PELOSI ZIBLATT LAW GROUP

Sent via Electronic Mail

October 25, 2021

Hon. Shamann Walton
San Francisco Board of Supervisors
City Hall Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Supplemental Response to Appeal of Environmental Impact Report
469 Stevenson Street (Case No. 2017-014833ENV)

Dear President Walton and Supervisors:

On behalf of our clients, 469 Stevenson Investment, LLC, we are submitting this response the October 21, 2021 letter from the Brandt-Hawley Law Group on behalf of the Yerba Buena Neighborhood Consortium ("YBNC") ("Appellant") providing a supplemental brief in support of their challenge to the certification of an Environmental Impact Report ("EIR") under the California Environmental Quality Act ("CEQA") for a 495-unit mixed-use residential development with approximately 4,000 square feet of ground floor retail space to replace a surface parking lot between 5th and 6th Street in the South of Market Neighborhood ("Project"). The Board of Supervisors is scheduled to hear the Appellant's CEQA appeal on October 26, 2021.

The Appellant's October 21, 2021 letter raises issues that were considered, responded to, and rejected, as part of the Planning Commission's review and certification of the Final EIR.[1] No new information or evidence, let alone substantial evidence, has been submitted or provided in support of their claims or in response to, and rebuttal of, the Planning Commission's prior determination.[2] The appeal, including the supplemental brief, is simply without merit. The Appellant has not met its legal burden in challenging certification of the EIR and the appeal should be rejected.

Legal Standard of Review

The Appellant's supplemental brief requests that the Board of Supervisors conduct a "*de novo* review" to find that the EIR is inadequate. Under CEQA, a *de novo* standard of review only applies where an EIR has omitted a discussion of a potentially significant impact or that discussion is factually insufficient. Put simply, in Sierra Club v. County of Fresno (2018) 6 Cal.5th 502 the California Supreme Court confirmed that substantial evidence is the appropriate standard for review of factual

[1] The Appellant's letter discusses the Conditional Use authorization granted for the Project including the Planning Commission's split vote and the Conditional Use authorization findings. The Conditional Use authorization was not appealed and is not before the Board of Supervisors.
[2] Restating an individual Planning Commissioner's opinion regarding the Project and its CEQA analysis prior to the EIR's certification is not relevant as not only is it opinion or narrative, but it quotes Planning Commission deliberation discussions prior to its action to certify the EIR.

determinations that underlie the analysis in an EIR with the *de novo* standard only appropriate in reviewing whether procedural or statutory criteria of CEQA were satisfied. To determine whether the discussion is factually insufficient and thus subject to a *de novo* review, the key question is whether the EIR included "sufficient detail" to "enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Id.* at 510, 516. Here, there is no question that the discussion of potential impacts associated with the Project was factually sufficient as evidenced by the Appellant's own letter that indicates that its concern is not with the amount of information provided, as clearly, they have enough information to meaningfully understand the issues, but with the determination based on the information or evidence provided. As noted in our October 20, 2021 letter and consistent with Sierra Club v. County of Fresno, the correct standard in this instance is not *de novo* review but the substantial evidence standard and here the Appellants have not met that standard.

Evidence in support of our statements above can be found in the Appellant's own claims. For example, regarding cultural resources, the Appellant cites comments raised by the public and the Planning Commission on the Project's potential impact to surrounding historic and cultural resources and districts. These citations are only possible because the Initial Study identified the surrounding properties and districts and because a determination based on a cultural resources analysis prepared by the San Francisco Planning Department dated September 25, 2019 (Historic Resource Status for Properties Adjacent to 469 Stevenson Street) and the applicable CEQA threshold[3], found potential impacts would be less than significant. The issue is not that the analysis contained insufficient information (i.e., *de novo* standard) but that the assessment of the impacts was incorrect (i.e., substantial evidence standard).

Regarding, geology and soils, the same determination can be made. Appellant asserts that the Project fails to evaluate potential seismic issues associated with the Project because there is **no** evaluation of seismic risks. That simply is not true. The Initial Study includes a discussion of soil conditions and the regulatory requirements that apply to construction in a seismically activate zone. The seismic risks associated with the Project and the requirements for construction are described. Based on those requirements and as allowed under CEQA and applicable CEQA caselaw, the Initial Study found there would be no impact because compliance with applicable State and local regulations eliminates any potentially significant seismic hazard. In this instance, CEQA does not require the exact techniques to be used to be identified. Sufficient detail is included for the public to know that Project construction will be subject to strict regulatory requirements and oversight. The Appellant may not agree with the determination that the impact can be reduced to a less than significant level, but that is a substantial evidence review, as discussed below, not *de novo*.

