ZACKS, FREEDMAN & PATTERSON

A PROFESSIONAL CORPORATION

February 13, 2023

VIA EMAIL

Land Use and Transportation Committee
c/o Erica Major
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102
erica.major@sfgov.org

Re: Agenda Item #2 – February 13, 2023 Hearing
BOS File No. 220815 [Administrative Code - Definition of Tourist or Transient Use Under Hotel Conversion Ordinance; Amortization Period]

Dear Chairperson Melgar and Honorable Members of the Land Use and Transportation Committee:

Our office represents the Hotel Des Arts and numerous other individual owners of SROs (collectively, "Owners"). The Owners object both substantively and procedurally to Board of Supervisors File No. 220815 (the "Ordinance").

Despite the City knowing from previous filings that our clients' property rights will be particularly affected by the Ordinance, **we were given no notice of today's hearing**. We learned of the hearing this morning and therefore have had insufficient time to prepare. **We therefore request a continuance.**

The proposed Ordinance represents a dramatic change to the City's Hotel Conversion Ordinance. It would prohibit weekly room rentals – which have always been lawful *and encouraged* in San Francisco – and take away the Owners' family businesses without compensation. Worst of all, the Ordinance would harm the City's most vulnerable residents: SRO occupants who cannot afford to pay a month's rent in advance, let alone a security deposit on a monthly lease.

1. The Ordinance would establish an insufficient amortization period

The proposed Ordinance would make the Owners' longstanding weekly SRO rental businesses illegal within two years. This is an extraordinarily short amortization period. It is well-established in California law that an amortization period must be "reasonable" in light of the investment in the use, and its remaining economic life, order to pass constitutional muster. (See Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365; United Business Com. v. City of San Diego (4th Dist. 1979) 91 Cal. App. 3d 156.) The courts have struck down amortization periods of as long as *five years* as being too short. (La Mesa v. Tweed & Gambrell Planing Mill (1956)

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146 C.A.2d 762, 770.)

Two years is a patently insufficient amortization period; Owners cannot recoup their investments within that time. Indeed, the value placed on residential hotel units by the City is hugely disproportionate to the likely monetary recovery for SRO owners over a two-year period. The Code allows SRO owners to convert residential hotel units to tourist use, but only if they provide a "one-for-one replacement." (Admin. Code, § 41.13.) That is, SRO owners must either build a comparable unit elsewhere, or pay the City or a nonprofit "an amount equal to 80% of the cost of construction of an equal number of comparable units." This amount would be significant in light of the extremely high cost of construction in San Francisco – a recent New York Times article, citing government data and industry reports, noted that it costs $750,000 to build one unit of affordable housing in San Francisco.[1] Given Owners would have to pay the City an amount in the high six figures *per unit* to convert residential hotel units, it is astonishing that the City considers a two-year amortization period to be appropriate for the forced change of use effected by the Ordinance.

By contrast, all other lawful nonconforming uses in San Francisco are given at least 5-10 year amortization periods. (Planning Code § 184.) In fact, many nonconforming uses are given 20, 30, or even 50-year amortization periods. (Planning Code § 185.) This disparate treatment of SRO owners, as opposed to other nonconforming uses, violates Owners' equal protection rights. As the California Supreme Court has held, a statute is not constitutional:

> . . . if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.
>
> Martin v. Superior Court (1824) 194 Cal. 93, 100.

Here, the City has singled out SRO Owners for disparate treatment – both as compared to owners of other nonconforming uses, and also as compared to tourist hotel owners. For the cessation of any other nonconforming use, owners and operators are afforded a much longer amortization period. Similarly, tourist hotel operators who offer weekly rentals will be able to continue doing so. The Ordinance arbitrarily imposes a burden on Owners and rides roughshod over their constitutional rights.

While the Ordinance contains a hearing procedure to request an exception for a longer amortization period, there is no assurance that such extensions will be granted. The Building Inspection Commission would be charged with holding hearings to consider whether an exception is "reasonable" in light of the "[s]uitability of the investments for residential hotel use" and any number of nebulous "other relevant factors." These criteria are so vague as to be impossible to administer in a fair, predictable manner. Indeed, in its response letter to BOS File No. 190646, which was similar to the Ordinance, the BIC noted that "details about the amortization process [are] not clear in the current legislation."

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[1] Thomas Fuller, *Why Does It Cost $750,000 to Build Affordable Housing in San Francisco?*, N.Y. TIMES, Feb. 20, 2020, *available at* https://nyti.ms/2Vb6kcq.

Finally, in order to determine what constitutes a "reasonable" period, the City must weigh "the public gain to be derived from a speedy removal of the nonconforming use against the private loss that removal of the use would entail". (Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848.) Here, there is *no public harm* associated with offering SRO units for rental on a weekly basis. To the contrary, Owners are providing housing to residents of San Francisco who cannot afford to pay rent on a monthly basis, or a month's rent in advance. Owners also provide weekly housing at affordable rates to medical patients and their families, who need to stay near the UCSF medical center to access treatment.[2] The cessation of this type of use will *harm* the public welfare, as it will result in the displacement of these residents. This factor strongly weighs in favor of a longer amortization period.

2. The Building Inspection Commission lacks the legal authority to hold amortization hearings

As discussed above, the proposed Ordinance would charge the Building Inspection Commission with administering the amortization exception process for SROs. However, this is a judicial function which the Commission is not authorized to exercise.

Under the California Constitution, "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const., art. VI, § 1.) Assessing damages is a judicial function, and the Ordinance has "set forth no criteria for assessing such losses or translating them into" particular extended amortization periods corresponding to particular financial losses. (Larson v. City and County of San Francisco (2011) 192 Cal.App.4th 1263, 1281.) Moreover, the Building Inspection Commission possesses no "special competence" (AICCO, Inc. v. Insurance Co. of North America (2001) 90 Cal.App.4th 579, 594)) or "specialized expertise" (Wise v. Pacific Gas & Electric Co. (2005) 132 Cal.App.4th 725, 740, as modified (Sept. 19, 2005)) in the subject of amortization or "suitability of investments" that would justify primary jurisdiction over the claims at issue.

As the California Supreme Court has held, an administrative agency "may exercise *only those powers that are reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes.*" (McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal.3d 348, 372; italics original.) The Building Inspection Commission's primary, legitimate regulatory purpose is "the provision of safe and sanitary buildings." (San Francisco Charter, Append. D3.750.) It has nothing to do with assessing the financial hardships of private property owners and business operators. And while the "commission shall have the power to hold hearings and hear appeals on . . . determinations made by the Department of Public Works, Water Department, or Department of Building Inspection" (id. at D3.750-4), it has no power to exercise quasi-judicial authority in the first instance. The Ordinance would unlawfully charge the Building Inspection Commission with holding hearings as the *initial* trier of fact – rather than reviewing the determinations of its subordinate departments.

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[2] See the declarations filed in Superior Court Case No. CPF-17-515656, attached hereto as Exh. A.

3. The Board of Supervisors lacks the power to alter the Building Inspection Commission's fundamental authority

The Building Inspection Commission was created in 1994 by Proposition G. In other words, it was created directly by the *voters* via an initiative Charter amendment. The Board of Supervisors lacks the authority to override a voter-enacted Charter amendment via a regular ordinance.

The proposed Ordinance would clearly alter the Commission's fundamental structure, in conflict with the Charter. As discussed above, the Ordinance would empower the Commission to hear quasi-adjudicative cases in the first instance. But the Charter does not allow it that power. To wit, the legislative digest for Proposition G (prominently printed at the top of the Voter Information Pamphlet and Sample Ballot for Prop. G[3]) states clearly, "The Commission could reverse, affirm or change certain decisions made by City departments concerning building construction projects." The Ordinance cannot empower it to hear exemption requests in the first instance – especially for amortization requests that are clearly unrelated to "building construction projects."

Since the Building Inspection Commission cannot hear SRO Owners' applications for extensions of the patently insufficient two-year amortization period, there would be no procedure for Owners to seek and obtain an amortization extension. In other words, the Ordinance constitutes a facial taking of private property (the Owners' lawful businesses) without just compensation.

4. The extension application procedure violates Due Process requirements.

Even if the BIC had jurisdiction to hear extension applications, the proposed hearing process raises a number of due process violations.

A property owner's legal nonconforming use status cannot be terminated without the procedural due process of a hearing. (Bauer v. City of San Diego (4th Dist., 1999) 75 Cal. App. 4th 1281.) Here, the amortization hearing process must provide an owner with an "opportunity to be heard at a meaningful time and in a meaningful manner." (Brown v. City of Los Angeles (2002) 102 Cal.App.4th 155, 173.) At a minimum, this requires:

> . . . written notice of the grounds for the [decision]; disclosure of the evidence supporting the [decision]; the right to present witnesses and to confront adverse witnesses; the right to be represented by counsel; a fair and impartial decisionmaker; and a written statement from the fact finder listing the evidence relied upon and the reasons for the determination made.
>
> (Brown v. City of Los Angeles (2002) 102 Cal.App.4th 155, 174, citing Burrell v. City of Los Angeles (1989) 209 Cal.App.3d 568, 577.)

The Ordinance requires Owners to submit a request to the BIC for an extension to the amortization period six months prior to the expiration of the amortization period, based on the following factors:

(1) The total cost of the hotel owner or operator's investments to the hotel;

(2) The length of time those investments have been in place;

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[3] Available at https://www.ifes.org/sites/default/files/ce02069_0.pdf, p. 107.

(3) Suitability of the investments for residential hotel use; and

(4) Any other factors relevant to determining the owner or operator's reasonable return on investments.

As noted above, factors (3) and (4) are vague and uncertain to the point of being unintelligible (as the City has effectively admitted with regard to the previous iteration of this Ordinance in stating that regulations would be necessary delineate the meaning of these provisions). Moreover, requiring staff to interpret the Ordinance and develop regulations would likely be an unconstitutional delegation of the City's legislative powers to City staff. (*Kugler v. Yocum* (1968) 69 Cal. 2d 371.) As the Ordinance is presently drafted, it is impossible for an SRO owner to know in advance what the criteria mean, or what would be needed to satisfy the BIC. The Ordinance fails to "provide sufficiently definite standards of application to prevent arbitrary and discriminatory enforcement," and is therefore unconstitutionally vague. (DeLisi v. Lam (1st Dist. 2019) 39 Cal. App. 5th 663.)

This unfairness is compounded by the fact the burden of proof is placed on the *SRO owner* to prove that a longer amortization period is appropriate. (Brown v. City of Los Angeles, *supra,* holding that the police department's administrative appeals procedure failed to provide adequate due process protection, since the procedure placed the burden of proof on the officer challenging the decision.)

Further, the Ordinance is silent as to whether an appeal procedure is available from the BIC determination. Although the Board of Appeals can hear appeals from BIC penalty decisions, it does not have a general appellate review role in relation to the BIC. Absent clear language in the Ordinance, it appears there is no right of appeal – rather, an SRO owner would have to go straight to court. This fails to satisfy basic due process requirements. The US Supreme Court has confirmed that due process requires that "prompt postdeprivation review" be available to a person deprived of a property interest. (Mackey v. Montrym (1979) 443 U.S. 1; see also Machado v. State Water Resources Control Bd. (2001) 90 Cal.App.4th 720.)

Here, the BIC hearing is not an "appeal" right, but the *initial* decision regarding the impact of the Ordinance on an individual Owner. The nature and extent of property deprivation crystallizes when the BIC determines the "reasonable" amortization period for a particular SRO hotel. By providing no prompt administrative appeal process from the BIC decision, the Ordinance does not comport with due process requirements.

5. An application for an extension of the amortization period requires an unconstitutional invasion of privacy

Even if the Ordinance's vague criteria could be fairly applied, the Ordinance's hearing process would require an SRO owner to provide (and effectively publicize):

(1) The total cost of the hotel owner or operator's investments to the hotel;

(2) The length of time those investments have been in place;

(3) Suitability of the investments for residential hotel use; and

(4) Any other factors relevant to determining the owner or operator's

reasonable return on investments.

First, an SRO Owner may not be able to determine the meaning of criteria 3 or 4, given their lack of clarity and specificity. And even if he or she could determine the criteria's meaning, the Owner may lack the wherewithal to produce this information.

More fundamentally, the Owners have state and federal constitutional rights to financial privacy. (See Cal. Const., art. I, § 1.) Personal financial information comes within the zone of privacy protected by the California Constitution. (Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652, 657.) Importantly, privacy protection is recognized in administrative as well as civil proceedings. (Sehlmeyer v. Department of Gen. Services (1993) 17 CA4th 1072, 1079.)

The Ordinance's extension procedure violates Owners' rights by compelling them to disclose proprietary and sensitive private financial information such as investments, pricing, profitability, and potentially non-SRO related income and financial hardships. Should the Building Inspection Commission be considering Owners' medical bills? What about their spouses' and children's medical bills? And should their right to continue operating their lawful businesses depend on such considerations? As a matter of law, the answer must be no.

6. The Ordinance must be reviewed by the Planning Commission

As a zoning ordinance which affects the permitted uses of real property, the proposed Ordinance "shall be adopted in the manner set forth in [Government Code] Sections 65854 to 65857, inclusive." (Gov. Code, § 65853.) There are numerous procedures and notice requirements that must be followed for the adoption and amendment of zoning ordinances under those sections. For example, the Planning Commission must hold a public hearing on the proposed Amendment with notice to be given pursuant to Government Code § 65090 "and, if the proposed ordinance or amendment to a zoning ordinance affects the permitted uses of real property, notice shall also be given pursuant to Section 65091."

Moreover, under local law, the Ordinance must be reviewed by the Planning Commission as required by San Francisco Charter Section 4.105: "An ordinance proposed by the Board of Supervisors concerning zoning shall be reviewed by the Commission." Amendments to the Hotel Conversion Ordinance have *always* been considered by the Planning Commission prior to enactment. This Ordinance is no exception. Regrettably, we do not believe the Ordinance is slated for a hearing at the Planning Commission as required by law.

The Planning Commission's authority to review this Ordinance cannot be transferred to the Building Inspection Commission – nor has the Building Inspection Commission reviewed the Ordinance, to our knowledge. As stated in the legislative digest for Proposition G, "The jurisdiction of the Planning Commission . . . would not be affected by this measure [Proposition G]." (1994 Voter Information Pamphlet and Sample Ballot, p. 108.) As discussed above, Proposition G created the Building Inspection Commission by amending the City Charter. The Board of Supervisors cannot abrogate the Planning Commission's Charter-granted authority via its decision to refer the proposed Ordinance to the Building Inspection Commission instead of the Planning Commission. The Charter is the City's ultimate authority. The Charter amendment that created the Building Inspection Commission – and the Charter itself – explicitly forbade the

transference of powers from the Planning Commission to the Building Inspection Commission: "Nothing in this chapter shall diminish or alter the jurisdiction of the Planning Department over changes of use or occupancy under the Planning Code." (Charter, Append. D3.750-4.) The Ordinance must be referred to the Planning Commission. Given the BIC's role in administering the Ordinance, it should also consider the Ordinance at a noticed public hearing.

7. Proper CEQA review must occur

The proposed Ordinance is a Project that requires proper environmental review pursuant to the California Environmental Quality Act, including, inter alia, a public hearing on the Owner's forthcoming appeal of the Ordinance's Negative Declaration. CEQA review will not be complete until that time, and the Board should refrain from taking action on the Ordinance until that time.

The Ordinance will have serious unmitigated environmental impacts. A copy of our PMND letter is attached hereto as Exh. B.

8. The Ordinance is unconstitutional

Lastly, it is a violation of equal protection and due process of law, targeting owners for disproportionate and unusual treatment, to take away the Owners' business and effectively offer to sell it back to them pursuant to the Admin. Code § 41.13 conversion process. There is no rational basis for this action.

PETITIONERS HAVE PREVIOUSLY SUBMITTED FOR THE BOARD'S RECORD EVIDENCE AND ARGUMENTS, INCLUDING THE EXTENSIVE BRIEFING FROM THE TRIAL AND APPELLATE COURTS IN OPPOSITION TO THE PRIOR SRO AMENDMENTS (BOS FILE NOS. 161291, 190049, 191258 AND 190946; SUPERIOR COURT CASE NO. CPF-17-515656). WE REINCORPORATE THOSE MATERIALS AND ARGUMENTS HERE BY REFERENCE AND OFFER TO LODGE HARD COPIES UPON REQUEST.

The Ordinance is unlawful for a host of reasons, and it will cause serious harm to those who are most in need of our City's protection. We urge you to reject this misconceived proposal. At a minimum, **we respectfully urge the Committee to continue this hearing until proper notice is given**.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC

Ryan J. Patterson

Encl.

EXH. A

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Attorneys for Petitioners and Plaintiffs
SAN FRANCISCO SRO HOTEL COALITION,
HOTEL DES ARTS, LLC, and BRENT HAAS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SAN FRANCISCO SRO HOTEL COALITION, an unincorporated association, HOTEL DES ARTS, LLC, a Delaware limited liability company, and BRENT HAAS,

Petitioners and Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, a public agency, acting by and through the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; DEPARTMENT OF BUILDING INSPECTION OF THE CITY AND COUNTY OF SAN FRANCISCO; EDWIN LEE, in his official capacity as Mayor of the City and County of San Francisco, and DOES 1 through 100, inclusive,

Respondents and Defendants.

