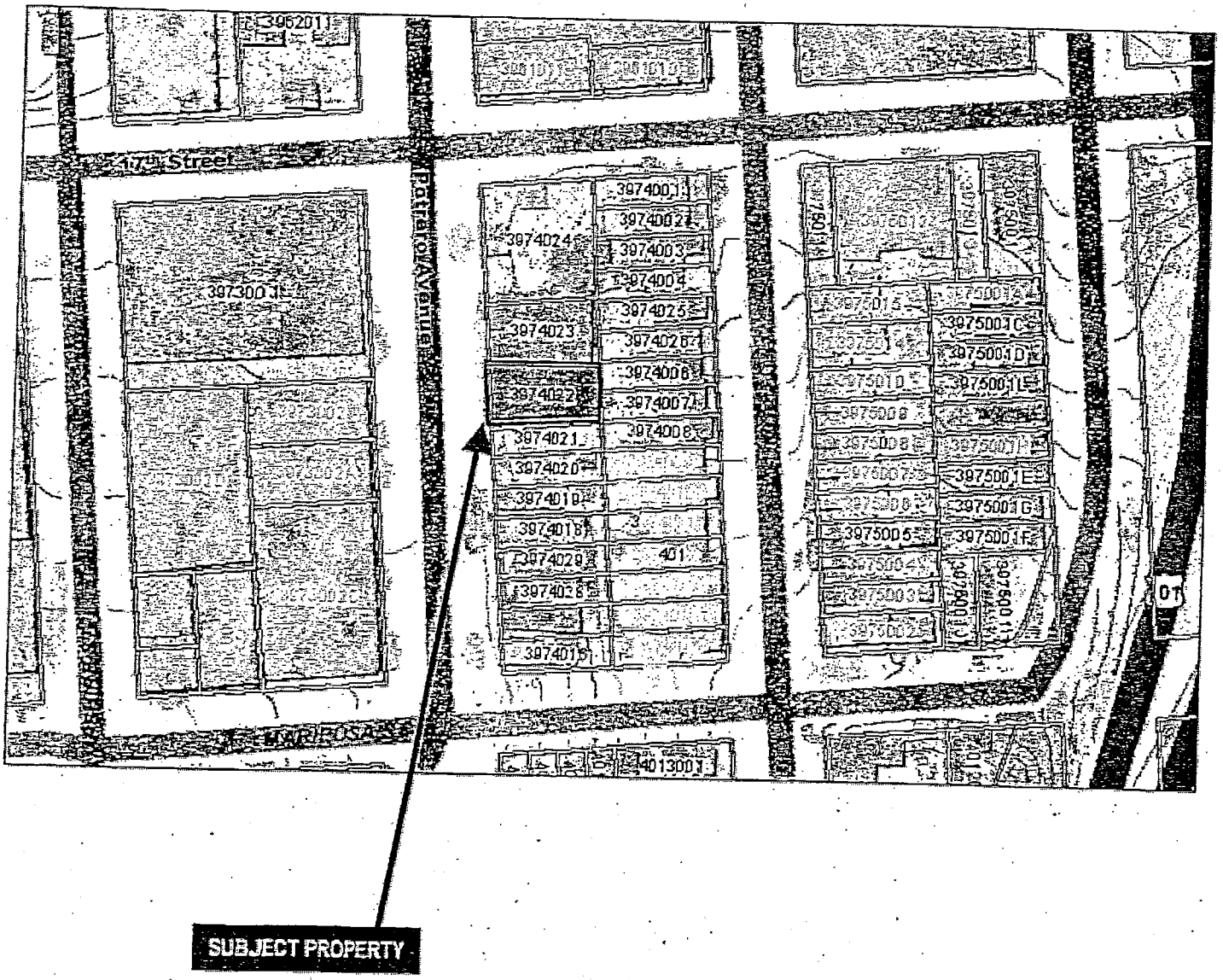
- The project will provide needed supportive technical services for businesses that are locating or growing in the City.
- The project is consistent with the Planning Code, Mission Area Plan, and the General Plan overall.

RECOMMENDATION:	Approval with Conditions

Attachments:
Parcel Map
Sanborn Map
Aerial Photographs
Site Photo
Zoning Map
Draft Motion
Sponsor Submittal
-Project Narrative
-Reduced Size Plans

CT: G:\Documents\C\2012\435 Potrero Ave\Executive Summary.doc

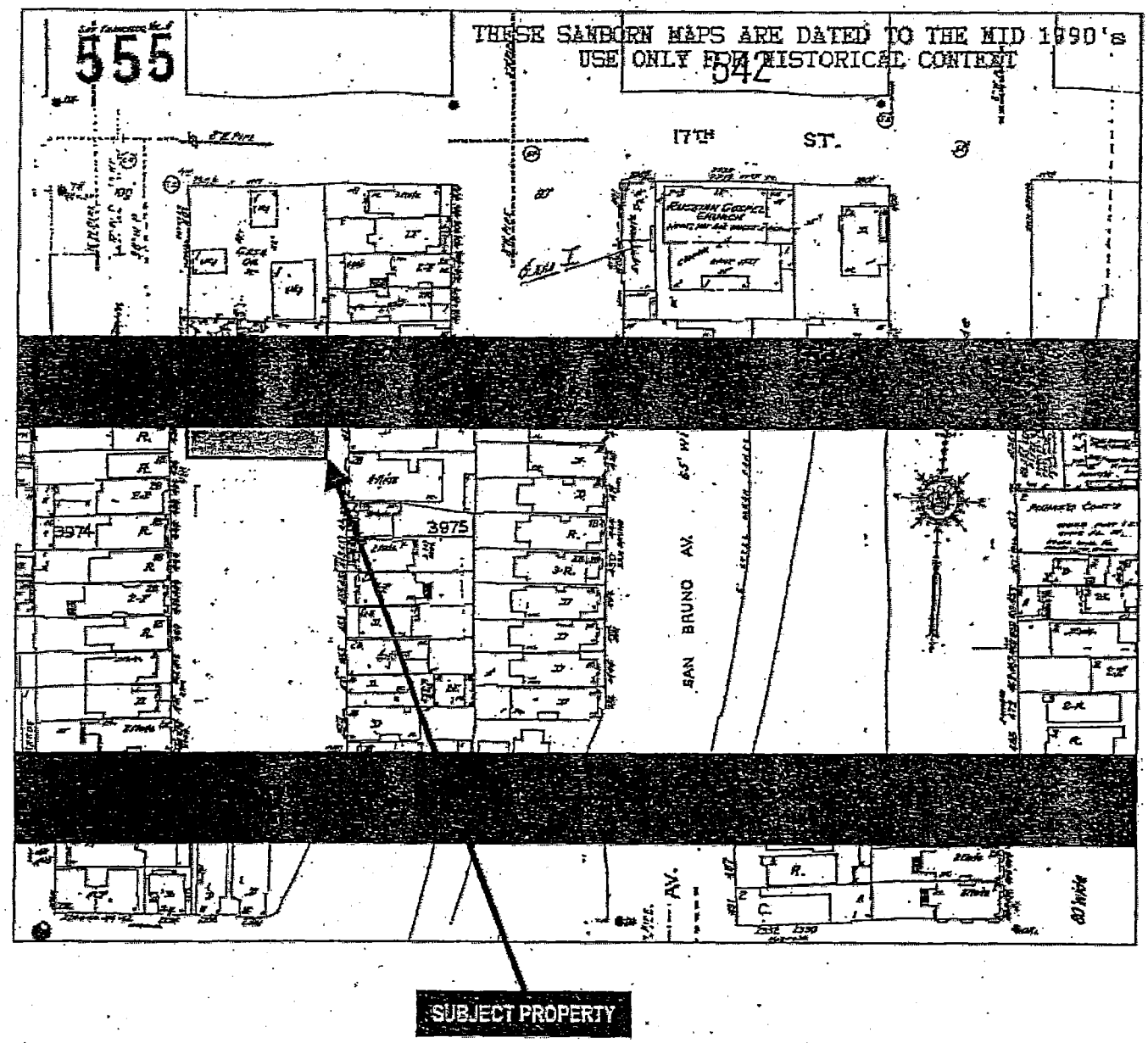
Parcel Map



Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

SAN FRANCISCO
PLANNING DEPARTMENT

Sanborn Map*

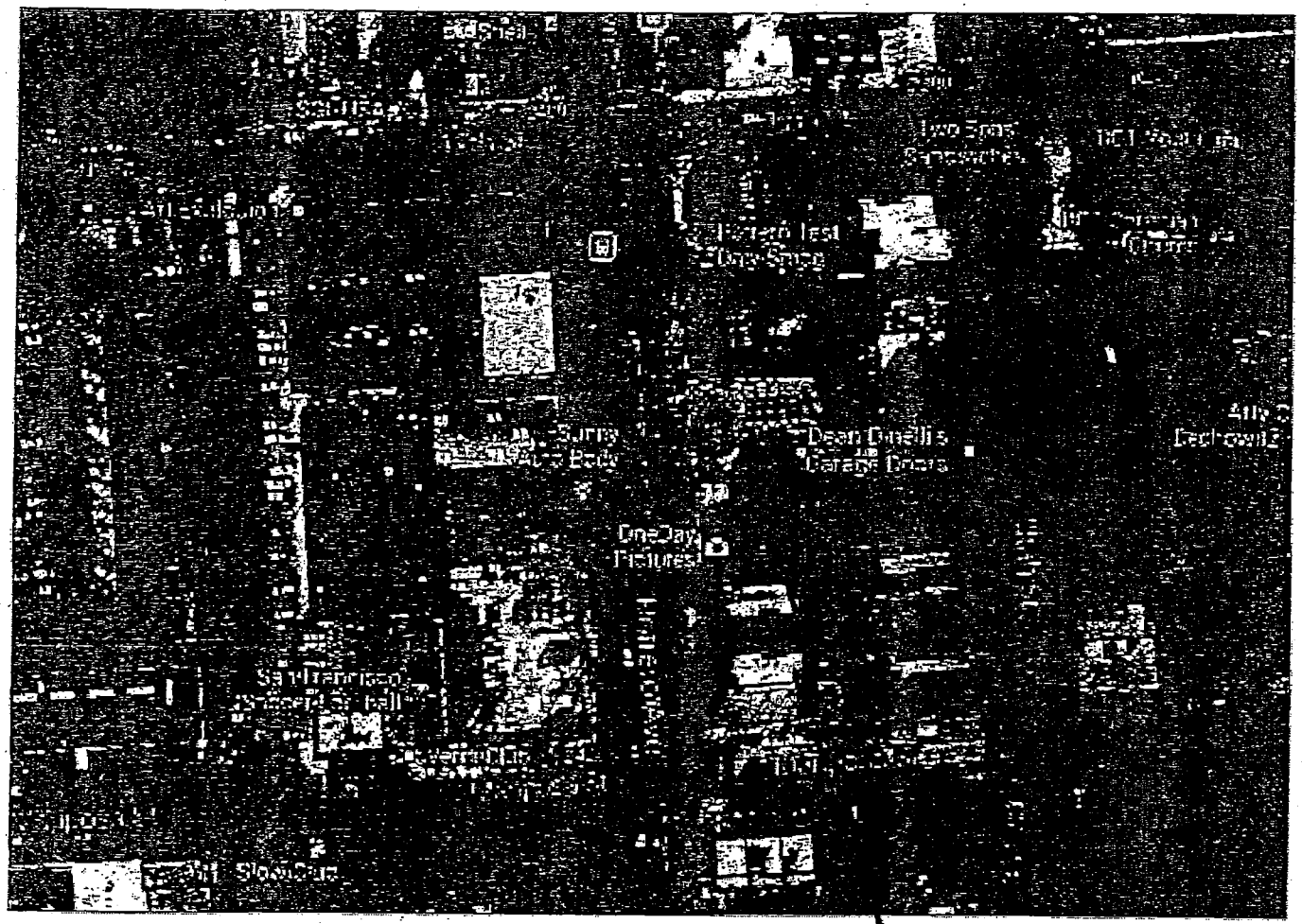


*The Sanborn Maps in San Francisco have not been updated since 1998, and this map may not accurately reflect existing conditions.

Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

SAN FRANCISCO
PLANNING DEPARTMENT

Aerial Photo

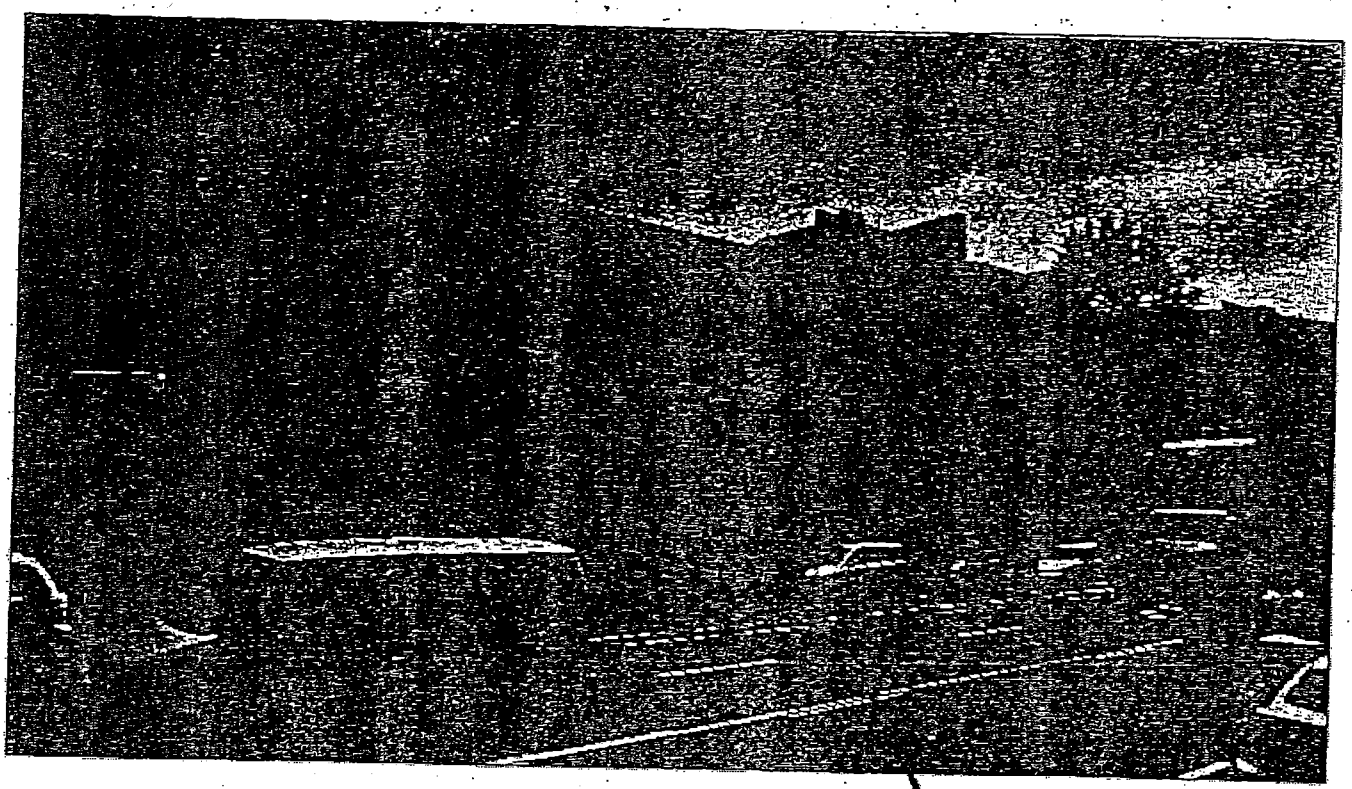


Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

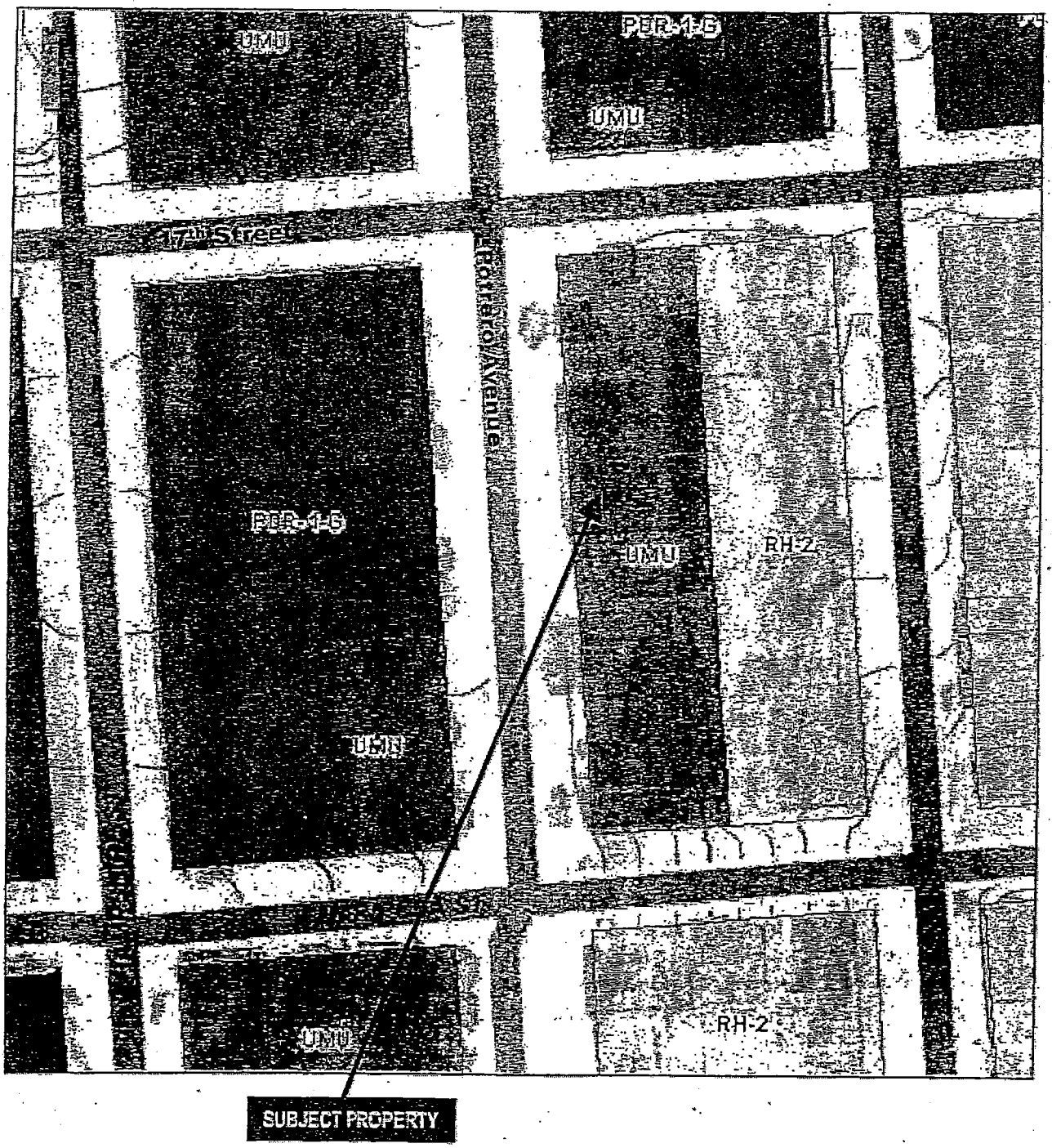
Aerial Photo



Site Photo



Zoning Map



Conditional Use Hearing
Case Number 2013.0447C
Internet Services Exchange
435-437 Potrero Avenue

SAN FRANCISCO
PLANNING DEPARTMENT

Subject to: (Select only if applicable)

- ☐ Affordable Housing (Sec. 415)
- ☐ Jobs Housing Linkage Program (Sec. 413)
- ☐ Downtown Park Fee (Sec. 412)
- ☐ First Source Hiring (Admin. Code)
- ☐ Child Care Requirement (Sec. 414)
- ☐ Other (TIDF – Sec. 411)

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

Planning Commission Draft Motion

HEARING DATE: JULY 11, 2013

Date:	July 3, 2013
Case No.:	2013.00477 C
Project Address:	435-437 Potrero Avenue
Zoning:	UMU (Urban Mixed Use) District 58-X Height and Bulk District
Block/Lot:	3974/022
Project Sponsor:	Industry Capital Internet Infrastructure, LLC 1 Sansome Street, 15th Floor San Francisco, CA 94104
Staff Contact:	Corey Teague – (415) 575-9081 corey.teague@sfgov.org

ADOPTING FINDINGS RELATING TO THE APPROVAL OF CONDITIONAL USE AUTHORIZATION PURSUANT TO PLANNING CODE SECTIONS 179.1, 227(R), 303, AND 303(H), TO ALLOW APPROXIMATELY 10,000 GROSS SQUARE FEET OF INTERNET SERVICES EXCHANGE ON THE ENTIRETY OF BOTH FLOORS OF THE EXISTING TWO-STORY BUILDING WITHIN A UMU (URBAN MIXED USE) ZONING DISTRICT AND 58-X HEIGHT AND BULK DISTRICT.