Appellant also appears to assert that other topics also warrant *de novo* review, but a simple review of the Initial Study, Draft EIR and/or Responses to Comments indicates that sufficient facts,

[3] CEQA Guidelines section 15064.5(b) provides that the significance of a historic resource is materially impaired when a project "demolishes or materially alters in an adverse manner those physical characteristics of a historic resource that convey its historic significance."

information, and analysis to allow for informed decision-making and public participation.[4] Thus, the applicable standard of review is not *de novo* but substantial evidence.

Under CEQA Guidelines section 15384, substantial evidence is defined as follows:

> "(a) [....] 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 that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.
>
> (b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."

In challenging the certification of an EIR, an appellant is required to provide substantial evidence in support of its claims founded on evidence in the record rather than on hypotheticals or unsubstantiated opinion. Citizens for Positive Growth & Preservation v City of Sacramento (2019) 43 CA5th 609, 636.

Pursuant to the CEQA Guidelines, an EIR is determined to be legally adequate when it includes "a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." See CEQA Guidelines section 15151.

As discussed below, Appellant's have not provided substantial evidence upon which the Board of Supervisors should find that the Final EIR should not be certified. The Appellant's claims are replete with unsubstantiated opinion and devoid of any expert opinion. Appellant's fail to provide any evidence, let alone substantial evidence, as is required under CEQA.

Appellant's Claims

As noted above, to challenge the adequacy of the EIR, the Appellant is required to provide substantial evidence that the EIR was legally inadequate. Substantial evidence is required to include facts,

[4] The Appellant's also raise concerns regarding transportation and displacement and gentrification. Transportation was studied and discussed in detail both in the Initial Study and in a separate transportation analysis prepared by Fehr & Peers, a transportation expert. Displacement and gentrification are only CEQA issues to the extent they have a physical impact on the environment. Here, there are over 1000 pages of technical studies and analysis in the Draft EIR and an additional 348 pages in the Response to Comments in support of the determination that there is no impact.

reasonable assumptions predicated upon facts, and expert opinion supported by facts. The Appellant has not met that burden.

Regarding shadow impacts, Appellant has raised no new issues. The EIR found that the Project would have a significant and unavoidable shadow impact on Mint Plaza. Appellant provides no evidence that the shadow analysis was flawed or inaccurate and provides no substantial evidence related to the impact.[5] This claim is without merit.

Regarding, geology and soils, Appellant has also raised no new issues. While additional information has been provided by John Elberling of YBNC, Mr. Elberling is not an expert and the information provided is opinion and narrative. The condition of soils on YBNC's site is not relevant and does not indicate that the Project cannot be constructed with a mat foundation as proposed. Statements regarding the number of basement levels and subterranean depth are not based in fact and are not relevant to the determination of whether the CEQA analysis adequately analyzed the Project's geology and soils impact. The Project as approved includes three levels of underground parking and that is what the EIR analyzed.

By contrast, there is substantial evidence in the record that the Project will not have an impact on geology and soils and that a mat foundation is feasible. This is evidenced by two towers of similar size and scale in the vicinity of the Project that have been approved and constructed with a mat foundation.[6] In addition, Langan, a geotechnical engineering firm, confirms that the soil conditions on those two sites are similar to the Project site. A copy of Langan's opinion regarding the feasibility of a mat foundation for the Project is attached and hereby submitted into the administrative record.[7]

* * * * * * *

In sum, the Appellant has not met its legal burden. Its claims are re-statements of a general opinion about the Final EIR and are speculation, unsubstantiated opinion or narrative. These statements are misleading, inaccurate or erroneous, failing to reach the applicable legal standard for challenging an EIR. As such, we respectfully request that the Board of Supervisors deny the appeal of the Final EIR and find that the claims in the appeals are without merit.

