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Subject:	Fifth Church of Christ, Scientist - 450-474 O"Farrell Street/532 Jones Street Project
Date:	Wednesday, August 25, 2021 7:27:32 PM
Attachments:	Fifth Church of Christ Letter to Board - Final 25Aug2021.pdf

Please find attached submittal regarding:

File No. 210858 – Appeal of Conditional Use Authorization
450-474 O'Farrell Street and 532 Jones Street

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August 25, 2021

Via email: bos.legislation@sfgov.org

San Francisco Board of Supervisors
Angela Calvillo
Clerk of the Board
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San Francisco, CA 94102-4689

Re: **California Housing Law Protections Relating to the 450-474 O'Farrell Street/532 Jones Street Project Application**

Dear Board of Supervisors,

Holland & Knight LLP[1] has been retained to represent Fifth Church of Christ, Scientist (the "Applicant") to ensure its rights under the California housing laws for the project proposed at 450-474 O'Farrell Street/532 Jones Street. The project includes "316 group housing units (632 beds), 172,323 square feet of residential use, including amenities and common areas, 4,900 square feet of open space, 6,023 square feet of restaurant/retail space, and 9,924 square feet for religious institution use (i.e., replacement of the existing church)" (the "Project"). (Addendum 2 to Environmental Impact Report ("Addendum 2"), June 23, 2021, at 3.) The Project's case number is 2013.1535EIA-02.

As outlined in our letter to the Planning Commission ("Commission") dated June 21, 2021 ("June 21, 2021 Letter"), the Project is subject to protections from several of California's housing laws, including the Permit Streamlining Act, Housing Accountability Act and SB 330 (the "Housing Crisis Act of 2019", all of which the Legislature has enacted to ensure the timely construction of housing to combat California's housing crisis.

[1] The Applicant is also represented by David Cincotta as well as Storzer & Associates, P.C. in connection with the Religious Land Use Act and Institutionalized Persons Act.

Summary of June 21, 2021 Letter. The following summarizes the main points in the June 21, 2021 Letter:

- The entitlements and exceptions currently sought were already approved for the previously approved project. The only land use related modification from the original approval requested for the revised Project is for a change to group housing with 316 group housing rooms. The Project is consistent with the standards for group housing in the RC-4 zoning district and all other applicable standards.

- The application was deemed complete on February 28, 2020 under the Permit Streamlining Act, based on our understanding that the Planning Department issued Plan Check Letter No. 1 more than 30 days after the Applicant's submittal, exceeding the 30 day window for completeness review of the Project. The City did not identify any project inconsistencies with objective standards as of April 28, 2020 and so the Project was deemed consistent with objective standards on that date under the Housing Accountability Act.

- As stated in the YIMBY Law Letter, "the Conditional Use Authorization currently being considered certainly falls well within the bounds of the General Plan. Even expanding our view to the project's previous approvals, including specific items within the Planned Unit Development, nothing proposed or adopted is sufficiently outside the scope of the city's general plan to warrant the assessment that the project is not protected by the Housing Accountability Act." As such, the Project does not involve any legislative amendments and, therefore, the Housing Accountability Act applies to the Project (limiting the ability to deny or reduce the Project density) as does the SB 330, including the five hearing maximum.

- The environmental review has been unnecessarily delayed. There is no substantial change to the revised Project that warranted preparation of a second Addendum and no new environmental impacts. The proposed modifications currently include and have always included approximately 300 group housing rooms, acknowledged by the City to represent for planning purposes approximately 600 beds.

The complete June 21, 2021 Letter is included as Attachment 1.

We applaud the Planning Commission for its approval of the Project at the June 24, 2021 hearing. After multiple hearings over the last several months, extensive outreach by the Church and the development team, the Commission incorporated several requested design improvements from the community and the Commission to improve the earlier Conditional Use Approval and refine the permitted group housing.

Summary of Responses to Appeal Letter

After receipt of the July 21, 2021 appeal letter filed by the Tenderloin Housing Clinic and Pacific Bay Inn, Inc. ("July 21, 2021 Appeal Letter") we wish to address certain additional points, as summarized below.

- The Appeal Letter challenges previous actions that were not part of the June 24, 2021 action by the Planning Commission. Specifically, the appeal is based on objections to alleged construction impacts and the authorization for group housing at this site. Nothing however in the action of the Planning Commission affects the previously approved site plan and associated construction impacts, and group housing is a permitted use in this zoning district, requiring no Planning Commission approval

- The Housing Accountability Act and five hearing maximum under SB 330 five hearing maximum still apply in the context of an appeal.

- The potential impacts raised in the Appeal Letter were adequately reviewed in the Environmental Impact Report ("EIR") and, where appropriate, addressed with specific mitigation measures. Any challenge to the EIR or the associated mitigation measures had to have been filed within 30 days of the December 2018 Notice of Determination.

- Procedural issues regarding hearing date underscore the delayed processing that has characterized processing of this Project.

The following provides additional detail.

I. Background

Our June 21, 2021 Letter to Planning Commission (Attachment 1), included an in depth summary in Section I of the relevant background regarding (A) Project processing, (B) application completeness, (C) environmental review, and (D) hearing history. Rather than repeat again, here we reference pages 3-7 in Attachment 1 for relevant background.

II. The Appeal Does Not Address the June 24, 2021 Planning Commission Action

The appeal is based on items that were not at issue in the recent action of the Planning Commission. Despite multiple community meetings and public hearings prior to the original Conditional Use Approval and the opportunity to appeal the original approval, the current appeal is focused on construction impacts associated with actions evaluated and approved in the prior approval, and zoning decisions decided in decision unrelated to this Project. The July 21, 2021 Appeal Letter states that the appeal is based on the following reasons:

> (1) Lack of Due Consideration, Disclosure or Analysis of the Health, Safety and Welfare of the Tenderloin Community and the Adjacent Pacific Bay Inn. The Project did not adequately disclose significant construction and operational impacts to the community.
>
> (2) The Project Is Not Compatible with the Tenderloin Community. The Tenderloin Community deems the revised Project to be out-of-place and undesirable as the neighborhood is already saturated with market rate group housing.

(3) Lack of Community Outreach and Dialogue. Forge, the new project sponsor, failed to engage neighbors and community stakeholders concerning the design, format and impacts of the Project.

As summarized in our June 21, 2021 Letter the original approvals included the following:

> The original version for the project proposed a 13-story (130 foot tall) mixed-use building, "with up to 176 dwelling units, restaurant and/or retail space on the ground floors, and a replacement church . . ., below grade parking and mechanical spaces, private and common open space and 116 Class 1 and 9 Class 2 bicycle parking spaces." (Planning Commission Motion No. 20281 ("Motion No. 20281"), September 13, 2018, at 4.) On September 13, 2018, the Commission moved to authorize "the Conditional Use Authorization as requested in Application No. 2013.1535ENVCUA" subject to conditions. (Motion No. 20281, at 3, 25.) The authorization allowed a "mixed-use residential and institutional use building . . . pursuant to Planning Code Section(s) 303, 304, 317, 253, 249.5, and 271 within the RC-4 District and North of Market Residential Special Use District and a 80-T-130-T Height and Bulk District." (Motion No. 20281, at Exhibit A-1.) In reviewing the project's application for Conditional Use Authorization, the Commission found that the mixed-use project, including rental housing and a new church facility, was compatible with neighborhood uses, would "not be detrimental to the health, safety, convenience or general welfare of persons residing in the vicinity," "generally complies with the applicable sections of the Code, with certain exceptions" and "conforms with multiple goals and policies of the General Plan." (*Id.* at 6-8.)

Accordingly, claims about construction activities and potential impacts from the approved site plan and relate to the original approvals and extensive environmental review.

The action before the Planning Commission was limited to proposed modification of conditions in the Conditional Use Approval. The substance of the Planning Commission action concerned modification of four (4) conditions from the original approval and addition of a condition of approval addressing the standards for group housing cooking facilities. The conditions that were modified concerned Parking for Affordable Units (#24), Car Share (#25), Bicycle Parking (#26), and the Inclusionary Affordable Housing Program (#32). The Planning Commission eliminated the Car Share and Parking for Affordable Unit conditions because they were no longer applicable, increased the number for Bicycle Parking, and clarified the application of the Inclusionary Affordable Housing Program. In accordance with Planning Code Section 303(e), the public hearing and notice procedures of Section 306 were appropriately followed for processing the modifications.

None of the reasons stated as the basis for the appeal concern the items modified by the Planning Commission action. ***The appeal is based on objections to alleged construction impacts and the authorization for group housing at this site. Nothing however in the action of the Planning Commission affects the previously approved site plan and associated construction impacts, and group housing is a permitted use in this zoning district, requiring no Planning Commission approval.*** Given the reasons stated for the appeal, the real target of the appeal is the prior site plan approval and earlier Planning Code amendments that designated group housing as a permitted use. The time for appealing those decisions has passed. The only appropriate

decision on this unsupported appeal of the modification of the Conditional Use approval is to deny the appeal.

III. Housing Protections Apply in the Context of an Appeal

Section II of the June 21, 2021 Letter, specifically pages 7-11, identified the applicable protections under the California housing laws. In short, the application was deemed complete on February 28, 2020 under the Permit Streamlining Act, based on our understanding that the Planning Department issued Plan Check Letter No. 1 more than 30 days after the Applicant's submittal, exceeding the 30-day window for completeness review of the Project. The City did not identify any project inconsistencies with objective standards as of April 28, 2020 and so the Project was deemed consistent with objective standards on that date under the Housing Accountability Act. As stated in the YIMBY Law Letter, "the Conditional Use Authorization currently being considered certainly falls well within the bounds of the General Plan. Even expanding our view to the project's previous approvals, including specific items within the Planned Unit Development, nothing proposed or adopted is sufficiently outside the scope of the city's general plan to warrant the assessment that the project is not protected by the Housing Accountability Act." ***As such, the Project does not involve any legislative amendments and, therefore, the Housing Accountability Act applies to the Project as does the five hearing limit under SB 330.***

Both laws apply equally in the context of an appeal. The Housing Accountability Act limits an agency's discretion to deny or reduce the density of a project. (Govt. Code 65589.5). There is no exception where an appeal has been filed so it follows that an agency's obligations under the Housing Accountability Act remain when an appeal has been filed.

Similarly, the five hearing maximum under SB 330 remains steadfast as there is no exception for an appeal. As this is a new and cutting edge area of the law, we recognize it has not yet been addressed by the courts. That said, language in Government Code Section 65905.5(a) is resolute in stating that an city and county "shall not conduct more than five hearings….in connection with the approval of that housing development project" and that the "city and county shall consider and either approve or disapprove the application at any of the five hearings allowed under this section consistent with the applicable timelines under the Permit Streamlining Act." Moreover, the definition of a hearing in Government Code Section 65905.5(b)(2) includes "any public hearing, workshop, or similar meeting conducted by the city or county with respect to the housing development project." The only exemption from the definition of a hearing is where there is a legislative approval or a timely appeal of the "approval or disapproval of a *legislative approval."* The proposed Project entitlements include only quasi-judicial approvals and no legislative approvals. Accordingly, an appeal hearing is not exempt from the five hearing maximum. We noted in our June 21, 2021 Letter that eight hearings have been held (or six if not counting the hearings purportedly continued by the Applicant). As such, the five hearing maximum has already been exceeded.

A plain reading of the five hearing maximum could be read and interpreted by the courts to require an agency to deny an appeal without holding a new hearing. While we do not necessarily

recommend such an action, we feel it important to recognize that, given the severity of the housing crisis and legislative and judicial trends, it is quite possible that courts will find that appeal hearings beyond five hearings are improper. With that legal background in mind, we continue to urge an outcome that is consistent with the significant legal trends on housing projects.

IV. The Appeal Raises Issues Evaluated in the EIR and Untimely CEQA challenges

The potential impacts raised in the Appeal Letter were adequately reviewed in the Environmental Impact Report ("EIR") and, where appropriate, addressed with specific mitigation measures. This Appeal identifies no new or different environmental impacts that those evaluated in the EIR. In particular, the potential environmental impacts detailed by the Pacific Bay Inn in the Appeal were all adequately reviewed in the EIR. Those potential impacts were addressed and specific mitigation measures responding to the potential impacts to adjacent buildings, including vibration monitoring and a management plan, were incorporated into the final EIR approved on November 13, 2018. The Church and its Project Sponsor partner have agreed to implement those mitigation measures. These mitigation measures have been consistently incorporated in all Addenda describing the group housing proposal, including documents prepared for and approved by the Commission on June 21.

The Pacific Bay Inn did not challenge or appeal the EIR evaluation or the mitigation measures incorporated into the Final EIR. The Notice of Determination ("NOD") for the project approval was published on December 18, 2018 and any challenge under the California Environmental Quality Act ("CEQA") to the EIR and those mitigation measures had to have been filed within 30 days of the NOD. More significantly, it should be noted that, in addition to arranging to implement the mitigation measures, under the current proposal withdraws the development's foundation significantly further away from the Pacific Bay Inn. Consequently, the current proposal incorporating group housing has less potential for impacting the Pacific Bay Inn.

Furthermore, as stated by Planning Department staff at the Planning Commission Hearing on June 21, 2021, the custom and practice of resolving any structural design issues for foundational issues of adjacent buildings is through mitigation measures, review and conditions by the Department of Building Inspection, and written agreement between the property owners (based on consultation with engineers). The first draft of such an agreement for this process has already been delivered to the representatives of the Pacific Bay Inn.

All of the potential impacts raised in the appeal were evaluated and addressed in the EIR that was certified in 2018. No appeal and no CEQA challenge was filed to the prior approval or the EIR from 2018. Finally, the City ultimately prepared two Addendums to the EIR and concluded that not further environmental review was required for the current proposal. The Addendum made the following finding:

> The revised project would not result in new or different environmental impacts, substantially increase the severity of the previously identified environmental impacts or require new mitigation measures. In addition, no new information has emerged that would materially change the analyses or conclusions set forth in

> the initial study and EIR. Therefore, the revised project would not change the analyses or conclusions in the initial study and EIR for the previous project.

Second Addendum to Environmental Impact Report, p. 11.

V. Procedural issues regarding Appeal Hearing date underscore delayed processing

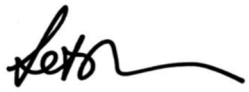
The Applicant continues to suffer delays in processing for this Project and as a result significant costs. The City Planning Code clearly requires that the Board of Supervisors or Clerk of the Board set a hearing on an appeal for a date not more than 30 or 40 days after the filing of the appeal. (Planning Code 308.1(c)) The Board must decide the appeal within 30 or 40 days of that hearing, unless the full membership of the Board is not available. (*Id.)* In that instance, the Board may continue the hearing for decision on the appeal to a date when the full Board is available, but not more than 90 days after the hearing on the appeal. (*Id.)* ***Despite the mandate in the Planning Code to set the hearing on the appeal to a date not more than 30 or 40 days after the filing of the appeal, the City has proposed to delay the hearing on appeal for more than 70 days.*** In response to the July 21st filing of appeal, Supervisor Matt Haney's Chief of Staff requested that the parties agree to delay the hearing on appeal until October 12, 2021. This request ignores the Planning Code requirements and continues the pattern of delay that already places the City in conflict with state law. This request also reflects the continuing disregard for the impact of delay on Applicant, even while relying on Applicant's continued cooperation and accommodation.

Applicant appreciates that the Board does not meet in August and that both Rosh Hashanah and the labor day holiday fall during the first week in September. Under these circumstances the Board must therefore make some appropriate arrangements. Nevertheless, in light of the limited scope of the Planning Commission action and the numerous delays in processing these modifications to the Conditional Use approval, proposing to set the hearing on the appeal to October represents another unreasonable delay.

This Appeal can and should be resolved without further unnecessary delay. As noted in prior correspondence, the Church has experienced significant damages as a result of the continuing delays.

Sincerely yours,

HOLLAND & KNIGHT, LLP



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Attachment 1 – June 21, 2021 Letter to Planning Commission

Attachment 1
June 21, 2021 Letter to Planning Commission

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June 21, 2021

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Re: **California Housing Law Protections Relating to the 450-474 O'Farrell Street/532 Jones Street Project Application**

Dear All:

Holland & Knight LLP[1] has been retained to represent Fifth Church of Christ, Scientist (the "Applicant") to ensure its rights under the California housing laws for the project proposed at 450-474 O'Farrell Street/532 Jones Street. The project includes "316 group housing units (632 beds), 172,323 square feet of residential use, including amenities and common areas, 4,900 square feet of open space, 6,023 square feet of restaurant/retail space, and 9,924 square feet for religious institution use (i.e., replacement of the existing church)" (the "Project"). (Addendum 2 to Environmental Impact Report ("Addendum 2"), June 23, 2021, at 3.) The Project's case number is 2013.1535EIA-02.

After the Planning Commission ("Commission") approved an earlier version of the project more than two and half years ago, the Commission has failed to take the actions required by law to process the Project's entitlements. This failure is a violation of California's housing laws, including the Permit Streamlining Act, Housing Accountability Act and SB 330, all of which the

[1] The Applicant is also represented by David Cincotta as well as Storzer & Associates, P.C. in connection with the Religious Land Use Act and Institutionalized Persons Act.

Legislature has enacted to ensure the timely construction of housing to combat California's housing crisis. The following summarizes the main points in this letter:

- The entitlements and exceptions currently sought were already approved for the previously approved project. The only land use related modification from the original approval requested for the revised Project is for a change to group housing with 316 group housing rooms. The Project is consistent with the standards for group housing in the RC-4 zoning district and all other applicable standards.

- The environmental review has been unnecessarily delayed. There is no substantial change to the revised Project that warranted preparation of a second Addendum and no new environmental impacts. The proposed modifications currently include and have always included approximately 300 group housing rooms, acknowledged by the City to represent for planning purposes approximately 600 beds.

- The Planning Department issued Plan Check Letter No. 1 more than 30 days after the Applicant's submittal. This timing exceeds the statutorily mandated 30 calendar day window for completeness review of the Project. As such, the application was deemed complete on February 28, 2020 under the Permit Streamlining Act.

- The City did not identify any project inconsistencies with objective standards as of April 28, 2020 and so the Project was deemed consistent with objective standards on that date under the Housing Accountability Act.

- As stated in the YIMBY Law Letter, "the Conditional Use Authorization currently being considered certainly falls well within the bounds of the General Plan. Even expanding our view to the project's previous approvals, including specific items within the Planned Unit Development, nothing proposed or adopted is sufficiently outside the scope of the city's general plan to warrant the assessment that the project is not protected by the Housing Accountability Act."

- Just as with the Housing Accountability Act, it is not appropriate to exclude applicability of the five hearing limit under SB 330 to those projects that request exceptions that do not rise to the level of general plan or zoning code amendments. As such, the five hearing limit applies.

- The hearing history shows, remarkably, that the hearings on the Project have been continued seven times. At the next hearing, which will be the eighth hearing (or the sixth if not counting the hearing purportedly continued at the request of the Applicant), the Commission must approve the Project. Under the limitations imposed by the Housing Accountability Act, the City has no basis for disapproving the Project. In the event the City does not promptly take action to consider and approve the Project, our clients will

exercise their rights under these laws. It is noted that the Church has experienced significant damages as a result of processing delays.

The following provides additional detail.

I. Background

The following provides relevant background regarding (A) Project processing, (B) application completeness, (C) environmental review, and (D) hearing history.

A. Project processing

1. Original approvals

The original version for the project proposed a 13-story (130 foot tall) mixed-use building, "with up to 176 dwelling units, restaurant and/or retail space on the ground floors, and a replacement church . . ., below grade parking and mechanical spaces, private and common open space and 116 Class 1 and 9 Class 2 bicycle parking spaces." (Planning Commission Motion No. 20281 ("Motion No. 20281"), September 13, 2018, at 4.) On September 13, 2018, the Commission moved to authorize "the Conditional Use Authorization as requested in Application No. 2013.1535ENVCUA" subject to conditions. (Motion No. 20281, at 3, 25.) The authorization allowed a "mixed-use residential and institutional use building . . . pursuant to Planning Code Section(s) 303, 304, 317, 253, 249.5, and 271 within the RC-4 District and North of Market Residential Special Use District and a 80-T-130-T Height and Bulk District." (Motion No. 20281, at Exhibit A-1.) In reviewing the project's application for Conditional Use Authorization, the Commission found that the mixed-use project, including rental housing and a new church facility, was compatible with neighborhood uses, would "not be detrimental to the health, safety, convenience or general welfare of persons residing in the vicinity," "generally complies with the applicable sections of the Code, with certain exceptions" and "conforms with multiple goals and policies of the General Plan." (*Id.* at 6-8.)

Furthermore, the Commission found that the project complies with the required criteria for a Conditional Use Authorization under Planning Code sections:

- 317 - demolition of or conversion of Residential Buildings
- 253(b)(1) - buildings with a street frontage height greater than 50 feet
- 249.5/263.7 - buildings that exceed a height of 80 feet in the North of Market Residential Special Use District
- 271(c) - buildings that exceed bulk limits. (*Id.* at 11-19.)

Additionally, as part of the Project's Planned Use Development authorizations, the Commission also approved modifications to the "rear yard requirements per Section 134(g) of the Planning Code," and "[a]n exception to the off-street loading requirements per Section 152 of the Planning Code, which requires one residential loading space for the project." (*Id.* at 9.) Finally, the

Commission found that the project "affirmatively promotes applicable objectives and policies of the General Plan." *Id.* It should be noted that Applicant paid fees for the earlier version of the project and a site permit was issued, but it was not ultimately financeable.

2. Project modifications comply with objective standards

The Applicant now proposes "316 group housing units (632 beds), 172,323 square feet of residential use, including amenities and common areas, 4,900 square feet of open space, 6,023 square feet of restaurant/retail space, and 9,924 square feet for religious institution use (i.e., replacement of the existing church)." (Addendum 2, at 3.) Specifically, the Applicant seeks to "amend Conditions of Approval Nos. 24, 25, 26, and 32 of Planning Commission Motion No. 20281 adopted on September 13, 2018." (Staff Report for April 15, 2021 Planning Commission ("April Staff Report"), Executive Summary Conditional Use, at 1.) These Conditions of Approval address vehicle, car share and bicycle parking (Nos. 24, 25 and 26) and inclusionary housing (No. 32) requirements. The Project's amendments "would be constructed within the envelope described for the [approved] project, with a similar mix of uses, decreased subsurface excavation and minor changes in building design . . . . All other aspects of the revised project would remain the same as those of the previous project." (Addendum 2, at 5.)

Implementation of the Project requires a conditional use authorization for a planned unit development to modify the requirements of San Francisco Planning Code sections 134(j) (for rear-yard modifications in a RC-4 District) and 152 (for on-street loading). The Planning Commission granted these approvals on September 13, 2018. The revised Project does not seek any modification to these prior approvals.

Implementation of the Project also requires "authorization from the planning commission under San Francisco Planning Code section 317(g)(5) for demolition of existing residential units; section 253(b) for new construction over 40 feet in height and a street frontage greater than 50 feet; section 263.7 for an exception to the 80-foot base height limit in North of Market Residential Special Use District No. 1; section 271 for exceptions to section 270, governing the bulk of the building; and section 303 for the new religious institution (church) use." (Addendum 2, at 9.) These authorizations were similarly approved by the Commission on September 13, 2018. The modifications requested for the revised Project do not involve any of these authorizations. (See April Staff Report, Draft Motion, at 7.)

The only land use related modification from the original approval requested for the revised Project is for a change to group housing with 316 group housing rooms. The revised Project also reduces the number of off-street parking previously approved. As detailed in the Staff Report for the April 15, 2021 Planning Commission, off-street parking is not required in the RC-4 zoning district. (April Staff Report, at 7.) Given that there is no required off-street parking, the revised Project is not at odds with the standard for off-street parking. **The revised Project is also consistent with the standards for group housing in the RC-4 zoning district**. The Staff Report for the April 15, 2021 Planning Commission states that "[p]ursuant to Section 209.3 of

the Planning Code, the RC-4 residential high-density zoning district, permits a group housing density up to one bedroom per every 70 square feet of lot area. On this 22,106 square foot site, 316 bedrooms are permitted, ..." (April Staff Report, at 7.) The revised Project is therefore consistent with the applicable objective standard for the RC-4 zoning district.

Notably, all relevant modifications proposed by the revised Project are consistent with applicable objective standards. Additionally, the modifications to Conditions of Approval 24, 25, 26 and 32 all comply with the applicable standards. No off-street parking or car share parking are required for the Project, therefore COA Nos. 24 and 25 do not apply. The revised Project complies with both the bicycle parking spaces and inclusionary affordable housing requirements applicable to the revised Project.

B. Application completeness

Correspondence between the City staff and Applicant demonstrates that the Project application is complete. The following is a chronology of the City's correspondence with the Applicant regarding the Project:

- January 24, 2020 - Application filed with City for amended PUD/CUA
- January 28, 2020 - Planning Department accepts Revised CUA Application
- April 9, 2020 - Plan Check Letter No. 1
- June 12, 2020 - Revisions submitted by Applicant
- July 10, 2020 - Plan Check Letter No. 2
- August 13, 2020 - Response submitted to City

The significance of this chronology is discussed further below. Notably, the April 9, 2020 Plan Check Letter No. 1 exceeds the 30 day time period to respond to an application submittal under the Permit Streamlining Act.

C. Environmental review

An Environmental Impact Report ("EIR") was certified for the original Project in 2018. On December 21, 2020, the City published an Addendum to the EIR for the proposed Project modifications. As such, the environmental review was completed six months ago, with the conclusion that the Project will not result in new significant environmental impacts and that no further environmental review is required. Although there were no substantial changes to the proposed revised Project, the City prepared a second Addendum in June 2021.

Similar to the findings in the Addendum, in the second Addendum, the City's analysis of the proposed modifications to the approved Project affirms that "[s]ince certification of the EIR, no substantial changes are proposed for the project and no changes have occurred in the circumstances under which the 450–474 O'Farrell Street/532 Jones Street Project would be implemented." (Addendum 2, at 9; see also Addendum, at 9.) Furthermore, "[n]o new

information has emerged that would materially change the analyses or conclusions set forth in the initial study or EIR for the previous project." (*Id.*) Significantly, as demonstrated throughout the City's extensive and lengthy environmental review of the Project, the Project modifications do not require further environmental review and do not result in new significant impacts. The following is a summary of the City's environmental review of the Project and its findings:

- December 21, 2020 – Addendum to EIR published by Planning Department
- January 7 and 21, 2021 – Planning Department determines that no further environmental review is required – see Planning Commission Agenda
- June 23, 2021, Addendum 2 to EIR prepared by Planning Department

No substantial project modifications were proposed for the revised Project after the first Addendum was published. The City considers a group housing room as equivalent to one room or two beds. For purposes of this Project, the City used the number of rooms for calculating density, open space, and inclusionary requirements. (See Plan Check Letter, April 9, 2020, Comment No. 3, at 2.) The core modification proposed by the revised Project continues to be the change to group housing comprised of approximately 300+ group housing rooms (or approximately 600+ beds).

Addendum – Proposed Modification To The Project	Addendum 2 – Proposed Modification To The Project
The proposed revised project would result in demolition of the buildings on the project site and the construction of a 13-story building with a basement. The structure would contain 302 group housing units (316 beds), 165,972 square feet of residential space, 4,900 square feet of open space, 7,959 square feet of restaurant/retail space, and 10,181 square feet for religious institution use (i.e., replacement of the existing church). The total built area would be approximately 199,384 square feet. (Addendum, at 3)	The revised project would result in demolition of the buildings on the project site and the construction of a 13-story building with a basement. The structure would contain 316 group housing units (632 beds), 172,323 square feet of residential use, including amenities and common areas, 4,900 square feet of open space, 6,023 square feet of restaurant/retail space, and 9,924 square feet for religious institution use (i.e., replacement of the existing church). The total built area would be approximately 207,448 square feet. (Addendum 2, at 3)

There is no substantial change to the revised Project that warranted preparation of a second Addendum and payment of an additional Addendum fee to the Planning Department. The proposed modifications currently include and have always included approximately 300 group housing rooms, acknowledged by the City to represent for planning purposes approximately 600 beds.

D. Hearing history

Yet in spite of the application completeness, conclusion of the environmental review and the City's own findings that the proposed modifications to the approved project do not require further environmental review, the Commission has failed to move forward procedurally and issue the requisite Project entitlements. The following is a timeline of the Commission's remarkable pattern of hearings continuances:

- January 7, 2021 – CONTINUED to January 21, 2021
- January 21, 2021 – CONTINUED to February 4, 2021
- February 4, 2021 – CONTINUED to March 11, 2021
- March 11, 2021 – CONTINUED to April 1, 2021
- April 1, 2021 – CONTINUED to April 15, 2021
- April 15, 2021 –CONTINUED to June 10, 2021
- June 10, 2021 – CONTINUED to June 24, 2021

For more than six months, the Commission has repeatedly voted for continuances. Neither the staff or Commission have given legitimate reasons to delay the Project hearings in this manner. We note that the Staff Report from January 21st states that opposition "is centered on the shift to group housing, and concerns about the community engagement process." (Executive Summary Conditional Use, January 21, 2021 at 2.) The Staff Report from February 4th goes further and states that a neighbors has a perception "that the church has not been a good neighbor." (Staff Report for February 4, 2021 Planning Commission, at 2.) The Applicant has in fact engaged in an extensive outreach process and none of the factors cited in the staff reports amounts to an objective standard; rather, the concerns amount to subjective "NIMBY" hurdles posed by special interest groups.

II. Housing Law Protections

Based on the remarkable history above, it is clear that there have been violations of the spirit, intent and plain application of the California housing laws, as described below.

As we know, California faces "a housing supply and affordability crisis of historic proportions," evidenced by the fact that the median home price in San Francisco was $1.6 million at the time that the Legislature passed the Housing Crisis Act of 2019. (Gov. Code § 65589.5(a)(2)(A); Housing Crisis Act of 2019, Section 2(a)(2).) "The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives." (Gov. Code § 65589.5(a)(2)(A).) To combat the crisis, the Legislature has plainly stated that it is the policy of the state that California's housing laws be afforded "the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code § 65589.5(a)(2)(L).) Furthermore, it is the policy of the state "that a local government not reject or make infeasible housing development projects" that contribute to the housing supply "without a thorough analysis of the economic, social, and environmental effects of the action." (Gov. Code § 65589.5(b).)

A. Application Completeness

Under the Permit Streamlining Act, as amended by SB 330, a local agency's authority to review the "completeness" of an application for a development permit is strictly limited to confirming

whether the applicant has provided the material contained on the agency's official submittal requirements checklist, as that checklist existed at the time of application submittal. (Gov. Code § 65943(a); *see also* Gov. Code §§ 65940, 65941.) Upon submittal of the materials on an agency's checklist, the agency has 30 days in which to notify the applicant in writing as to whether the application is complete. (Gov. Code § 65943(a).) If the applicant is required to amend or supplement the application materials, an agency has 30 days from receipt of those materials to notify the applicant in writing of the agency's completeness determination. (Gov. Code § 65943(b).) "If the written determination is not made within that 30-day period, the application together with the submitted materials *shall be deemed complete*." (*Id.*) (emphasis added.)

The Planning Department ("Department") accepted the Applicant's Project application on January 28, 2020. **The Department then issued Plan Check Letter No. 1 on April 9, 2020. This timing exceeds the statutorily mandated 30 calendar day window for completeness review of the Project. As such, the application was deemed complete on February 28, 2020.**[2]

B. Consistency with Objective Standards

The Housing Accountability Act ("HAA") requires a local agency to provide written documentation if a housing development project is inconsistent with objective standards: "(i) Within 30 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains 150 or fewer housing units; or (ii) Within 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains more than 150 units." (Gov. Code § 65589.5(j)(2)(A).) If the local agency fails to provide the required documentation, the housing project *shall be deemed consistent with applicable standards*. (Gov. Code § 65589.5(j)(2)(B))) (emphasis added.)

As stated, the Project is a mixed-use residential project with at least two-thirds residential uses; and as such, it is a qualifying housing development project under the HAA that is subject to review for consistency with the City's objective standards. (Gov. Code § 65589.5(g); Gov. Code § 65589.5(h)(1)(B).) Once the application is complete, the HAA limits review of project consistency to the City's objective standards. **Accordingly, assuming application completeness occurred in February 2020, the City did not identify any project inconsistencies as of April 28, 2020 and the Project was deemed consistent with objective standards on that date.**

However, the City's Staff Reports from January 21st and February 4th state that "opposition to the Project is centered on the shift to group housing, and concerns about the community engagement process." Moreover, the reports express that response to the Applicant's community

[2] Even if there was City correspondence prior to April 9, 2020, application completeness occurred on August 13, 2020 at the latest as the last Applicant submittal (see chronology in Section 1(b) above).

outreach "has focused on community benefits, size and functionality of units, unit mix, and amenities" (Executive Summary Conditional Use, January 21, 2021, at 2), and that a neighbor has a perception that "the church has not been a good neighbor." (Staff Report for February 4, 2021 Planning Commission, at 3.) To the extent that this subjective community feedback is being incorporated into Project revisions or determinations of inconsistency, it is a violation of the HAA because the feedback does not qualify as an objective standard upon which the Project may be reviewed.

C. Housing Accountability Act Applicability

The current development application is for modification of four Conditions of Approval to authorize development of group housing. As set forth in the Addendum, the proposed revised Project does not represent a significant change to the approved Project. Additionally, the modifications requested are each consistent with the applicable objective standards.

Under the San Francisco Planning Code, authorization of a change in any condition imposed by a Conditional Use Authorization is subject to the same procedures as a new Conditional Use Authorization. (San Francisco Planning Code § 303(e).) The proposed revised Project continues to be consistent with all other previously approved development authorizations for the Site, each of which is still valid and continue in effect. (*Id.*)

Additionally, the procedural requirement for a Conditional Use Authorization does not make a housing project not consistent with applicable objective standards. We note that YIMBY Law already submitted a letter on May 25, 2021 regarding Housing Accountability Act applicability. (Letter from Sonja Trauss, YIMBY Law (Executive Director) to Planning Commissioners) (hereinafter "YIMBY Law Letter", included as Attachment 1.) It accurately describes the following:

> The crux of the issue is whether the project approval would require any action abrogating or overriding the general plan designation and standards for the site. **The Conditional Use Authorization currently being considered certainly falls well within the bounds of the General Plan. Even expanding our view to the project's previous approvals, including specific items within the Planned Unit Development, nothing proposed or adopted is sufficiently outside the scope of the city's general plan to warrant the assessment that the project is not protected by the Housing Accountability Act**. As the project is subject to protection under the HAA, the commission is limited both in the actions it may take on the project and the number of hearings the project may be subjected to.

The YIMBY Law Letter then quotes applicable law under the Housing Accountability Act identifying the Commission's limited discretion in reviewing the Project. This law has been affirmed by the courts. The Housing Accountability Act "imposes a substantial limitation on the government's discretion to deny a permit." (*N. Pacifica, LLC. v. City of Pacifica* (N.D. Cal. 2002) 234 F. Supp. 2d 1053, 1059,aff'd sub nom. *N. Pacifica LLC v. City of Pacifica* (9th Cir. 2008) 526

F.3d 478 (internal quotation omitted).) Further, a city may not reject the project based on any subjective or discretionary criteria, such as "suitability." (*Honchariw v. Cty. of Stanislaus* (2011) 200 Cal. App. 4th 1066, 1076, 1079.)

D. SB 330

Additionally, we reiterate the points in the YIMBY Law letter that the Commission is limited both in the actions it may take on the project as well as the number of hearings that may be held under SB 330.

Specifically, the Housing Crisis Act of 2019, SB 330, limits the number of public hearings applicable to a project that "complies with the applicable objective general plan and zoning standards in effect at the time an application is deemed complete." (Gov. Code § 65905.5(a).) If a project complies with applicable general plan and zoning standards, a City may only conduct five public hearings. (*Id.*) If the city continues a hearing subject to this section to another date, the continued hearing shall count as one of the five hearings allowed under this section. (*Id.*) Significantly, the law requires a City to "consider and either approve or disapprove the application at any of the five hearings allowed." (*Id.*) Therefore, given that the City has held seven public hearings for the Project just this year, without approving or disapproving the Project, the City has exceeded the 5 hearing maximum. (Gov. Code § 65905.5.)

We note that the City's guidance on implementation of SB 330 provides that "housing development projects that comply with applicable zoning standards and that are not seeking any exceptions, rezoning, or other legislative actions, can be subject to a maximum of five public hearings to consider project approval by the city." (Planning Director Bulletin No. 7, Housing Crisis Act of 2019 Project Review and Zoning Actions, at 3.)

Just as with the Housing Accountability Act, it is not appropriate to exclude applicability of the five hearing limit to those projects that request exceptions that do not rise to the level of general plan or zoning code amendments. As noted above and in the YIMBY Law Letter, exceptions do not rise to the level of a legislative amendment, as with a General Plan or Zoning amendment. Zoning codes routinely include mechanisms for exceptions and conditional authorizations. Compliance with such mechanisms built into the zoning code retains consistency with applicable zoning code standards. There is ample evidence that other cities adhere to the state law protections and apply the housing laws for projects with non-legislative, quasi-judicial entitlements.

Not adhering the housing laws would be counter to the intent of the housing laws to streamline processing for needed housing. The stated intent of the Legislature in enacting SB 330 is to "[s]uspend certain restrictions on the development of new housing during [this] period of statewide [housing] emergency" and "expedite the permitting of housing in regions suffering the worst housing shortages and highest rates of displacement." (SB 330, Housing Crisis Act of 2019, Sec. 2(c).)

We also note that the City's guidance on implementation of SB 330 provides that "[i]ndependent requests from Project Sponsors for a continuance do not count toward the five-hearing limit." (Planning Director Bulletin No. 7, Housing Crisis Act of 2019 Project Review and Zoning Actions, at 4.) In reviewing the Commission hearing minutes, we note that two hearing continuances were purportedly requested by the project sponsor. The Applicant wishes to convey that the continuances were requested *at the Planning Department's recommendation* and not fairly considered to be at the Applicant's request. Moreover, the Applicant did not formally waive its rights to the five hearing maximum under SB 330. Moreover, even without counting the two hearings purportedly requested by the Applicant, there have still been five hearings.

At the next hearing, which will be the eighth hearing (or the sixth if not counting the hearing purportedly continued at the request of the Applicant), the Commission must approve the Project. Under the limitations imposed by the HAA, the City has no basis for disapproving the Project. In the event the City does not promptly take action to consider and approve the Project, our clients will exercise their rights under these laws.[3] It is noted that the Church has experienced significant damages as a result of processing delays.

Sincerely yours,

HOLLAND & KNIGHT LLP

Chelsea Maclean

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[3] We note that our firm has successfully represented applicants in the enforcement of housing laws. (*MWest Propco XXIII LLC v. City of Morgan Hill and Morgan Hill City Council,* Santa Clara County Superior Court, Case No. 18CV333676 (City did not comply with the Housing Accountability Act); *40 Main Street Offices, LLC v. City of Los Altos*, Santa Clara County Superior Court, Case No. 19CV349845 (ity's denial of housing development violated the HAA because the City failed to identify objective standards with which the project did not comply); *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, reh'g denied (May 19, 2021), review filed (June 1, 2021) (City did not provide adequate findings when denying the SB 35 application).) As noted previously, we also note that the Applicant is represented by Storzer & Associates, P.C. on its RLUPA claims.

ATTACHMENT 1
YIMBY Law Letter

YIMBY LAW

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5/25/2021

San Francisco Planning Commission
49 South Van Ness, Ste 1400
San Francisco, CA 94103

commissions.secretary@sfgov.org
Via Email

Re: 450 O'Farrell Street

Dear San Francisco Planning Commission,

This letter is intended to outline some of the legal issues surrounding the project at 450 O'Farrell and to explain why the Housing Accountability Act does apply to this project, despite planning staff objections.

The crux of the issue is whether the project approval would require any action abrogating or overriding the general plan designation and standards for the site. The Conditional Use Authorization currently being considered certainly falls well within the bounds of the General Plan. Even expanding our view to the project's previous approvals, including specific items within the Planned Unit Development, nothing proposed or adopted is sufficiently outside the scope of the city's general plan to warrant the assessment that the project is not protected by the Housing Accountability Act. As the project is subject to protection under the HAA, the commission is limited both in the actions it may take on the project and the number of hearings the project may be subjected to.

Conditional Use Authorization and the Housing Accountability Act

It is a common misconception that any additional approvals for a project besides a simple site permit automatically renders the Housing Accountability Act void. This is not the case. The Housing Accountability Act applies so long as the residential development complies with the objective general plan standards in place at the time of application submission.

(j) When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:

(1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

. . .

(4) For purposes of this section, a proposed housing development project is not inconsistent with the applicable zoning standards and criteria, and shall not require a rezoning, if the housing development project is consistent with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan. If the local agency has complied with paragraph (2), the local agency may require the proposed housing development project to comply with the objective standards and criteria of the zoning which is consistent with the general plan, however, the standards and criteria shall be applied to facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project.

(California Government Code § 65589.5)

Though a conditional use permit requires additional authorization, it does not push the project beyond the bounds of the general plan. By its very nature, a conditional use is one that is permitted by the general plan provided certain prerequisites are met. The extra level of scrutiny does not mean that the project is no longer general plan compliant.

In this case the project is seeking a conditional use authorization to change its previous plan to group housing. Group housing is an allowed use under the site's general plan designation despite requiring some extra processing, namely a conditional use authorization. Despite the extra layer of approval the project remains general plan compliant.

Planned Unit Development and the Housing Accountability Act

Planning staff maintain that the conditional use authorization is not the problem when it comes to the project's status under the HAA. Rather their contention is that exceptions required as part of the PUD were what rendered the project HAA exempt. The specific parts of the PUD referenced include exceptions from height, dwelling unit exposure, rear yard, and permitted obstructions standards. These were all included in the CUA for the project.

Like everything else in the CUA, as passed previously and as proposed, we do not believe that these provisions bring the project out of compliance with the General Plan. The project may require exceptions from specific zoning standards but these are all allowed under the PUD and CUA process without any significant zoning amendments or general plan amendments.

If the project were asking for exceptions that exceed the scope of those allowed as part of the PUD and CUA process then this issue would be different. The project does not propose anything of the sort however, and therefore should be considered covered by the HAA.

Conclusion

Moving forward, this project should be treated as any other project would be under the HAA. This means that the Planning Commission's discretion is limited in this case. The project does not pose a threat to public health and safety and complies with nearly objective general plan standards. The project was approved previously with very similar characteristics and so it is clear that Commission and planning staff mostly agree with us on this point.

The Planning Commission should stop delaying this project and approve the modifications to the Conditional Use Authorization to allow the project to move forward. Plans for development at this site have been stifled for a variety of reasons for over 40 years and it's time to allow a project to proceed.

Sincerely,

Sonja Trauss

Sonja Trauss
Executive Director
YIMBY Law