Case No. CPF-17-515656

DECLARATION OF ANDREW M. ZACKS IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION FOR LEAVE TO FILE REPLY BRIEF ON MAY 30, 2017

Date: May 30, 2017
Time: 11:00 a.m.
Dept: 206, Presiding Judge
Judge: Hon. Teri L. Jackson

I, Andrew M. Zacks, declare as follows:

1. I am an attorney licensed to practice in California and am a lead counsel for Plaintiffs/Petitioners in this action. I have personal knowledge of the following facts and could testify truthfully thereto if called to do so.

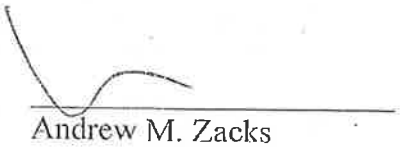
2. My office was primarily responsible for drafting this motion. Because of my nearly 30 years experience with the HCO, I intended to take the lead in drafting this reply. Unfortunately, last week my schedule was so impacted, I had to delegate responsibility to my associate, James Kraus. I had to attend to the following unexpected client matters:

On May 25, I participated in the mediation of a particularly contentious land use suit in Oakland which was scheduled one court day prior on Friday May 23. On May 26, I had a conference call with retired Judge James Warren in an upcoming arbitration. I prepared for, and attended, oral argument in the First District in Jacoby v. CCSF, #A145683. I then was called on to assist with a preliminary opposition to a First District writ petition filed by the City in the very contentious case 1049 Market Street LLC v. CCSF S.F. #A151274. I was also exclusively responsible for preparing opposition to two requests to the Supreme Court to depublish the opinion in Coyne v. CCSF (2017) 9 Cal.App.5th 1215. These were on a strict, 10-day opposition achedule due today. One of the requests was by the City. I am also working on an opposition brief in SFAA v. CCSF, #A149919, which is on appeal by the City. Our Respondents' brief is due June 5 – with the 15 day automatic extension.

3. The proposed revised reply brief adds a few paragraphs and case quotes. and corrects some typographical errors. I believe these additions are important to resolving the motion on the merits, will not complicate hearing preparation, and should be allowed to be filed today.

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

Date: May 30, 2017



Andrew M. Zacks

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Respondents and Defendants.

Case No. CPF-17-515656

DECLARATION OF BRENT HAAS IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[CCP sec. 526]

Date: June 5, 2017
Time: 2:00 p.m.
Dept: CEQA, room 503
Judge: Hon. Teri L. Jackson

I, Brent Haas, declare as follows:

1. I am over the age of 18 and have personal knowledge of the following facts. I could testify truthfully thereto if called to do so.

2. I am a hair stylist and visual artist. (www.brenthaas.com) I also care for my elderly, widowed mother (age 82) who lives alone in Ohio. I moved to San Francisco right after Loma Prieta in 1989. My father died about 30 years ago and I have been visiting my mother regularly since. These visits are important to both of us. I am a California resident – I get healthcare here, pay CA resident taxes, and consider San Francisco my home – but due to the circumstances of being the primary caregiver for my aging mother, I have to spend considerable time in Ohio, her state of legal residency.

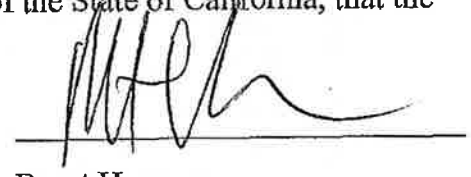
3. For the past 12 years, I've generally spent about 10 days to 3 weeks of every month living and working in the City, and the other 1-3 weeks in Ohio with my mother.

4. When I am in the City, I generally stay at several SROs. The ability to rent rooms at these SROs by the week – meaning I don't pay first and last month, and security deposit – is a godsend. Not having to pay expenses that I do not incur because of the ability to rent weekly or biweekly enables me to visit my mother. On rare occasion, I am in the City for more than 3 weeks in which case I stay at the Zen Center.

5. If San Francisco prohibits hotels like the ones I stay at from being able to rent to me on a weekly or biweekly basis, it would be very difficult for me to continue to visit my mother regularly. I would have to pay much more in rent and would have little time to visit her. I certainly could not be gone for 2-3 weeks and not work if I were paying rent on an apartment or I would have to leave San Francisco. I certainly do not want to do that anymore than any other San Franciscan wants to.

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

Date: April 24, 2017



Brent Haas

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

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Respondents and Defendants.

Case No. CPF-17-515656

DECLARATION OF HAMED SHAHAMIRI IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[CCP sec. 526]

Date: June 5, 2017
Time: 2:00 p.m.
Dept: CEQA, room 503
Judge: Hon. Teri L. Jackson

I, Hamed Shahamiri, declare as follows:

1. I am over the age of 18 years. I have personal knowledge of the following facts and could testify truthfully thereto if called to do so.

2. I am the manager of the Carl Hotel, located at 198 Carl Street, San Francisco. The cross-street is Stanyan. The Carl has 28 rooms – 0 tourist and 28 residential. We have three permanent residents.

3. The Carl is about 4 blocks from UCSF medical center on Parnassus Avenue. Many of our guests comprise medical patients, and their family members or friends. I know this because many of theses guests tell me why they are visiting and particularly staying at the Carl. In fact, some of these guests take the time to write friendly notes to me, appreciating the availability of the Carl – both due to its proximity to UCSF, but also its affordability; our weekly rates range from $539 to $1085. I am attaching a true and correct sample of copies of these letters I have received as Exh. A.

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

Date: April 20, 2017

Hamed Shahamiri

A

Judy Vivian
November 11, 2012
Robert, Manager
Carl Hotel

Dear Robert,

Larry and I would like to thank you so much for all of your help and hospitality at your hotel.

My husband had surgery Oct. 29th, for his thyroid, and he had a totally successful surgery.

We want to thank you for your help and flexibility with a surgery we had no idea about, or how long Larry would be in the hospital. It took so much stress away with your flexability on our days in the hotel.

It was also a great help to have a single room for our daughter and letting her move to our room when Larry entered the hospital.

The convenience of your hotel was a great relief.

We will recommend our friends and family to your hotel with great confidence.

Sincerely,
Judy and Larry Vivian

May 26, 2010

Management of the Carl Hotel
198 Carl Street
San Francisco, CA 94117

Re: Hamed

To Whom It May Concern,

I feel compelled to write and let you know of the tremendous assistance your employee, Hamed, gave me in a great time of need. I am a nurse at an Alzheimer's facility in Eureka, CA and we serve many disabled adults not just those with Alzheimer's disease. We recently had the occasion to send one of our client's to San Francisco for a medical consult, an extensive surgery, and then back a third time for a follow up. She was accommodated quite comfortably in your hotel and was very grateful but on her final visit she ran into some problems that Hamed assisted me from this great distance away to rectify. She has some mental health issues and can be quite charming but lacks judgment. On each prior visit she had been accompanied by her children who were able to mange her affairs and cope with any problems that arose but on this visit they were unable to be there. On her final day she would have missed her transportation home and been stuck in San Francisco without any money had Hamed not helped her and me resolve the problems that arose and make the arrangements that she needed. I am completely in his debt and wanted you to be aware of the excellent employee that you have. We could not have resolved this problem were it not for his efforts and she would have been stuck in San Francisco without any money or accommodations. I have no idea how we would have found her and gotten her safely home. Thank you for everything and especially thank you to Hamed for saving the day. I am completely in his debt.

Sincerely,

Joan Edwards

To The Staff
of
The Carl Hotel.

A note to thank you
for your thoughtfulness
and for the warmth
you express with every
kind word.

Thank you so much for
your hospitality and help
while I stayed with you,
while my husband had his
surgery.

Sincerely
Sylvia Gilmore

November 14, 2007

Hamed (sp?),

Forgive me if I am misspelling your name, but the purpose of this letter is to thank you so much for your great customer relations. You were so helpful, courteous, and kind to me in helping me with my reservations at your hotel for the period of Nov. 1-8, 2007.

You helped make my journey from Orlando, Florida to San Francisco to be with my son during his radical surgery at UCSF during that period so much easier because of your friendly and helpful support.

Without offending you I would like to leave you with a quote from my Bible which is, "May the God of hope fill you with all joy and peace. Rom.15-13.

Thank you again for your friendly support and compassion.

Richard D. Jarvis

Richard D. Jarvis

October 7, 2002

Dear Hamed,

This note is to express my family's deep appreciation to you for being so helpful and kind to all of us during the times we were in San Francisco for Danny's brain tumor surgery and treatments. We enjoyed our accommodations and the lovely patio. Dan's latest M.R.I. showed "no recurrent or residual tumor" and we thank God for this. We have recovered well but now we're having chemo

(over please)

Dear Staff Hotel Members,

Thank you for your kind and empathetic service you provided for my family while we went through my Mom's surgery. You were all very helpful and understanding during this difficult time. Thank you for being flexible and allowing us to adjust on accomodations.

My Mom is doing much better and we are looking forward to better days ahead.

Del Eugston

5/22/16

Dear Hamid (& Bill) –

Before any more time elapsed, we wanted to let you know how much your kindness & conscientiousness meant during our stay earlier this month. Thank you for making what was an otherwise very stressful time for us @ UCSF a little bit easier.

All the best,

Erik & Stephanie Schein
Reno, NV

P.S. –
Chelise has been doing remarkably better since the surgery! Seems we may have turned the corner for the better.

SUNDAY
MARCH 30TH OR
31ST?

DEAR
HAMUD
HAMED, HAMAD?
(I DON'T KNOW HOW TO SPELL YOUR NAME).

I WANTED TO THANK YOU SO MUCH FOR
ALL OF YOUR KINDNESS AND LISTENING
SKILLS. YOU ARE A JEWEL!
STAYING HERE AT THE
CARL HOTEL WAS SUCH A COMFORT
DURING DIFFICULT TIMES DUE TO A LONG
TIME FRIEND (LINDA BERCK) HAVING A
DANGEROUS SURGERY ON HER SPINE.

THE CARL HOTEL IS LUCKY TO HAVE
YOU (AND "BILL" TOO) AS YOU REPRESENT
THEM SO WELL. YOUR WARM PERSONALITY
AND THOUGHTFULNESS AND EMPATHY
FOR OTHERS, TRANSFERS A SINCERE!
CARING THAT IS MUCH APPRECIATED!

I WISH YOU BOTH DRANK WATER SO
THAT I COULD HAVE MADE YOU A WATER
CARRIER! (RATS).

IF EVER I NEED TO STAY HERE AGAIN,
I HOPE TO SEE YOU BOTH IN GOOD HEALTH.

WARMLY YOURS,
Jo Rabbetts

2014

long term boxes. We chose your hotel as it was so close to hospital. It was a good choice and we told the hospital staff to put you at the top of the list.

My daughter had a very rough time and joined near the hotel - got bad and had to return to hospital this happened several times. One of these times we needed a cab fast - none came Hamed had Eddie take us in his car. To the emergency room.

Very special people

Regards

Lorraine Parrott

Mr Edardo Shirhamiri,

I want to tell you of the wonderful care we received from Hamed and Eddie while we were at your hotel.

My daughter had a transplant surgery at the University Hospital. We were in your hotel 30 days.

Hamed was extremely caring and very helpful.

The social workers at the hospital had a list of places for family members to stay on

ZACKS, FREEDMAN & PATTERSON
A PROFESSIONAL CORPORATION

601 Montgomery Street, Suite 400
San Francisco, California 94111
Telephone (415) 956-8100
Facsimile (415) 288-9755
www.zfplaw.com

January 25, 2023

VIA ELECTRONIC SUBMISSION

President Rachael Tanner and Commissioners
San Francisco Planning Commission
49 South Van Ness Ave, Suite 1400
San Francisco, CA 94103

Re: Appeal of Preliminary Negative Declaration
2022 Hotel Conversion Ordinance Amendments (Case No. 2020-005491ENV)

Dear President Tanner and Commissioners:

Our office represents Hotel des Arts, LLC, the appellant in Planning Case No. 2020-005491ENV regarding the Planning Department's issuance of a Preliminary Negative Declaration ("PND") and determination that the proposed 2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient use under Hotel Conversion Ordinance, Amortization Period (Board of Commissioners File No. 22081) (the "2022 HCO Amendments") will have no significant effect on the environment.

Under the California Environmental Quality Act ("CEQA"), a negative declaration is proper only where "[t]here is *no* substantial evidence, in light of the whole record before the lead agency, that the project *may* have a significant effect on the environment." (Pub. Resources Code § 21080(c), emphasis added). An environmental impact report (EIR) is therefore required if there is even a "fair argument" that a proposed project *may* have any adverse environmental impacts. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal. 4th 310, 319-320.) Here, there is a fair argument that the proposed project would have significant environmental impacts that were not adequately addressed in the PND. The PND and Planning Department's response to the appeal, rather than rebut the Appellants arguments, merely confirm that the 2022 HCO Amendments *will* lead to displacement of low-income occupants and contribute to direct physical impacts on the environment such as blight and urban decay. The Department's conclusions to the contrary are based on speculation, unsubstantiated narrative, and clearly erroneous and inaccurate assumptions.

1. The Project Will Have a Significant Effect on Displacement and Vacancy Rates

The Planning Department response acknowledges that the City's entire premise in regulating SRO units is that "they are a limited resource and critical housing stock that must remain available to serve a vulnerable and economically disadvantaged target population." Courts have similarly recognized that "residential hotel units serve many who *cannot afford security and rent deposits for an apartment*." (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 674, emphasis added.) The San Francisco Superior Court similarly determined in *San Francisco SRO Hotel Coalition, et al. v. CCSF, et al.* (CPF-17-515656) and *San Francisco SRO Hotel Coalition v. CCSF, et al.* (CPF-19-516864) (the "2017 HCO Amendments") that similar proposed amendments, and the possibility of SRO occupant displacement, was a reasonably foreseeable result of increasing the minimum length of stay from 7 to 32 days and that it is reasonably foreseeable that SRO owners would charge monthly rents and require security deposits. (See **Exhibit A)**

Multiple courts have found that requiring SROs to operate like apartments will lead to monthly rents and security deposits being required, and the Department's conclusions otherwise are based on nothing more than unsubstantiated opinion. The Department simply ignores these findings, callously claiming that "thousands of San Franciscans" are able to afford to pay monthly rents. This completely ignores the primary demographic that SROs are meant to serve – those in the extremely-low-income bracket. While the percentage of middle- and high-income residents in San Francisco has continued to rise and the percentage of very-low- and low-income residents has fallen, the percentage of extremely-low-income residents in San Francisco that make less than 30% of area median income has remained steady at 18%.[1] According to the Consumer Financial Protection Bureau, 37 percent of households are unable to cover expenses for longer than one month by using all sources, including savings, selling assets, borrowing, or

[1] *San Francisco Housing Needs and Trends Report July 2018,* San Francisco Planning Department, *available at* https://default.sfplanning.org/publications_reports/Housing-Needs-and-Trends-Report-2018.pdf.

seeking help from friends or family.[2] That figure rises to *51 percent* of Black and Hispanic households that cannot cover expenses for longer than a month. The 2022 HCO Amendments, which will lead to SRO units charging security deposits and monthly rents, would put such units out of reach for 37% of all households that do not have the ability to cover more than one month of expenses and likely a much higher percentage of SRO occupants.

The PND recognizes that "exclusionary displacement occurs when a lower income household cannot afford to move into an area given the cost of housing relative to their household income," yet the PND and Department response completely ignores this aspect of displacement that the 2022 HCO Amendments will cause. There is substantial evidence that the 2022 HCO Amendments will lead to exclusionary displacement, and the PND does not address this impact at all.

The PND and Department response do recognize that the 2022 HCO Amendments will cause economic displacement, which occurs when residents and businesses can no longer afford escalating rents or property taxes. However, the PND erroneously states that the Department "conservatively" assumes that occupants of only 64 SRO units will be displaced. This clearly erroneous assumption is based on the number of vacancies that SRO owners reported were directly due to the 2017 HCO Amendments. This number plainly underrepresents the true impact that the 2022 HCO Amendments may have.

First, the City acknowledges that there is a low response rate to its "Annual Unit Usage Report" ("AUUR") survey, and that the City has difficulty determining the actual vacancy rate. Despite the fact that the data only represents a fraction of the actual number of SRO units, the City only uses the raw total number of units that were reported vacant due to the 2017 HCO Amendments. Thus the 64 total units is likely significantly less than the total number of vacancies if *all* SROs were taken into account.

Moreover, the City similarly acknowledges that at the time of the AUUR surveys, "many SROs were *not complying with 32-day minimum and were still offering 7-day rentals*." In other

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[2] *Making Ends Meet in 2022: Insights from the CFPB Making Ends Meet Survey*, CFPB Office of Research Publication No. 2022-9, available at: https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet-in-2022_report_2022-12.pdf.

words, SRO owners were not reporting vacancies due to the 2017 HCO Amendments because the City was not enforcing, and SRO owners were complying, with the 32-day minimum stay requirement. If the City were to enforce the 2022 HCO Amendments, the raw total number of vacancies due to the minimum stay requirement would likely rise significantly.

Finally, the Department does not explicitly acknowledge that the AUUR form only asks SRO owners to provide an explanation for reported vacancies when *more than 50%* of the units in the building are vacant.[3] The PND conceals this fact, and does not reveal how many SRO owners actually provided an explanation for their reported vacancies. This again suggests that raw total of reported vacancies due to the 2017 HCO Amendments is far below the actual number of vacancies that were caused by the 2017 HCO Amendments.