Very truly yours,

Alexis M. Pelosi

[5] Appellant's claims that the Board of Supervisors should select a reduced-size alternative is without justification. Under CEQA, an EIR is to provide a range of alternatives but is also to consider whether an alternative meets project objectives and is feasible. As the DEIR states, the reduced-size alternative does not meet Project objectives. It provides significantly less affordable housing, a key project objective, and the reduced density makes the Project economically infeasible (DEIR 6-8).

[6] The 5M project, approximately one (1) block away from the Project, is currently under construction with a 240-foot-high building and a 350-foot tall building both supported on mat systems.

[7] Nothing in the attached letter changes any of the analysis conducted in the EIR. It provides some additional detail that confirms the EIR's conclusions regarding geology and soils.

LANGAN

Memorandum

135 Main Street, Suite 1500 San Francisco, CA 94105 T: 415.955.5200 F: 415.955.5201

To: Mr. Tyler Kepler – Build Inc.

From: Maria G. Flessas, PE, GE and Peter Brady, PE

Date: 25 October 2021

Project: 469 Stevenson Street, San Francisco, California

Subject: Summary of Project, Subsurface Conditions, and Feasibility for Mat Foundation
Langan Project No.: 731690402

The proposed structure at 469 Stevenson Street will be a 27-story structure with a 1- to 6-level podium. The structure will include a three-level basement that will extend beneath the entire site. The excavation for the new basement and foundation will extend 46 to 52 feet below existing site grades. The proposed development includes a 27-story (274-foot-high) tower that is considered a tall building as defined by the City and County of San Francisco Department of Building Inspection (DBI). According to Administrative Bulletin 111 (AB-111) *Guidelines for Preparation of Geotechnical and Earthquake Ground Motion Report for Foundation Design and Construction of Tall Buildings*, the design level geotechnical investigation report for a tall building will be reviewed by geotechnical reviewer(s) who are part of the Engineering Design Review Team (EDRT) assigned to the project by DBI.

The 469 Stevenson Street Site is north of the edge of the previous Sullivan Marsh Area. Based on two borings drilled within the project site in 2020 (Phase 1 investigation) that extended to bedrock, the site is covered by 8 to 8½ feet of sandy fill, underlain by about 19 feet of loose to dense native sand (Dune sand), in turn underlain by 6½ to 10 feet of marsh deposit. The marsh deposit extends to a depth of about 37 feet below site grades. Below the marsh deposit is dense to very dense sand (Colma formation) to depths of 98 to 114½ feet below the ground surface (bgs). A 24- to 37-foot-thick stiff to hard clay layer, locally referred to as Old Bay Clay, is present below the dense to very dense sand and extends to depths of 114.5 to 135 feet bgs. The Old Bay Clay is underlain by dense to very dense sand to depths of 189 to 198 feet, and very stiff to hard clays (alluvium and residual soil) extending to bedrock. Bedrock was encountered at depths of 243 to 249 feet bgs.

The fill, Dune sand and marsh deposit will be removed in their entirely during the building excavation. The soil subgrade at the bottom of the excavation will consist of dense to very dense Dune sand. The 50-year building settlement from consolidation of the Old Bay clay is estimated to range from 1 inch to 3.7 inches, which meets AB-111 requirement for total short-term and long-term computed settlement of the foundation under gravity and seismic loads to not exceed 4 inches. The results of the two borings indicate a mat is feasible for the support of the proposed structure. The final evaluation of the foundation system will include the results of the second phase of the investigation, 1 boring extending to bedrock and one boring which will be cored at least 50 feet into bedrock. The results of the field investigation (both field investigation phases) will be included in a design level geotechnical investigation report. Seismic hazards and

settlement of the structure will be addressed in the final report. The design level report, including the feasibility of a mat for the support of the proposed structure, will be reviewed by the EDRT; any comments addressed by EDRT will need to be resolved before the design level geotechnical report is approved by EDRT.

The subsurface conditions at the 469 Stevenson Street site are similar to the subsurface conditions for a nearby development, 5M, currently under construction. 5M includes two buildings that have subsurface conditions very similar to 469 Stevenson. One building is a 240-foot high concrete building, with a 25-foot-deep basement, and soil improvement to the bottom of the marsh deposit. The second building is a 350-foot tall, steel-framed building, with a 32-foot-deep excavation. Both buildings are supported on mats. Measured settlement of the 350-foot-tall building is forwarded to the City; settlement to date is about ½ inch; settlement will be monitored for at least 10 years per City requirements.

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