PREAMBLE

On April 18, 2013, David Silverman, on behalf of Industry Capital Internet Infrastructure, LLC (hereinafter "Project Sponsor"), filed an application with the Planning Department (hereinafter "Department") for Conditional Use Authorization under Planning Code Sections 179.1, 227(r), 303, and 303(h), to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building within a UMU (Urban Mixed Use) Zoning District and 58-X Height and Bulk District.

On July 11, 2013, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Application No. 2013.0477C.

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 1 categorical exemption.

The Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of the applicant, Department staff, and other interested parties.

MOVED, that the Commission hereby authorizes the Conditional Use requested in Application No. 2013.0477C, subject to the conditions contained in "EXHIBIT A" of this motion, based on the following findings:

FINDINGS

Having reviewed the materials identified in the preamble above, and having heard all testimony and arguments, this Commission finds, concludes, and determines as follows:

1. The above recitals are accurate and constitute findings of this Commission.

2. **Site Description and Present Use.** The project is located on the east side of Potrero Avenue between 17th and Mariposa Streets. The property is located within the UMU (Urban Mixed Use) District with a 58-X height and bulk district. The irregularly shaped parcel is nearly 5,000 square feet and contains an approximately 10,000 square foot, two-story building that was built in 1950 and the building was occupied as an Internet Services Exchange from 2000 to 2010 (most recently d.b.a. Astound Networks).

3. **Surrounding Properties and Neighborhood.** The project site is located in an area where the commercial nature of Showplace Square and lower Potrero begins to transition towards a mix of uses, including residential. As such, it is surrounded by a mix of building types and sizes, and a mix of land uses. The subject property is located in a cluster of UMU zoning that also borders RH-2 (along Utah Street) and PDR-1-G. Land uses on the subject block include a gas station, art studio, auto repair shop, residential buildings, and a vacant lot proposed for residential development (480 Potrero Avenue). Other nearby landmarks include Franklin Square, the Potrero Shopping Center, and the Soka Gakkai International of America Buddhist Center.

4. **Project Description.** The applicant proposes to establish an Internet Services Exchange (ISE) to occupy the entire building of approximately 10,000 square feet through the Eastern Neighborhoods Legitimization program. No changes to the exterior of the building are proposed except for some additional screening for the existing rooftop mechanical equipment. In contrast to larger ISEs, this project's small scale, local ownership, and central location will allow it to provide services to smaller users and businesses within the City.

5. **Public Comment.** The Department did not receive any comments from the project explicitly supporting or opposing the project. However, several neighbors did express concerns about specific aspects of the project that were generally related to the operation of the backup generator.

6. Planning Code Compliance: The Commission finds that the Project is consistent with the relevant provisions of the Planning Code in the following manner:

A. Legitimization. Planning Code Section 179.1 established a time-limited program wherein existing uses in the Eastern Neighborhoods plan area that have operated without the benefit of required permits may seek those permits. Uses that could be "legitimized" under this Section are those uses which, under the current provisions of this Code and without this Section, could not otherwise seek the required permits.

The proposed Internet Services Exchange (ISE) originally occupied the subject building in 2000. The subject property was zoned M-1 at that time, which permitted ISEs with a Conditional Use Authorization. The Zoning Administrator issued a Letter of Legitimization on June 4, 2013 for this project stating that the approximately 10,000 gross square feet of Internet Services Exchange occupying the entire existing building is eligible to be approved as a legal nonconforming use pursuant to Planning Code section 179.1. As such, the project is now seeking a Conditional Use Authorization under the provisions of the properties former M-1 zoning.

7. Planning Code Section 303 establishes criteria for the Planning Commission to consider when reviewing applications for Conditional Use approval. On balance, the project does comply with said criteria in that:

A. The proposed new uses and building, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable, and compatible with, the neighborhood or the community.

The proposed Internet Services Exchange has already existed at the site for more than ten years without any reported complaints from surrounding businesses or residents. The low-intensity nature of the use, along with its relatively small size and scale, make it compatible with the existing mixed use surroundings. Additionally, the use provides a locally-owned, small-scale option for small businesses within the City for data and information storage.

B. The proposed project will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity. There are no features of the project that could be detrimental to the health, safety or convenience of those residing or working the area, in that:

i. Nature of proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;

The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

ii. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time, and there is a two-space tandem parking garage in the building. Therefore, the project will not create issues for traffic or parking.

iii. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;

The existing HVAC equipment consists of seven fan units that will comply with the San Francisco Noise Ordinance the equipment and does not emit any dust or odors. The backup generator will only be used for testing and in emergencies like power outages.

iv. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs;

The existing building covers the entire site and includes no open space or landscaped areas. All lighting and signing will meet Planning Code requirements.

C. That the use as proposed will comply with the applicable provisions of the Planning Code and will not adversely affect the General Plan.

The Project complies with all relevant requirements and standards of the Planning Code and is consistent with objectives and policies of the General Plan as detailed below.

D. That the use as proposed would provide development that is in conformity with the purpose of the applicable Neighborhood Commercial District.

The project is not located within a Neighborhood Commercial District.

8. Planning Code Section 303(h) establishes additional criteria for the Planning Commission to consider when reviewing applications for Conditional Use Approval of Internet Services Exchanges. On balance, the project does comply with said criteria in that:

a. The intensity of the use at this location and in the surrounding neighborhood is not such that allowing the use will likely foreclose the location of other needed neighborhood-serving uses in the area;

The use has a low intensity and has existed in the building for more than ten years with no known negative impacts. Additionally, the existing building is not currently designed to easily

accommodate a more active commercial use, and therefore is suitable for an Internet Services Exchange.

b. The building in which the use is located is designed in discrete elements, which respect the scale of development in adjacent blocks, particularly any existing residential uses;

The existing building is two stories and approximately 30 feet high. It was originally built in 1950 and is representative of the size and scale of buildings in the area. The project would not enlarge or reduce the size of the building.

c. Rooftop equipment on the building in which the use is located is screened appropriately;

The project is required to provide adequate screening of rooftop equipment pursuant to Planning Code Section 141 and Condition of Approval No. 6 in this motion.

d. The back-up power system for the proposed use will comply with all applicable federal state, regional and local air pollution controls;

The existing backup generator complies with all relevant controls and is permitted by the Bay Area Air Quality Management District (Permit No. 21731).

e. Fixed-source equipment noise does not exceed the decibel levels specified in the San Francisco Noise Control Ordinance;

A consultant is currently conducting a noise analysis for this building. The building's rooftop mechanical equipment will be altered and/or replaced to ensure compliance with maximum noise levels permitted for commercial and industrial buildings (no more than eight dBA above the local ambient at any point outside of the property plane) in the San Francisco Noise Ordinance (Section 2909 of the San Francisco Police Code). This requirement is also listed as Condition of Approval No. 11 of this motion.

f. The building is designed to minimize energy consumption, such as through the use of energy-efficient technology, including without limitation, heating, ventilating and air conditioning systems, lighting controls, natural ventilation and recapturing waste heat, and as such commercially available technology evolves;

The existing equipment at the site is fully operable. However, the project will also use the following energy saving techniques to reduce the total power consumption of the building:

1). *Energy efficient Toshiba G90000 UPS systems to increase the efficiency of the current uninterruptible power system from 80 percent efficiency to 96.5 percent efficiency.*

2) *Cold isle containment, which can reduce the power associated with mechanical cooling by 25 to 30 percent.*
3) *Air-side economization, which can reduce the cooling power consumption by an estimated 50 to 60 percent.*

g. The project sponsor has examined the feasibility of supplying and, to the extent feasible, will supply all or a portion of the building's power needs through on-site power generation, such as through the use of fuel cells or co-generation;

The project sponsor studied the feasibility of using on-site Co-generation and fuel cells. However, due to the limited lot size, such power generation is not possible.

h. The project sponsor shall have submitted design capacity and projected power use of the building as part of the conditional use application;

The building is served by PG&E with a 1.0 mega volt ampere ("MVA") dedicated underground feed transformer that is located inside the building. This translates into a serviced capacity of approximately 800kW of power per hour. Using a vacancy factor estimate of 7.5 percent, the projected maximum annual energy use is 6,500,000 KWh per year, or 540,000kWh per month.

The following table provides projected monthly energy use per year as the building is leased up over time:

Power Use per Month	*2013*	*2014*	*2015*	*2016*
Total Capacity (KWh)	*36,000*	*216,000*	*360,000*	*540,000*

9. **General Plan Compliance.** The Project is, on balance, consistent with the following Objectives and Policies of the General Plan:

COMMERCE AND INDUSTRY

Objectives and Policies

OBJECTIVE 1:
MANAGE ECONOMIC GROWTH AND CHANGE TO ENSURE ENHANCEMENT OF THE TOTAL CITY LIVING AND WORKINIG ENVIRONMENT.

Policy 1.1:
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development that has substantial undesirable consequences that cannot be mitigated.

The project will provided a much needed support service for other businesses within the City without producing undesirable consequences.

OBJECTIVE 3:
PROVIDE EXPANDED EMPLOYMENT OPPORTUNITIES FOR CITY RESIDENTS, PARTICULARLY THE UNEMPLOYED AND ECONOMICALLY DISADVANTAGED.

Policy 3.4:
Assist newly emerging economic activities.

OBJECTIVE 4:
IMPROVE THE VIABILITY OF EXISTING INDUSTRY IN THE CITY AND THE ATTRACTIVENESS OF THE CITY AS A LOCATION FOR NEW INDUSTRY.

Policy 4.1:
Maintain and enhance a favorable business climate in the city.

Policy 4.2:
Promote and attract those economic activities with potential benefit to the City.

The project will provided a much needed support service for other businesses to locate and grow within the City, especially businesses with technological support needs.

10. **Planning Code Section 101.1(b)** establishes eight priority-planning policies and requires review of permits for consistency with said policies. On balance, the project does comply with said policies in that:

A. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses be enhanced.

The proposal will not remove or otherwise impact any existing neighborhood-serving retail uses in the area.

B. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods.

The proposed use has existed within the subject building since 2000 (including periods of vacancy). Continuing the use at this location will not impact existing housing or neighborhood character.

C. That the City's supply of affordable housing be preserved and enhanced,

No housing is created or removed as part of this project.

D. That commuter traffic not impede MUNI transit service or overburden our streets or neighborhood parking.

The nature of the project is such that very little traffic will be generated because it is not a typical commercial use where customers come to the place of business to receive a service or purchase a good. Additionally, only two to four workers will be present at a time, and there is a two-space tandem parking garage in the building. Therefore, the project will not create issues for traffic, parking, or MUNI.

E. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced.

The Project will not displace any service or industry establishment, but will instead preserve and industrial service that has existed at this site since 2000.

F. That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake.

The project includes no significant changes to the existing building.

G. That landmarks and historic buildings be preserved.

The subject building was determined to not be a historic resource by the Showplace Square/Northeast Mission Historic Survey.

H. That our parks and open space and their access to sunlight and vistas be protected from development.

The project will have no impact on existing parks and open spaces.

11. The Project is consistent with and would promote the general and specific purposes of the Code provided under Section 101.1(b) in that, as designed, the Project would contribute to the character and stability of the neighborhood and would constitute a beneficial development.

12. The Commission hereby finds that approval of the Conditional Use authorization would promote the health, safety and welfare of the City.

DECISION

That based upon the Record, the submissions by the Applicant, the staff of the Department and other interested parties, the oral testimony presented to this Commission at the public hearings, and all other written materials submitted by all parties, the Commission hereby APPROVES Conditional Use Application No. 2013.0477C subject to the following conditions attached hereto as "EXHIBIT A" in general conformance with plans on file, dated May 30, 2013, and stamped "EXHIBIT B", which is incorporated herein by reference as though fully set forth.

APPEAL AND EFFECTIVE DATE OF MOTION: Any aggrieved person may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion No. XXXXX. The effective date of this Motion shall be the date of this Motion if not appealed (After the 30-day period has expired) OR the date of the decision of the Board of Supervisors if appealed to the Board of Supervisors. For further information, please contact the Board of Supervisors at (415) 554-5184, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

I hereby certify that the Planning Commission ADOPTED the foregoing Motion on July 11, 2013.

Jonas P. Ionin
Acting Commission Secretary

AYES:

NAYS:

ABSENT:

ADOPTED: July 11, 2013

EXHIBIT A

AUTHORIZATION

This authorization is for a conditional use to allow approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors of the existing two-story building located at 435-437 Potrero Avenue, Block 3972, and Lot 22, pursuant to Planning Code Section(s) 179.1, 227(r), 303, and 303(h) within the UMU District and a 58-X Height and Bulk District; in general conformance with plans, dated May 30, 2013, and stamped "EXHIBIT B" included in the docket for Case No. 2013.0477C and subject to conditions of approval reviewed and approved by the Commission on July 11, 2013 under Motion No. XXXXXX. This authorization and the conditions contained herein run with the property and not with a particular Project Sponsor, business, or operator.

RECORDATION OF CONDITIONS OF APPROVAL

Prior to the issuance of the building permit or commencement of use for the Project the Zoning Administrator shall approve and order the recordation of a Notice in the Official Records of the Recorder of the City and County of San Francisco for the subject property. This Notice shall state that the project is subject to the conditions of approval contained herein and reviewed and approved by the Planning Commission on July 11, 2013 under Motion No XXXXXX.

PRINTING OF CONDITIONS OF APPROVAL ON PLANS

The conditions of approval under the 'Exhibit A' of this Planning Commission Motion No. XXXXXX shall be reproduced on the Index Sheet of construction plans submitted with the Site or Building permit application for the Project. The Index Sheet of the construction plans shall reference to the Conditional Use authorization and any subsequent amendments or modifications.

SEVERABILITY

The Project shall comply with all applicable City codes and requirements. If any clause, sentence, section or any part of these conditions of approval is for any reason held to be invalid, such invalidity shall not affect or impair other remaining clauses, sentences, or sections of these conditions. This decision conveys no right to construct, or to receive a building permit. "Project Sponsor" shall include any subsequent responsible party.

CHANGES AND MODIFICATIONS

Changes to the approved plans may be approved administratively by the Zoning Administrator. Significant changes and modifications of conditions shall require Planning Commission approval of a new Conditional Use authorization.

Conditions of Approval, Compliance, Monitoring, and Reporting

PERFORMANCE

1. **Validity.** The authorization and right vested by virtue of this action is valid for three (3) years from the effective date of the Motion. The Department of Building Inspection shall have issued a Building Permit or Site Permit to construct the project and/or commence the approved use within this three-year period.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

2. **Expiration and Renewal.** Should a Building or Site Permit be sought after the three (3) year period has lapsed, the project sponsor must seek a renewal of this Authorization by filing an application for an amendment to the original Authorization or a new application for Authorization. Should the project sponsor decline to so file, and decline to withdraw the permit application, the Commission shall conduct a public hearing in order to consider the revocation of the Authorization. Should the Commission not revoke the Authorization following the closure of the public hearing, the Commission shall determine the extension of time for the continued validity of the Authorization.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

3. **Diligent pursuit.** Once a site or Building Permit has been issued, construction must commence within the timeframe required by the Department of Building Inspection and be continued diligently to completion. Failure to do so shall be grounds for the Commission to consider revoking the approval if more than three (3) years have passed since this Authorization was approved.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

4. **Extension.** All time limits in the preceding three paragraphs may be extended at the discretion of the Zoning Administrator where implementation of the project is delayed by a public agency, an appeal or a legal challenge and only by the length of time for which such public agency, appeal or challenge has caused delay.
   For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

5. **Conformity with Current Law.** No application for Building Permit, Site Permit, or other entitlement shall be approved unless it complies with all applicable provisions of City Codes in effect at the time of such approval. *For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.*

DESIGN – COMPLIANCE AT PLAN STAGE

6. **Rooftop Mechanical Equipment.** Pursuant to Planning Code 141, the Project Sponsor shall submit a roof plan to the Planning Department prior to Planning approval of the building permit

application. Rooftop mechanical equipment, if any is proposed as part of the Project, is required to be screened so as not to be visible from any point at or below the roof level of the subject building.
For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

PROVISIONS

7. **Transit Impact Development Fee.** Pursuant to Planning Code Section 411 (formerly Chapter 38 of the Administrative Code), the Project Sponsor shall pay the Transit Impact Development Fee (TIDF) as required by and based on drawings submitted with the Building Permit Application. Prior to the issuance of a temporary certificate of occupancy, the Project Sponsor shall provide the Planning Director with certification that the fee has been paid.
For information about compliance, contact the Case Planner, Planning Department at 415-558-6378, www.sf-planning.org.

MONITORING

8. **Reporting.** As long as the use remains an Internet Services Exchange, the project sponsor shall submit to the Planning Department on an annual basis power use statements for the previous twelve-month period as provided by all suppliers of utilities and shall submit a written annual report to the Department of Environment and the Planning Department which shall state: (a) the annual energy consumption and fuel consumption of all tenants and occupants of the Internet Services Exchange; (b) the number of all diesel generators located at the site and the hours of usage, including usage for testing purposes; (c) evidence that diesel generators at the site are in compliance with all applicable local, regional, state and federal permits, regulations and laws; and (d) such other information as the Planning Commission may require.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

9. **Enforcement.** Violation of any of the Planning Department conditions of approval contained in this Motion or of any other provisions of Planning Code applicable to this Project shall be subject to the enforcement procedures and administrative penalties set forth under Planning Code Section 176 or Section 176.1. The Planning Department may also refer the violation complaints to other city departments and agencies for appropriate enforcement action under their jurisdiction.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

10. **Revocation due to Violation of Conditions.** Should implementation of this Project result in complaints from interested property owners, residents, or commercial lessees which are not resolved by the Project Sponsor and found to be in violation of the Planning Code and/or the specific conditions of approval for the Project as set forth in Exhibit A of this Motion, the Zoning Administrator shall refer such complaints to the Commission, after which it may hold a public hearing on the matter to consider revocation of this authorization.

For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

OPERATION

11. **Noise Control.** The premises shall be adequately soundproofed or insulated for noise and operated so that fixed-source equipment noise shall not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.
For information about compliance with the fixed mechanical objects such as rooftop air conditioning, restaurant ventilation systems, and motors and compressors with acceptable noise levels, contact the Environmental Health Section, Department of Public Health at (415) 252-3800, www.sfdph.org.

12. **Sidewalk Maintenance.** The Project Sponsor shall maintain the main entrance to the building and all sidewalks abutting the subject property in a clean and sanitary condition in compliance with the Department of Public Works Streets and Sidewalk Maintenance Standards.
For information about compliance, contact Bureau of Street Use and Mapping, Department of Public Works, 415-695-2017, http://sfdpw.org.