In sum, the 64 reported vacancies due to the 2017 HCO Amendments is based on a mere fraction of the actual number of SRO units, an even smaller fraction of reporting SRO units that complied with the 32-day minimum stay requirement, and an *even smaller* fraction of reporting complying SRO units that had more than a 50% vacancy rate. The PND and Department's assumption that this number is "conservative" is clearly erroneous. The City's own data demonstrates that displacement is certain to occur from the 2022 HCO Amendments and that the impact is clearly much greater than analyzed in the PND.

The PND and Department attempt to downplay the significance of the economic displacement that the 2022 HCO Amendments may cause by arguing that students, technology sector workers, and weekly transient tourists would make up part of the number of occupants who would be displaced. With respect to students and technology workers, the City's own 2015 analysis demonstrates that students and technology workers are definitively *not* part of the group of occupants who would be displaced by the 2022 HCO Amendments. As the Department response confirmed in a 2015 report to the Board of Supervisors, the Budget and Legislative Analyst Office found that some SROs are "providing *long-term rental housing* to students or to young technology sector workers" and confirmed that "at least three of the hotels are now providing *long-term housing* for students only." The 2022 HCO Amendments, which will

[3] See 2022 AAUR Form, available at https://sf.gov/sites/default/files/2022-11/2022AUURForm.pdf; 2018 AUUR Form, available at https://sfdbi.org/sites/default/files/AUUR%20Form.pdf.

increase the minimum stay requirement from 7 days to 30 days will have no impact at all on students and technology workers who *already* utilize SROs for long-term tenancies (and for whom a month's worth of rent and security deposit would likely not pose an economic barrier).

With regard to weekly transient tourists, the PND also fails to mention that the AUUR data *already* differentiates between residential guest rooms and tourist guest rooms.[4] The data provided in the PND, however, only lists total unit vacancies without revealing the vacancies for each type of unit. This again obscures the potential impact of the 2022 HCO Amendments. For example, if a 100-unit SRO included 50 residential guest rooms with 50% vacancy due to an inability to find occupants and 50 tourist guest rooms with 0% vacancy, the data in the PND would show that the SRO has only a 25% vacancy rate. However, if the 2022 HCO Amendments went into effect, the vacancy rate of the 100-unit SRO in the example above would skyrocket to 75% as the SRO in this example could only find enough occupants to fill 25 of its 50 residential guest rooms. The PND again fails to adequately analyze the evidence in the record, and the PND's conclusions that the 2022 HCO Amendments will not have an impact on vacancy rates is clearly erroneous.

2. The Project Will Have a Significant Effect on Urban Blight and Decay

The City has acknowledged that SRO units can provide a temporary step in finding permanent housing for homeless individuals, and the San Francisco Department of Public Health even leases a number of rooms in privately owned SRO buildings to temporarily house homeless individuals coming off the street or out of the hospital.[5] Monthly rents in privately owned and operated SRO buildings typically range from $650 to $700.[6] Data shows that 44% of employed homeless individuals and 82% of unemployed individuals earn less than $750 a month.[7] While such individuals may be able to seek shelter in an SRO for a week or several weeks at a time,

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[4] *See id.*
[5] *Single Room Occupancy Hotels in San Francisco: A Health Impact Assessment*, San Francisco Department of Public Health, available at: https://www.sfdph.org/dph/files/EHSdocs/HIA/SFDPH-SROHIA-2017.pdf.
[6] *Id.* at 10.
[7] *San Francisco Homeless County and Survey: 2022 Comprehensive Report*, Applied Survey Research, *available at*: https://hsh.sfgov.org/wp-content/uploads/2022/08/2022-PIT-Count-Report-San-Francisco-Updated-8.19.22.pdf.

requiring SRO owners to rent their units for a month at a time will put these rooms completely out of reach for a majority of homeless individuals.

Moreover, academic research is clear that the historic loss of SRO units as a naturally affordable housing option has led to an increase in homelessness.[8] As explained above, the PND's analysis on the impact on the vacancy rate is flawed and clearly erroneous. Yet even the PND's flawed analysis demonstrates that the vacancy rate in SRO's has been steadily increasing on its own, and the 2022 HCO Amendments will only exacerbate this problem. Increased vacancy rates will inevitably lead to deferred maintenance, closures, increased homelessness, urban decay, and blight. The fact that the PND explicitly acknowledges that these issues were *not* analyzed at all confirms that the PND is inadequate.

3. The Project May Have Potential Physical Impacts that Must Be Analyzed

Although the PND appears to acknowledge that the 2022 HCO Amendments may potentially have social and economic impacts, the Department states that only potential physical impacts resulting from economic activities must be analyzed under CEQA. Beyond the fact that caselaw is clear that urban blight and decay *are* physical impacts that must be analyzed under CEQA, the Department explicitly acknowledges that a reasonably foreseeable impact of the potential loss of low-income units (and resulting increase in homelessness) would be for the City to "*construct* homeless shelters, supportive housing and navigation centers." Construction of replacement housing units is unquestionably a physical impact that must be analyzed, and which this PND does not anlyze.

4. Conclusion

The environmental review of the 2022 HCO Amendments violates CEQA for multiple reasons. The data and evidence contained in the PND clearly demonstrates that the 2022 HCO Amendments *will* have a significant impact on displacement of SRO occupants, and that will

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[8] *Single-Room Occupancy Housing in New York City: The Origins and Dimensions of a Crisis*, Sullivan, Brian J., and Jonathan Burke. 17 CUNY L. Rev. 113-144, available at: https://mobilizationforjustice.org/wp-content/uploads/CNY109_Sullivan-Burke.pdf; *see also Preserving Affordable Housing in the City of San Diego*, San Diego Housing Commission, available at: https://www.sdhc.org/wp-content/uploads/2020/05/Affordable-Housing-Preservation-Study.pdf.

ironically put SRO units out of reach for the very sector of the population that the ordinance is apparently designed to protect – extremely-low-income residents. The 2022 HCO Amendments will unquestionably lead to increased vacancies, deferred maintenance, building closures, urban decay, and blight. The PND explicitly states that these potential impacts were ignored, despite the fact that the PND acknowledges that such impacts could lead to the construction of replacement public housing. The evidence is clear that the 2022 HCO Amendments may have significant environmental impacts, and we strongly urge that a more rigorous evaluation of those impacts be conducted through a full Environmental Impact Report.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC

Brian O'Neill

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

SAN FRANCISCO SRO HOTEL COALITION, an unincorporated association, HOTEL DES ARTS, LLC, a Delaware limited liability company, and BRENT HAAS,

Plaintiffs and Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a public agency, acting by and through the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; DEPARTMENT OF BUILDING INSPECTION OF THE CITY AND COUNTY OF SAN FRANCISCO; EDWIN LEE, in his official capacity as Mayor of the City and County of San Francisco,

Defendants and Respondents.

Case No. CPF-17-515656

CEQA

ORDER RE. PETITION FOR WRIT OF MANDAMUS

Date Action Filed:	May 8, 2017
Trial Date:	May 3, 2019
Hearing Judge:	Cynthia Ming-mei Lee
Time:	9:30 a.m.
Place:	Department 503

INTRODUCTION

This matter was heard on May 3, 2019 at 9:30 a.m. in Department 503 of the San Francisco County Superior Court, the Honorable Cynthia Ming-mei Lee presiding. Bryan Wenter and Arthur Coon of the law firm Miller Starr Regalia, and Andrew Zacks of the law firm Zacks Friedman & Patterson P.C. appeared for plaintiffs and petitioners San Francisco SRO Hotel Coalition, Hotel Des Arts, LLC, and Brent Haas (collectively, "Petitioners"). Deputy City Attorneys Andrea Ruiz-Esquide, Kristen Jensen, and James Emery appeared on behalf of defendants and respondents, the City and County of San Francisco, the Board of Supervisors, the Department of Building Inspection, and the Mayor (collectively, "San Francisco").

In their First Amended Petition and Complaint ("FAP"), Petitioners assert causes of action under the California Environmental Quality Act ("CEQA"), codified under Public Resources Code sections 21000 *et seq.*), the federal and state constitutions, and the California Public Records Act ("PRA"). The Court heard argument on the CEQA claim and the PRA claim only. The federal and state constitutional claims remain pending.

I. CEQA

A. Background

In 1979, the San Francisco Board of Supervisors instituted a moratorium on the conversion of residential hotel units into tourist units in response to a severe shortage of affordable rental housing for elderly, disabled, and low-income persons. (Administrative Record ("AR") 001117, 001320; S.F. Admin. Code ("HCO") §§ 41.3(g).) Subsequently, in 1981, the City enacted the Residential Hotel Unit Conversion and Demolition Ordinance (the "HCO"), Administrative Code Chapter 41, instituting permanent controls to regulate all future residential hotel conversions. (AR 1427-45; HCO § 41.1 *et seq.*) In adopting the HCO, the Board of Supervisors included findings that "the City suffers from a severe shortage of affordable rental housing; that many elderly, disabled and low-income persons reside in residential hotel units; that the number of such units had decreased by more than 6,000 between 1975 and 1979; that loss of such units had created a low-income housing "emergency" in San Francisco, making it in the public interest to regulate and provide remedies for unlawful conversion of residential hotel units; that the City had instituted a moratorium on residential hotel conversion

effective November 21, 1979; and that because tourism is also essential to the City, the public interest also demands that some moderately priced tourist hotel rooms be available, especially during the summer tourist season." (*San Remo Hotel L.P. v. City and Cty. of San Francisco* (2002) 27 Cal.4th 643, 650 [citing the original HCO § 41.3]; see AR 1427-28.)

In the original HCO, a unit's designation as "residential" or "tourist" was determined as of September 23, 1979, by its occupancy status according to definitions contained in the HCO. (AR 1428-49 at §41.4.) The HCO required single room occupancy ("SRO") hotels in San Francisco to report all residential and tourist units in a hotel as of September 23, 1979. (AR 1433 at § 41.6.) Residential units were then placed on a registry, and a hotel owner could convert residential units into tourist units only by obtaining a conversion permit from the Department of Building Inspection ("DBI").[1] (*Id.* at §§ 41.4 [definition of Conversion]; 41.12 [Permit to Convert]; 41.16 [Unlawful Conversion; Remedies; Fines].) To obtain a conversion permit, applicants were required to construct new residential units, rehabilitate old ones, or pay an "in lieu" fee into the City's Residential Hotel Preservation Fund Account. (*Id.* at §41.10.)

The original HCO also allowed seasonal tourist rentals of residential units during the summer if the unit was vacant because a permanent resident voluntarily vacated the unit or was evicted for cause by the hotel operator. (*Id.* at § 41.16.) Further, the HCO required hotel operators to maintain records to demonstrate compliance with the ordinance and to provide these records for inspection by DBI. (*Id.* at §§ 41.6(h)-41.7.)

When the City adopted the original HCO in 1981, it determined there was no possibility the ordinance would have a significant impact on the environment. (AR 1454.) The trial court disagreed and found the requirement of one-for-one replacement of residential units "creates the very real possibility of a significant environmental impact." (*Id.*) While the trial court case was pending on appeal, the City performed an initial study on the original HCO and, on April 15, 1983, issued a preliminary negative declaration concluding that the HCO could not have a significant impact on the

[1] The Department of Building Inspection was formerly termed the Bureau of Building Inspection in the original HCO.

environment. (AR 1530-33; AR 1542.) The City then readopted the HCO and adopted a final Negative Declaration on June 23, 1983. (AR 1657-64.)

The Court of Appeal eventually issued its decision finding that "the City's failure to comply with CEQA was illegal," but "the defect was cured, however, by reenactment of the ordinance following an environment evaluation and issuance of a negative declaration." (*Terminal Plaza Corp. v. City & Cty. of San Francisco* (1986) 177 Cal.App.3d 892, 905, n.6.) Environmental review of subsequent amendments to the HCO likewise determined those amendments, addressed to the administration and enforcement of the HCO, could have no impact on the environment. (See, e.g., AR 1689-1693; AR 1727-29.)

In 1987 and 1988, the City conducted a series of meetings and workshops to discuss the operation of the HCO with City staff, community housing groups, and residential hotel owners and operators. (AR 1705.) City decision makers considered the concerns of hotel operators relating to the prohibition on renting residential units for fewer than 32 days. (AR 1706-09.) Ultimately, the City repealed and readopted the HCO in 1990, making four changes from the old law. (*San Remo Hotel v. City and County of San Francisco* (9th Cir. 1998) 145 F.3d 1095, 1099.) The 1990 amendments: (1) prohibited the summer tourist use of residential rooms; (2) increased the in lieu payment from 40 percent to 80 percent; (3) added the requirement that any hotel that rents rooms to tourists during the summer must rent the rooms at least 50 percent of the time to permanent residents during the winter; and (4) the new law did not provide for relief on the ground of economic hardship. (*Id.*)

In 2014, the City did an analysis of the HCO and found that while private hotel owners are required to file an Annual Unit Usage Report ("AUUR") with DBI, only 179 of 413 private SRO hotels thought to be in operation returned the annual usage report. (AR 3523-27.) The City acknowledged that given the low rate of response to the AUUR, it was difficult to know precisely the total number of residential units available in private and non-profit owned and operated SRO hotels, and the actual vacancy rates for these buildings. (AR 3525.) However, the City determined the following vacancies (*see* Table 2 at AR 3524):

- Of 228 privately owned SROs for which data was obtained, 864 of 7,241 units (11.9 percent) were vacant.

- Of 32 non-profit hotels, 91 of 2,667 units (3.4 percent) were vacant.

The City further found that "a few of the buildings…indicated that they were serving populations other than the low-income, disabled, and elderly individuals whom the units are intended to serve," and that "the hotels may be providing long-term rental housing to students or to young technology sector workers, both of which would be allowed under the provisions of Chapter 41." (AR 3523). It confirmed that "at least three of the hotels are now providing long-term housing for students only, a use which is allowed under Chapter 41, but which does not accomplish the goal of providing rooms for low-income and disabled populations." (AR 3525.)

Further analysis from the City showed the following vacancies in 2015 (*see* Table 3 at AR 5432):

- Of 419 hotels citywide, 1,689 of 16,611 units (10.2 percent) were vacant.
- Of 354 privately owned hotels, 1,488 of 11,473 units (13 percent) were vacant.
- Of 29 non-profit hotels, 84 of 2,028 units (4.1 percent) were vacant.
- Of 36 master-leased hotels by the City, 117 of 3,110 units (3.8 percent) were vacant.

Again, the City acknowledged that "many SROs had disconnected numbers, did not return phone calls, or were unable to provide information, [and] as a result, it was impossible to verify whether they were still in operation, or to include vacancy information for them." (*Id.*)

On December 6, 2016, Supervisor Peskin introduced substitute Ordinance No. 38-17 ("the 2017 Amendments") to update the HCO. (AR 0001; 0098-0122.) On December 16, 2016, the City determined the Ordinance was "not defined as a project under CEQA Guidelines Sections 15378 and 15060(c)(2) because it does not result in a physical change in the environment." (*Id.*)

On February 7, 2017, the Board of Supervisors unanimously adopted the 2017 Amendments. (AR 229.) Mayor Ed Lee signed the 2017 Amendments on February 17, 2017, and the 2017 Amendments became effective on March 19, 2017. (AR 204-230.) As of the proposed amendments, the HCO regulated roughly 18,000 residential units within 500 residential hotels across San Francisco. (AR 175.)

The focus of this action is subsections 41.20(a) and (b) of the amended HCO, which reads as follows:

SEC. 41.20. UNLAWFUL CONVERSION; REMEDIES; FINES.

(a) Unlawful Actions. It shall be unlawful to:

(1) Change the use of, or to eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter;

(2) Rent any residential unit for *Tourist or Transient Use* ~~*a term of tenancy less than seven days*~~ except as permitted by Section 41.19 of this Chapter;

(3) Offer for rent for ~~*nonresidential use or*~~ *T*~~t~~ourist *or Transient* U~~u~~se a residential unit except as permitted by this Chapter.

(AR 225 [added text is shown in italics and underlined; deleted text is shown in italics and strikethrough)].) The 2017 Amendments define "Tourist or Transient Use" as "any use of a guest room for less than a 32-day term of tenancy by a party other than a Permanent Resident." (AR 209.)

i. The 2019 Amendment

On May 31, 2019, after the Court heard oral argument, the City passed further legislation amending the HCO to revise the definition of "Tourist or Transient Use" to "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident." Thereafter, on June 12, 2019, the City filed a Motion to Dismiss the First through Fifth Causes of Action in the First Amended Petition as moot. An Amended Motion to Dismiss was filed on June 18, 2019. On June 18, 2019, Petitioners filed a Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint.

The Court heard oral argument on the Motion to Dismiss and Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint on August 9, 2019. The parties stipulated to continue the Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint to September 27, 2019.[2] The Court denied the City's Motion to Dismiss. As the Court stated in its August 15, 2019 order:

> Plaintiffs' Constitutional and CEQA challenges are not moot because material questions remain for the Court's determination.[3] (*Eye Dog Found. v. State Bd. of Guide Dogs for Blind* (1967) 67 Cal. 2d 536, 541 ["the general rule governing mootness becomes subject to the case

[2] The Court granted Petitioner's ex parte application on September 10, 2019 to advance the hearing to September 25, 2019 in light of the statutory deadline to challenge the 2019 Amendments under Government Code section 65009(c).

[3] San Francisco acknowledges that Plaintiffs' PRA cause of action in its First Amended Petition is not moot. (Motion to Dismiss at 4, n.1.)

recognized qualification that an appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination"]; *Davis v. Superior Court* (1985) 169 Cal. App. 3d 1054, 1057–58 ["the enactment of subsequent legislation does not automatically render a matter moot. The superseding changes may or may not moot the original challenges…This issue may only be determined by addressing the original claims in relation to the latest enactment"].) While the 2019 HCO Amendment dropped the minimum length of SRO unit use from 32 days to 30 days, this change does not moot Plaintiffs' challenge to the 2017 HCO Amendments on grounds that the HCO "redefine[ed] prohibited 'tourist or transient' use and 'unlawful actions' so as to entirely eliminate SRO operators' preexisting year-round right to rent SRO units for minimum terms of at least seven (7) days." (First Amended and Supplemental Verified Petition at ¶ 23.)

Accordingly, the Court will address the 2017 Amendments in relation to the 2019 Amendment in this order.

B. Exhaustion of Administrative Remedies

CEQA requires issue exhaustion: "No action or proceeding may be brought pursuant to [CEQA] unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency … during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Res. Code § 21177(a).) This exhaustion requirement is jurisdictional. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.)

Under the exhaustion of administrative remedies doctrine, the "exact issue" must be presented to the agency, and neither "bland and general" references to environmental issues, nor "isolated and unelaborated comments" will suffice. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-36.) Petitioner "bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level." (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 910.)

The City argues that neither Petitioners Brent Haas nor Hotel Des Arts raised any CEQA claim during the City's administrative review of the 2017 Amendments. (Opposition ("Opp") at 11.) Petitioners argue that the City did not give proper notice and therefore, the exhaustion doctrine does not apply. (Reply at 24.) The Court finds Petitioners' notice argument unpersuasive. The record reflects that the City noticed multiple public hearings before the Board of Supervisors, providing a description of the proposed changes to the HCO and indicating that one of the issues to be discussed

would be "affirming the Planning Department's determination under the California Environmental Quality Act." (AR 645 [January 23, 2017 Meeting Agenda], 734 [January 31, 2017 Meeting Agenda], 1065 [February 7, 2017 Meeting Agenda].) Further, any argument regarding defective notice is waived since Samantha Felix, manager of Hotel Des Arts, submitted a letter to the Board of Supervisors dated January 27, 2017 and received January 31, 2017, objecting to the minimum 32 night stay under the proposed amendments. (AR 6609-6611; *see Hines v. California Coastal Com.* (2010) 186 Cal. App. 4th 830, 855 [finding that the administrative remedy exhaustion requirement of section 21177, subdivision (a) was triggered where one appellant spoke and appellants and others submitted written arguments at two public hearings].)

Based on the evidence discussed, the Court finds that Petitioner Hotel Des Arts exhausted its administrative remedies and has standing. However, the Court finds that Mr. Haas lacks standing to pursue the CEQA claims in this case. There is no evidence in the record that Mr. Haas participated in the administrative process before the Board of Supervisors when the City enacted the 2017 Amendments.

C. Petitioners' Motion to Augment the Administrative Record and Request for Judicial Notice

The City stipulated to augmentation of the Administrative Record with Exhibits 4 and 12 through 18 to the 9/13/18 Declaration of Arthur F. Coon In Support Of Petitioners' Motion To Augment Administrative Record ("9/13/18 Coon Decl."). The City agreed to allow a redacted version of Exhibit 11, omitting an inadvertently disclosed attorney-client communication from the email chain. Accordingly, the Court orders the record augmented only as to these specific exhibits.

The Court finds that all other exhibits attached to the 9/13/18 Coon Decl. are irrelevant as Petitioners have not shown that the documents were actually considered by the Board in making its decision. Accordingly, the Court denies the balance of the Motion to Augment. The Court denies Petitioners' Request for Judicial Notice on the same grounds.

D. Whether the amended HCO is a CEQA "Project"

CEQA and CEQA Guidelines establish a three-tier process to ensure public agencies inform their decisions with environmental considerations. (*Muzzy Ranch Co. v. Solano County Airport Land*

Use Com'n (2007) 41 Cal.4th 372, 380.) The first tier is jurisdictional—that is, an agency must "conduct a preliminary review to determine whether an activity is subject to CEQA." (*Muzzy Ranch,* 41 Cal.4th at 380; CEQA Guidelines[4] § 15060(c).) If an activity is not a "project," it is not subject to CEQA. (*Id.*) At the second tier, if the agency has determined the proposed action is a CEQA "project," it must determine whether it qualifies for any exemption from CEQA review. (*Id.*) If not, the agency "must conduct an initial study to determine whether the project may have a significant effect on the environment." (*Id.*; CEQA Guidelines § 15063(a).) If there is "no substantial evidence that the project or any of its aspects may cause a significant effect on the environment,...the agency must prepare a "negative declaration" that briefly describes the reasons supporting its determination." (*Id.* at 380-81; CEQA Guidelines § 15063(b)(2).) At the third tier, "if the agency determines substantial evidence exists that an aspect of the project may cause a significant effect on the environment...the agency must ensure that a full environmental impact report is prepared on the proposed project." (*Id.* at 381; CEQA Guidelines § 15063(b)(1).) Accordingly, no environmental review under CEQA occurs if an agency determines an activity is not a project.

A "project" is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (1) An activity directly undertaken by any public agency..." (Pub. Res. Code § 21065(a); *see also* CEQA Guidelines § 15378(a)(1) [A "project" is "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: (1) An activity directly undertaken by any public agency including but not limited to . . . enactment and amendment of zoning ordinances . . ."]; see also *Muzzy Ranch*, *supra*, 41 Cal.4th at 381 ["whether an activity constitutes a project subject to CEQA is a categorical question respecting whether the activity is of a general kind with which CEQA is concerned, without regard to whether the activity will actually have environmental impact"].) CEQA "shall apply to discretionary projects proposed to be carried out or

[4] References to CEQA Guidelines refers to Cal. Code Regs., tit. 14, Ch. 3 §§15000-15387.

approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances . . . ." (Pub. Res. Code § 21080(a).)

The parties dispute: 1) whether the amended HCO is categorically a "project" because it is an ordinance akin to a zoning ordinance; and 2) whether the amended HCO is an activity that may cause a reasonably foreseeable indirect physical change in the environment. The Court addresses these issues in turn.

i. Zoning Ordinance

Petitioners assert the amended HCO is "categorically a project within CEQA's purview" because: 1) the 2017 Amendments are "akin" to a zoning ordinance; and 2) zoning ordinances are categorically CEQA "projects" under § 21080(a), which specifically lists "the enactment and amendment of zoning ordinances" as among the discretionary projects subject to CEQA, citing *Rominger v. County of Colusa* (2014) 229 Cal.App.4th at 690, 702. (Petitioners' Opening Brief ["Opening Brief"] at 9-10, 25.) As to whether zoning ordinances are categorically CEQA "projects," the California Supreme Court recently disapproved of *Rominger* in *Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal. 5th 1171, holding "the various activities listed in section 21080 must satisfy the requirements of section 21065 before they are found to be a project for purposes of CEQA." Thus, CEQA applies "only to activities that qualify as projects — in other words, to specific examples of the listed activities that have the potential to cause, directly or indirectly, a physical change in the environment." (*Id.* at 328, emphasis in original.)

Regardless, the Court finds that the 2017 Amendments are not "akin" to a zoning ordinance. As the court found in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 902 regarding the original HCO:

> Zoning laws typically regulate such facets of land use as location, height, bulk, setback lines, number of stories and size of buildings, and the use to which property may be put in designated areas (Gov. Code, § 65860 et seq.; *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 59 [107 Cal.Rptr. 214].)....The ordinance, however, does not regulate land use in the same manner as zoning laws. The nature of buildings or uses permitted in specified districts are not touched upon by the ordinance; nor does it seek to control the dimensions, size, placement or distribution of structures within the City. The ordinance is of general application, and merely

regulates existing uses. The regulations governing issuance of conversion permits require purely ministerial acts; the replacement provisions do not call for land use decisions.

In other words, the land is already zoned for commercial use and remains unchanged. The HCO merely regulates how owners operate commercial use buildings once they've been built.

The cases cited by Petitioner involve ordinances that regulate initial uses of the land rather than existing uses and are therefore distinguishable. (*see e.g.*, *Morehart v. County of Santa Barbara* (1994) Cal.4th 725, 750 [purpose of the challenged ordinance was "to regulate the minimum size of a lot on which a residence may be built"]; *People v. Optimal Global Healing, Inc.* (2015) 241 Cal.App.4th Supp. 1, 7-8 [involving ordinance that makes it a misdemeanor to own, establish, operate, use, or permit the establishment or operation of a medical marijuana business]; *DeVita v. Cty. of Napa* (1995) 9 Cal. 4th 763, 773 [involving amendment to general plan that guided future local land use].)

ii. Reasonably Foreseeable Indirect Physical Change in the Environment

The next issue is whether the amended HCO is an activity that may cause a reasonably foreseeable indirect physical change in the environment. Identifying a physical change involves "comparing *existing* physical conditions with the physical conditions that are predicted to exist at a later point in time, after the proposed activity has been implemented. The difference between these two sets of physical conditions is the relevant physical change." (*Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal. App.4th 273, 289 (disapproved on other grounds in *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279) (emphasis in original, citation & footnote omitted).) Under CEQA Guidelines, "an indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." (§ 1504(d)(3).)

A comparison of the HCO before and after the 2017 Amendments indicates that prior to 2017, section 41.20(a) made it unlawful to "rent any residential unit for a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter" and "offer for rent for nonresidential use or

tourist use a residential unit except as permitted by this Chapter." (AR 225.) Hence, a hotel owner could rent a residential unit for as few as seven days as long as it was for residential use. A hotel owner could not rent a residential unit for tourist use unless certain conditions applied. Following the 2017 Amendments, section 41.20(a) makes it unlawful "to rent any residential unit for Tourist or Transient Use except as permitted by Section 41.19 of this Chapter" and "offer for rent for Tourist or Transient Use a residential unit except as permitted by this Chapter." (*Id.*)

Under the 2017 Amendments, "Tourist or Transient Use" was defined as "any use of a guest room for less than a 32-day term of tenancy by a party other a Permanent Resident.[5]" (AR 209.) As such, a guest who occupied a residential unit of an initial term of 32 continuous days became subject to the provisions of San Francisco's rent ordinance. (S. F. Admin. Code § 37.2(r) [definition of a rental unit].) In effect, the 2017 Amendments no longer permitted rentals to non-permanent residents for short term tenancies lasting from seven days to thirty-one days. Under the recent 2019 Amendment, "Tourist or Transient Use" is defined as "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident." (HCO § 41.20(a).) The significance of the minimum 30-day rule is that guests who stay the minimum 30-day tenancy cannot be evicted unless an unlawful detainer proceeding is brought. (see Civil Code § 1940.1)

The Court finds that tenant displacement is a reasonably foreseeable impact of the amended HCO. The HCO's purpose is to provide and preserve affordable housing for elderly, disabled, and low-income persons; its premise in extensively regulating the terms of occupancy for SRO units is that they are a limited resource and critical housing stock that must remain available to serve a vulnerable and economically-disadvantaged target population. (HCO § 41.3.) While the 2019 Amendment reduced the 32-day minimum tenancy to 30 days, it still restricts hotel owners from renting rooms to guests for tenancies as short as seven days, as was previously allowed prior to the 2017 Amendments.

[5] Permanent Resident is defined as "A person who occupies a guest room for at least 32 consecutive days." (HCO § 41.4.)

A change in regulation that increases the minimum term of occupancy for the finite number of available SRO units from weekly hotel rentals to monthly apartment rentals foreseeably restricts the availability of the limited stock of these units to the target population, with the reasonably foreseeable effect of displacing that population elsewhere.

The Court rejects the City's argument that the HCO will not result in displacement of short-term tenants because it does not require private SRO hotel owners to charge first and last months' rent and security deposits. While the 2017 Amendments does not require a specific payment structure, it is reasonably foreseeable that hotel owners could begin requiring security and monthly deposits if forced to rent for longer minimum rental terms that eliminate weekly rentals. It is also reasonably foreseeable that renters who are unable to afford monthly deposits would be displaced as a result. (*San Remo Hotel,* 27 Cal.4th at 674 ["residential hotel units serve many who cannot afford security and rent deposits for an apartment"].) Such reasonably foreseeable actions by hotel owners resulting in displacement is sufficient for purposes of the first tier of CEQA analysis. (Pub. Res. Code § 21065(a) ["'Project' means an activity which *may* cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment"] (emphasis added).)

The Court of Appeal's opinion[6] reversing this Court's denial of Petitioners' motion for a preliminary injunction based on their constitutional due process and takings claims is also instructive in this regard. In its unpublished October 15, 2018 opinion, the court held that the pre-amendment version of HCO "precluded rentals of less than seven days, regardless of a showing of the renter's purpose, and it is the seven-day period which demarcates residential from tourist rentals." (10/15/18

[6] The Court of Appeal's relevant findings and holdings are considered the law of the case and govern the disposition of subsequent issues in this litigation. (*Santa Clarita Org. for Planning the Env't v. Cty. of Los Angeles* (2007) 157 Cal. App. 4th 149, 156 [holding "where an appellate court states in its opinion a principle or rule of law necessary to its decision, that principle or rule becomes the law of the case"].) After reversal of the order denying the preliminary injunction and upon remand, this Court re-set Petitioners' preliminary injunction motion for hearing to balance the parties' relative hardships. Upon the parties' stipulation, this Court entered an injunction on against operation or enforcement of the HCO's minimum rental term by anyone and for any purpose pending resolution of this litigation or further order of this Court. (11/30/18 Injunction Order.)

Opinion at 8.) The court further held "the 2017 Amendments effected a substantial change by making the minimum term 32 days unless the person was already a permanent resident." (*Id.*) Noting that the 2017 HCO Amendments do not provide for compensation or a reasonable amortization period, the court held, "they do, on their face, require owners of SROs to forego more classically styled hotel rentals in favor of more traditional tenancies. This changes the fundamental nature of their business, by making them landlords rather than hotel operators." (*Id.* at 10.) As such, even a 30-day minimum term, which, as discussed, would make the hotel owner subject to landlord-tenant laws under state law, could foreseeably cause SRO hoteliers forced to become apartment landlords to begin requiring the security and rent deposits customary to that fundamentally changed business model. This is assuming they wish to rent their SRO units at all.

To the extent Petitioners argue that this displacement also leads to increased homelessness and urban blight, the Court acknowledges *San Remo*, which found that "while a single room without a private bath and kitchen may not be an ideal form of housing, [SRO] units accommodate many whose only other options might be sleeping in public spaces or in a City shelter." (27 Cal.4th at 674.) However, the Court finds that Petitioners fail to provide evidence in the record that links tenant displacement due to the amended HCO with homelessness and/or urban blight. (*see e.g.*, AR 3534 [internal e-mail between HSA/DSS employees discussing "public health risk" and "individual human suffering that results from homelessness" in the context of a building a mandatory shelter]; 3539 [HSH-HAS draft policy document noting homelessness as the City's "#1 problem" and "public health crisis" that "poses risks to the general public due to the presence of excrement, used needles, vermin, etc. that are often byproducts of persons living on the streets or in our parks," and proposing that the City "provide a nightly shelter bed to ALL individuals who are living on the streets or in our parks a night; 1375-1389 [San Francisco Leasing Strategies Report Draft discussing generally strategies for encouraging landlords to rent to individuals who are, were, or are at risk of being homeless].) The

Court also rejects Petitioners' further assertion that resort to record evidence is unnecessary to resolve the threshold issue raised here as a categorical matter. (*Muzzy Ranch.*, 41 Cal.4th at 382 [holding "whether an activity is a project is an issue of law that can be decided on undisputed data in the record on appeal"].)

Regardless, the Court need not reach this issue, since a finding of tenant displacement is within the purview of CEQA. In *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 451, the project at issue included demolition of housing units in a redevelopment plan. The court held that CEQA "is made relevant here by the Ellis Act's explicit exceptions for a public entity's power to regulate, among other things, "planning," "subdivision map approvals," the "demolition and redevelopment of residential property," *and the mitigation of adverse impacts on persons displaced by reason of the withdrawal of rental accommodations*. Such items are the common focus and byproducts of the CEQA process, as they were in the case here." (emphasis added.)

The record further reflects that short-term renter displacement as a result of change in the minimum term of tenancy was foreseen and documented by the City. (AR 1706 [1988 Report on Residential Hotels Policy and Legislative Issues noting, "The 32 day rental requirement often works against the rental of vacant residential hotel units as operators have to refuse occupancy to weekly tenants, even though some residential units may have been vacant for long periods"] see also AR 1341, 1345 [City memo suggesting section 41.20 be revised to a 32 day minimum rental, also suggesting that "low income, elderly, and disabled persons should be allowed to pay in seven (7) day increments so they, as the target population to be served, have access to this housing"].) The City also foresaw, in connection with its consideration of prior HCO amendments, that hoteliers not wanting to risk permanently committing to undesirable tenants not vetted through weekly rentals, might hold SRO units off the rental market. (AR 1707 [1988 City Planning report: "Weekly rentals are used by

operators to screen potential trouble making tenants. Without this option, operators are leaving units vacant rather than risk renting to potentially troublesome tenants on a monthly basis."].)

In summary, it is reasonably foreseeable that the 2017 HCO Amendments may lead to indirect physical changes in the environment in the form of tenant displacement, and tenant displacement is the general sort of activity with which CEQA is concerned. Accordingly, the Court finds that the amended HCO is "project" and the City failed to proceed in the manner required by law in summarily dispensing with CEQA review. The Court therefore grants the CEQA writ petition and orders the issuance of a writ of mandate setting aside the City's adoption of the 2017 HCO Amendments pending its compliance with CEQA.

II. The Public Records Act Requests

A. Background

Petitioners filed their verified FAP on August 23, 2017, adding the Sixth Cause of Action for PRA violations and seeking a writ of mandate under Code of Civil Procedure Section 1085. They thus "bear the burden of pleading and proving the facts on which the claim for relief is based." (*Cal. Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153 (internal citations omitted).)

Petitioners allege and argue that they were required to sue the City to obtain relevant public records which they had requested and to which they are entitled under the PRA because the City had: (1) refused to search for relevant and responsive records in all City departments possessing them; (2) intentionally narrowly interpreted the scope of Petitioners' facially broad requests; (3) improperly stopped producing responsive documents for over two months before Petitioners filed their FAP alleging the PRA claim; and (4) ultimately and belatedly provided a large number of previously withheld responsive documents (many of which became part of the certified Administrative Record on the CEQA claim) after the PRA claim was filed. (Coon PRA decl. at ¶¶ 18-25, 36-37.) Petitioners

also allege the City improperly failed to produce required affidavits from certain City officials and employees verifying that adequate searches for responsive public records on their personal electronic devices were made (*Id.* at ¶¶ 5, 8, 13, 17, 37.) On this issue, the Court directed the City to provide executed declarations from the specified individuals at the May 3, 2019 hearing. Thereafter, on May 24, 2019, the City produced the declarations except for the custodian of records for the Department of Building Inspection who supervised the collection of documents including materials from Rosemary Bosque (now retired). The City indicated that the custodian was away from the office until May 29, 2019, but that they would the would forward her declaration after her return.

As to document production, Petitioners acknowledge the City has produced all responsive documents. However, they assert they have prevailed on their PRA claim under the catalyst theory. Under the catalyst theory, "the question whether the plaintiff prevailed, in the absence of a final judgment in his or her favor, is really a question of causation—the litigation must have resulted in the release of records that would not otherwise have been released." (*Sukumar v. City of San Diego* (2017) 14 Cal. App. 5th 451, 464.) In determining whether a PRA lawsuit caused an agency to release requested public records, "it is necessary to examine the parties' communications, the timing of the public record productions, and the nature of the records produced." (*Id.* at 454.) Petitioners must show "more than a mere temporal connection between the filing of litigation to compel production of records under the PRA and the production of those records." (*Id.* at 464.) As the court in *Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 901-902 similarly held:

> A party is considered the prevailing party if his lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result. The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two.

(internal citations omitted.) Based on the evidence in the record, the Court finds the City acted reasonably in responding to Petitioners' PRA requests, and Petitioners' PRA cause of action was not "the motivating factor" for the City's document production.

B. Evidence in the Record

On February 7, 2017, the Board of Supervisors enacted the 2017 Amendments. On the same day, counsel for Petitioners sent a letter to the Board commenting on the pending legislation, and requesting "relevant documents to include records that comprise, constitute or relate to:"

- The person, persons, organizations, or entities that suggested the Proposed Amendments or that in any way initiated the Proposed Amendments or caused the Proposed Amendments to be initiated.
- The rationale or justification for the Proposed Amendments.
- CEQA review or studies for any aspect of the Proposed Amendments or potential environmental effect of the Proposed Amendments, including but not limited to displacement of tenants.
- The City's record retention policies

(Dec. of Arthur Coon in Supp. of Writ ["Coon Decl."] at Ex. 1.) In response to this request, the custodian of records for the Board of Supervisors provided documents in installments between February 7 and March 6, 2017. (*Id.* at Ex. 2.)

Petitioners' Counsel sent a second document request on March 24, 2017. (*Id.*, at Ex. 3.) This time, the request was addressed to both the Board of Supervisors and the Department of Building Inspection, and requested documents relating to:

- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any member of the Board of Supervisors, Planning Commission, Building Inspection Commission, and Single Room Occupancy Task Force.
- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any member of the Land Use and Transportation Committee, Rules Committee, and Budget and Finance Committee.
- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any City representative [including ten specifically named City employees and departments].
- Any record pertaining to any potential environmental effect (including but not limited to displacement of SRO tenants) of the HCO prepared, owned, used, retained, created, received, or exchanged by the City of any of the individuals or entities referenced in this Public Records Act request.

(*Id.* at Ex. 3.) The request also stated "Please note, we are only seeking records prepared, owner, used, retained, created, received, or exchanged by the City since January 1, 2016. In the case of Supervisor Peskin, however, we are seeking records dating from December 8, 2015." (*Id.*)

In response, the custodian of records from DBI contacted counsel asking for clarification regarding the scope of the request and, on April 4, 2017, provided a first production to the requestor, followed by a second and final production on June 6, 2017. (*Id.* at Exs. 4 and 5.) The custodian indicated on June 6, 2017 that parts of the record had been redacted where they were "legally required to do so to protect the privacy interests of individuals" under California Constitution, Article I, section 1 and California Government Code sections 6254(k) and 6254(c), and that attorney-client privileged records had been withheld. (*Id.* at Ex. 5.) The custodian further stated "We have finished conducting our search and found no other documents responsive to your request. Therefore, we consider your request closed." (*Id.*)

On July 12, 2017, counsel for Petitioners submitted a third records request to the records managers for the Board of Supervisors and Department of Building Inspections, asserting that the City's productions to date were inadequate, and objected to duplications and the redactions by DBI. (*Id.* at Ex. 6.) The request exponentially increased the chronological scope by requesting documents over a 36-year period, cast a wider net to non-specified City agencies, and added categories of requested information including homelessness. It was somewhat ambiguous in terminology and lacked distinct parameters. Among the new requests, Petitioners sought the following:

- All writings that address or relate to displacement of persons from SRO hotels since the adoption of the HCO in 1981
- All documents reflecting laws, programs, procedures, policies, and efforts developed by the City to assist tenants or potential tenants who are displaced from housing options
- All documents prepared, owned, used, retained, created, received, or exchanged by the City, and/or any of its departments, agents, consultants, volunteers, or employee between January 1, 2008 and [2017] that survey, study, analyze, catalogue, count, estimate, quantify, or reflect (a) The number of homeless persons within the City and/or (b) the environmental impacts caused by homeless persons living or sleeping in public

places not meant for human habitation in the City (e.g., urination or defecation, waste, tent encampment, discarded hypodermic needles, panhandling, loitering, crime, etc."

- Added the Tenderloin Housing Clinic and Randy Shaw to the list of city agencies referenced in the second PRA request.

(*Id.* at Ex. 6.) Petitioners' counsel explained the July PRA request was "made to facilitate our preparation of the administrative record in [this action], and we believe such documents should be included in the administrative record." (*Id.*) The third request was only served on the records manager for the Board and custodian of records for DBI. (*Id.*) No other City agencies, commissions, or individuals were served. The request caused the records manager for the Board of Supervisors to contact Petitioner to affirm that the Board of Supervisors did not have any additional records responsive to the new request and suggested Petitioner contact the Department of Building Inspections directly for other documents. (*Id.* at Ex. 9).

On August 2, 2017, the Custodian of Records for the Department of Building Inspections responded to Petitioners, acknowledging its production of responsive documents related to Petitioners' March 24, 2017 request, and stated "it seems you now have three new requests for DBI." (*Id.* at Ex. 10). The custodian requested clarifications on the "new" requests as follows: (1) for the new request for additional documents relating to the HCO, "provide the keywords/topics of interest along with the timeframe;" (2) provide a definition of "displacement of persons," in addition to identifying the subject matter of interest in light of the burden of responding, to allow narrowing the search and getting Petitioner the documents sought; (3) noted the request for all HCO documents since its adoption in 1981 and expressed a desire to work with Petitioner to identify the particular HCO sub-topic and narrow the time frame if possible; and (4) directed contact with the Department of Homelessness and Supportive Housing or SF Human Services Agency for the information sought. (*Id.*)

Petitioners responded in a letter on August 4, 2017, in which they rejected the requests for definition of "displacement," clarified the scope of the request to "records that address or relate to displacement of persons, whether low income, elderly, disabled, or otherwise from SRO hotels since the adoption of the HCO in 1981, and (sic) regardless of the reason for the displacement," and reiterated that "records" included "electronic records in all forms wherever located, including

privately-owned computers, tablets, phones and electronic devices, including privately-owned and maintained accounts or servers," citing *City of San Jose v. Superior Court (Smith)* (2017) 2 Cal.5th 608. (*Id.* at Ex. 11.) Petitioners noted that thus far, no documents had been produced regarding "the environmental impacts caused by homeless persons in the City" and rejected the City's implied response of lack of documents regarding the number of homeless persons within the City, citing two of City's websites containing data. Petitioners further requested affidavits with sufficient facts to show whether the requested records were personal or public. (*Id.*)

On August 7, 2017, the records manager for the Board of Supervisors responded that all relevant documents had been provided, referred Petitioner to the Legislative Research Center for other legislative files and indicated that follow up inquires for records should be made to DBI. (*Id.* at Ex. 12.) For litigation matters, Petitioners were told to contact Deputy City Attorney Robb Kapla. (*Id.*)

On August 8, Petitioners responded to the Records and Project Manager for the Board of Supervisors and Custodian for the Department of building Inspections, excoriating both individuals for the responses to the three Public Records Acts requests and reminding them of the obligation to provide the documents or an affidavit from all relevant individuals to show whether any information withheld is public or private. (*Id.* at 13.)

On August 15, 2017, the records manager for the Board again stated there were no additional responsive records and advised Petitioners to "contact DBI if you have follow up inquiries that address or pertain to any of records that they may have, or contact the respective City Department(s) if you are extending your search to all City Departments, and lateraled all follow-up to Deputy City Attorney Robb Kapla. (*Id.* at Ex. 14). The City Attorney's office had not been served with any of the three records requests. There is no evidence that the City Attorney was actively involved with responses to the multiple requests. Rather, the evidence indicates that each agency responded individually to requests within their purview.

Petitioners responded with an email to the custodians of records for the Board of Supervisors, DBI, and Deputy City Attorney Kapla on August 16, stating "we are still being told to figure out ourselves which other city departments might have responsive documents and to make separate requests to those departments (each of our requests has always been intended to include all City

departments)," and further, "if the City Attorney is responsible for coordinating with all City departments, we obviously request for that to occur." (*Id.* at Ex. 15.) This e-mail stated what was already apparent—a lack of notice to individual City agencies despite Petitioners' requests for documents encompassing over 160 City departments, commissions, task forces, and numerous named individuals. Rather, the three records requests had only been served on the Board of Supervisors and DBI, the only two agencies named in the requests. Petitioners inexplicably assumed one of the two agencies would somehow be responsible for the coordination of records collection for all the other independent City agencies, each with a unique custodian of records.

As of mid-August 2017, the City had produced a total of 2,500 pages of responsive documents and efforts continued to fulfill the requests in a "rolling production" process. Subsequently, on August 23, 2017, Petitioners filed their "First Amended and Supplemental Verified Petition for Writ of Mandate; Complaint for Declaratory and Injunctive Relief For Takings, Denial of Due Process, and Denial of Equal Protection," which added a Sixth Cause of Action seeking a writ of mandamus for violations of the California Public Records Act – Government Code sections 6258 and 6259, and Code of Civil Procedure section 1085. (FAP at 20.)

On August 28, Petitioners wrote to the two City Attorneys assigned to the CEQA litigation referencing the history of requests to the custodians of the Board of Supervisors and DBI. (*Id.* at Ex. 17.) Petitioners disclaimed that the requests were limited to the Board of Supervisors or DBI, and asserted that their requests had "always included and been intended to include all City departments," which "should be broadly construed to include any council, board, commission, department, committee, official, officer, council member, commissioner, employee, agent, or representative of the City." (*Id.*) In a separate letter also on August 28, Petitioners further wrote to the City with regard to the delay in certification of the administrative record. (*Id.* at Ex. 16.)

On September 6, 2017, the Deputy City Attorney Ruiz-Esquide wrote to Petitioner indicating readiness to certify the administrative record, explaining previous hesitancy to do so because of the "broad and evolving document requests to city agencies, explicitly stating that Petitioners seek additional documents for inclusion in the administrative record." (*Id.* at Ex. 18.) Two days later, on September 8, 2017, DCA Ruiz-Esquide responded to the records issues and stated "as you know, the

documents you requested are voluminous. Different City departments are diligently searching their records. We will be producing them to you on a rolling basis, as we receive them from the different departments," and enclosed a disc with records from the Human Services Agency and Department of Homelessness and Supportive Housing. (*Id.* at Ex. 19). In another letter three days later, on September 11, 2017, Petitioners denied knowing or having any reason to know the records were voluminous, given the response by the Board and DBI. (*Id.* at Ex. 20.) This was despite Petitioners' insistence that the request was intended to include all city departments and city agencies, and to be broadly construed.

At the Case Management Conference on September 29, 2017, the parties brought the Public Records Act production issues to the Court's attention. (See parties' Case Management Conf. Statements, filed Aug. 30, 2017). Of concern to the parties was the increased scope of the request, volume of documents and dispute about what was properly part of the Administrative Record. A central question emerged regarding whether all documents generated by City employees or agencies properly part of the Administrative Record, even if the decision-makers (Board of Supervisors) did not consider the documents in the CEQA decision.

At the September 29, 2017 Case Management Conference, and at subsequent conferences on November 17, 2017 and January 11, 2018, the Court supervised further negotiations between the parties. City department searches for the documents with the terminology in the requests identified "truckloads" of material of questionable relevance. The Court and the parties discussed appropriate ways for the Petitioners to fine-tune the search through more specific search terms and how to narrow the search to the relevant City departments. In addition, the Court imposed production deadlines for the City and reviewed the progress of production by each City department selected. The City conducted a review for privilege and redaction of personal identifying information.

At the November 17, 2017 conference, the Court directed the City to collect and produce documents "to be located through the use of search terms as discussed" and refine search terms including "environmental impact of homelessness" and "environmental impact caused by homelessness." (Petitioners' CMC Statement, filed Dec. 27, 2017.) Other search terms were discussed at length. The search term "homeless" produced documents from the Department of Public

Health which were not relevant to the issues, while a broad search involving documents from the Mayor's Office of Housing and Community Development yielded individual applications for housing which would require redaction of personal identifying information. Petitioners requested more specific terms be utilized, (eg. urination, defecation, human waste, tent encampment, needles) to reflect the environmental impacts of homelessness.

As for document production, the City Attorney represented that documents aggregated by their office were being processed and redacted as needed. Production of documents from the Department of Public Works, Department of Public Health, Planning Department, Planning Commission, Budget/Legislative Analyst Office, Single Room Occupancy Task Force among others were in progress. Other agencies, such as the Department of Human Services completed production. The search with some terms ("environmental impact of homelessness") continued for all city departmental files. By the end of December, almost 4,000 additional documents were produced.

At the January 11, 2018 conference, Petitioners' counsel "further narrowed" their requests. (See Petitioners' CMC Statement, filed March 27, 2018.) An additional 9,600 pages from various city departments had been produced. The City represented that all documents that had been produced using the new search parameters were being processed.

On February 14, 2018, San Francisco completed its production in response to Petitioners' revised and narrowed Public Records Act Requests. San Francisco's rolling production totaled nearly 40,000 pages from twelve City agencies, commissions or departments. (See Petitioners' CMC Statement, filed March 27, 2018; Coon Decl., Exs. 27, 33.) Throughout this process, it became apparent that the ambiguous and overbroad terminology of the third request produced too many documents, some of which Petitioners acknowledged were not relevant to the litigation.

Petitioners argue that the filing of the lawsuit resulted in production of documents withheld. The evidence indicates that with the filing of the PRA claim, the City Attorney's Office became the point-persons to direct the search, aggregate response, assert privilege where appropriate, and coordinate and communicate with the appropriate city agencies, since many agencies performed duties unrelated to the issues in this litigation. However, Petitioners have not shown that there is "more than a mere temporal connection between the filing of litigation to compel production of records under the

PRA and the production of those records" or that the litigation was "the motivating factor for the production of documents." (*Sukumar*, 14 Cal.App.5th at 464; *Belth*, 232 Cal.App.3d at 901-902.) Petitioners ignore the crucial fact that service of each request upon the Board of Supervisors and DBI only resulted in responses by each department. The communication between Petitioner and the City was limited to the custodians of each of these two departments, who had no control or ability to produce documents from other departments. The response by the two city departments served with the records request and by only those departments should have signified to Petitioners that their assumption that one of those departments would act as the "aggregator" for the other city agencies was faulty.

Under the current City infrastructure, each city department is responsible to respond to PRA claims, each having a separate custodian of records. The delay in production and response by departments not served with the three requests was not prompted by the litigation nor lack of willingness to comply with the request. Rather, it was that each city department not served with the requests had no knowledge or opportunity to respond. One cannot respond to that which one does not have knowledge of. Petitioners were on notice as to the city infrastructure and their need to serve individual City departments, but did not do so. Unlike respondent in *Belth,* who initially refused plaintiff's request for documents she claimed were confidential, but obtained consent to disclose the documents after plaintiff filed a writ petition, there is little if any evidence that the BOS or DBI refused to provide or withheld requested documents in the first request. (232 Cal.App.3d at 902.) There is evidence that other city departments were never served with any request.

Moreover, the alleged delay in production of documents is not persuasive given that the PRA claim was filed on August 23, and by August 31, contact had been made with the Human Services Agency. (Coon Decl. at Ex. 22.) Delay in production was caused by the ever-widening and increased time frame to include a 36-year period from 1981-2017, and uncertainty over the scope of the request. Petitioner alleges that an August 31, 2017 email from Matt Braun of the Human Services Agency demonstrates frustration of the PRA request. (*Id.*) While the email acknowledges the "first phase of this search" to identify official city documents using a "rather narrow definition of 'documents,'" it then states "you may receive a subsequent request or requests for such documents," and that the plan is

that "the City Attorney will produce documents responsive to this request on a rolling basis" with the intent that the materials be collected before his last day of September 8, reflecting prioritization of the materials to be produced. (*Id.*)

The facts here are distinguishable from *Sukumar*, in which the City "unequivocally claimed it had produced every responsive nonexempt document." (14 Cal.App.5th at 464.) The City's lawyer even told the court in that case that it had produced "everything." (*Id.*) Upon depositions of the city's PMK, however, further documents were discovered. (*Id.*) The holding of the *Sukumar* court relies upon the City's facile representations to the court in the face of failure to perform a complete search. There is no evidence here that the City failed to perform a complete search for responsive documents in compliance with the requests, upon direction from the City Attorney's office. Since having taken over the responses to the three requests, it was incumbent upon the City Attorney to communicate with all City departments to determine which departments had materials relevant to the each of the three requests, using search terms from the requests and as modified from ambiguous and overbroad terms of the third request. As the aggregator of the materials, and coordinator of the document productions across over all city departments, commissions, task forces, councils, boards, employees, representatives and officials, the City Attorney was obligated to conduct privilege review and redactions when necessary (eg. HIPPA, personal identifying information). The evidence indicates the City Attorney's Office commenced coordination and communication with multiple City departments, appropriately reviewing all documents for privileged information and redacting as necessary to protect third party privacy.

The sole change effected by adding the PRA claim to the existing CEQA litigation was to compel the City Attorney to take responsibility and control of the responses to the PRA requests, which was required by its ethical duty of representation. At the time of filing the claim, production of responsive documents had already begun by the departments served with requests.

Accordingly, the Court finds the City acted reasonably in responding to Petitioners' PRA requests. Petitioner has failed to meet the burden of proof for the Sixth Cause of Action.

CONCLUSION

With respect to Petitioners' First Cause of Action for CEQA violations, the Court GRANTS the petition. The Court orders issuance of a writ of mandate setting aside and voiding the City's adoption of the 2017 HCO Amendments, and thereby the 2019 HCO Amendment, ordering the City to comply with CEQA before proceeding with any HCO legislation increasing the 7-day minimum rental period for SRO units. The City shall file a return demonstrating compliance with this court's writ within 60 days of this order. The Court shall retain continuing jurisdiction to enforce and ensure compliance with the writ and CEQA under Public Resources Code § 21168.9(b). (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 479-480.)

With respect to Petitioners' Sixth Cause of Action for PRA violations, the Court DENIES the petition and finds in favor of Respondent.

In light of this Court's Order setting aside the challenged 2017 HCO Amendments on CEQA grounds, Petitioners' Second through Fifth Causes of Action seeking to invalidate the Ordinance on constitutional due process, equal protection and takings grounds are now moot. The Court need not reach and decide those claims, which are hereby ordered dismissed without prejudice.

The Court's preliminary injunction against the City's enforcement of the HCO's minimum rental period is hereby modified to be a permanent injunction pending City's compliance with CEQA, and is modified to allow City's enforcement of the HCO's 7-day minimum rental period, which is the law validly in effect due to the Court's invalidation of the 2017 and 2019 HCO Amendments.

Having disposed of all causes of action framed by the pleadings between all the parties, this Order shall constitute the Court's final Judgment in this action. Any claims for prevailing party attorneys' fees and costs shall be made by timely post-judgment motion(s) and cost bill(s) pursuant to all applicable law.

IT IS SO ORDERED.

Dated: 9/24/19

Hon. Cynthia Ming-mei Lee
JUDGE OF THE SUPERIOR COURT

CPF-17-515656 SAN FRANCISCO SRO HOTEL COALITION, AN ET AL VS. CITY AND COUNTY OF SAN FRANCISCO A PUBLIC AGENCY ET AL (CEQA Case)

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on September 24, 2019 I served the foregoing CEQA - Order RE: Petition for Writ of Mandamus on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: September 24, 2019

By: S. LE

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A PROFESSIONAL CORPORATION

February 13, 2023

VIA EMAIL

Land Use and Transportation Committee
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Re: Agenda Item #2 – February 13, 2023 Hearing
BOS File No. 220815 [Administrative Code - Definition of Tourist or Transient Use Under Hotel Conversion Ordinance; Amortization Period]

Dear Chairperson Melgar and Honorable Members of the Land Use and Transportation Committee:

Our office represents the Hotel Des Arts and numerous other individual owners of SROs (collectively, "Owners"). The Owners object both substantively and procedurally to Board of Supervisors File No. 220815 (the "Ordinance").

Despite the City knowing from previous filings that our clients' property rights will be particularly affected by the Ordinance, **we were given no notice of today's hearing**. We learned of the hearing this morning and therefore have had insufficient time to prepare. **We therefore request a continuance.**

The proposed Ordinance represents a dramatic change to the City's Hotel Conversion Ordinance. It would prohibit weekly room rentals – which have always been lawful *and encouraged* in San Francisco – and take away the Owners' family businesses without compensation. Worst of all, the Ordinance would harm the City's most vulnerable residents: SRO occupants who cannot afford to pay a month's rent in advance, let alone a security deposit on a monthly lease.

1. The Ordinance would establish an insufficient amortization period

The proposed Ordinance would make the Owners' longstanding weekly SRO rental businesses illegal within two years. This is an extraordinarily short amortization period. It is well-established in California law that an amortization period must be "reasonable" in light of the investment in the use, and its remaining economic life, order to pass constitutional muster. (See Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365; United Business Com. v. City of San Diego (4th Dist. 1979) 91 Cal. App. 3d 156.) The courts have struck down amortization periods of as long as *five years* as being too short. (La Mesa v. Tweed & Gambrell Planing Mill (1956)

146 C.A.2d 762, 770.)

Two years is a patently insufficient amortization period; Owners cannot recoup their investments within that time. Indeed, the value placed on residential hotel units by the City is hugely disproportionate to the likely monetary recovery for SRO owners over a two-year period. The Code allows SRO owners to convert residential hotel units to tourist use, but only if they provide a "one-for-one replacement." (Admin. Code, § 41.13.) That is, SRO owners must either build a comparable unit elsewhere, or pay the City or a nonprofit "an amount equal to 80% of the cost of construction of an equal number of comparable units." This amount would be significant in light of the extremely high cost of construction in San Francisco – a recent New York Times article, citing government data and industry reports, noted that it costs $750,000 to build one unit of affordable housing in San Francisco.[1] Given Owners would have to pay the City an amount in the high six figures *per unit* to convert residential hotel units, it is astonishing that the City considers a two-year amortization period to be appropriate for the forced change of use effected by the Ordinance.

By contrast, all other lawful nonconforming uses in San Francisco are given at least 5-10 year amortization periods. (Planning Code § 184.) In fact, many nonconforming uses are given 20, 30, or even 50-year amortization periods. (Planning Code § 185.) This disparate treatment of SRO owners, as opposed to other nonconforming uses, violates Owners' equal protection rights. As the California Supreme Court has held, a statute is not constitutional:

> . . . if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.
>
> Martin v. Superior Court (1824) 194 Cal. 93, 100.

Here, the City has singled out SRO Owners for disparate treatment – both as compared to owners of other nonconforming uses, and also as compared to tourist hotel owners. For the cessation of any other nonconforming use, owners and operators are afforded a much longer amortization period. Similarly, tourist hotel operators who offer weekly rentals will be able to continue doing so. The Ordinance arbitrarily imposes a burden on Owners and rides roughshod over their constitutional rights.

While the Ordinance contains a hearing procedure to request an exception for a longer amortization period, there is no assurance that such extensions will be granted. The Building Inspection Commission would be charged with holding hearings to consider whether an exception is "reasonable" in light of the "[s]uitability of the investments for residential hotel use" and any number of nebulous "other relevant factors." These criteria are so vague as to be impossible to administer in a fair, predictable manner. Indeed, in its response letter to BOS File No. 190646, which was similar to the Ordinance, the BIC noted that "details about the amortization process [are] not clear in the current legislation."

[1] Thomas Fuller, *Why Does It Cost $750,000 to Build Affordable Housing in San Francisco?*, N.Y. TIMES, Feb. 20, 2020, *available at* https://nyti.ms/2Vb6kcq.

Finally, in order to determine what constitutes a "reasonable" period, the City must weigh "the public gain to be derived from a speedy removal of the nonconforming use against the private loss that removal of the use would entail". (Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848.) Here, there is *no public harm* associated with offering SRO units for rental on a weekly basis. To the contrary, Owners are providing housing to residents of San Francisco who cannot afford to pay rent on a monthly basis, or a month's rent in advance. Owners also provide weekly housing at affordable rates to medical patients and their families, who need to stay near the UCSF medical center to access treatment.[2] The cessation of this type of use will *harm* the public welfare, as it will result in the displacement of these residents. This factor strongly weighs in favor of a longer amortization period.

2. The Building Inspection Commission lacks the legal authority to hold amortization hearings

As discussed above, the proposed Ordinance would charge the Building Inspection Commission with administering the amortization exception process for SROs. However, this is a judicial function which the Commission is not authorized to exercise.

Under the California Constitution, "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." (Cal. Const., art. VI, § 1.) Assessing damages is a judicial function, and the Ordinance has "set forth no criteria for assessing such losses or translating them into" particular extended amortization periods corresponding to particular financial losses. (Larson v. City and County of San Francisco (2011) 192 Cal.App.4th 1263, 1281.) Moreover, the Building Inspection Commission possesses no "special competence" (AICCO, Inc. v. Insurance Co. of North America (2001) 90 Cal.App.4th 579, 594)) or "specialized expertise" (Wise v. Pacific Gas & Electric Co. (2005) 132 Cal.App.4th 725, 740, as modified (Sept. 19, 2005)) in the subject of amortization or "suitability of investments" that would justify primary jurisdiction over the claims at issue.

As the California Supreme Court has held, an administrative agency "may exercise *only those powers that are reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes.*" (McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal.3d 348, 372; italics original.) The Building Inspection Commission's primary, legitimate regulatory purpose is "the provision of safe and sanitary buildings." (San Francisco Charter, Append. D3.750.) It has nothing to do with assessing the financial hardships of private property owners and business operators. And while the "commission shall have the power to hold hearings and hear appeals on . . . determinations made by the Department of Public Works, Water Department, or Department of Building Inspection" (id. at D3.750-4), it has no power to exercise quasi-judicial authority in the first instance. The Ordinance would unlawfully charge the Building Inspection Commission with holding hearings as the *initial* trier of fact – rather than reviewing the determinations of its subordinate departments.

[2] See the declarations filed in Superior Court Case No. CPF-17-515656, attached hereto as Exh. A.

3. The Board of Supervisors lacks the power to alter the Building Inspection Commission's fundamental authority

The Building Inspection Commission was created in 1994 by Proposition G. In other words, it was created directly by the *voters* via an initiative Charter amendment. The Board of Supervisors lacks the authority to override a voter-enacted Charter amendment via a regular ordinance.

The proposed Ordinance would clearly alter the Commission's fundamental structure, in conflict with the Charter. As discussed above, the Ordinance would empower the Commission to hear quasi-adjudicative cases in the first instance. But the Charter does not allow it that power. To wit, the legislative digest for Proposition G (prominently printed at the top of the Voter Information Pamphlet and Sample Ballot for Prop. G[3]) states clearly, "The Commission could reverse, affirm or change certain decisions made by City departments concerning building construction projects." The Ordinance cannot empower it to hear exemption requests in the first instance – especially for amortization requests that are clearly unrelated to "building construction projects."

Since the Building Inspection Commission cannot hear SRO Owners' applications for extensions of the patently insufficient two-year amortization period, there would be no procedure for Owners to seek and obtain an amortization extension. In other words, the Ordinance constitutes a facial taking of private property (the Owners' lawful businesses) without just compensation.

4. The extension application procedure violates Due Process requirements.

Even if the BIC had jurisdiction to hear extension applications, the proposed hearing process raises a number of due process violations.

A property owner's legal nonconforming use status cannot be terminated without the procedural due process of a hearing. (Bauer v. City of San Diego (4th Dist., 1999) 75 Cal. App. 4th 1281.) Here, the amortization hearing process must provide an owner with an "opportunity to be heard at a meaningful time and in a meaningful manner." (Brown v. City of Los Angeles (2002) 102 Cal.App.4th 155, 173.) At a minimum, this requires:

> . . . written notice of the grounds for the [decision]; disclosure of the evidence supporting the [decision]; the right to present witnesses and to confront adverse witnesses; the right to be represented by counsel; a fair and impartial decisionmaker; and a written statement from the fact finder listing the evidence relied upon and the reasons for the determination made.
>
> (Brown v. City of Los Angeles (2002) 102 Cal.App.4th 155, 174, citing Burrell v. City of Los Angeles (1989) 209 Cal.App.3d 568, 577.)

The Ordinance requires Owners to submit a request to the BIC for an extension to the amortization period six months prior to the expiration of the amortization period, based on the following factors:

(1) The total cost of the hotel owner or operator's investments to the hotel;

(2) The length of time those investments have been in place;

[3] Available at https://www.ifes.org/sites/default/files/ce02069_0.pdf, p. 107.

(3) Suitability of the investments for residential hotel use; and

(4) Any other factors relevant to determining the owner or operator's reasonable return on investments.

As noted above, factors (3) and (4) are vague and uncertain to the point of being unintelligible (as the City has effectively admitted with regard to the previous iteration of this Ordinance in stating that regulations would be necessary delineate the meaning of these provisions). Moreover, requiring staff to interpret the Ordinance and develop regulations would likely be an unconstitutional delegation of the City's legislative powers to City staff. (*Kugler v. Yocum* (1968) 69 Cal. 2d 371.) As the Ordinance is presently drafted, it is impossible for an SRO owner to know in advance what the criteria mean, or what would be needed to satisfy the BIC. The Ordinance fails to "provide sufficiently definite standards of application to prevent arbitrary and discriminatory enforcement," and is therefore unconstitutionally vague. (DeLisi v. Lam (1st Dist. 2019) 39 Cal. App. 5th 663.)

This unfairness is compounded by the fact the burden of proof is placed on the *SRO owner* to prove that a longer amortization period is appropriate. (Brown v. City of Los Angeles, *supra*, holding that the police department's administrative appeals procedure failed to provide adequate due process protection, since the procedure placed the burden of proof on the officer challenging the decision.)

Further, the Ordinance is silent as to whether an appeal procedure is available from the BIC determination. Although the Board of Appeals can hear appeals from BIC penalty decisions, it does not have a general appellate review role in relation to the BIC. Absent clear language in the Ordinance, it appears there is no right of appeal – rather, an SRO owner would have to go straight to court. This fails to satisfy basic due process requirements. The US Supreme Court has confirmed that due process requires that "prompt postdeprivation review" be available to a person deprived of a property interest. (Mackey v. Montrym (1979) 443 U.S. 1; see also Machado v. State Water Resources Control Bd. (2001) 90 Cal.App.4th 720.)

Here, the BIC hearing is not an "appeal" right, but the *initial* decision regarding the impact of the Ordinance on an individual Owner. The nature and extent of property deprivation crystallizes when the BIC determines the "reasonable" amortization period for a particular SRO hotel. By providing no prompt administrative appeal process from the BIC decision, the Ordinance does not comport with due process requirements.

5. An application for an extension of the amortization period requires an unconstitutional invasion of privacy

Even if the Ordinance's vague criteria could be fairly applied, the Ordinance's hearing process would require an SRO owner to provide (and effectively publicize):

(1) The total cost of the hotel owner or operator's investments to the hotel;

(2) The length of time those investments have been in place;

(3) Suitability of the investments for residential hotel use; and

(4) Any other factors relevant to determining the owner or operator's

reasonable return on investments.

First, an SRO Owner may not be able to determine the meaning of criteria 3 or 4, given their lack of clarity and specificity. And even if he or she could determine the criteria's meaning, the Owner may lack the wherewithal to produce this information.

More fundamentally, the Owners have state and federal constitutional rights to financial privacy. (See Cal. Const., art. I, § 1.) Personal financial information comes within the zone of privacy protected by the California Constitution. (Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652, 657.) Importantly, privacy protection is recognized in administrative as well as civil proceedings. (Sehlmeyer v. Department of Gen. Services (1993) 17 CA4th 1072, 1079.)

The Ordinance's extension procedure violates Owners' rights by compelling them to disclose proprietary and sensitive private financial information such as investments, pricing, profitability, and potentially non-SRO related income and financial hardships. Should the Building Inspection Commission be considering Owners' medical bills? What about their spouses' and children's medical bills? And should their right to continue operating their lawful businesses depend on such considerations? As a matter of law, the answer must be no.

6. The Ordinance must be reviewed by the Planning Commission

As a zoning ordinance which affects the permitted uses of real property, the proposed Ordinance "shall be adopted in the manner set forth in [Government Code] Sections 65854 to 65857, inclusive." (Gov. Code, § 65853.) There are numerous procedures and notice requirements that must be followed for the adoption and amendment of zoning ordinances under those sections. For example, the Planning Commission must hold a public hearing on the proposed Amendment with notice to be given pursuant to Government Code § 65090 "and, if the proposed ordinance or amendment to a zoning ordinance affects the permitted uses of real property, notice shall also be given pursuant to Section 65091."

Moreover, under local law, the Ordinance must be reviewed by the Planning Commission as required by San Francisco Charter Section 4.105: "An ordinance proposed by the Board of Supervisors concerning zoning shall be reviewed by the Commission." Amendments to the Hotel Conversion Ordinance have *always* been considered by the Planning Commission prior to enactment. This Ordinance is no exception. Regrettably, we do not believe the Ordinance is slated for a hearing at the Planning Commission as required by law.

The Planning Commission's authority to review this Ordinance cannot be transferred to the Building Inspection Commission – nor has the Building Inspection Commission reviewed the Ordinance, to our knowledge. As stated in the legislative digest for Proposition G, "The jurisdiction of the Planning Commission . . . would not be affected by this measure [Proposition G]." (1994 Voter Information Pamphlet and Sample Ballot, p. 108.) As discussed above, Proposition G created the Building Inspection Commission by amending the City Charter. The Board of Supervisors cannot abrogate the Planning Commission's Charter-granted authority via its decision to refer the proposed Ordinance to the Building Inspection Commission instead of the Planning Commission. The Charter is the City's ultimate authority. The Charter amendment that created the Building Inspection Commission – and the Charter itself – explicitly forbade the

transference of powers from the Planning Commission to the Building Inspection Commission: "Nothing in this chapter shall diminish or alter the jurisdiction of the Planning Department over changes of use or occupancy under the Planning Code." (Charter, Append. D3.750-4.) The Ordinance must be referred to the Planning Commission. Given the BIC's role in administering the Ordinance, it should also consider the Ordinance at a noticed public hearing.

7. Proper CEQA review must occur

The proposed Ordinance is a Project that requires proper environmental review pursuant to the California Environmental Quality Act, including, inter alia, a public hearing on the Owner's forthcoming appeal of the Ordinance's Negative Declaration. CEQA review will not be complete until that time, and the Board should refrain from taking action on the Ordinance until that time.

The Ordinance will have serious unmitigated environmental impacts. A copy of our PMND letter is attached hereto as Exh. B.

8. The Ordinance is unconstitutional

Lastly, it is a violation of equal protection and due process of law, targeting owners for disproportionate and unusual treatment, to take away the Owners' business and effectively offer to sell it back to them pursuant to the Admin. Code § 41.13 conversion process. There is no rational basis for this action.

PETITIONERS HAVE PREVIOUSLY SUBMITTED FOR THE BOARD'S RECORD EVIDENCE AND ARGUMENTS, INCLUDING THE EXTENSIVE BRIEFING FROM THE TRIAL AND APPELLATE COURTS IN OPPOSITION TO THE PRIOR SRO AMENDMENTS (BOS FILE NOS. 161291, 190049, 191258 AND 190946; SUPERIOR COURT CASE NO. CPF-17-515656). WE REINCORPORATE THOSE MATERIALS AND ARGUMENTS HERE BY REFERENCE AND OFFER TO LODGE HARD COPIES UPON REQUEST.

The Ordinance is unlawful for a host of reasons, and it will cause serious harm to those who are most in need of our City's protection. We urge you to reject this misconceived proposal. At a minimum, **we respectfully urge the Committee to continue this hearing until proper notice is given**.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC

Ryan J. Patterson

Encl.

EXH. A

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Attorneys for Petitioners and Plaintiffs
SAN FRANCISCO SRO HOTEL COALITION,
HOTEL DES ARTS, LLC, and BRENT HAAS

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SAN FRANCISCO SRO HOTEL COALITION, an unincorporated association, HOTEL DES ARTS, LLC, a Delaware limited liability company, and BRENT HAAS,

Petitioners and Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, a public agency, acting by and through the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; DEPARTMENT OF BUILDING INSPECTION OF THE CITY AND COUNTY OF SAN FRANCISCO; EDWIN LEE, in his official capacity as Mayor of the City and County of San Francisco, and DOES 1 through 100, inclusive,

Respondents and Defendants.

Case No. CPF-17-515656

DECLARATION OF ANDREW M. ZACKS IN SUPPORT OF PLAINTIFFS' EX PARTE APPLICATION FOR LEAVE TO FILE REPLY BRIEF ON MAY 30, 2017

Date: May 30, 2017
Time: 11:00 a.m.
Dept: 206, Presiding Judge
Judge: Hon. Teri L. Jackson

I, Andrew M. Zacks, declare as follows:

1. I am an attorney licensed to practice in California and am a lead counsel for Plaintiffs/Petitioners in this action. I have personal knowledge of the following facts and could testify truthfully thereto if called to do so.

2. My office was primarily responsible for drafting this motion. Because of my nearly 30 years experience with the HCO, I intended to take the lead in drafting this reply. Unfortunately, last week my schedule was so impacted, I had to delegate responsibility to my associate, James Kraus. I had to attend to the following unexpected client matters:

On May 25, I participated in the mediation of a particularly contentious land use suit in Oakland which was scheduled one court day prior on Friday May 23. On May 26, I had a conference call with retired Judge James Warren in an upcoming arbitration. I prepared for, and attended, oral argument in the First District in Jacoby v. CCSF, #A145683. I then was called on to assist with a preliminary opposition to a First District writ petition filed by the City in the very contentious case 1049 Market Street LLC v. CCSF S.F. #A151274. I was also exclusively responsible for preparing opposition to two requests to the Supreme Court to depublish the opinion in Coyne v. CCSF (2017) 9 Cal.App.5th 1215. These were on a strict, 10-day opposition achedule due today. One of the requests was by the City. I am also working on an opposition brief in SFAA v. CCSF, #A149919, which is on appeal by the City. Our Respondents' brief is due June 5 – with the 15 day automatic extension.

3. The proposed revised reply brief adds a few paragraphs and case quotes. and corrects some typographical errors. I believe these additions are important to resolving the motion on the merits, will not complicate hearing preparation, and should be allowed to be filed today.

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

Date: May 30, 2017

Andrew M. Zacks

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CITY AND COUNTY OF SAN FRANCISCO, a public agency, acting by and through the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; DEPARTMENT OF BUILDING INSPECTION OF THE CITY AND COUNTY OF SAN FRANCISCO; EDWIN LEE, in his official capacity as Mayor of the City and County of San Francisco, and DOES 1 through 100, inclusive,

Respondents and Defendants.

Case No. CPF-17-515656

DECLARATION OF BRENT HAAS IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[CCP sec. 526]

Date: June 5, 2017
Time: 2:00 p.m.
Dept: CEQA, room 503
Judge: Hon. Teri L. Jackson

I, Brent Haas, declare as follows:

1. I am over the age of 18 and have personal knowledge of the following facts. I could testify truthfully thereto if called to do so.

2. I am a hair stylist and visual artist. (www.brenthaas.com) I also care for my elderly, widowed mother (age 82) who lives alone in Ohio. I moved to San Francisco right after Loma Prieta in 1989. My father died about 30 years ago and I have been visiting my mother regularly since. These visits are important to both of us. I am a California resident – I get healthcare here, pay CA resident taxes, and consider San Francisco my home – but due to the circumstances of being the primary caregiver for my aging mother, I have to spend considerable time in Ohio, her state of legal residency.

3. For the past 12 years, I've generally spent about 10 days to 3 weeks of every month living and working in the City, and the other 1-3 weeks in Ohio with my mother.

4. When I am in the City, I generally stay at several SROs. The ability to rent rooms at these SROs by the week – meaning I don't pay first and last month, and security deposit – is a godsend. Not having to pay expenses that I do not incur because of the ability to rent weekly or biweekly enables me to visit my mother. On rare occasion, I am in the City for more than 3 weeks in which case I stay at the Zen Center.

5. If San Francisco prohibits hotels like the ones I stay at from being able to rent to me on a weekly or biweekly basis, it would be very difficult for me to continue to visit my mother regularly. I would have to pay much more in rent and would have little time to visit her. I certainly could not be gone for 2-3 weeks and not work if I were paying rent on an apartment or I would have to leave San Francisco. I certainly do not want to do that anymore than any other San Franciscan wants to.

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

Date: April 24, 2017

Brent Haas

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Attorneys for Petitioners and Plaintiffs
SAN FRANCISCO SRO HOTEL COALITION, HOTEL DES ARTS, LLC, and BRENT HAAS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

SAN FRANCISCO SRO HOTEL COALITION, an unincorporated association, HOTEL DES ARTS, LLC, a Delaware limited liability company, and BRENT HAAS,

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CITY AND COUNTY OF SAN FRANCISCO, a public agency, acting by and through the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; DEPARTMENT OF BUILDING INSPECTION OF THE CITY AND COUNTY OF SAN FRANCISCO; EDWIN LEE, in his official capacity as Mayor of the City and County of San Francisco, and DOES 1 through 100, inclusive,

Respondents and Defendants.

Case No. CPF-17-515656

DECLARATION OF HAMED SHAHAMIRI IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[CCP sec. 526]

Date: June 5, 2017
Time: 2:00 p.m.
Dept: CEQA, room 503
Judge: Hon. Teri L. Jackson

I, Hamed Shahamiri, declare as follows:

1. I am over the age of 18 years. I have personal knowledge of the following facts and could testify truthfully thereto if called to do so.

2. I am the manager of the Carl Hotel, located at 198 Carl Street, San Francisco. The cross-street is Stanyan. The Carl has 28 rooms – 0 tourist and 28 residential. We have three permanent residents.

3. The Carl is about 4 blocks from UCSF medical center on Parnassus Avenue. Many of our guests comprise medical patients, and their family members or friends. I know this because many of theses guests tell me why they are visiting and particularly staying at the Carl. In fact, some of these guests take the time to write friendly notes to me, appreciating the availability of the Carl – both due to its proximity to UCSF, but also its affordability; our weekly rates range from $539 to $1085. I am attaching a true and correct sample of copies of these letters I have received as Exh. A.

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

Date: April 20, 2017

Hamed Shahamiri

A

Judy Vivian
November 11, 2012
Robert, Manager
Carl Hotel

Dear Robert,

Larry and I would like to thank you so much for all of your help and hospitality at your hotel.

My husband had surgery Oct. 29th, for his thyroid, and he had a totally successful surgery.

We want to thank you for your help and flexibility with a surgery we had no idea about, or how long Larry would be in the hospital. It took so much stress away with your flexability on our days in the hotel.

It was also a great help to have a single room for our daughter and letting her move to our room when Larry entered the hospital.

The convenience of your hotel was a great relief.

We will recommend our friends and family to your hotel with great confidence.

Sincerely,
Judy and Larry Vivian

Management of the Carl Hotel
198 Carl Street
San Francisco, CA 94117

May 26, 2010

Re: Hamed

To Whom It May Concern,

I feel compelled to write and let you know of the tremendous assistance your employee, Hamed, gave me in a great time of need. I am a nurse at an Alzheimer's facility in Eureka, CA and we serve many disabled adults not just those with Alzheimer's disease. We recently had the occasion to send one of our client's to San Francisco for a medical consult, an extensive surgery, and then back a third time for a follow up. She was accommodated quite comfortably in your hotel and was very grateful but on her final visit she ran into some problems that Hamed assisted me from this great distance away to rectify. She has some mental health issues and can be quite charming but lacks judgment. On each prior visit she had been accompanied by her children who were able to mange her affairs and cope with any problems that arose but on this visit they were unable to be there. On her final day she would have missed her transportation home and been stuck in San Francisco without any money had Hamed not helped her and me resolve the problems that arose and make the arrangements that she needed. I am completely in his debt and wanted you to be aware of the excellent employee that you have. We could not have resolved this problem were it not for his efforts and she would have been stuck in San Francisco without any money or accommodations. I have no idea how we would have found her and gotten her safely home. Thank you for everything and especially thank you to Hamed for saving the day. I am completely in his debt.

Sincerely,

John Edwards

To The Staff
of
The Carl Hotel.

A note to thank you
for your thoughtfulness
and for the warmth
you express with every
kind word.

Thank you so much for
your hospitality and help
while I stayed with you,
while my husband had his
surgery.

Sincerely,
Lynn Gilmore

November 14, 2007

Hamed (sp?),

Forgive me if I am misspelling your name, but the purpose of this letter is to thank you so much for your great customer relations. You were so helpful, courteous, and kind to me in helping me with my reservations at your hotel for the period of Nov. 1-8, 2007.

You helped make my journey from Orlando, Florida to San Francisco to be with my son during his radical surgery at UCSF during that period so much easier because of your friendly and helpful support.

Without offending you I would like to leave you with a quote from my Bible which is, "May the God of hope fill you with all joy and peace. Rom.15-13.

Thank you again for your friendly support and compassion.

Richard D. Jarvis

Richard D. Jarvis

October 7, 2002

Dear Hamed,

This note is to express my family's deep appreciation to you for being so helpful and kind to all of us during the times we were in San Francisco for Danny's brain tumor surgery and treatments. We enjoyed our accommodations and the lovely patio. Dan's latest M.R.I. showed "no recurrent or residual tumor" and we thank God for this. He has recovered well but now is having chemo

(over please)

Dear Staff Hotel Members,

Thank you for your kind and empathetic service you provided for my family while we went through my Mom's surgery. You were all very helpful and understanding during this difficult time. Thank you for being flexible and allowing us to adjust on accomodations.

My Mom is doing much better and we are looking forward to better days ahead.

Del Engstrom

5/22/16

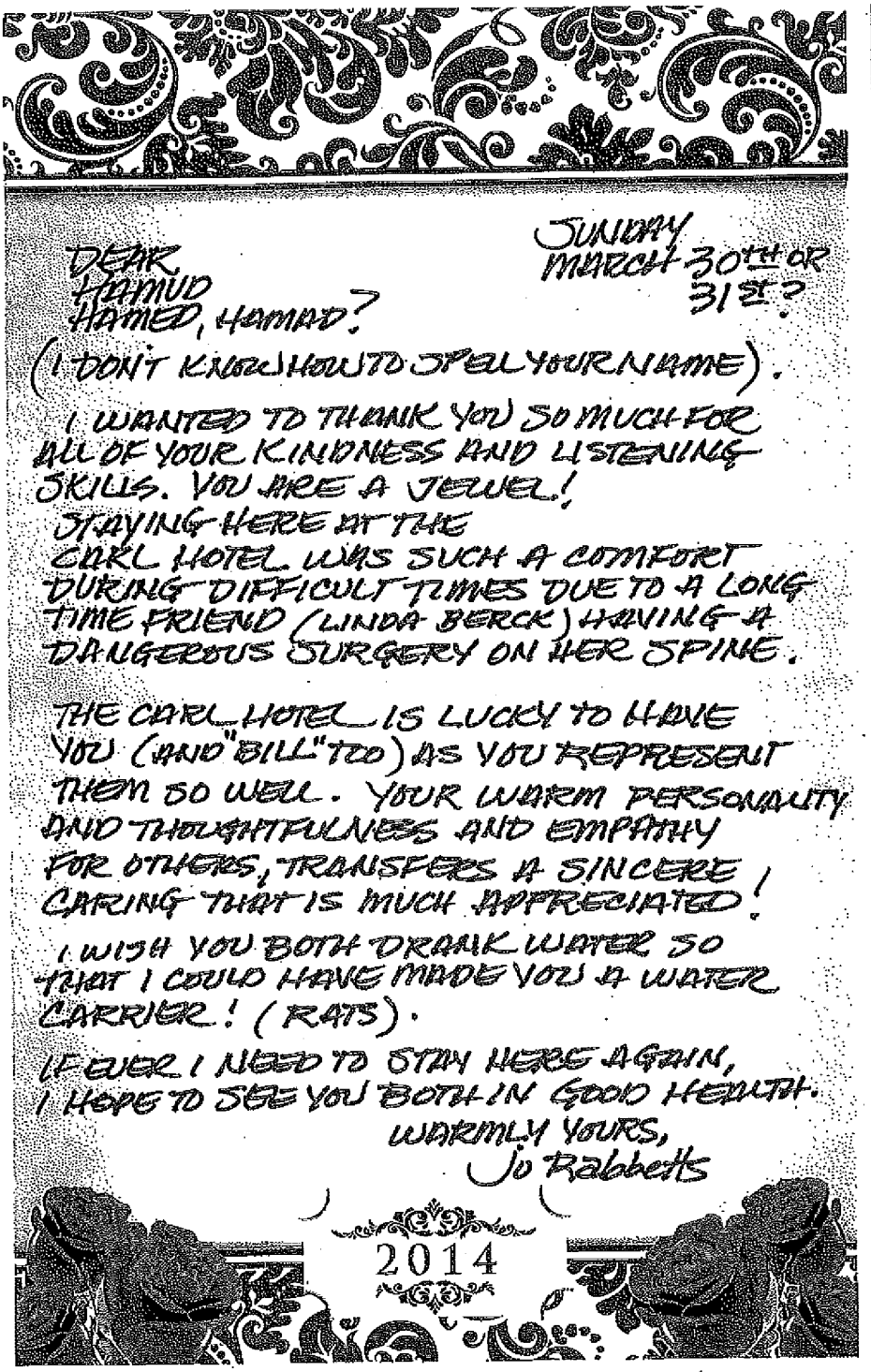
Dear Hamid (& Bill) –

Before any more time elapsed, we wanted to let you know how much your kindness & conscientiousness meant during our stay earlier this month. Thank you for making what was an otherwise very stressful time for us @ UCSF a little bit easier.

All the best,

Erik & Stephanie Scheer
Reno, NV

P.S. –
Chelise has been doing remarkably better since the surgery! Seems we may have turned the corner for the better.


SUNDAY
MARCH 30TH OR
31ST?
DEAR
HAMUD
HAMED, HAMAD?
(I DON'T KNOW HOW TO SPELL YOUR NAME).
I WANTED TO THANK YOU SO MUCH FOR
ALL OF YOUR KINDNESS AND LISTENING
SKILLS. YOU ARE A JEWEL!
STAYING HERE AT THE
CARL HOTEL WAS SUCH A COMFORT
DURING DIFFICULT TIMES DUE TO A LONG
TIME FRIEND (LINDA BERCK) HAVING A
DANGEROUS SURGERY ON HER SPINE.
THE CARL HOTEL IS LUCKY TO HAVE
YOU (AND "BILL" TOO) AS YOU REPRESENT
THEM SO WELL. YOUR WARM PERSONALITY
AND THOUGHTFULNESS AND EMPATHY
FOR OTHERS, TRANSFERS A SINCERE
CARING THAT IS MUCH APPRECIATED!
I WISH YOU BOTH DRANK WATER SO
THAT I COULD HAVE MADE YOU A WATER
CARRIER! (RATS).
IF EVER I NEED TO STAY HERE AGAIN,
I HOPE TO SEE YOU BOTH IN GOOD HEALTH.
WARMLY YOURS,
Jo Rabbetts
2014

long term bases. We chose your hotel as it was so close to hospital. It was a good choice and we told the hospital staff to put you at the top of the list.

My daughter had a very rough time and joined me at the hotel - got bad and had to return to hospital this happened several times. One of these times we needed a cab fast - none came Hamed had Eddie take us in his car. To the emergency room.

Very special people

Regards

Lorraine Parrott

Mr Edards Shrihamiri,

I want to tell you of the wonderful care we received from Hamed and Eddie while we were at your hotel.

My daughter has a transplant surgery at the University Hospital. We were in your hotel 30 days.

Hamed was extremely caring and very helpful.

The social workers at the hospital had a list of places for family members to stay on

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January 25, 2023

VIA ELECTRONIC SUBMISSION

President Rachael Tanner and Commissioners
San Francisco Planning Commission
49 South Van Ness Ave, Suite 1400
San Francisco, CA 94103

Re: Appeal of Preliminary Negative Declaration
2022 Hotel Conversion Ordinance Amendments (Case No. 2020-005491ENV)

Dear President Tanner and Commissioners:

Our office represents Hotel des Arts, LLC, the appellant in Planning Case No. 2020-005491ENV regarding the Planning Department's issuance of a Preliminary Negative Declaration ("PND") and determination that the proposed 2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient use under Hotel Conversion Ordinance, Amortization Period (Board of Commissioners File No. 22081) (the "2022 HCO Amendments") will have no significant effect on the environment.

Under the California Environmental Quality Act ("CEQA"), a negative declaration is proper only where "[t]here is *no* substantial evidence, in light of the whole record before the lead agency, that the project *may* have a significant effect on the environment." (Pub. Resources Code § 21080(c), emphasis added). An environmental impact report (EIR) is therefore required if there is even a "fair argument" that a proposed project *may* have any adverse environmental impacts. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal. 4th 310, 319-320.) Here, there is a fair argument that the proposed project would have significant environmental impacts that were not adequately addressed in the PND. The PND and Planning Department's response to the appeal, rather than rebut the Appellants arguments, merely confirm that the 2022 HCO Amendments *will* lead to displacement of low-income occupants and contribute to direct physical impacts on the environment such as blight and urban decay. The Department's conclusions to the contrary are based on speculation, unsubstantiated narrative, and clearly erroneous and inaccurate assumptions.

1. <u>The Project Will Have a Significant Effect on Displacement and Vacancy Rates</u>

The Planning Department response acknowledges that the City's entire premise in regulating SRO units is that "they are a limited resource and critical housing stock that must remain available to serve a vulnerable and economically disadvantaged target population." Courts have similarly recognized that "residential hotel units serve many who *cannot afford security and rent deposits for an apartment*." (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 674, emphasis added.) The San Francisco Superior Court similarly determined in *San Francisco SRO Hotel Coalition, et al. v. CCSF, et al.* (CPF-17-515656) and *San Francisco SRO Hotel Coalition v. CCSF, et al.* (CPF-19-516864) (the "2017 HCO Amendments") that similar proposed amendments, and the possibility of SRO occupant displacement, was a reasonably foreseeable result of increasing the minimum length of stay from 7 to 32 days and that it is reasonably foreseeable that SRO owners would charge monthly rents and require security deposits. (See **Exhibit A)**

Multiple courts have found that requiring SROs to operate like apartments will lead to monthly rents and security deposits being required, and the Department's conclusions otherwise are based on nothing more than unsubstantiated opinion. The Department simply ignores these findings, callously claiming that "thousands of San Franciscans" are able to afford to pay monthly rents. This completely ignores the primary demographic that SROs are meant to serve – those in the extremely-low-income bracket. While the percentage of middle- and high-income residents in San Francisco has continued to rise and the percentage of very-low- and low-income residents has fallen, the percentage of extremely-low-income residents in San Francisco that make less than 30% of area median income has remained steady at 18%.[1] According to the Consumer Financial Protection Bureau, 37 percent of households are unable to cover expenses for longer than one month by using all sources, including savings, selling assets, borrowing, or

[1] *San Francisco Housing Needs and Trends Report July 2018,* San Francisco Planning Department, *available at* https://default.sfplanning.org/publications_reports/Housing-Needs-and-Trends-Report-2018.pdf.

seeking help from friends or family.[2] That figure rises to *51 percent* of Black and Hispanic households that cannot cover expenses for longer than a month. The 2022 HCO Amendments, which will lead to SRO units charging security deposits and monthly rents, would put such units out of reach for 37% of all households that do not have the ability to cover more than one month of expenses and likely a much higher percentage of SRO occupants.

The PND recognizes that "exclusionary displacement occurs when a lower income household cannot afford to move into an area given the cost of housing relative to their household income," yet the PND and Department response completely ignores this aspect of displacement that the 2022 HCO Amendments will cause. There is substantial evidence that the 2022 HCO Amendments will lead to exclusionary displacement, and the PND does not address this impact at all.

The PND and Department response do recognize that the 2022 HCO Amendments will cause economic displacement, which occurs when residents and businesses can no longer afford escalating rents or property taxes. However, the PND erroneously states that the Department "conservatively" assumes that occupants of only 64 SRO units will be displaced. This clearly erroneous assumption is based on the number of vacancies that SRO owners reported were directly due to the 2017 HCO Amendments. This number plainly underrepresents the true impact that the 2022 HCO Amendments may have.

First, the City acknowledges that there is a low response rate to its "Annual Unit Usage Report" ("AUUR") survey, and that the City has difficulty determining the actual vacancy rate. Despite the fact that the data only represents a fraction of the actual number of SRO units, the City only uses the raw total number of units that were reported vacant due to the 2017 HCO Amendments. Thus the 64 total units is likely significantly less than the total number of vacancies if *all* SROs were taken into account.

Moreover, the City similarly acknowledges that at the time of the AUUR surveys, "many SROs were *not complying with 32-day minimum and were still offering 7-day rentals*." In other

[2] *Making Ends Meet in 2022: Insights from the CFPB Making Ends Meet Survey*, CFPB Office of Research Publication No. 2022-9, available at: https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet-in-2022_report_2022-12.pdf.

words, SRO owners were not reporting vacancies due to the 2017 HCO Amendments because the City was not enforcing, and SRO owners were complying, with the 32-day minimum stay requirement. If the City were to enforce the 2022 HCO Amendments, the raw total number of vacancies due to the minimum stay requirement would likely rise significantly.

Finally, the Department does not explicitly acknowledge that the AUUR form only asks SRO owners to provide an explanation for reported vacancies when *more than 50%* of the units in the building are vacant.[3] The PND conceals this fact, and does not reveal how many SRO owners actually provided an explanation for their reported vacancies. This again suggests that raw total of reported vacancies due to the 2017 HCO Amendments is far below the actual number of vacancies that were caused by the 2017 HCO Amendments.

In sum, the 64 reported vacancies due to the 2017 HCO Amendments is based on a mere fraction of the actual number of SRO units, an even smaller fraction of reporting SRO units that complied with the 32-day minimum stay requirement, and an *even smaller* fraction of reporting complying SRO units that had more than a 50% vacancy rate. The PND and Department's assumption that this number is "conservative" is clearly erroneous. The City's own data demonstrates that displacement is certain to occur from the 2022 HCO Amendments and that the impact is clearly much greater than analyzed in the PND.

The PND and Department attempt to downplay the significance of the economic displacement that the 2022 HCO Amendments may cause by arguing that students, technology sector workers, and weekly transient tourists would make up part of the number of occupants who would be displaced. With respect to students and technology workers, the City's own 2015 analysis demonstrates that students and technology workers are definitively *not* part of the group of occupants who would be displaced by the 2022 HCO Amendments. As the Department response confirmed in a 2015 report to the Board of Supervisors, the Budget and Legislative Analyst Office found that some SROs are "providing *long-term rental housing* to students or to young technology sector workers" and confirmed that "at least three of the hotels are now providing *long-term housing* for students only." The 2022 HCO Amendments, which will

[3] See 2022 AAUR Form, available at https://sf.gov/sites/default/files/2022-11/2022AUURForm.pdf; 2018 AUUR Form, available at https://sfdbi.org/sites/default/files/AUUR%20Form.pdf.

increase the minimum stay requirement from 7 days to 30 days will have no impact at all on students and technology workers who *already* utilize SROs for long-term tenancies (and for whom a month's worth of rent and security deposit would likely not pose an economic barrier).

With regard to weekly transient tourists, the PND also fails to mention that the AUUR data *already* differentiates between residential guest rooms and tourist guest rooms.[4] The data provided in the PND, however, only lists total unit vacancies without revealing the vacancies for each type of unit. This again obscures the potential impact of the 2022 HCO Amendments. For example, if a 100-unit SRO included 50 residential guest rooms with 50% vacancy due to an inability to find occupants and 50 tourist guest rooms with 0% vacancy, the data in the PND would show that the SRO has only a 25% vacancy rate. However, if the 2022 HCO Amendments went into effect, the vacancy rate of the 100-unit SRO in the example above would skyrocket to 75% as the SRO in this example could only find enough occupants to fill 25 of its 50 residential guest rooms. The PND again fails to adequately analyze the evidence in the record, and the PND's conclusions that the 2022 HCO Amendments will not have an impact on vacancy rates is clearly erroneous.

2. <u>The Project Will Have a Significant Effect on Urban Blight and Decay</u>

The City has acknowledged that SRO units can provide a temporary step in finding permanent housing for homeless individuals, and the San Francisco Department of Public Health even leases a number of rooms in privately owned SRO buildings to temporarily house homeless individuals coming off the street or out of the hospital.[5] Monthly rents in privately owned and operated SRO buildings typically range from $650 to $700.[6] Data shows that 44% of employed homeless individuals and 82% of unemployed individuals earn less than $750 a month.[7] While such individuals may be able to seek shelter in an SRO for a week or several weeks at a time,

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[4] *See id.*
[5] *Single Room Occupancy Hotels in San Francisco: A Health Impact Assessment*, San Francisco Department of Public Health, available at: https://www.sfdph.org/dph/files/EHSdocs/HIA/SFDPH-SROHIA-2017.pdf.
[6] *Id.* at 10.
[7] *San Francisco Homeless County and Survey: 2022 Comprehensive Report*, Applied Survey Research, *available at*: https://hsh.sfgov.org/wp-content/uploads/2022/08/2022-PIT-Count-Report-San-Francisco-Updated-8.19.22.pdf.

requiring SRO owners to rent their units for a month at a time will put these rooms completely out of reach for a majority of homeless individuals.

Moreover, academic research is clear that the historic loss of SRO units as a naturally affordable housing option has led to an increase in homelessness.[8] As explained above, the PND's analysis on the impact on the vacancy rate is flawed and clearly erroneous. Yet even the PND's flawed analysis demonstrates that the vacancy rate in SRO's has been steadily increasing on its own, and the 2022 HCO Amendments will only exacerbate this problem. Increased vacancy rates will inevitably lead to deferred maintenance, closures, increased homelessness, urban decay, and blight. The fact that the PND explicitly acknowledges that these issues were *not* analyzed at all confirms that the PND is inadequate.

3. <u>The Project May Have Potential Physical Impacts that Must Be Analyzed</u>

Although the PND appears to acknowledge that the 2022 HCO Amendments may potentially have social and economic impacts, the Department states that only potential physical impacts resulting from economic activities must be analyzed under CEQA. Beyond the fact that caselaw is clear that urban blight and decay *are* physical impacts that must be analyzed under CEQA, the Department explicitly acknowledges that a reasonably foreseeable impact of the potential loss of low-income units (and resulting increase in homelessness) would be for the City to "*construct* homeless shelters, supportive housing and navigation centers." Construction of replacement housing units is unquestionably a physical impact that must be analyzed, and which this PND does not anlyze.

4. <u>Conclusion</u>

The environmental review of the 2022 HCO Amendments violates CEQA for multiple reasons. The data and evidence contained in the PND clearly demonstrates that the 2022 HCO Amendments *will* have a significant impact on displacement of SRO occupants, and that will

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[8] *Single-Room Occupancy Housing in New York City: The Origins and Dimensions of a Crisis*, Sullivan, Brian J., and Jonathan Burke. 17 CUNY L. Rev. 113-144, available at: https://mobilizationforjustice.org/wp-content/uploads/CNY109_Sullivan-Burke.pdf; *see also Preserving Affordable Housing in the City of San Diego*, San Diego Housing Commission, available at: https://www.sdhc.org/wp-content/uploads/2020/05/Affordable-Housing-Preservation-Study.pdf.

ironically put SRO units out of reach for the very sector of the population that the ordinance is apparently designed to protect – extremely-low-income residents. The 2022 HCO Amendments will unquestionably lead to increased vacancies, deferred maintenance, building closures, urban decay, and blight. The PND explicitly states that these potential impacts were ignored, despite the fact that the PND acknowledges that such impacts could lead to the construction of replacement public housing. The evidence is clear that the 2022 HCO Amendments may have significant environmental impacts, and we strongly urge that a more rigorous evaluation of those impacts be conducted through a full Environmental Impact Report.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC

Brian O'Neill

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

SAN FRANCISCO SRO HOTEL COALITION, an unincorporated association, HOTEL DES ARTS, LLC, a Delaware limited liability company, and BRENT HAAS,

Plaintiffs and Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a public agency, acting by and through the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; DEPARTMENT OF BUILDING INSPECTION OF THE CITY AND COUNTY OF SAN FRANCISCO; EDWIN LEE, in his official capacity as Mayor of the City and County of San Francisco,

Defendants and Respondents.

Case No. CPF-17-515656

CEQA

ORDER RE. PETITION FOR WRIT OF MANDAMUS

Date Action Filed:	May 8, 2017
Trial Date:	May 3, 2019
Hearing Judge:	Cynthia Ming-mei Lee
Time:	9:30 a.m.
Place:	Department 503

INTRODUCTION

This matter was heard on May 3, 2019 at 9:30 a.m. in Department 503 of the San Francisco County Superior Court, the Honorable Cynthia Ming-mei Lee presiding. Bryan Wenter and Arthur Coon of the law firm Miller Starr Regalia, and Andrew Zacks of the law firm Zacks Friedman & Patterson P.C. appeared for plaintiffs and petitioners San Francisco SRO Hotel Coalition, Hotel Des Arts, LLC, and Brent Haas (collectively, "Petitioners"). Deputy City Attorneys Andrea Ruiz-Esquide, Kristen Jensen, and James Emery appeared on behalf of defendants and respondents, the City and County of San Francisco, the Board of Supervisors, the Department of Building Inspection, and the Mayor (collectively, "San Francisco").

In their First Amended Petition and Complaint ("FAP"), