From:	Linda K. Kwon
To:	Board of Supervisors, (BOS); BOS Legislation, (BOS)
Cc:	Michael W. Shonafelt; Gregory D. Tross; Ruby Williams
Subject:	2013.1535CUA-02 – 450-474 O'Farrell / 532 Jones Street
Date:	Monday, August 30, 2021 3:57:34 PM
Attachments:	image001.png image002.png image003.png image004.png Letter to SF Board of Supervisors.PDF

Dear Board of Supervisors:

On behalf of Mr. Shonafelt, please find attached correspondence regarding the above-referenced matter. A hard copy will follow by U.S. Mail.

Best regards,

NEWMEYER DILLION

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August 30, 2021

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VIA E-MAIL AND U.S. MAIL

President Shamann Walton and Members
City and County of San Francisco
Board of Supervisors
c/o Angela Calvillo, Clerk of the Board
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City Hall, Room 244
San Francisco, CA 94102-4689
Board.of.Supervisors@sfgov.org
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Re: 2013.1535CUA-02 – 450-474 O'Farrell / 532 Jones Street.

Dear President Walton and Members of the Board of Supervisors:

This office continues to represent Pacific Bay Inn, Inc. ("PBI"), owner of the Pacific Bay Inn Hotel ("Hotel"), located at 500-520 Jones Street, in the City and County of San Francisco ("City").

This letter presents additional comments to the Board of Supervisors ("Board") regarding PBI's and Tenderloin Housing Clinic's (collectively, "Appellants") appeal of the Planning Commission's approval of Forge Development Partners' proposed development at 450-474 O'Farrell Street/532 Jones Street ("Revised Project"), Case No. 2013.1535EIA. At its June 24, 2021 hearing, the Planning Commission adopted Motion No. 20935 to approve the Revised Project ("Motion 20935").

This letter presents additional legal support for PBI's grounds for the pending appeal ("Appeal"). PBI requests that the Board reverse the Planning Commission's decision to adopt Motion 20935 and require any project built on the Project Site to undergo additional environmental analysis and disclosure based on the additional revelations concerning the Revised Project's impacts to the Hotel and to the health, safety and welfare of the Hotel's residents.

1. Project History.

The Project site was originally slated for a proposed 13-story (130 feet tall) mixed-use building with 176 dwelling units, restaurant and retail space on the ground floors and a new church to replace the historic Fifth Church of Christ, Scientist at 450 O'Farrell ("Original Project"). (Planning Commission Motion No. 20281 ("Motion 20281"), September 13, 2018, at 4.) The authorization allowed a mixed-use residential,

commercial and institutional use building pursuant to Planning Code sections 303, 304, 317, 253, 249.5, and 271 within the RC-4 District and North of Market Residential Special Use District and an 80-T-130-T Height and Bulk District. (Motion 20281, Exhibit A-1.)

The Revised Project hews to the Original Project's envelope, but revises the Original Project to include 302 group housing units, requiring less open space per unit and increasing the retail/restaurant space and religious institutional spaces. (Second Addendum, p. 5.) The Revised Project modified the structural foundation for the Project, removing a portion of the basement but shoring that portion of the structure with deep foundation pylons instead. (*Id.*, Appendix H, p. 2.)

The Hotel was built over 110 years ago in 1908 after the 1906 San Francisco earthquake and fire devastated the City. It lies on a portion of the Revised Project's western boundary at a zero lot line. The Hotel currently is operated by DISH (Delivering Innovation in Supportive Housing), a non-profit group, which partners with the City to provide permanent homes for the City's racially diverse homeless population suffering from serious health issues. (See https://dishsf.org/our-history/.) The Hotel offers 75 single-room occupancy units for San Francisco's disabled homeless population. (See January 7 Letter, p. 3.) The Hotel therefore includes environmentally sensitive receptors who will be heavily impacted by the estimated 18 months of construction for the Revised Project and potential ongoing structural impacts to the Hotel, with resultant lingering uncertainties about the ongoing safety of the Hotel.

PBI presented multiple letters to the Planning Commission reiterating these concerns and presented new information that the City did not take into account when assessing the environmental impacts of the Original Project and Revised Project. It did so with its own resources, in an effort to augment a persistently deficient administrative record. This appeal letter references and incorporates PBI's letters to the City Planning Commission subsequent to the City's publishing of the First Addendum to the Final Environmental Impact Report (State Clearinghouse No. 2017022067) ("EIR") on January 7, 2021, and April 14, 2021, and after the filing of the Second Addendum to the FEIR on June 23, 2021 ("Second Addendum") (collectively, "Addendums"). This appeal letter also specifically includes comments made by the Appellants and other commenters during the Planning Commission's various public hearings on the Revised Project including on January 7, 2021, April 15, 2021, and June 24, 2021. Among other things, those letters presented findings of three engineering firms that demonstrated sub-grade foundation encroachments onto the Forge site. Those reports present a preponderance of evidence that potentially severe impacts could arise from shoring, dewatering and foundation work required for the Revised Project at or close to the zero lot line of the Hotel's east-facing wall.

2. The Housing Accountability Act Does Not Prevent the Board from Denying the Revised Project and Does Not Exempt This Project from CEQA's "Substantive Mandate" to Mitigate Significant Impacts to Health, Safety & Welfare.

In 2019, the State Legislature enacted the Housing Crisis Act of 2019 (SB 330) ("HCA"). The HCA revised and/or amended certain portions of the Housing Accountability Act (Gov. Code, § 65589.5) ("HAA"), including provisions regarding the denial of housing projects. The HCA and HAA are meant to provide a balance between the growing need for housing and local government interest in safeguarding the health, safety, and welfare of its constituents. The HAA requires a "thorough analysis of the economic, social, and environmental effects" of actions to deny qualifying housing projects. (*Id*., subd. (b).)

Despite claims from Forge and the Fifth Church of Christ, Scientist ("Church"), the City can deny a housing development project in compliance with the HAA if it determines that the project would result in 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 …." (Gov. Code, § subd. (j).) Government Code section 65589.5, subdivision (j) provides that:

> [w]hen a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, ***but the local agency proposes to disapprove the project*** or to impose a 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 a preponderance of the evidence on the record that both of the following conditions exist:
>
> (A) 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.
>
> (B) 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.

(Gov. Code, § 65589.5, subd. (j), emphasis added.) Assuming *arguendo*, that the Project is consistent with the City/County General Plan, Zoning Code, and design review standards, PBI has demonstrated that the Project would give rise to a significant adverse impact on the general public safety and welfare at the Hotel and in the Project Site. Importantly, the HAA ***does not*** restrict the City's authority to impose appropriate mitigation for the impacts of a housing development project under the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.) ("CEQA"). (Gov. Code, § 65589.5, sub. (e).) Indeed, the HAA specifically declares that, while housing development is critical, such projects must still be approved in a manner that does not result in significant detrimental impacts.. (*Id.*, subd. (b).) Nothing in the HCA or HAA exempts a project from the "substantive mandate" of CEQA that public agencies ***not approval projects if there are feasible alternatives or mitigation measures that can substantially lessen the impact***. (*Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 134 [65 Cal.Rptr.2d 580]; Pub. Resources Code, § 21002.)

3. The Revised Project as Approved Will Result in a Specific Adverse Impact on the Hotel and Its Residents Based on Objective, Identified Written Public Health or Safety Standards and Policies.

According to the proponents of the Revised Project, the application was deemed complete as of February 28, 2020. (Project Applicant Letter dated June 21, 2021, p. 2.) Assuming this as true, the Revised Project must comply with those standards in place at the time the Revised Project application was deemed complete. The Revised Project fails to meet the objective and quantifiable standards in place at that time.

The City's obligation to ensure the health, safety and welfare of its inhabitants is the keystone of its police powers. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 635 [113 S.Ct. 1710, 123 L.Ed.2d 353].) That standard is not only "objective," it is the beating heart of every planning, zoning and building enactment that issues forth from the City's legislative powers. It underscores such enactments as San Francisco Building Code section 102A, which establishes that:

> all buildings, structure, property, or parts thereof, regulated by this code that are structurally unsafe or not provided with adequate egress, or that constitute a fire hazard, or are otherwise dangerous to human life, safety, or health of the occupants or the occupants of adjacent properties or the public by reason of inadequate maintenance, dilapidation, obsolescence or abandonment, or by reason of occupancy or use in violation of law or ordinance, or

> were erected, moved, altered, constructed or maintained in violation of law or ordinance are, for the purpose of this chapter, unsafe.

(San Francisco Building Code, § 102.A.) Likewise, the San Francisco Building Code section 3307 requires adjoining public and private property to be protected from damage during construction or demolition work. (*Id.*, § 3307.) Protections are to be provided for footings, foundations, party walls, chimneys, skylights and roofs. (*Ibid.*) Provisions shall be made to control water runoff and erosions during construction activities. (*Ibid.*) These provisions align with multiple, binding provisions of the California Building Code, which are intended to ensure that construction work, including foundation excavation, dewatering and shoring, ***do not impact adjacent structures***. (Cal. Bldg. Code, § 1804; see ch. 18, generally.)

While Forge may be heard to contend that the above standards are part-and-parcel of the eventual Department of Building Inspection's ("DBI") building permit process, such assurances ring hollow. It is not clear that the structural impacts identified by PBI will be addressed at all because they have not been ***analyzed, disclosed or acknowledged now, in the planning approval phase***.

Critically, DBI is a non-discretionary department of the City; it does not have planning and zoning authority and cannot impose any conditions or mitigation measures on the Revised Project. The peril of not examining or disclosing impacts at the planning stage -- ***before*** approval of the layout, design and project conditions -- is manifest. Indeed, CEQA exists to "inform the public and its responsible officials of the environmental consequences of their decisions ***before*** they are made" and before the impacts become a ***fait accompli***. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [276 CalRptr. 410], emphasis in original.) CEQA mandates such disclosures "as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." (CEQA Guidelines, § 15004, sub.d. (b).)

CEQA Guidelines section 15126.2, subdivision (a) requires disclosure of "health and safety problems caused by the physical changes" that a proposed project will precipitate. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219 [22 Cal.Rptr.3d 203].) Accordingly, the CEQA document must identify and analyze the adverse health impacts likely to result from the project. (*Id.*, at p. 1220; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1367–1371 [111 Cal.Rptr.2d 598].) The Revised Project relies upon a prior environmental impact report for an older project (State Clearinghouse No. 2017022067) ("EIR" as defined above). The EIR and the Addendums are substantially deficient in their mandated disclosure of the impacts to the Hotel and its inhabitants. ***In fact, PBI was compelled to perform its own analyses, which are now part of the administrative record before the Board.*** The information provided by PBI under its own resources should have been the duty of Forge and the City. PBI

expended significant resources to do the work that CEQA mandates on the City. The information PBI disclosed to the public was the catalyst for this Appeal. It is manifest that the EIR and its short-shrift Addendums either overlooked or gave only passing attention to the impacts PBI disclosed. Health, safety and welfare are at the core of the Board's police powers. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 635 [113 S.Ct. 1710, 123 L.Ed.2d 353]; *Whalen v. Roe* (1977) 429 U.S. 589, 603, n. 30 [97 S.Ct. 869, 51 L.Ed.2d 64].) The lack of protections afforded by the mitigation measures ultimately will violate multiple objective, identified, written standards, including, but not limited to, Building Code section 3307, and could force the Hotel in the status of an unsafe nuisance in violation of San Francisco Municipal Code 102A.

The EIR's mitigation measures to reduce impacts on historical cultural resources within Uptown Tenderloin National Register Historic District currently do not include written, identified, and viable efforts to minimize potential perils to the Hotel's foundations and its residents. (See, EIR, S-5, 6.) There has been no research, analysis or disclosure of potential structural impacts to the Hotel. While the mitigation measure CR-3b requires Forge Development to use "all feasible means to avoid damage to the adjacent contributing resources," those "feasible means" are not readily defined and the scope of the risks is not disclosed. More specifically, there are no mitigation measures or conditions in place that address the manifest risks of excavation impacts to adjacent historical resources' foundations. This constitutes unlawful "deferred" mitigation, which undermines the public disclosure requirements of CEQA and occludes from public view what those measures will ultimately and whether they will even be implemented. As one court observed:

> [I]t is improper to defer the formulation of mitigation measures until after project approval; instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur before the project is approved.

(*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 621 [91 Cal.Rptr.3d 571], citing *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296 [248 Cal.Rptr. 352] and *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359 [43 Cal.Rptr.2d 170].)

The deficiencies in the current analyses are myriad. For instance, the Federal Transportation Authority, upon which the City relies, asserts that vibration thresholds for construction on fragile buildings is set at 0.12 peak particle velocity ("PPV").[1] The equipment proposed to be used has a PPV of 0.089 PPV at 25 feet, but it was not assessed at areas closer to the adjacent structures. (See, FEIR, p. 4-37.) The City

[1] (See Federal Transit Administration. 2018. Transit Noise and Vibration Impact Assessment. GTA-VA-90-1003-06. Office of Planning and Environment. Available: https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/research-innovation/118131/transit-noise-and-vibration-impact-assessment-manual-fta-report-no-0123_0.pdf; see also, FEIR, p. 4-37.)

even acknowledged that the threshold could be exceeded within 50 feet of the Project site. (*Ibid.*) Further, the EIR assumed that the Revised Project would not require "pile driving." (*Ibid.*) Forge's own structural engineers nevertheless have stated the at-grade portion of the proposed structure (which appears to be closest to the Hotel) "may need deep foundational support from the medium to dense to very dense sand anticipated below a depth of about 20 feet from existing street grades." (Second Addendum, Appendix H, p. 2.) This foundation will therefore be directly adjacent to, and below, the Hotel's existing basement area.

The mitigation measures set forth in Impact CR-3a likewise do not provide sufficient protection to the Hotel. Impact CR-3a requires Forge to create a Vibration Monitoring and Management Plan that addresses vibration or differential settlement caused by vibration during the Revised Project's construction activities. While the mitigation measure states that adjacent "buildings shall be protected to prevent further damage and remediated to pre-construction conditions per the consent of the building owner," this measure appears only to relate to vibration impacts and not impacts to the residents residing at the Hotel. Further, it does not place viable limitations on those vibration levels. As already noted, a 0.2 PPV velocity is not adequate threshold for fragile buildings composed of unreinforced masonry. As PBI's recent expert report confirms, the Hotel is fragile. The City's limits therefore are not adequate to protect fragile buildings and the residents therein. Even with the mitigation proposed, it is likely the Revised Project will cause significant damage to the Hotel, rendering it uninhabitable.

Additionally, the Planning Department did not analyze the Hotel or its residents as a sensitive receptor. That critical omission precluded informed review by the Planning Commission. Obviously, the Hotel residents will be subject to continuous noise and vibration at more significant levels than those sensitive receptors at O'Farrell Towers and the nearby senior facility analyzed as part of the EIR and Addendums. Those impacts will continue for over a year (estimated to be 18 months) as the Revised Project is built out. The Addendums claim that the vibrations would be noticeable within the immediate vicinity of the use of heavy equipment for the Revised Project yet claims such vibrations would not be noticeable at the nearest receptors, i.e., O'Farrell Towers. (Addendum, p. 24.) Clearly, the Addendums have overlooked impacts to sensitive receptors adjacent to the Revised Project site. The Original Project and the Revised Project, as currently proposed, do not provide adequate levels of protection for the Hotel and its residents and are fatally short on information concerning potentially severe impacts.

The Revised Project, with its deep foundation work on a zero lot line with the Hotel, has the high likelihood of causing damage that was not disclosed or analyzed from an environmental perspective, nor were appropriate mitigation measures or alternatives properly studied. Without proper environmental review of the significant impacts the Original Project and Revised Project pose on the Hotel and its residents, there is a likelihood impacts and harm to health, safety and welfare will occur. Without

proper analysis of the significant impacts the Revised Project will have on the Hotel, the Project must be denied.

4. Denial of the Revised Project Does Not Run Afoul of the Religious Land Use and Institutionalized Persons Act, Free Exercise Clause, or Fair Housing Act.

The Project Applicant, Fifth Church of Christ, Scientists, ("Church") cannot legitimately invoke the protections of the First Amendment's Free Exercise Clause and Religious Land Use and Institutionalized Persons Act ("RLUIPA") as a means to push through a residential housing and mixed-use project even if a religious institution is combined with that proposed project. The RLUIPA and First Amendment do not extend so far. Further, the protections afforded by those statutes do not protect against the denial of a project which has the potential to harm another sacred individual right: life.

The RLUIPA provides that a government land-use regulation that imposes a substantial burden on the religious exercise of a religious assembly or institution is unlawful unless the government demonstrates that imposition of the burden is in furtherance of a compelling governmental interest and is the lease restrictive means of furthering that compelling interest. (42. U.S.C. § 2000cc(a)(1).) Under the RLUIPA, the Church bears the burden to prove that a land use regulation, denial, or conditional use permit imposes a substantial burden on its religious exercise. (*International Church of Foursquare Gospel v. City of San Leandro* (2011) 673 F.3d 1059, 1066.) "Substantial burden" must place more than inconvenience on religious exercise and must be oppressive to a significantly great extent. (*Id.*, citing *San Hose Christian College* (2004) 360 F.3d 1024, 1034.) The Church's attempt to cloak a commercial, mixed-use development with the constitutional protections of freedom of worship stretches those protections beyond their logical (let alone meaningful) context and borders on the cynical. The Revised Project is not a religious project, but a commercial development project advanced by a for-profit development corporation. It would qualify as a slippery slope for any court to claim that denial of a project like this were void merely because a portion of that project also included a religious institution element. The RLUIPA does not extend that far; nor is it meant to.

Further, the Church claims that the Project Site's location is a main factor in why any denial would place a substantial burden on the Church, stating that the area around the Church is dangerous and prevents them from conducting their religious services. (See Fifth Church Letter dated August 25, 2021, p. 7.) Importantly, the Church and Forge's current proposal is to demolish the existing Fifth Church of Christ, Scientist building, a well-known historical landmark in the downtown Tenderloin District and instead install a thirteen-story high-rise residential structure in its place. Notably, the Church is not moving from the Project Site, but simply moving further down O'Farrell Street. The Church provides no evidence for its claims that "this block needs animation, foot traffic, and density. Any effort to limit density on the block would directly harm the Church and impose a substantial burden on its religious exercise, as the church would not be feasible with the allowed density." (Fifth Church Letter dated August 25, 2021,

p. 6.) Nor does the Church provide evidence that it cannot fulfill its religious mission in the current church building. Finally, the Church provides no evidence for its claims that denying the Revised Project places a substantial burden on its religious activities merely because it cannot utilize a reading room.

In any event, the Appellants do not argue whether or not the Church's religious activities should remain at the Project Site or that the Church cannot properly implement other uses at the Project Site in conjunction with those activities. The Appellants simply ask that any proposed project actually factor in and account for the great risk the Revised Project, as proposed, places on the health, safety and welfare of its neighbors as well as meet the use, fit, and character of the surrounding community.

Finally, the Church's suggestion that the issues presented by the Appellants are not properly before the Board are spurious, at best. It is manifest on the record that Forge and the Church have presented modifications to the Original Project that have triggered CEQA. If that were not the case, there would be no presentation of a CEQA addendum document (the "Addendums," as defined above). (CEQA Guidelines, § 15164, subd. (a).) The involvement of CEQA, even with an EIR addendum (which PBI asserts in the incorrect form of CEQA review), establishes that the Planning Commission -- and now the Board -- exercise plenary discretionary authority over a "project" as defined by CEQA. (Pub. Resources Code, § 21065.) CEQA defines a "project" as an activity that: (1) is a discretionary action by a governmental agency and (2) will either have a direct or reasonably foreseeable indirect impact on the environment. (Pub. Res. Code, § 21065.) Such discretion reopens the entire project to review and scrutiny. (*Ibid*.)

5. Conclusion.

For the foregoing reasons, the Project should be denied and Motion 20935 reversed, or alternatively, any approval of the Revised Project should be accompanied by new and robust mitigation measure to address the issues raised herein, including, but not limited to, appropriate building setbacks. The Revised Project's construction, as proposed, has a strong likelihood to detrimentally affect and permanently damage these adjacent historical resources, specifically the Hotel, with attendant safety hazards to its vulnerable inhabitants. Such damage would cause the Hotel to be in violation of City Building Code section 102A and Building Code section 3307 and CEQA among other standards, codes and statutes.

Very truly yours,

Michael W. Shonafelt