13. **Community Liaison.** Prior to issuance of a building permit to construct the project and implement the approved use, the Project Sponsor shall appoint a community liaison officer to deal with the issues of concern to owners and occupants of nearby properties. The Project Sponsor shall provide the Zoning Administrator with written notice of the name, business address, and telephone number of the community liaison. Should the contact information change, the Zoning Administrator shall be made aware of such change. The community liaison shall report to the Zoning Administrator what issues, if any, are of concern to the community and what issues have not been resolved by the Project Sponsor.
For information about compliance, contact Code Enforcement, Planning Department at 415-575-6863, www.sf-planning.org.

PROJECT SPONSOR'S SUBMITTAL
IN SUPPORT OF CONDITIONAL USE APPLICATION
(Planning Code Section 303(h))

for

PRE-EXISTING LEGITIMIZED INTERNET SERVICES USE AT 435-437 POTRERO AVENUE (BLOCK 3974, LOT 022)

APPLICANT:
INDUSTRY CAPITAL INTERNET INFRASTRUCTURE, LLC

PLANNING DEPARTMENT CASE NO. 2013.0477C
HEARING DATE: June 13, 2013

Attorneys for Applicant:

REUBEN, JUNIUS & ROSE, LLP
One Bush Street, Suite 600, San Francisco, CA 94104
Tel No.: (415) 567-9000 Fax No.: (415) 399-9480

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A. INTRODUCTION

Industry Capital Internet Infrastructure, LLC ("Applicant") received a Letter of Legitimization from the Zoning Administrator ("ZA Legitimization Letter") for the pre-existing Internet Services Use at 435-437 Potrero Avenue, Block 3974/Lot 022 ("Property"). A copy of the ZA Legitimization Letter is attached to the Staff Report. The ZA Legitimization noted that a Conditional Use Authorization was also required for continuation of the use. The Applicant seeks Conditional Use Authorization ("Authorization") pursuant to the ZA Legitimization Letter. The Property is located at the east side of Highway 101 between 17th and Mariposa Streets, and is within the UMU Zoning District and the 58-X Height and Bulk District.

The Conditional Use criteria are set forth in Planning Code Sections 303(c) and 303(h). The existing use supports and addresses the continued need for Internet Services for San Francisco's small business and start-up community by providing convenient, affordable access to the existing data center. The existing use meets all requirements of San Francisco's General Plan and Planning Code.

B. SITE INFORMATION

Street Address:	435-437 Potrero Avenue
Cross Streets:	17th Street and Mariposa Street
Assessor's Block/Lot:	3974/022
Zoning District:	UMU
Height/Bulk District:	58-X
Other Planning Areas:	None
Parcel Area Size:	4,996 square feet
Existing Improvements:	Two-story structure improved with electrical and other upgrades for existing Internet Services use
Existing Use:	Internet Services

C. PROJECT SUMMARY

Proposed Use:	Continuation of existing Internet Services Use
Building Height:	30 feet
Gross Square Footage:	10,000 square feet
Number of Stories:	2 stories

D. DESCRIPTION OF THE BUILDING AND EXISTING USE

The building is located on a rectangular lot on the east side of Potrero Avenue between 17th Street and Mariposa Streets. The Site is within the UMU Zoning District. Plans of the existing building are attached as **Exhibit A**.

The building was constructed in 1950 and significantly improved in 2000 for use as an Internet Services Center operated by RCN (which later became Astound Networks). The building is fully equipped for this use. No changes to the exterior of the building are proposed, except for additional screening on the roof to cover the existing mechanical equipment.

In contrast to the larger Internet Services centers that are in existence in San Francisco, this site is ideally suited to serve small customers in the City – much like a print shop or a similar light industrial use but with a 21st century application. In the City, there is currently no independent provider of Internet Service data center except for Digital Realty, a multi-billion dollar development company, which owns two large facilities at 365 Main Street and 200 Paul Street. The Property represents a local choice for the San Francisco small business community. The building's central location is ideal for local businesses. Additionally, by continuing the existing use with its infrastructure intact, the business will not require construction of a new facility.

The Applicant will focus on local retail business customers whereas some of the larger facilities that have been built in the City are focused on much larger, wholesale clients. The size of the facility is small compared to the others operating the City. The proximity of this facility to the city center will help attract and retain small businesses and start-up companies.

We expect this data center to promote further job growth in San Francisco as the business users will have a platform to grow their businesses with a local data center provider, which we believe can provide a higher degree of service than the larger national and multi-national platforms.

E. COMPLIANCE WITH SECTION 303 (CONDITIONAL USE) CRITERIA

Under Planning Code section 303(c), the Planning Commission shall approve the application and authorize a conditional use if the facts presented establish the following:

1. Desirability and Compatibility of Project

Planning Code section 303(c) (1) requires that facts be established which demonstrate the following:

> **That the proposed use or feature, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable for, and compatible with, the neighborhood or the community.**

The existing use is compatible with the neighborhood and the community. The Applicant plans to use the existing building (built in 1950). No exterior changes are proposed except a roof screen upgrade. The height and scale of this building are in line with the adjacent

properties. Additionally, at 10,000 sq. ft., the data center is in scale with many of the surrounding small businesses.

The Applicant proposes to use the existing facility to serve the small business community of San Francisco with co-location services. Co-location services means that servers and communications equipment which are either housed at the customer's premises or which would be housed in other facilities would be located inside the 435-437 Potrero building. Co-location has the benefit of increasing the energy efficiency of the equipment. Much of the equipment would otherwise be spread out among offices and basements.

Typically, the customers who choose to maintain a presence in the City do so because of a real need to be close to the location of their servers and back-up computers. The customers are typically small-to-medium sized businesses who cannot afford to build dedicated data centers.

At any given time there will be 4-6 people employed at the facility with 2-4 employees of customers rotating on and off-site at any given time.

2. Effect of Project on Health, Safety, Convenience or General Welfare

Planning Code section 303(c)(2) requires that facts be established which demonstrate the following:

That such use or feature as proposed will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity, or injuries to property, improvements or potential development in the vicinity, with respect to aspects including but not limited to the following:

(a) The nature of the proposed site, including its size and shape, and the proposed size, shape and arrangement of the structure.

The CU Authorization will not be detrimental to the health, safety or general welfare of the persons or business in the vicinity. The use has been in operation at the site for 13 years.

(b) The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading.

The 4-6 employees and the customers are expected to arrive by foot, bicycle, or public transit. Given the central location of the building and proximity to public transit, we do not expect any traffic issues.

(c) The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor.

The HVAC equipment consists of seven fan units that comply with the San Francisco Noise Ordinance. The HVAC equipment does not emit any dust or odors. The backup generator is located in the basement, and is used only in emergencies such as power outages.

(d) Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs.

An awning will be added to improve the entrance. Rooftop screening will be upgraded.

3. Compliance with the General Plan

Planning Code Section 303(c)(3) requires that facts be established that demonstrate the following:

That such use or feature as proposed will comply with the applicable provisions of this code and will not adversely affect the Master Plan.

The Project will affirmatively promote, is consistent with, and will not adversely affect the General Plan, as follows:

The objectives and policies of the Commerce Element of the General Plan are based on the premise that economic development activities in San Francisco must be designed to achieve economic vitality, among other things:

POLICY 4.11
Maintain an adequate supply of space appropriate to the needs of incubator industries.

Small, emerging industries in the City, many utilizing new technologies, are dependent on relatively inexpensive space accessible to prospective markets. Examples of these "incubator" type industries include electronic data processing firms, business services, apparel manufacturing and design, crafts manufacturing, etc. During the early stages of developments, while markets are being established, fixed costs such as rent and transportation must be kept at minimal levels. The South of Market area is currently serving as a functional area containing a supply of such spaces needed by new businesses. The maintenance of a reservoir of such spaces, which can fulfill these needs, is needed.

Economic Vitality

The first goal is to maintain and expand a healthy, vital and diverse economy which will provide jobs essential to personal well-being and revenues to pay for the services essential to the quality of life in the city.

POLICY 1.1
Encourage development which provides substantial net benefits and minimizes undesirable consequences. Discourage development which has substantial undesirable consequences that cannot be mitigated.

In situations where proposed developments have no significant adverse environmental effects and will result in positive fiscal and employment benefits for residents, and where the developments otherwise meet planning objectives, they should be encouraged.

POLICY 2.1
Seek to retain existing commercial and industrial activity and to attract new such activity to the City.

POLICY 3.4
Assist newly emerging economic activities.

POLICY 4.1
Maintain and enhance a favorable business climate in the city.

The creation and maintenance of a positive relationship between city government and private industry is an important factor for many industries in choosing to stay or relocate.

F. COMPLIANCE WITH ADDITIONAL CONDITIONAL USE CRITERIA (SECTION 303(h))

The Planning Commission shall, in addition to the criteria set forth in Section 303(c) above, find that:

1) The intensity of the use at this location and in the surrounding neighborhood is not such that allowing the use will likely foreclose the location of other needed neighborhood-serving uses in the area.

The building is already constructed and has been in use for more than 13 years for Internet Services Use. We do not anticipate that the current use will preclude other uses in the area.

2) The building in which the use is located is designed in discrete elements, which respect the scale of development in adjacent blocks, particularly any existing residential uses.

The existing building is within the physical dimensions and scale of the surrounding neighborhood, and the design and layout is consistent with the surrounding architecture for commercial buildings on Potrero Avenue.

3) **Rooftop equipment on the building in which the use is located is screened appropriately.**

The rooftop equipment is not visible from street level (see Exhibit B). The equipment screen will be improved.

4) **The back-up power system for the proposed use will comply with all applicable federal state, regional and local air pollution controls.**

The building's backup generator complies with and is permitted by Bay Area Air Quality Management District permit number 21731.

5) **Fixed-source equipment noise does not exceed the decibel levels specified in the San Francisco Noise Control Ordinance.**

The building's air cooled fans located on the roof will comply with the ambient noise levels, by utilizing the following technologies and methods to meet and exceed the noise control Ordinance:

i. Mufflers and Variable Frequency Drive fans and pumps.

ii. Sound wall / noise absorption

6) **The building is designed to minimize energy consumption, such as through the use of energy-efficient technology, including without limitation, heating, ventilating and air conditioning systems, lighting controls, natural ventilation and recapturing waste heat, and as such commercially available technology evolves.**

The equipment at the site is functioning well and can continue to be used as is. However, the Applicant, as part of its commitment to energy efficiency, will deploy the following energy saving technologies:

i. Energy efficient Toshiba G9000 UPS systems increases the efficiency of the current uninterruptible power system from 80% efficiency to 96.5% (reduces energy usage).

ii. Deployment of cold isle containment, reducing the power associated with mechanical cooling by 25-30%.

iii. Deployment of air-side economization will reduce the cooling power consumption by an estimated 50-60%.

In aggregate, the above will reduce power consumption by approximately 45% relative to the existing use.

7) **The Applicant has examined the feasibility of supplying and, to the extent feasible, will supply all or a portion of the building's power needs through on-site power generation, such as through the use of fuel cells or co-generation.**

The Applicant has studied the feasibility of utilizing onsite Co-gen and fuel cells. Due to the limited lot size, such power generation is not possible.

8) **The Applicant shall have submitted design capacity and projected power use of the building as part of the conditional use application.**

The building is served by PG&E with a 1,000 mega volt amperes ("MVA") dedicated underground feed transformer that is located inside the building. The maximum capacity shall not exceed 800 KW. The following is the estimated power use for the building

Power Use	2013	2014	2015	2016
Total capacity in KWh	36,000	216,000	360,000	540,000

As a condition of approval, and so long as the use remains an Internet Services Exchange, the Applicant shall submit to the Planning Department on an annual basis power use statements for the previous twelve-month period as provided by all suppliers of utilities and shall submit a written annual report to the Department of Environment and the Planning Department which shall state: (a) the annual energy consumption and fuel consumption of all tenants and occupants of the Internet Services Exchange; (b) the number of all diesel generators located at the site and the hours of usage, including usage for testing purposes; (c) evidence that diesel generators at the site are in compliance with all applicable local, regional, state and federal permits, regulations and laws; and (d) such other information as the Planning Commission may require.

The building is only 10,000 square feet in size, with 800 KWh of dedicated power and a single 400 KWh diesel standby backup generator.

G. MASTER PLAN PRIORITY POLICIES

Planning Code Section 101.1 establishes the following eight priority planning policies and requires review of permits for consistency with said policies. The Project and this Section 329 Application are consistent with each of these policies as follows:

1. That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced.

The continuance of the existing use will benefit existing neighborhood-serving retail uses by keeping employees and customers in the neighborhood.

2. That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods.

The Applicant will not have any effect on housing. The existing use is a part of the neighborhood character.

3. That the City's supply of affordable housing be preserved and enhanced.

The application will have no effect on affordable housing.

4. That commuter traffic not impede Muni transit service or overburden our streets or neighborhood parking.

The application will have no effect on commuter traffic or Muni.

5. That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced.

No commercial office development is proposed.

6. That the City achieves the greatest possible preparedness to protect against injury and loss of life in an earthquake.

The application is consistent with this policy.

7. That landmarks and historic buildings be preserved.

The Property is not a landmark or historically rated building and the Property is not located within a historic district. The Project will have no impact on landmarks or historic buildings.

8. That our parks and open space and their access to sunlight and vistas be protected from development.

The Property is not adjacent to any parks or public open space, and will therefore have no impact on access to sunlight or vistas.

H. CONCLUSION

The application satisfies the objectives and policies of the General Plan, the Planning Code, and the ZA Legitimization Letter, and should be approved.

Dated: May 29, 2013

REUBEN, JUNIUS & ROSE, LLP
Attorneys for Owner and Applicant

By: _____
David Silverman

LIST OF EXHIBITS

Exhibit A – Floor Plans

ABBREVIATIONS

SYMBOLS

GENERAL NOTES

APPLICABLE CODES

SCOPE OF WORK

PROJECT INFORMATION

SHEET INDEX

SITE IMAGES

VICINITY MAP

architecture

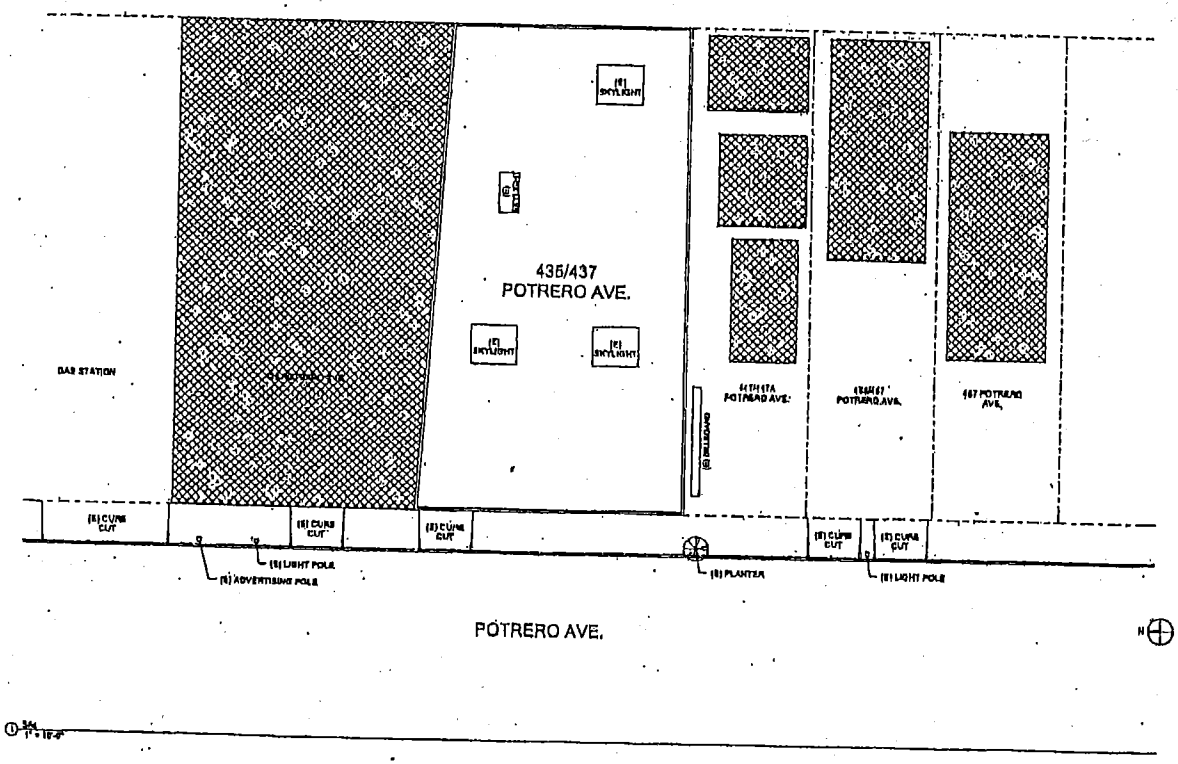
435 POTRERO AVE

SAN FRANCISCO, CA 94110

PROJECT INFORMATION

A 0.0

1089



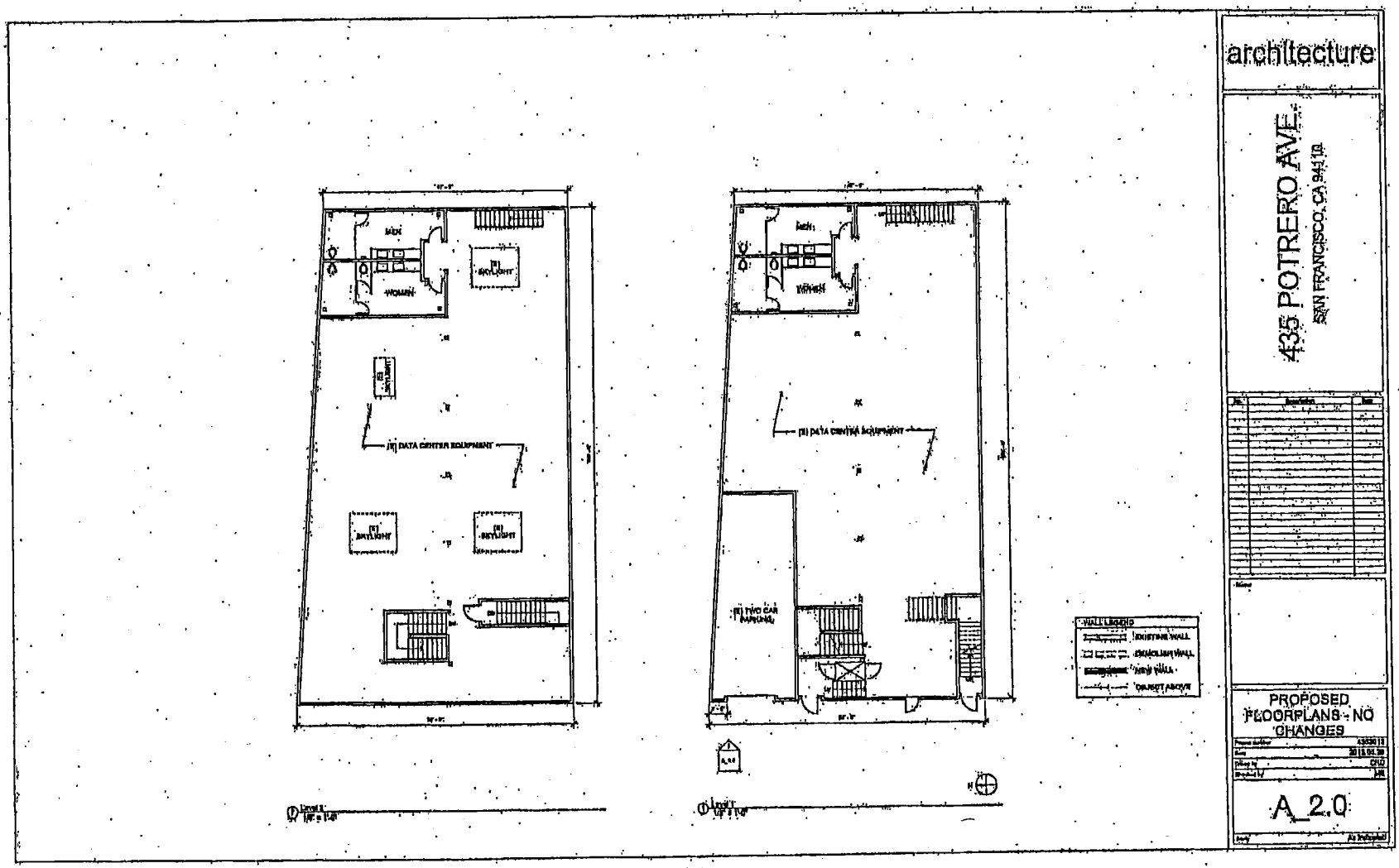
architecture

435 POTRERO AVE.
SAN FRANCISCO, CA 94110

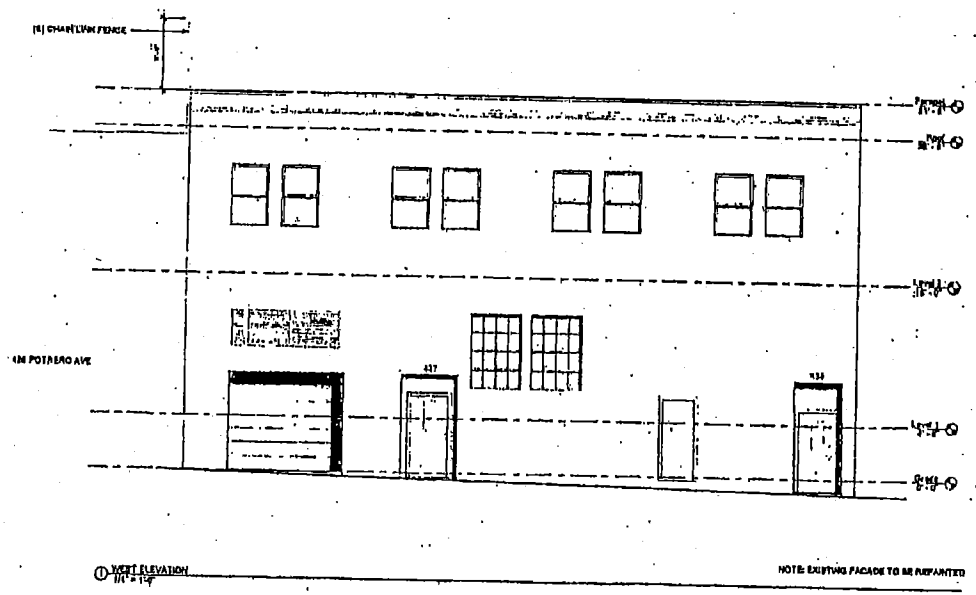
SITE PLAN

A_1.0

1090


architecture
435 POTRERO AVE.
SAN FRANCISCO, CA 94110
PROPOSED FLOORPLANS - NO CHANGES
A_2.0
WOMEN
MEN
(E) SKYLIGHT
(E) DATA CENTER EQUIPMENT
(E) TWO CAR PARKING
WALL LEGEND

1091



① WEST ELEVATION
1/4" = 1'-0"

architecture

435 POTRERO AVE.
SAN FRANCISCO, CA 94110

EXISTING ELEVATION - NO CHANGES

A_3.0

1092

SAN FRANCISCO
PLANNING DEPARTMENT

Letter of Legitimization

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

June 4, 2013

David Silverman
Reuben, Junius & Rose LLP
1 Bush Street, Suite 600
San Francisco, CA 94104

Site Address:	435-437 Potrero Avenue
Assessor's Block/Lot:	3974/022
Zoning District:	UMU
Staff Contact:	Corey Teague, (415) 575-9081 or corey.teague@sfgov.org

Dear Mr. Silverman:

This letter is in response to your request for a Letter of Legitimization per Planning Section 179.1 regarding the property at 435-437 Potrero Avenue. This parcel is located in the UMU Zoning District and a 58-X Height and Bulk District. The request is to legitimize the existing "Internet Services Exchange" use on the entirety of both floors in the existing two-story building totaling approximately 10,000 gross square feet.

Procedural Background

The Department received the request for legitimization of office space at 435-437 Potrero Avenue on October 15, 2012. Staff reviewed the request and associated materials and the Zoning Administrator issued a 30-day public notice of the intent to issue the Letter of Legitimization on April 15, 2013. The public notice also included a draft letter for review, and was sent to 1) all owners of property within 300 feet of the subject property, 2) all current tenants of the subject property, and 3) all individuals and neighborhood associations that had requested to receive such notice. Additionally, notice was posted on the site during the notification period. The notification period expired on May 15, 2013.

Eligibility

The land use proposed for legitimization is deemed eligible if it meets the following criteria:

i. The land use existed as of the date of the application;

Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the entirety of the subject building has been used as an "Internet Services Exchange" (d.b.a. RCN Telecom Services and Astound) since approximately May 30, 2000.

ii. The land use would have been principally permitted or permitted with conditional use authorization under provisions of the Planning Code that were effective on April 17, 2008;

Prior to the Eastern Neighborhoods rezoning, the subject property was located in the M-1 Zoning District, which permitted an Internet Services Exchange with a Conditional Use Authorization.

iii. The land use would not be permitted under current provisions of the Planning Code;

The subject property is located in the UMU Zoning District, which prohibits an Internet Services Exchange.

iv. The land use either has been (1) regularly operating or functioning on a continuous basis for no less than 2 years prior to the effective date of Planning Code Section 179.1, or (2) functioning in the space since at least April 17, 2008, and is associated with an organization, entity or enterprise which has been located in this space on a continuous basis for no less than 2 years prior to the effective date of Planning Code Section 179.1;

Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the entirety of the subject building has been used as an "Internet Services Exchange" (d.b.a. RCN Telecom Services and Astound) since approximately May 30, 2000.

v. The land use is not accessory to any other use;

The subject Internet Services Exchange is the principal use and is not accessory to any other uses within the building.

vi. The land use is not discontinued and abandoned pursuant to the provisions of Planning Code Section 183 that would otherwise apply to nonconforming uses.

Lease documents, business tax documents, building permits, utilities bills, and insurance documents indicate that the building remained occupied until June 2010. Since that time, no new use was established in the building, and it has been actively marketed as an Internet Services Exchange. Therefore, the Internet Services Exchange use was not discontinued and abandoned pursuant to the provisions of Planning Code Section 183.

Determination

It is my determination that the request for legitimization of the existing approximately 10,000 gross square feet of Internet Services Exchange on the entirety of both floors in the existing two-story building as shown on the submitted plans meet all the required criteria of Planning Code Section 179.1. Therefore, the subject gross floor area is deemed to be a legitimate Internet Services Exchange space as defined in Planning Code Section 209.6(c). A Notice of Special Restrictions shall be filed on the subject property documenting the specific building area legitimized as Internet Services Exchange in this letter and

documented on the submitted plans on file with this request, prior to the approval of a site or building permit establishing such Internet Services Exchange. This determination is not a project approval, or in any way a substitute for the Building Permit Application for the change of use to Internet Services Exchange.

Please note that a Conditional Use Authorization and subsequent Building Permit Application must be approved to legally convert the subject gross floor area to Internet Services Exchange. Additionally, the relevant impact fees outlined in Section 179.1(g), and elsewhere in the Municipal Code, shall be assessed as part of the Building Permit Application.

APPEAL: If you believe this determination represents an error in interpretation of the Planning Code or abuse in discretion by the Zoning Administrator, an appeal may be filed with the Board of Appeals within 15 days of the date of the Letter of Legitimization. For information regarding the appeals process, please contact the Board of Appeals located at 1650 Mission Street, Room 304, San Francisco, or call (415) 575-6880.

Sincerely,

Scott F. Sanchez
Zoning Administrator

cc: Corey Teague, Planner
Philip Blix, Property Owner
William Spencer
Planning Commissioners
All Parties on the Notification Request List

I:\Current Planning\SE Team\ EASTERN NEIGHBORHOODS\EN Legitimization\435 Potrero Ave\Draft LoL.doc

REUBEN & JUNIUS LLP

Eastern Neighborhoods Legitimization Application §179.1

October 15, 2012

ID #10741 (SE) J BANALES
CK # 20855 $588 -
NEEDS $13 MORE

By Hand Delivery

Mr. Scott Sanchez
Zoning Administrator
1650 Mission Street, 4th floor
San Francisco, CA 94103

Re: Eastern Neighborhood Legitimization Application
Planning Code Section 179.1
435-437 Potrero Avenue (Block 3974, Lot 022)
Our File No.: 7424.01

Dear Mr. Sanchez:

Enclosed please find the application and supporting materials, including two additional copies, for an Eastern Neighborhoods ("EN") Legitimization request under Planning Code Section 179.1 for the property located at 435-437 Potrero Avenue ("Property"). We are filing this application on behalf of F.W. Spencer & Son, Inc., the owner of the Property.

A. Introduction and Background.

The Property is located at 435-437 Potrero Avenue, midblock between Mariposa and 17th Street, approximately two blocks from the Bayshore Freeway/Route 101. The building covers the full lot. The Property is improved with a 2-story, 10,000-square foot building used as an Internet Services Exchange since May 30, 2000 by RCN Telecom Services of California, Inc., which was purchased by Astound in 2005 but continued the same use. After a brief vacancy, during which marketing took place for the same use, the Property will be occupied by Industry Capital Data Centers for the identical use, immediately after this application is approved.

James A. Reuben | Andrew J. Junius | Kevin H. Rose | Sheryl Reuben[1] | David Silverman | Thomas P. Tunny | Jay F. Drake
Daniel A. Frattin | Lindsay M. Petrone | John Kevin | [illegible] Eigerman[2,3] | John McInerney III[1]
1. Also admitted in New York 2. Of Counsel 3. Also admitted in Massachusetts

One Bush Street, Suite 600
San Francisco, CA 94104
tel: 415-567-9000
fax: 415-399-9480
www.reubenlaw.com

B. Floor Plans, Photographs, and Upgrades.

Floor plans for the Property are attached as **Exhibit A**. Interior and exterior photographs are attached as **Exhibit B**. The building comprises approximately 10,000 gross square feet of Internet Services Exchange area that is the subject of this request for legitimization.

C. Evidence Supporting Eligibility.

i. The land use existed as of the date of the application;

The entire building has been used since May 2000 by RCN Telecom Services of California Inc. (RCN) as an Internet Services Exchange. The lease between F.W. Spencer and Son, Inc., and RCN dated May 30, 2000 describes the "permitted uses" at the Property as follows:

> "Telecommunications hub site for cable, internet and telephony, internet routing facility and other telecommunication uses and other related uses for Tenant's telecommunications business."

(See Triple Net Lease with RCN dated May 30, 2009, and First Amendment to Triple Net Lease dated June 2004, attached as **Exhibit C.**)

The owners significantly upgraded the building in 2000 at a cost exceeding $1,000,000 to serve as an Internet Services Exchange for RCN. The building was seismically strengthened and mechanically upgraded to house a PG&E transformer vault to provide 400 kilowatts of power, including a diesel generator backup and related infrastructure for the Internet Services Exchange.

Continued use as an Internet Services Exchange will provide a vital and indispensable service to Internet startups and related small businesses in the South of Market neighborhood. Nearby businesses will access the Property to service and maintain their Internet servers on a continuing basis. Continuance of this Internet Services Exchange use will provide a significant benefit to the City as a whole and especially to the many Internet and technology companies located within walking distance to the Property. The Property has been upgraded to meet all current ADA requirements in connection with the seismic, electrical, and other other upgrades to the building conducted in May 2000.

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

www.reubenlaw.com

This is a unique building that was outfitted with specialized electrical and mechanical upgrades to accommodate the Internet Services Exchange use twelve years ago, at the commencement of the boom of Internet startups. We are unaware of any other Internet Services Exchange in the neighborhood, and the use clearly provides an indispensable service for the most recent boom in the South of Market tech industry, which has been the primary creator of new employment opportunities for San Franciscans over the past several years, and a primary growth center in the San Francisco economy.

ii. The land use would have been principally permitted or permitted with conditional use authorization under provisions of the Planning Code that were effective on April 17, 2008;

Prior to the EN rezoning, the Property was located in the M-1 (Light Industrial) Zoning District, which principally permitted "Commercial wireless transmitting, receiving or relay facility, including towers, antennae, and related equipment for the transmission, reception, or relay of radio, television, or other electronic signals" pursuant to Planning Code Section 227(h). "Internet Services Exchange" was not created as a separate land use category until May 13, 2002 by Ordinance No. 77-02. At that date, Sections 209.6, 790.80, and 890.80 were amended to define "Internet Services Exchange" as a new use within the "utility installation" use category. Had the use category for Internet Services Exchange existed at the time of the original permitting, it would have been permitted as Internet Use Exchange.

The land use would not be permitted under current provisions of the Planning Code;

Upon the conclusion of the EN rezoning process, the zoning district classification was changed from M-1 to Urban Mixed Use ("UMU"). Internet Services Exchanges are not permitted in the UMU zoning district. (Planning Code Section 843.14.)

The new zoning, UMU (Urban Mixed Use), was not adopted until June 11, 2008.

iii. The land use either has been (1) regularly operating or functioning on a continuous basis for no less than 2 years prior to the effective date of Planning Code Section 179.1, or (2) functioning in the space since at least April 17, 2008, and is associated with an organization, entity or enterprise which has been

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

www.reubenlaw.com

located in this space on a continuous basis for no less than 2 years prior to the effective date of Planning Code Section 179.1;

The Internet Services Exchange use has occupied the entire building since May 2000, well in excess of the two-year requirement for the EN Legitimization program under §179.1(2)(D)(1). The use has continued without interruption up to the present, except for a one-year period of marketing to find a replacement Internet Services Exchange. The new occupant will be Industry Capital Data Centers, and it will occupy the entire Property for Internet Services Exchange use as soon as this application is approved.

iv. The land use is not accessory to any other use;

The Internet Services Exchange use that is being requested for legitimization comprises the entire current use, which occupies the entire Property. The use that is the request of this legitimization is not accessory to any other use, but instead is the principal use of the building.

v. *The land use is not discontinued and abandoned pursuant to the provisions of Planning Code Section 183 that would otherwise apply to nonconforming uses.*

The Property has been under continuous, uninterrupted occupancy by RCN (purchased by Astound in 2005) for Internet Services Exchange use since May 2000. The use has not been discontinued or abandoned for a period of three years. (See Planning Code Section 183.) After a recent period of marketing for a new Internet Services Exchange, the new occupant, Industry Capital Data Centers, is awaiting approval of this application to commence its occupancy.

D. Notification Materials.

Mailing labels, 300-foot radius map and a list of owners within 300-foot radius are enclosed with this application.

E. Fees.

In addition to the evidence and other information and documents identified above, I have enclosed a check in the amount of $588.00 made to the order of the Planning Department for the Department's filing fee.

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

www.reubenlaw.com

Please do not hesitate to contact me or if you need any additional information or have any questions.

Very truly yours,

REUBEN & JUNIUS, LLP

David Silverman

Enclosures

Exhibit A – Floor plans
Exhibit B – Photographs, Exterior and Interior
Exhibit C – Lease and First Amendment to Lease
Mailing labels, map and list of owners for 300-foot radius
Check for $588.00 for the Planning Department determination fee

cc: F.W. Spencer & Son, Inc. (w/o encls.)

One Bush Street, Suite 600
San Francisco, CA 94104

tel: 415-567-9000
fax: 415-399-9480

www.reubenlaw.com

FIRST AMENDMENT TO TRIPLE NET LEASE

This First Amendment to Triple Net Lease ("Amendment") is made and entered into as of the ___ day of June, 2004, between F.W. Spencer & Son, Inc., a California corporation with an address of 99 South Hill Drive, Brisbane, California 94005 ("Landlord"), and RCN Telecom Services, Inc., a Pennsylvania corporation, successor by merger to RCN Telecom Services of California, Inc., having an address at 105 Carnegie Center, Princeton, New Jersey 08540 ("Tenant").

A. Landlord and Tenant have entered into a triple net lease dated as of May 30, 2000 (the "Lease") pursuant to which Landlord has leased to Tenant and Tenant has leased from Landlord certain Premises located at 437 Potrero Avenue, San Francisco, California.

B. Landlord and Tenant have agreed to amend the Lease to provide for an adjustment of the Fixed Rent payable under the Lease for the remainder of the Term.

C. Terms not otherwise defined herein shall have the same meaning as set forth in the Lease.

Now, therefore, in consideration of the mutual premises set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant agree as follows:

1. Section 1.2, Reference Data, "Fixed Rent" is deleted in its entirety from the Lease and the following is substituted in its place:

"Fixed Rent:	At an annual rental rate of Twenty-Nine Dollars Ninety-Four Cents ($29.94) per square foot for the period from July 1, 2004 through July 31, 2004. Beginning on August 1, 2004 and on each August 1 thereafter through the expiration of the Term, Fixed Rent shall be adjusted annually by an amount equal to Three and One-Half Percent (3.5%) over the then prevailing Fixed rent for the Premises. Fixed Rent shall be payable in advance on the first day of each month."

2. Except as otherwise expressly amended by this Amendment, the terms of the Lease are ratified and affirmed.

In witness whereof, Landlord and Tenant have caused this Amendment to be executed by their duly authorized officers as of the date first above referenced.

LANDLORD:
F.W. Spencer & Son, Inc.

By: _____
Its: CEO

TENANT:
RCN Telecom Services, Inc.

By: _____
Its:

RCN Corporation, the Guarantor under that Guarantee dated May 30, 2000, joins in this Amendment for the limited purpose of consenting to the Amendment and reaffirming its obligations under the Guarantee.

RCN Corporation

By: _____
Its:
VP & Asst Secy

TRIPLE NET LEASE

ARTICLE I

1.1 Parties. This Triple Net Lease ("Lease") is executed this 30th day of May, 2000, between F. W. SPENCER & SON, INC., a California corporation with an address of 99 South Hill Drive, Brisbane, California 94005 ("Landlord") and RCN TELECOM SERVICES OF CALIFORNIA, INC., a California corporation having an office at 105 Carnegie Center, Princeton, New Jersey 08540 ("Tenant").

1.2 Reference Data. Each reference in this Lease to any of the following shall have the meaning set forth below:

Building:	The building known as 437 Potrero Avenue, San Francisco, California, as more specifically described on the plan attached hereto as Exhibit "A". The Building is located on the Land.
Land:	The parcel of land on which the Building is located, which portion is more specifically shown on the plan attached hereto as Exhibit "A".
Premises:	Approximately 10,000 square feet of gross leasable area located in the Building, as shown on the plan attached hereto as Exhibit "B".
Term:	Ten (10) years.
Option:	Tenant shall have the option and right to renew this Lease for one (1) additional term of ten (10) years. The renewal term shall commence on the day following the termination of the initial term. Fixed Rent for the renewal term shall be at 3.5% over the then prevailing Fixed Rent for the Premises and shall be adjusted annually on each anniversary of the Rent Commencement by an amount equal to 3.5% over the then prevailing Fixed Rent for the Premises.
Commencement Date:	The date upon which Landlord and Tenant have executed this Lease. If Landlord is unable to deliver the Premises on or before July 10, 2000 ("Possession Date"), Landlord or Tenant may cancel this Lease without penalty by written notice to the other party, delivered to the other party prior to delivery of the Premises. If delivery of the Premises is delayed beyond the Possession Date, the Rent Commencement Date and the Expiration Date shall be adjusted to account for such delay.
Expiration Date:	July 31, 2010

Rent Commencement Date:	August 1, 2000.
Fixed Rent:	Thirty-Six Dollars ($36.00) per square foot for the first year of the Lease Term commencing on the Rent Commencement Date. Fixed Rent shall be adjusted annually on each anniversary of the Rent Commencement by an amount equal to 3.5% over the then prevailing Fixed Rent for the Premises. Fixed Rent shall be payable in advance on the first day of each month.
Permitted Uses:	Telecommunications hub site for cable, internet and telephony, internet routing facility and other telecommunication uses and other related uses for Tenant's telecommunications business.
Public Liability Insurance Limits:	$1,000,000.00 combined single limit
Security Deposit:	RCN Corporation, a Delaware corporation, shall provide Landlord with a corporate guaranty in the form of **Exhibit "F"** attached hereto at the time of execution of the Lease securing Tenant's performance hereunder.
Premises Delivery Fee:	On or before June 1, 2000, Tenant shall deposit the sum of Sixty-Five Thousand Dollars ($65,000.00) ("Premises Delivery Fee") into an attorney trust account pursuant to escrow instructions in the form attached hereto as **"Exhibit "G."** The Premises Delivery Fee is for the reimbursement of Landlord's costs and expenses associated with facilitating the delivery of the Premises to Tenant on or before July 10, 2000. The Premises Delivery Fee and any accrued interest shall be released from the attorney trust account and paid to Landlord at the time the existing tenant vacates the Premises, which is anticipated by the parties to be on or before the Possession Date. If Landlord fails to deliver the Premises to Tenant on the Possession Date described above and Tenant elects to cancel the Lease as set forth herein, the Premises Delivery Fee shall be paid to Tenant within two (2) days after receipt of the cancellation notice.

1.3 Exhibits. The exhibits listed below in this Section are incorporated in this Lease by reference and are to be construed as a part of this Lease:

Exhibit A - Legal Description and Plan Showing Building and Land
Exhibit B - Plan Showing Premises
Exhibit C - Co-Location Agreement
Exhibit D - Tenant Improvements Agreement
Exhibit E - Form of Estoppel Certificate
Exhibit F - Form of Guaranty
Exhibit G – Premises Delivery Fee Escrow Instructions

ARTICLE II

2.1 Premises. Landlord hereby leases to Tenant and Tenant hereby leases from Landlord, subject to and with the benefit of the terms, covenants, conditions and provisions of this Lease, the Premises, as is. Landlord represents and warrants that it owns, manages, controls and/or operates the Building and the Premises and has the individual or corporate authority to enter into this Lease.

2.2 Term. Tenant shall hold the Premises for a term beginning with the Rent Commencement Date, and continuing for the Term, unless sooner terminated as hereinafter provided. Upon execution of this Lease, Tenant may take occupancy of the Premises prior to the scheduled Possession Date, in which event all of the terms and conditions of this Lease (with the exception of the rent provisions) shall be applicable from and after such earlier date. Such early occupancy by Tenant shall not affect the Term of this Lease.

2.3 Option to Extend. Tenant shall have the right, by notice given to Landlord at least six (6) months prior to the expiration of the Term or any prior extension term, to extend this Lease for one additional term of ten (10) years each, upon the same terms and conditions provided in the Lease ("Option"). The Fixed Rent during each such extension term shall be determined in accordance with Section 1.2 above. The Option shall be void if Tenant has breached any material term of the Lease, after receipt of written notice and an opportunity to cure such breach, prior to Tenant's submission of Tenant's written notice of its intent to exercise the Option.

2.4 Offsite Customers. Landlord acknowledges that Tenant's Permitted Use requires the installation in the Premises of certain communications equipment by certain licensees and customers of Tenant that do not occupy space in the Building (collectively, "Offsite Customers") in order for such Offsite Customers to interconnect with Tenant's Equipment or to permit Tenant to manage or operate such Offsite Customers' equipment, all in compliance with all applicable laws, covenants or restrictions of record, regulations and ordinances in effect on the Commencement Date ("Applicable Requirements"). Notwithstanding anything to the contrary contained in this Lease, Landlord has approved Tenant's use of the Co-Location Agreement attached to this Lease as Exhibit "C" ("Co-Location Agreement"), without material modification, for the limited purpose of permitting such arrangements as described above. A fully executed copy of such Co-Location Agreement shall be delivered to Landlord prior to the installation of an Offsite Customer's equipment. Tenant's right to co-locate the equipment of Offsite Customers is a right to site the Offsite Customer's equipment within, around, over and under the Premises, subject to Section 1.a. of the Co-Location Agreement.

ARTICLE III

3.1 Rent. Tenant covenants to pay to Landlord, at the address of Landlord set forth above, or at such other place or to such other person or entity as Landlord may by notice in writing to Tenant from time to time direct, during the Term hereof and so long thereafter as Tenant or anyone claiming under Tenant occupies the Premises, the following rent:

3.1.1 Fixed Rent. The Fixed Rent set forth in Section 1.2, in equal monthly installments in advance on the first day of each month of the Term, and pro rata for any fraction of a month at the beginning or end of the Term, any fraction payable with respect to a portion of a month at the beginning of the Term is to be paid on the Commencement Date.

3.1.2 Additional Rent. Tenant shall pay to Landlord, as Additional Rent, the following (collectively, "Operating Expenses"):

(a) 100% of real estate taxes and assessments by governmental authorities payable with respect to the rentable square footage of the Premises; and

(b) 100% of all operating costs incurred by Landlord in the operation of the Building.

Tenant shall pay the aforesaid Additional Rent in monthly installments, based on Landlord's reasonable estimate of such amounts for the current calendar year. Not later than 30 days after the end of the calendar year, Landlord shall deliver to Tenant a statement detailing the actual Operating Expenses for the preceding calendar year together with copies of actual invoices and bills respecting said Operating Expenses, to the extent such bills are requested by Tenant. In the event Landlord's estimate of Operating Expenses exceeds the actual Operating Expenses for the preceding year, Tenant shall receive a credit against Additional Rent next due or, if the Term has expired, a refund of such overpayment; in the event the actual Operating Expenses exceed Landlord's estimate, Tenant shall pay the difference to Landlord together with the next monthly installment of Fixed Rent.

If the real estate taxes for any tax year shall be reduced, whether as a result of a reduction in the tax rate or an appeal by Landlord of the real estate tax assessment, Landlord shall credit to Tenant, Tenant's proportionate share of such reduction minus the costs of such appeal to Landlord, against Tenant's Pro Rata Share of real estate taxes. If any reduction shall occur after the expiration of the Lease Term but shall apply to periods prior to such expiration, Tenant's proportionate share of such reduction shall be promptly refunded to Tenant.

3.1.3 Late Payments of Rent. If any installment of rent is paid more than ten (10) days after the date the same was due, it shall bear interest at the rate of ten percent (10%) per annum from the due date, but in no event more than the maximum rate of interest allowed by law, which shall be Additional Rent. In addition to such interest, for each installment of rent paid more than ten (10) days after the due date, Tenant shall pay to Landlord an amount equal to five (5%) percent of such installment to defer Landlord's costs of collection and administrative expenses relating to such late payment. If Tenant shall fail to pay three or more installments of rent on a timely basis within any consecutive twelve (12) month period, then, in lieu of the due date for payment of Fixed Rent set forth in Section 3.1.1, above, Tenant shall pay Fixed Rent on or before the 15th day of the month preceding the month to which such Fixed Rent applies, and payments made more than ten (10) days after such payment date shall be subject to all of the penalties for late payment set forth in this Section 3.1.3.

3.1.4 Tenant's Insurance. Tenant shall at its sole cost and expense obtain and maintain throughout the Term with reputable insurance companies qualified to do business in California, the following insurance, designating Landlord as a named insured:

(a) Commercial General Liability insurance indemnifying Landlord and Tenant against all claims and demands for any injury to person or property which may be claimed to have occurred in the Premises, in amounts which, at the beginning of the Term, shall be not less than the amounts set forth in Section 1.2, and, from time to time during the Term, may be for such higher amounts as Landlord may require, taking into account the region in which the Premises are located and similar properties used for similar purposes;

(b) So-called "all-risk" property insurance in the amount of the full replacement cost of all Tenant's property and fixtures and Landlord's property and fixtures;

(c) Workmen's compensation and any other insurance required by law or the nature of Tenant's business;

(d) Insurance against such other hazards as may from time to time be required by Landlord, or any bank, insurance company or other lending institution holding a first mortgage on the Premises, provided that such insurance is customarily carried in the region in which the Premises are located, on property similar to the Premises and used for similar purposes.

(e) If Tenant's use or occupancy of the Premises causes any increase in insurance premiums for the Building or Premises, Tenant will pay such additional cost.

Tenant shall furnish Landlord with certificates evidencing all such insurance prior to the beginning of the Term and of each renewal policy at least twenty (20) days prior to the expiration of the policy being renewed. Tenant's use and occupancy of the Premises shall conform to and comply with all requirements of Landlord's insurers, as such requirements may be amended or modified from time to time.

3.1.5 Utilities. Tenant shall pay directly to the proper authorities charged with the collection thereof all charges for the consumption of water use, sewer, electricity, gas, telephone and other services separately metered or billed to Tenant for the Premises, all such charges to be paid as the same from time to time become due. Tenant shall make its own arrangements for such utilities, and Landlord shall be under no obligation to furnish any utilities to the Premises and shall not be liable for any interruption or failure in the supply of any such utilities to the Premises. Landlord shall cooperate with Tenant in making any necessary utility connections available to Tenant.

3.1.6 Permits and Approvals. Tenant shall at its sole cost and expense obtain and maintain throughout the Term all of the authorizations, permits, approvals and licenses required for the construction of the improvements to the Premises and the conduct of Tenant's business

operations therein.

3.2 Audit Rights. In the event any dispute arises between Landlord and Tenant as to Operating Expenses, Tenant shall have the right, upon reasonable notice and at Landlord's offices, to inspect and photocopy, if desired, Landlord's records concerning the Operating Expenses of the Building. If, after such inspection, Tenant continues to dispute Operating Expenses, Tenant shall be entitled to retain an independent accountant or accountancy firm that has a specialty in auditing operating expenses to conduct an audit; provided that in no event shall Tenant conduct an audit more than one time in any twelve (12) month period. If any specific issue with respect to Operating Expenses is raised by Tenant and the same issue has been raised by any other Tenant and a change with respect to such issue has been granted to such other Tenant or if Tenant's audit reveals that Landlord has overcharged Tenant, after Landlord has been afforded an opportunity to explain any contrary position on the matter to Tenant's accounting firm (with any disputes being resolved in good faith by the parties), then Tenant shall receive a credit against the next month's Rent in the amount of such overcharge. If the audit reveals that Tenant was undercharged, then, within thirty (30) days after the results of such audit are made available to Tenant, Tenant shall reimburse Landlord for the amount of such undercharge. Tenant shall pay the cost of any audits requested by Tenant, unless any audit reveals that Landlord's determination of the Operating Expenses was in error by more than five percent (5%), in which case Landlord shall pay the cost of such audit. Landlord shall be required to maintain records of the Operating Expenses for the two-year period following each Operating Expense statement. Except in the event of fraud by Landlord, failure on the part of Tenant to object to the Operating Expense statement within one (1) year after its receipt thereof shall be conclusively deemed Tenant's approval of such Operating Expense statement.

ARTICLE IV

Tenant further covenants and agrees:

4.1 Repair and Maintenance. To keep the Premises in good order and repair, and in at least as good order and repair as they are in on the Commencement Date, reasonable use and wear and damage by fire or casualty insured against only excepted; and to keep all glass, fixtures and equipment now or hereafter on the Premises, including, without limitation, all heating, plumbing, electrical, air-conditioning, and mechanical fixtures and equipment serving the Premises, in good order and repair, and in at least as good order and repair as they are in on the Commencement Date, damage by fire or casualty only excepted; and to make all repairs and replacements and to do all other work necessary for the foregoing purposes. It is further agreed that the exception of reasonable use and wear shall not apply so as to permit Tenant to keep the Premises in anything less than suitable, efficient and usable condition, considering the nature of the Premises and the use reasonably made thereof, or in less than good order, repair, and condition.

4.2 Damage to the Premises. To pay the cost of all repairs to the Building including, without limitation, the roof, exterior walls and all structural components, if any damage thereto is caused by Tenant's improper use thereof.

4.3 Indemnity. To indemnify and save Landlord harmless from all claims, actions, damages, liability, cost or expense whatsoever arising or resulting from (i) any injury or damage to any person or property on the Premises or sidewalks or ways adjacent thereto, or otherwise arising directly or resulting directly from the use and maintenance and occupancy of the Premises, or any part thereof, by Tenant, (ii) any violation of this Lease by Tenant; or (iii) any act, omission or misconduct of Tenant, its agents, contractors, employees, licensees, subtenants or invitees.

4.4 Personal Property at Tenant's Risk. To the extent permitted by law, all merchandise, furniture, fixtures, effects and property of every kind, nature and description belonging to Tenant or to any persons claiming through or under Tenant, which may be on the Premises at any time, shall be at the sole risk and hazard of Tenant, and if the whole or any part thereof shall be destroyed or damaged by fire, water or otherwise, by theft or from any other cause, no part of said loss or damage is to be charged to or be borne by Landlord, except, however, in the event said loss or damage is attributable to Landlord's gross negligence or willful misconduct.

4.5 Assignment and Subletting. Not to assign or sublet this Lease, except to an "Affiliate" (as hereinafter defined), without first obtaining on each occasion the written consent of Landlord, which shall not be unreasonably withheld. No assignment or subletting shall in any way impair the continuing primary liability of Tenant hereunder, and no consent to any assigning or subletting in a particular instance shall be deemed to be a waiver of the obligation to obtain the Landlord's approval in the case of any other assignment or subletting. Notwithstanding the foregoing, Tenant may assign this Lease or sublet all or any part of the Premises to an Affiliate without Landlord's prior consent, but Tenant shall give Landlord prompt written notice of such assignment or subletting. For purposes of this Lease, an "Affiliate" of Tenant shall be a person (i) controlled by, controlling or under common control with Tenant, (ii) with whom or into whom Tenant is merged (regardless of whether Tenant is the surviving person after such merger), or (iii) acquiring all or substantially all of Tenant's assets and business operations for which the facilities located in the Premises are used by Tenant. An equipment collocation agreement with one or more carriers will not be considered an assignment or subletting by Tenant.

4.6 Compliance with Law. At Tenant's sole cost and expense, to conform to and comply with all zoning, building, environmental, fire, health and other codes, regulations, ordinances or laws.

4.7 Landlord's Right to Enter. To permit Landlord and Landlord's representatives to enter into and examine the Premises and show them to prospective purchasers, tenants and mortgagees at any reasonable time upon prior notice, subject, however, to Tenant's right to require that any such person entering the Premises be accompanied by a representative of Tenant as a condition of permitting entry into any secured area, except in the event of an emergency.

4.8 Expiration. At the expiration of the Term or upon earlier termination of this Lease:

(i) to remove such of Tenant's goods and effects as are not permanently affixed to the Premises;

(ii) to repair any damage caused by such removal; and

(iii) peaceably to yield up the Premises and all previously approved alterations and additions thereto in the same order and repair as they were in at the beginning of the Term of this Lease or were put in during the Term hereof, reasonable use and wear and damage by fire or casualty insured against only excepted.

Tenant shall indemnify and hold Landlord harmless against any loss, cost or damage resulting from the failure and delay of Tenant or anyone claiming by or through it to surrender the Premises as provided in this Section.

4.9 Use. To use the Premises only for the Permitted Uses, and not to cause, permit or suffer the emission of objectionable odors, fumes, noise or vibration from the Premises. Landlord makes no representation or warranty that the use of the Premises for the Permitted Uses is allowed by local zoning or other bylaws, and any permits for such use shall be the exclusive responsibility of Tenant.

4.10 Additions or Alterations. Not to make or permit any installations, alterations or additions in, to or on the Premises over Twenty-Five Thousand Dollars ($25,000.00) without the prior written consent of Landlord in each instance. Landlord expressly consents to Tenant's initial alterations and improvements to the Premises required for the Permitted Use, at Tenant's sole expense, including, without limitation, build out of the Premises and installation of Tenant's fixtures and equipment required for the Permitted Use, increasing the electric service to the Building to 2000 amps, installation of an FM200/Preaction fires suppression system in the Premises, installation by Tenant of an emergency generator and fuel source for the support of Tenant's Premises only, and placement of redundant fiber optic connections from the Premises to the public right of way.

4.11 Signs. Not to place or paint on the Premises or anywhere in the Building any placard or sign which is visible from the exterior of the Premises.

4.12 Loading and Nuisance. Not to injure, overload, deface, or permit to be injured, overloaded or defaced, the Premises or the Building, and not to permit, allow or suffer any waste or any unlawful, improper or offensive use of, or the accumulation of trash or debris on the Premises, or any occupancy thereof that shall be injurious to any person or property, or invalidate or increase the premiums for any insurance on the Building.

4.13 Tenant's Work. To procure at Tenant's sole expense all necessary permits and licenses before undertaking any work on the Premises expressly permitted by Landlord hereunder; to do all such work in a good and workmanlike manner, employing materials of good quality and so as to conform with all applicable zoning, building, environmental, fire, health and other codes, regulations, ordinances and laws; to pay promptly when due the entire cost of any work on the Premises undertaken by Tenant, so that the Premises shall at all times be free of liens of labor and materials; to employ for such work one or more responsible contractors; to

save Landlord harmless and indemnified from all injury, loss, claims or damage to any person or property occasioned by or growing out of such work; and to provide copies of as built plans of such work to Landlord upon completion. If any construction of tenant improvements is necessary for the continued occupancy of the Premises, such construction shall be accomplished and the cost of such construction shall be borne by Tenant in accordance with a separate "Leasehold Improvements Agreement" (herein so called) between Landlord and Tenant, set forth as Exhibit "D" and made a part hereof. Landlord shall have the right to post notices of non-responsibility in or on the Premises as provided by law. Notwithstanding the foregoing, Landlord shall be responsible for any structural latent defects in the Premises, at Landlord's expense. Landlord, at Landlord's expense, shall maintain or cause to be maintained, repaired and replaced in good order, condition and repair, structure, exterior walls and load-bearing columns of the Building.

4.14 Condition of the Premises. Landlord is not obligated to and shall not make any improvements to the Premises. Notwithstanding the foregoing, Landlord agrees to replace the roof and to construct and perform all necessary seismic work and repairs to the Building to render the Building and the Premises structurally sound in accordance with applicable building and safety codes at Landlord's sole cost and expense on or before August 31, 2000. In addition, Landlord represents and warrants that the roof is in good order and repair and the roof structure is sound. After completion of Landlord's work, Tenant understands and acknowledges that the Premises are leased without any further improvements or alterations thereto and in "as-is" condition. Except as set forth above, Tenant has inspected the Premises and has found the Premises' current state of repair, condition and maintenance to be acceptable to Tenant without further improvements by Landlord and, subject to the completion of Tenant's Work, to be sufficient for Tenant's use and occupancy.

4.15 Personal Property Taxes. Tenant shall pay prior to delinquency all taxes assessed against and levied upon Tenant owned alterations and utility installations, trade fixtures, furnishings, equipment and all personal property to be assessed and billed separately from the real property of Landlord. If any such of Tenant's property shall be assessed with Landlord's real property, Tenant shall pay Landlord the taxes attributable to Tenant's property within 10 days after receipt of a written statement setting forth the taxes applicable to Tenant's property.

4.16 Hazardous Substances. Tenant shall not manufacture, store, use, handle or dispose of any substance which is designated as a hazardous or toxic substance or waste under applicable federal or state law at the Premises, except in accordance with the statutes, rules and regulations governing the manufacture, storage, use, handling or disposition of such substance. Tenant shall be responsible for any and all costs, losses, damages, fines, penalties, and other expenses relating to the manufacture, storage, use, handling or disposition of any such hazardous or toxic substance at the Premises by Tenant or any employee, agent or contractor of Tenant.

ARTICLE V

5.1 Casualty or Taking; Termination. In the event that the Premises, or any part thereof, shall be taken by any public authority or for any public use, or shall be destroyed or

damaged by fire or casualty, or by the action of any public authority, and Landlord elects not to restore the Building or the Premises and so notifies Tenant, then either Landlord or Tenant may elect to terminate this Lease. Such election shall be made by the electing party giving written notice of its election to the other party within ninety (90) days after the right of election accrues.

5.2 Restoration. If this Lease is not terminated pursuant to Section 5.1 above, this Lease shall continue in force and a just proportion of the rent reserved, according to the nature and extent of the damages sustained by the Premises shall be abated until the Premises, or what may remain thereof, shall be put by Landlord in proper condition for use to the extent permitted by the net proceeds of insurance recovered or damages awarded for such taking, destruction or damage, and subject to zoning and building laws and ordinances then in existence. "Net proceeds of insurance recovered or damages awarded" refers to the gross amount of such insurance or damages less the reasonable expenses of Landlord in connection with the collection of the same, including without limitation, fees and expenses for legal and appraisal services.

5.3 Award. Irrespective of the form in which recovery may be had by law, all rights to damages or compensation for the Premises shall belong to Landlord in all cases. Tenant hereby grants to Landlord all of Tenant's rights to such damages and covenants to deliver such further assignments or endorsements as Landlord may from time to time request. Notwithstanding the foregoing, Tenant may seek a separate award from the condemning authority for Tenant's relocation damages.

ARTICLE VI

6.1 Events of Default; Remedies. If (a) Tenant shall default in the performance of any of its monetary obligations under this Lease, and if such default shall continue for ten (10) days after written notice from Landlord to Tenant or (b) if within fifteen (15) days after written notice from Landlord to Tenant specifying any other default or defaults, Tenant has not commenced diligently to correct such default or has not thereafter diligently pursued such correction to completion, or (c) if any assignment shall be made by Tenant for the benefit of creditors, or if a petition is filed by or against Tenant under any provision of the Bankruptcy Code and, in the case of an involuntary petition, such petition is not dismissed within ninety (90) days, or (d) if the Tenant's leasehold interest shall be taken on execution or by other process of law, attached or subjected to any other involuntary encumbrance, then and in any of such cases Landlord and its agents and servants may lawfully, immediately or at any time thereafter, and without further notice or demand, and without prejudice to any other remedies available to Landlord for arrearages of rent or otherwise, either (i) enter into and upon the Premises or any part thereof, in the name of the whole, and repossess the same as of Landlord's former estate or (ii) mail a notice of termination addressed to Tenant at the Premises, and upon such entry or mailing this Lease shall terminate. In the event that this Lease is terminated under any of the foregoing provisions, or otherwise for breach of Tenant's obligations hereunder, Tenant covenants to pay forthwith to Landlord as compensation the total rent reserved for the residue of the Term. In calculating the rent reserved there shall be included the value of all other consideration agreed to be paid or performed by Tenant for such residue of the Term.

Tenant further covenants as an additional and cumulative obligation after any such

termination or entry to pay punctually to Landlord all the sums and perform all the obligations which Tenant covenants in this Lease to pay and to perform in the same manner and to the same extent and at the same times as if this Lease had not been terminated. In calculating the amounts to be paid by Tenant under the foregoing covenant, Tenant shall be credited with any amount actually paid to Landlord as compensation as hereinbefore provided and also with any additional rent actually obtained by Landlord by reletting the Premises after deducting the expenses of collecting the same.

Nothing herein contained shall, however, limit or prejudice the right of Landlord to prove for and obtain in proceedings for bankruptcy or insolvency or reorganization or arrangement with creditors as liquidated damages by reason of such determination an amount equal to the maximum allowed by any statute or rule of law in effect at the time when, and governing the proceedings in which, such damages are to be proved, whether or not such amount be greater than, equal to, or less than the amounts referred to above.

6.2 Landlord's Right to Cure. If Tenant remains in default at the expiration of the time periods specified in Section 6.1(a) or 6.1(b), Landlord shall have the right to perform such obligation. All sums so paid by Landlord and all necessary incidental costs and expenses in connection with the performance of any such act by Landlord shall be deemed to be Additional Rent under this Lease and shall be payable to Landlord immediately on demand. Landlord may exercise the foregoing rights without waiving or releasing Tenant from any of its obligations under this Lease.

ARTICLE VII

7.1 Effect of Waivers of Default. Any consent or permission by Landlord to any act or omission which otherwise would be a breach of any covenant or condition herein, or any waiver by Landlord of the breach of any covenant or condition herein, shall not in any way be construed to operate so as to impair the continuing obligation of any covenant or condition herein.

7.2 No Accord and Satisfaction. No acceptance by Landlord of a lesser sum than the Fixed Rent, Additional Rent and any other charge then due shall be deemed to be other than on account of the earliest installment of rent then due, and Landlord may accept such payment without prejudice to Landlord's right to recover the balance of such installment or pursue any other remedy available to Landlord.

7.3 Subordination; Non-Disturbance. This Lease shall be subordinate to any mortgage now or hereafter placed upon the Premises by Landlord, and to each advance made or to be made under any such mortgage. Tenant agrees to execute and deliver any appropriate instruments necessary to confirm such subordination. Tenant's agreement to subordinate to any future mortgage is conditioned upon Tenant receiving from the holder of the lien of such mortgage assurances (a "non-disturbance agreement") that Tenant's possession and this Lease, including any options to extend the term thereof, shall not be disturbed so long as Tenant is not in breach hereof and attorns to the record holder of the Premises. Landlord agrees to use its best efforts to obtain from any existing a non-disturbance agreement from such mortgagee in favor of Tenant.

7.4 Successors and Assigns. This Lease shall be binding upon Landlord and Tenant and their respective successors and permitted assigns. Tenant agrees that the Landlord named herein and any subsequent Landlord shall be liable hereunder only for obligations accruing while owner of the Premises. No holder of a mortgage of the Landlord's interest shall be deemed to be the owner of the Premises until such holder shall have acquired indefeasible title to the Premises.

7.5 Quiet Enjoyment. Landlord agrees that upon Tenant's paying the rent and performing and observing the agreements and conditions herein on its part to be performed and observed, Tenant shall and may peaceably and quietly have, hold and enjoy the Premises during the Term hereof without any manner of hindrance or molestation from Landlord or anyone claiming under Landlord, subject, however, to the terms of this Lease.

7.6 Notices. All notices for Landlord shall be addressed to Landlord at the address of Landlord set forth above, or to such other place as may be designated by written notice to Tenant; and all notices for Tenant shall be addressed to Tenant at the Premises, with a copy in each instance addressed to RCN Corporation, 105 Carnegie Center, Princeton, New Jersey 08540, Attn: General Counsel, or to such other place as may be designated by written notice to Landlord. Any notice shall be deemed duly given when mailed to such address postage prepaid registered or certified mail, return receipt requested, or when delivered to such address by hand or by national overnight courier service.

7.7 Broker. Landlord and Tenant represent and warrant each to the other that it has had no dealings, negotiations, or consultation with, nor employed any broker or other intermediary with respect to this Lease and each shall hold harmless the other from any claim for brokerage or other commission arising from any breach of or misrepresentation contained in the foregoing warranty.

7.14 Holding Over. In the event Tenant or anyone claiming through Tenant shall retain possession of the Premises or any portion thereof after the termination or expiration of this Lease, such holding over shall be as a tenant at sufferance at an occupancy and use charge equal to 150 percent (150%) of the Fixed Rent and any Additional Rent due hereunder for the last month of the Term, and otherwise subject to all of the covenants and conditions of this Lease. The period of holding over shall not exceed two (2) months.

7.9 Environmental Matters. Landlord represents and warrants that to its best knowledge, there are no "hazardous wastes" or "hazardous substances" on or under the Land or the Building or within the Premises. Landlord shall be responsible for and shall indemnify Tenant against any loss, cost or damage resulting from the presence of any such hazardous wastes or substances on or under the Land or Building or within the Premises on or before the date of execution of this Lease, or resulting from any act or omission of Landlord, its employees, agents or contractors after the date of such execution. Tenant shall indemnify and hold Landlord harmless against any loss, cost or damage resulting from presence of any such hazardous wastes or substances on or under the Land or Building or within the Premises after the date of execution of this Lease resulting from any act or omission of Tenant, its employees, agents or contractors.

7.10 Applicable Law. This Lease, and the rights and obligations of the parties hereto,

shall be construed and enforced in accordance with the laws of the State of California. The parties agree that the proper and exclusive venue for any legal disputes arising out of this Lease shall be the federal or state courts sitting in or having jurisdiction over San Francisco County, California. In the event of any legal dispute pertaining to this Lease, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees incurred in connection therewith.

7.11 Partial Invalidity. If any term of this Lease, or the application thereof to any person or circumstances, shall to any extent be invalid or unenforceable, the remainder of this Lease, or the application of such term to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term of this Lease shall be valid and enforceable to the fullest extent permitted by law.

7.12 All Agreements Contained. This Lease contains all the agreements of the parties with respect to the subject matter thereof and supersedes all prior dealings between them with respect to such subject matter.

7.13 Waiver of Subrogation. All insurance which is carried by either party with respect to the Premises or to furniture, furnishings, fixtures or equipment therein or alterations or improvements thereto, whether or not required, if either party so requests and it can be so written, and if it does not result in additional premium, or if the requesting party agrees to pay any additional premium, shall include provisions which either designate the requesting party as one of the insured or deny to the insurer acquisition by subrogation of rights of recovery against the requesting party to the extent such rights have been waived by the insured party prior to occurrence of loss or injury. The requesting party shall be entitled to have duplicates or certificates of any policies containing such provisions. Each party hereby waives all rights of recovery against the other for loss or injury against which the waiving party is protected by insurance containing said provisions, reserving, however, any rights with respect to any excess of loss or injury over the amount recovered by such insurance.

7.14 Keys. Tenant agrees to notify Landlord if Tenant replaces or changes the lock on any exterior door to the Premises and to provide Landlord with copies of keys to any such lock prior to or upon its installation.

7.15 Estoppel Certificate. From time to time, upon prior written request by Landlord, Tenant shall execute, acknowledge and deliver to Landlord a statement in writing certifying that this Lease is unmodified and in full force and effect and that Tenant has no defenses, offsets or counterclaims against its obligations to pay the Rent and any other charges and to perform its other covenants under this Lease, except as otherwise disclosed in such writing.

7.16 Sale by Landlord. If Landlord sells or conveys the Premises and/or the Building, the same shall operate to release Landlord from any future liability upon any of the covenants or conditions, express or implied, herein contained in favor of Tenant, and in such event, Tenant agrees to look solely to the responsibility of the successor in interest of Landlord in and to this Lease, but such relief shall not extend to obligations of Landlord arising prior to such transfer or assignment unless the successor landlord specifically undertakes to perform such obligations in a

writing provided to Tenant in form and substance reasonably satisfactory to Tenant. Notwithstanding the foregoing, if Landlord sells or conveys the Premises and/or Building, this Lease shall not be terminated nor shall the rights and possession of Tenant hereunder be disturbed if Tenant shall not then be in default in the payment of rental or other sums or be otherwise in default under the terms of this Lease. Upon a sale of the Premises and/or Building by Landlord, Tenant agrees to attorn to the purchaser or assignee, such attornment to be effective and self-operative without the execution of any further instruments by the parties to this Lease.

7.17 Authority. If Tenant signs as a corporation or partnership, each of the persons executing this Lease on behalf of Tenant does hereby covenant and warrant that Tenant is a duly authorized and existing entity, that Tenant has and is qualified to do business in California, that Tenant has full right and authority to enter into this Lease, and that each and both of the persons signing on behalf of Tenant are authorized to do so. Upon Landlord's request, Tenant shall provide Landlord with evidence reasonably satisfactory to Landlord confirming the foregoing covenants and warranties.

7.18 Surrender Not Merger. The voluntary or other surrender of this Lease by Tenant, or a mutual cancellation thereof, shall not work a merger, and shall, at the option of Landlord, terminate all or any existing subleases or subtenancies, or may, at the option of Landlord, operate as an assignment to it of any or all such subleases or subtenancies.

7.19 Nonrecourse. The obligations of Landlord under this Lease and any liability resulting therefrom are not personal obligations of Landlord, its officers, agents or employees and Tenant shall look solely to Landlord's interest in the Premises for satisfaction of any liability arising out of or relating to such obligations.

7.20 Attorneys' Fees. If any action or proceeding is commenced by either party to enforce their rights under this Lease or to collect damages as a result of the breach of any of the provisions of this Lease, the prevailing party in such action or proceeding, including any bankruptcy, insolvency or appellate proceedings, shall be entitled to recover all reasonable costs and expenses, including, without limitation, reasonable attorneys' fees and court costs, in addition to any other relief awarded by the court.

7.21 Captions. Captions are for convenience only and do not constitute a part of this Lease.

EXECUTED as a sealed instrument as of the day and year first above written.

Landlord:

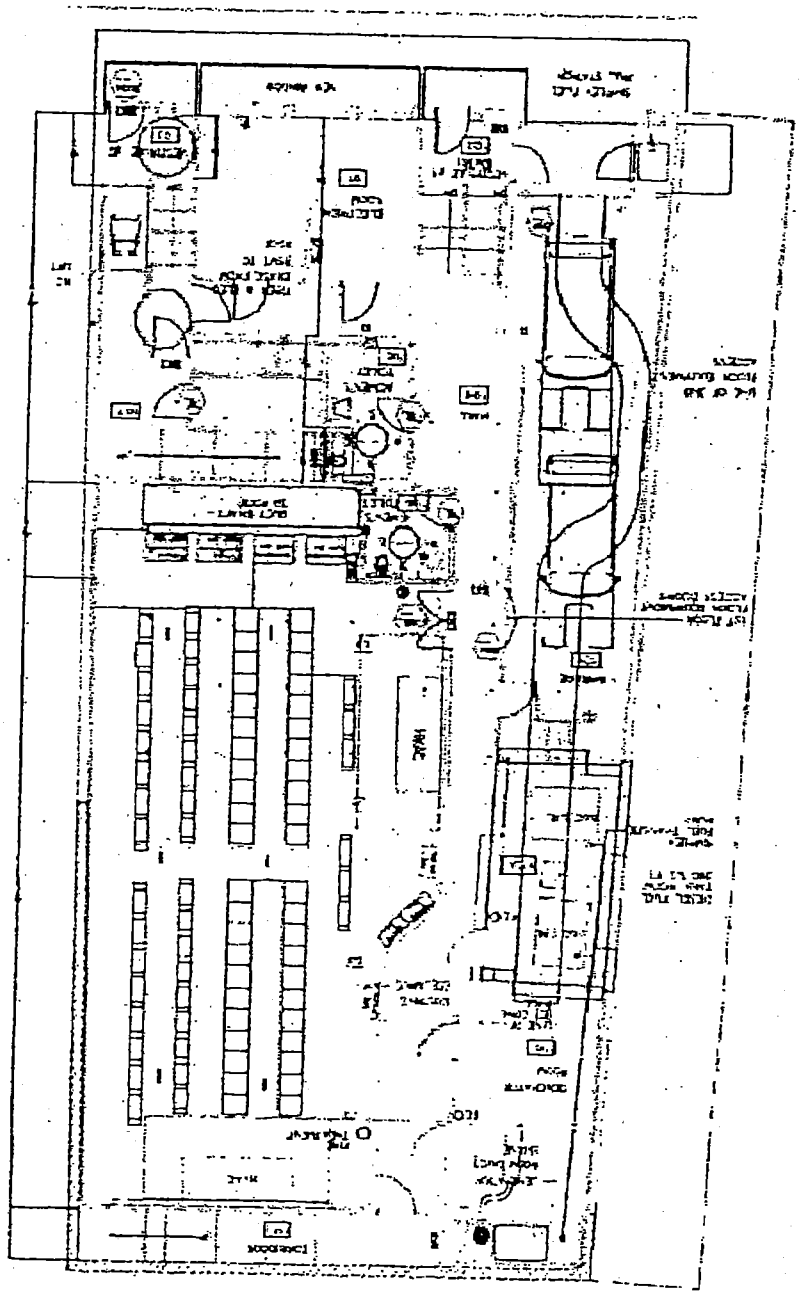
F. W. Spencer & Son, Inc., a California corporation

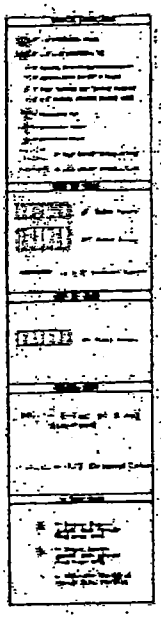
By: _____
Name: W. SPENCER
Title: PRESIDENT

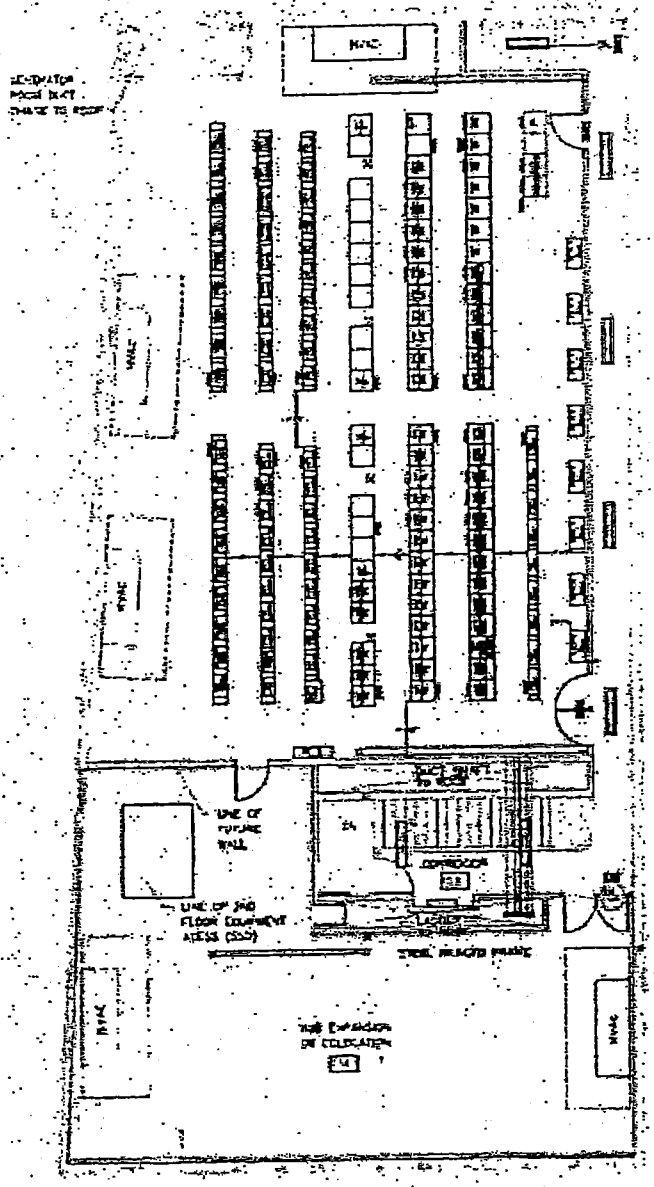
Tenant:

RCN Telecom Services of California, Inc.

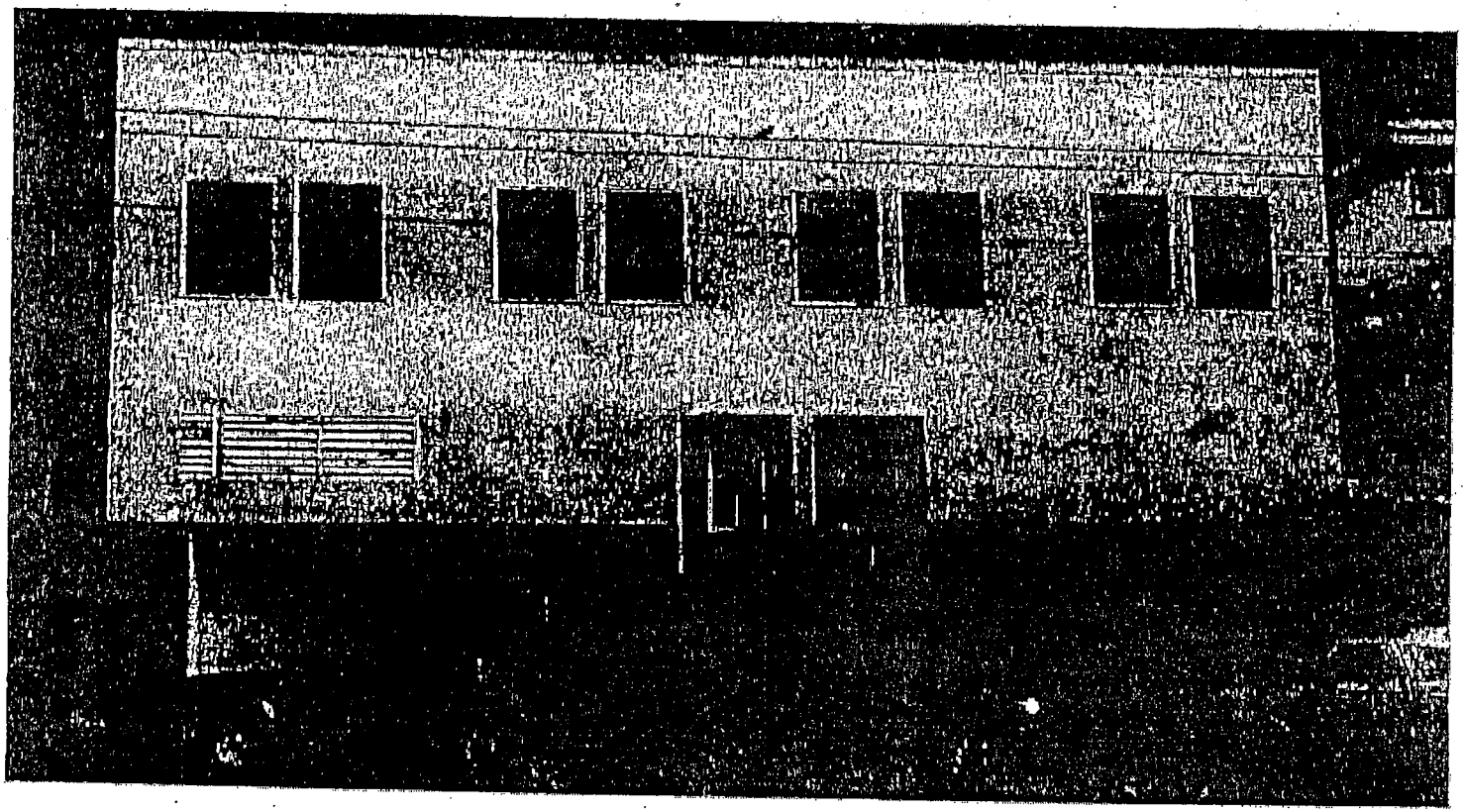
By: _____
Name: Timothy J Stoklosa
Title: Exec Vice President & CFO



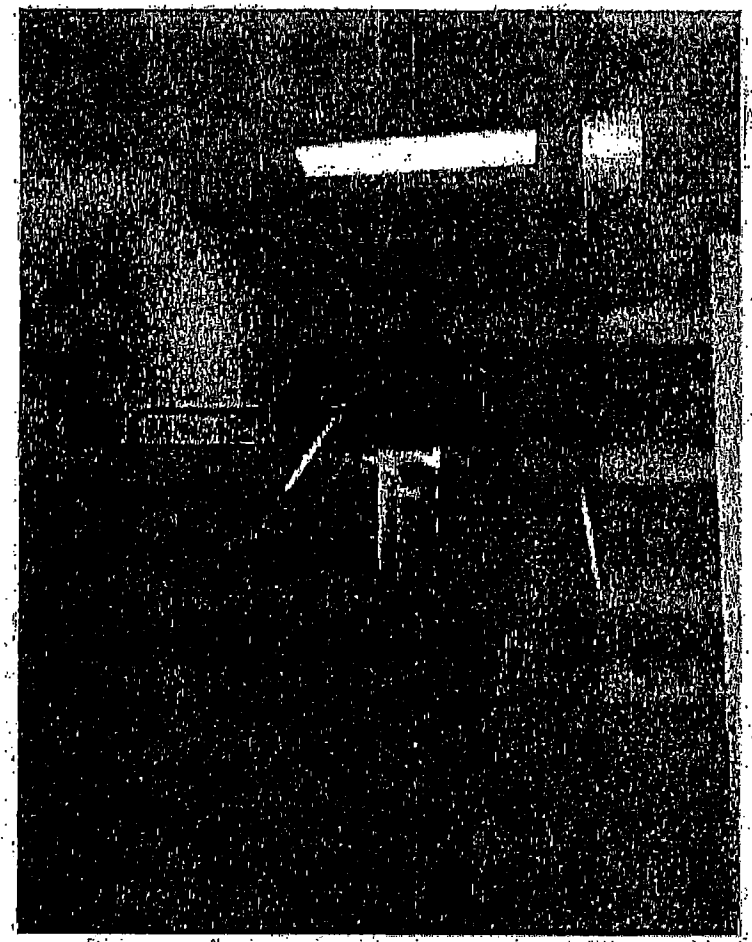




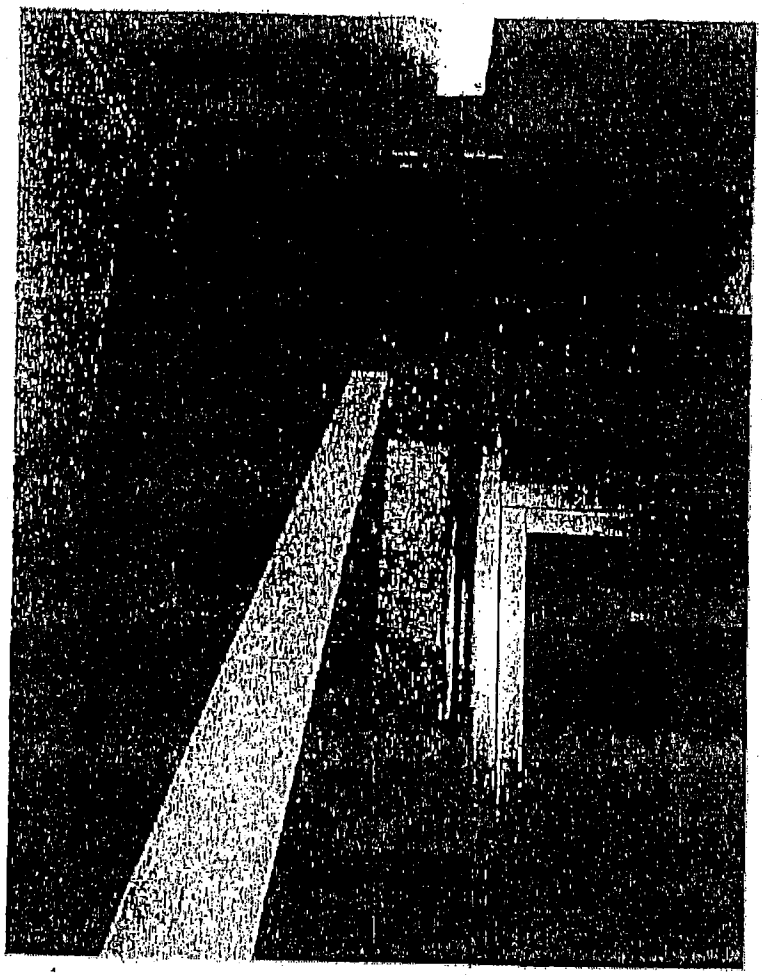
Exterior



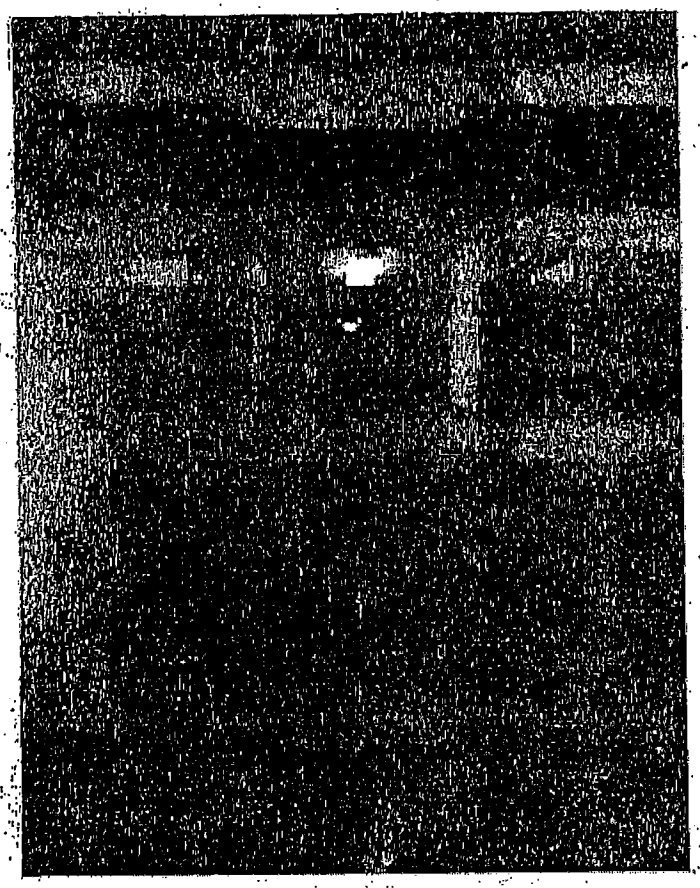
437 Potrero Interior Entrance



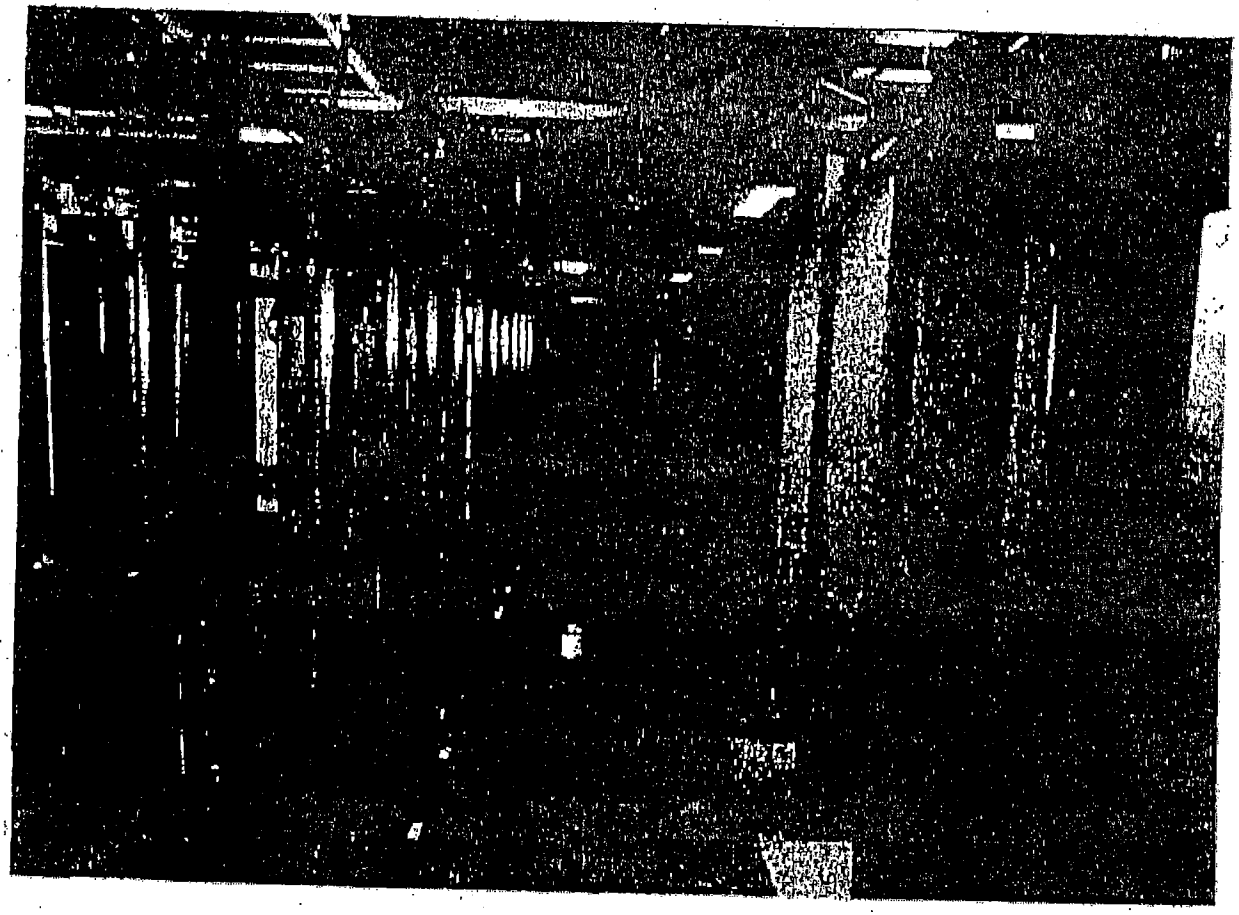
435 Potrero Interior Entrance



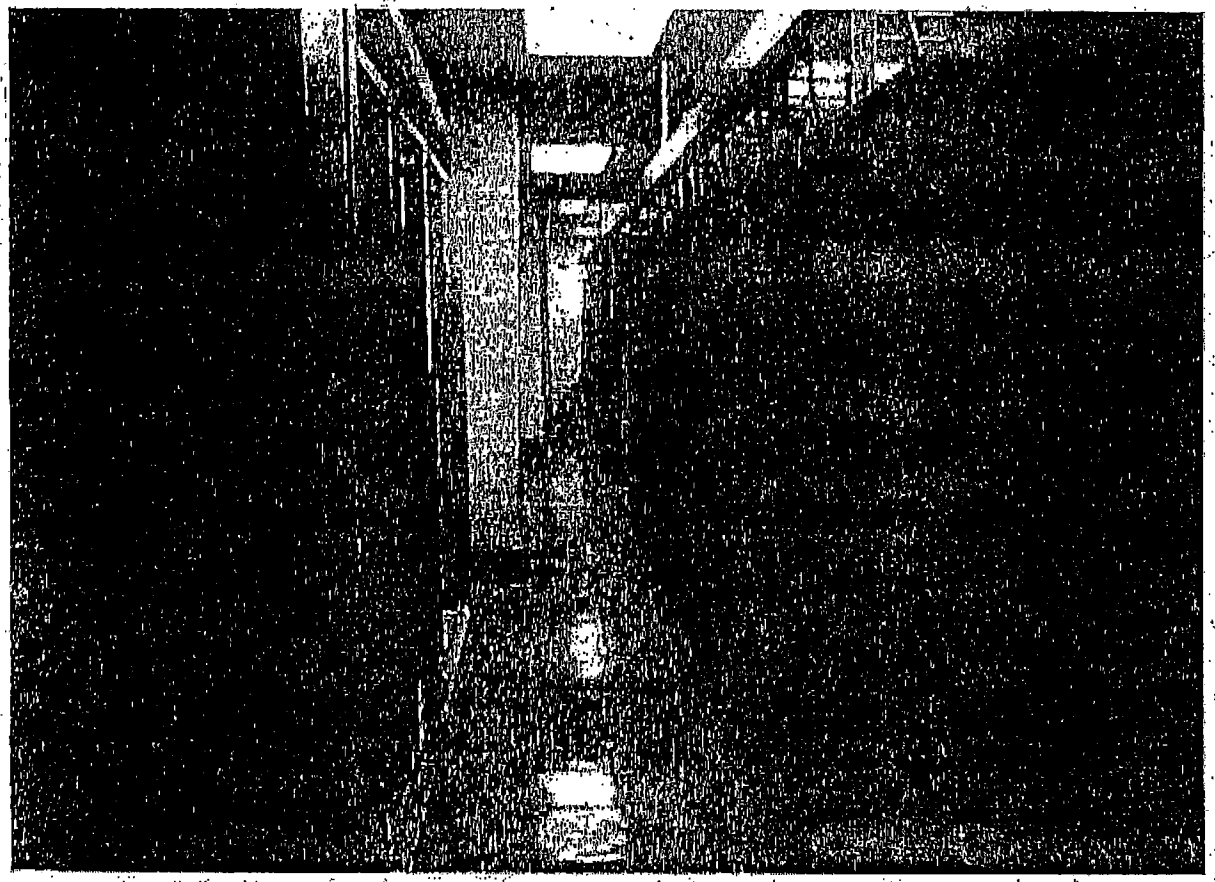
435 Potrero Interior Entrance



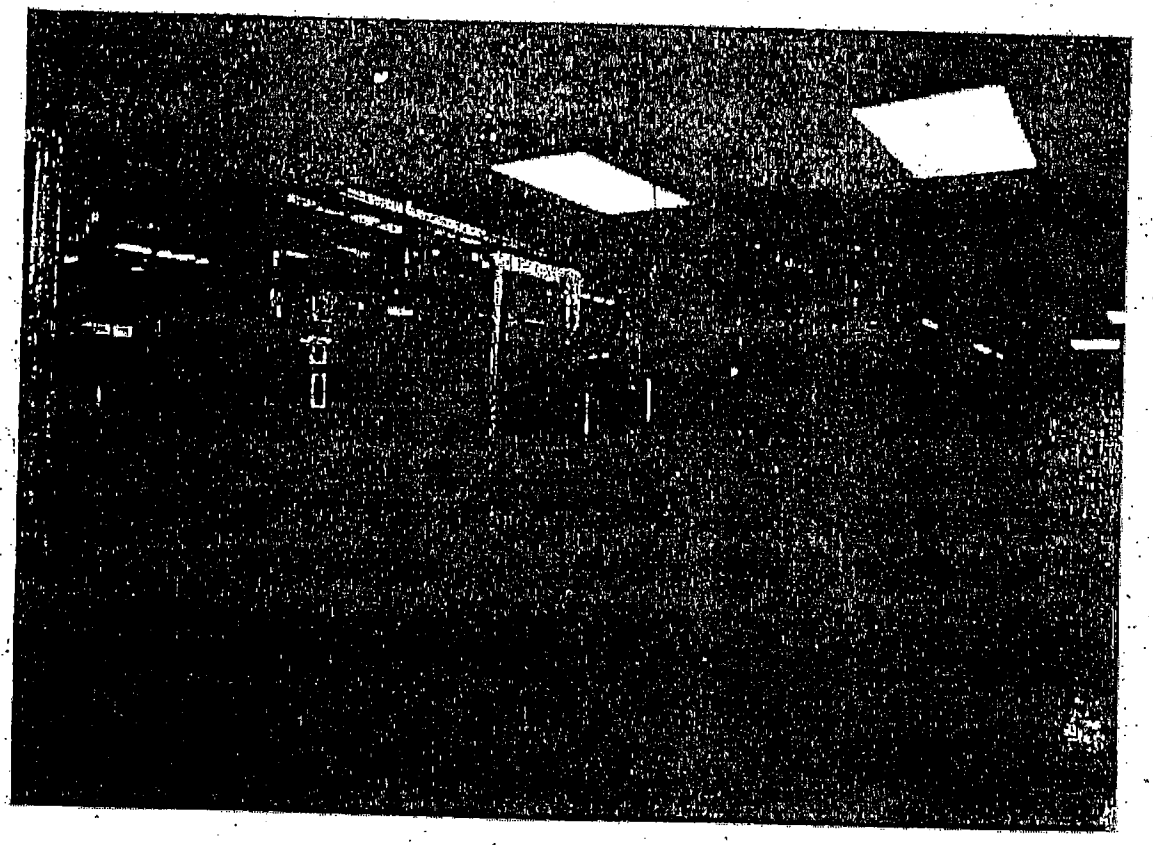
First Floor Data Room



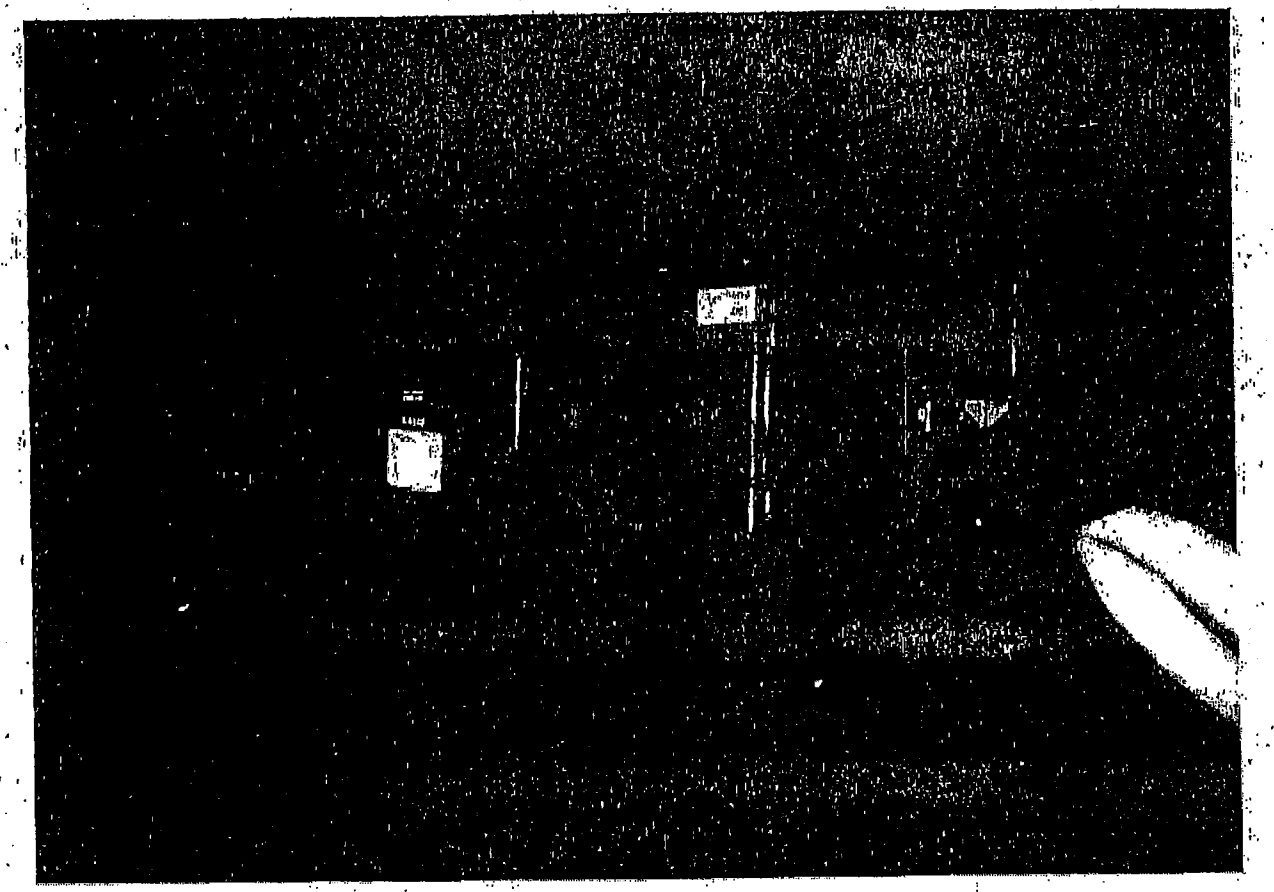
First Floor Data Room



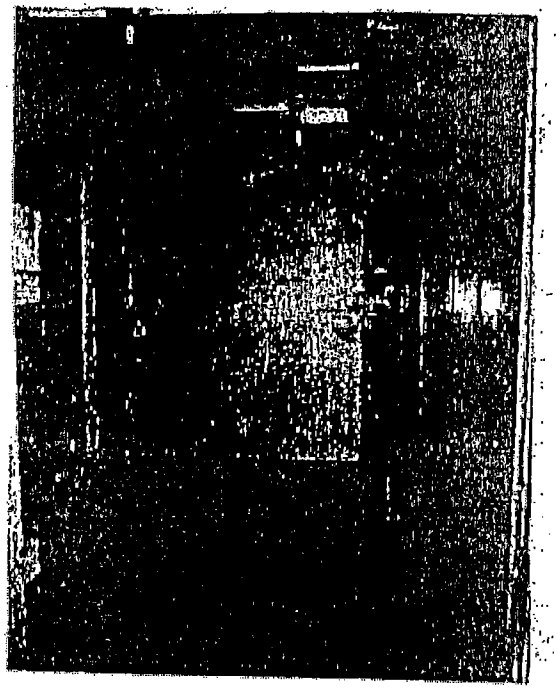
Second Floor Data Room

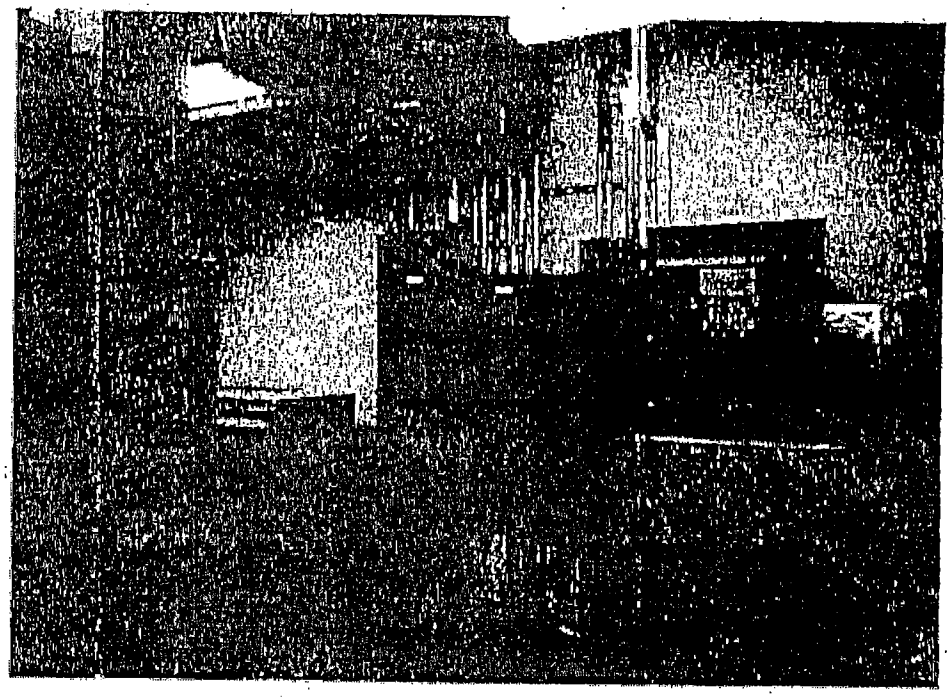


PG&E Transformer



Electrical Room





City & County of San Francisco
BOARD OF APPEALS

Date Filed: BOARD OF APPEALS
JUL 25 2013
~~APPEAL #~~ JR

JURISDICTION REQUEST

Date of request: July 25, 2013.

Mica Ringel, (requestor(s)) hereby seeks a new appeal period for the following departmental action: ISSUANCE of LETTER OF LEGIMIZATION by Zoning Administrator, issued to: F.W. Spencer & Son Incorporated c/o David Silverman @ Reuben, Junius & Rose LLP, for property at 435-437 Potrero Avenue, that was issued or became effective on June 04, 2013, and for which the appeal period ended at close of business on June 19, 2013.

Your Jurisdiction Request will be considered by the Board of Appeals on Wednesday, August 14, 2013 at 5:00 p.m. City Hall, Room 416, One Dr. Carlton B. Goodlett Place.

Pursuant to Article V, § 10 of the Board Rules, the RESPONSE to the written request for jurisdiction must be submitted by the permit, variance, or determination holder(s) and/or department(s) no later than Letter of Legitimization Holder days from the date of filing, on or before August 05, 2013, and must not exceed 6 pages in length (double-spaced), with unlimited exhibits. An original and 10 copies shall be submitted to the Board office with additional copies delivered to the opposing parties the same day.

You or your representative MUST be present at the hearing. It is the general practice of the Board that only up to three minutes of testimony from the requestor, the permit holder, and the department(s) will be allowed. Your testimony should focus on the reason(s) you did not file on time, and why the Board should allow a late filing in your situation.

Based upon the evidence submitted and the testimony, the Board will make a decision to either grant or deny your Jurisdiction Request. Four votes are necessary to grant jurisdiction. If your request is denied, an appeal may not be filed and the decision of the department(s) is final. If your request is granted, a new five (5) day appeal period shall be created which ends on the following Monday, and an appeal may be filed during this time.

Please Print:

Name: Mica Ringel

Address: 405 Potrero Ave #C

Phone: 415 519 7523

Email: supermica@gmail.com

Signature of Requestor or Agent

City and County of San Francisco

Board of Appeals

July 25, 2013

F.W. Spencer & Son Inc., Subject Prop. Owner
c/o David Silverman, Attorney for Subject Prop. Owner
One Bush Street #600
San Francisco, CA 94104

Re:	**JURISDICTION REQUEST**
Date Filed:	**July 25, 2013**
Departmental Action:	**Issuance of Letter of Legitimization by ZA**
Subject Property:	**435-437 Potrero Avenue**

Dear Sir or Madam:

The Board of Appeals has received the enclosed letter requesting that it take jurisdiction beyond the fifteen (15)-day appeal period for the matter(s) referenced above. This ***JURISDICTION REQUEST*** has been scheduled for consideration on ***Aug. 14, 2013***, ***at City Hall, Room 416, at 5:00 pm***; One Dr. Carlton B. Goodlett Place.

Please note that the filing of a Jurisdiction Request ***DOES NOT*** suspend the above-referenced departmental action. However, if the Board grants the Jurisdiction Request on the above – referenced date of consideration (4 out of 5 votes required), ***a new five (5) - day appeal period shall be created which ends on the following Monday,*** and the subject departmental action shall then be suspended upon the filing of a formal appeal, and until the Board of Appeals decides the matter and releases a notice of decision and order.

Pursuant to Article V, § 10 of the Board Rules, the RESPONSE to the written request for jurisdiction must be submitted by the permit/variance/determination holder(s) or Department no later than 10 days from the date of filing, on or before Aug. 05, 2013, and must not exceed 6 pages in length, with unlimited exhibits. An original and 10 copies shall be submitted to the Board office by 4:30pm, with additional copies delivered to the opposing parties the same day. It is the general practice of the Board that only up to three (3) minutes of testimony for each party will be allowed. If you have any questions, please call (415) 575-6880.

Sincerely,

BOARD STAFF

cc: ZA Scott Sanchez, Staff Planner & Requestor(s) w/o enclosures

Mica Ringel, Requestor
485 Potrero Ave, Unit C
San Francisco, CA 94110

B4083

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Plant# 21731 Page: 1 Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

Arman Khalili
ICDC LLC
One Sansome St, 15th floor
San Francisco, CA 94104

Location: 437 Potrero Street
San Francisco, CA 94110

S#	DESCRIPTION	[Schedule]	PAID
1	Standby Diesel engine, 519 hp, Caterpillar S/N 4ZRD6880 Generator Emissions at: P1 Stack	[B,1096 days]	559

1 Permit Source, 0 Exempt Sources

*** See attached Permit Conditions ***

The operating parameters described above are based on information supplied by permit holder and may differ from the limits set forth in the attached conditions of the Permit to Operate. The limits of operation in the permit conditions are not to be exceeded. Exceeding these limits is considered a violation of District regulations subject to enforcement action.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

*** PERMIT CONDITIONS ***

COND# 22820 *applies to S# 1*

1. The owner/operator shall not exceed 20 hours per year per engine for reliability-related testing. [Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

2. The owner/operator shall operate each emergency standby engine only for the following purposes: to mitigate emergency conditions, for emission testing to demonstrate compliance with a District, State or Federal emission limit, or for reliability-related activities (maintenance and other testing, but excluding emission testing). Operating while mitigating emergency conditions or while emission testing to show compliance with District, State or Federal emission limits is not limited. [Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

3. The owner/operator shall operate each emergency standby engine only when a non-resettable totalizing meter (with a minimum display capability of 9,999 hours) that measures the hours of operation for the engine is installed, operated and properly maintained. [Basis: Title 17, California Code ofRegulations, section 93115, ATCM for Stationary CI Engines]

4. Records: The owner/operator shall maintain the following monthly records in a District-approved log for at least 36 months from the date of entry (60 months if the facility has been issued a Title V Major Facility Review Permit or a Synthetic Minor Operating Permit). Log entries shall be retained on-site, either at a central location or at the engine's location, and made immediately available to the District staff upon request.
   a. Hours of operation for reliability-related activities (maintenance and testing).
   b. Hours of operation for emission testing to show compliance with emission limits.
   c. Hours of operation (emergency).
   d. For each emergency, the nature of the emergency condition.
   e. Fuel usage for each engine(s).

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
939 ELLIS STREET
SAN FRANCISCO, CALIFORNIA 94109
(415) 771-6000

PERMIT TO OPERATE

Expires: MAR 1, 2014

This document does not permit the holder to violate any District regulation or other law.

*** PERMIT CONDITIONS ***

[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

5. At School and Near-School Operation:
If the emergency standby engine is located on school grounds or within 500 feet of any school grounds, the following requirements shall apply:

The owner/operator shall not operate each stationary emergency standby diesel-fueled engine for non-emergency use, including maintenance and testing, during the following periods:

a. Whenever there is a school sponsored activity (ifthe engine is located on school grounds)
b. Between 7:30 a.m. and 3:30 p.m. on days when school is in session.

"School" or "School Grounds" means any public or private school used for the purposes of the education of more than 12 children in kindergarten or any of grades 1 to 12, inclusive, but does not include any private school in which education is primarily conducted in a private home(s). "School" or "School Grounds" includes any building or structure, playground, athletic field, or other areas of school property but does not include unimproved school property.

[Basis: Title 17, California Code of Regulations, section 93115, ATCM for Stationary CI Engines]

END OF CONDITIONS

Bay Area Air Quality Management District

** SOURCE EMISSIONS **

PLANT #21731
Mar 14, 2013

S#	Source Description	Annual Average lbs/day PART	ORG	NOx	SO2	CO
1	Generator	-	-	.08	-	.02
	T O T A L S			.08		.02

BAY AREA AIR QUALITY MANAGEMENT DISTRICT Printed: DEC 23, 2011
DETAIL POLLUTANTS - ABATED
MOST RECENT P/O APPROVED (2010)

Astound Broadband (P# 19488)

S# SOURCE NAME / MATERIAL THROUGHPUT	SOURCE CODE DATE	POLLUTANT	CODE	LBS/DAY
1. Generator	C22AG098			
		Benzene	41	1.09E-04
		Formaldehyde	124	6.85E-04
		Organics (part not spec el	990	5.29E-03
		Arsenic (all)	1030	9.53E-08
		Beryllium (all) pollutant	1040	5.59E-08
		Cadmium	1070	2.38E-07
		Chromium (hexavalent)	1095	4.93E-09
		Lead (all) pollutant	1140	2.02E-07
		Manganese	1160	3.17E-07
		Nickel pollutant	1180	3.86E-06
		Mercury (all) pollutant	1190	6.74E-08
		Diesel Engine Exhaust Part	1359	5.51E-03
		PAH's (non-speciated)	1840	5.08E-07
		Nitrous Oxide (N2O)	2030	2.93E-05
		Nitrogen Oxides (part not	2990	7.71E-02
		Sulfur Dioxide (SO2)	3990	3.58E-05
		Carbon Monoxide (CO) pollu	4990	1.68E-02
		Carbon Dioxide, non-biogen	6960	3.67E+00
		Methane (CH4)	6970	1.47E-04

print this search?: [L]ocal or s[Y]stem printer (5th flr); [N]o, [E]xit:

BOARD of SUPERVISORS

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco 94102-4689
Tel. No 554-5184
Fax No. 554-5163
TTD/TTY No. 5545227

NOTICE OF PUBLIC HEARING

BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO

NOTICE IS HEREBY GIVEN THAT the Board of Supervisors of the City and County of San Francisco will hold a public hearing to consider the following proposal and said public hearing will be held as follows, at which time all interested parties may attend and be heard:

Date: **Tuesday, September 24, 2013**

Time: **3:00 p.m.**

Location: **Legislative Chamber, Room 250, located at City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102**

Subject: **File No. 130805. Hearing of persons interested in or objecting to the Planning Commission's determination dated July 11, 2013, that the project located at 435-437 Potrero Avenue, Assessor's Block No. 3974, Lot No. 022 is exempt from environmental review under Class 1 of the California Environmental Quality Act (CEQA) Guidelines as a minor alteration to an existing facility; the proposed work involves establishment of an internet services exchange to occupy the entirety of an existing 10,000 square foot building. (District 10) (Appellant: Mica I. Ringel) (Filed August 12, 2013).**

Pursuant to Government Code Section 65009, the following notice is hereby given: if you challenge, in court, the general plan amendments or planning code and zoning map amendments described above, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the Board of Supervisors at, or prior to, the public hearing.

In accordance with Section 67.7-1 of the San Francisco Administrative Code, persons who are unable to attend the hearing on these matters may submit written comments to the City prior to the time the hearing begins. These comments will be made part of the official public record in these matters, and shall be brought to the attention of the Board of Supervisors. Written comments should be addressed to Angela Calvillo, Clerk of the Board, Room 244, City Hall, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102. Information relating to this matter is available in the Office of the Clerk of the Board and agenda information will be available for public review on Friday, September 20, 2013.

Angela Calvillo
Clerk of the Board

DATED: September 13, 2013
MAILED/POSTED: September 13, 2013

Print Form

Introduction Form

By a Member of the Board of Supervisors or the Mayor

Time stamp or meeting date

I hereby submit the following item for introduction (select only one):

☐ 1. For reference to Committee.

An ordinance, resolution, motion, or charter amendment.

☐ 2. Request for next printed agenda without reference to Committee.

☒ 3. Request for hearing on a subject matter at Committee.

☐ 4. Request for letter beginning "Supervisor _____ inquires"

☐ 5. City Attorney request.

☐ 6. Call File No. _____ from Committee.

☐ 7. Budget Analyst request (attach written motion).

☐ 8. Substitute Legislation File No. _____

☐ 9. Request for Closed Session (attach written motion).

☐ 10. Board to Sit as A Committee of the Whole.

☐ 11. Question(s) submitted for Mayoral Appearance before the BOS on _____

Please check the appropriate boxes. The proposed legislation should be forwarded to the following:

☐ Small Business Commission ☐ Youth Commission ☐ Ethics Commission

☐ Planning Commission ☐ Building Inspection Commission

Note: For the Imperative Agenda (a resolution not on the printed agenda), use a Imperative For

Sponsor(s):

Clerk of the Board

Subject:

Public Hearing - Appeal of Determination of Exemption from Environmental Review - 435-437 Potrero Avenue

The text is listed below or attached:

Hearing of persons interested in or objecting to the Planning Commission's determination dated July 11, 2013, that the project located at 435-437 Potrero Avenue, Assessor's Block No. 3974, Lot No. 022 is exempt from environmental review under Class 1 of the California Environmental Quality Act (CEQA) Guidelines as a minor alteration to an existing facility; the proposed work involves establishment of an internet services exchange to occupy the entirety of an existing 10,000 square foot building. (District 10) (Appellant: Mica I. Ringel) (Filed August 12, 2013).

130805

Signature of Sponsoring Supervisor: _____

For Clerk's Use Only: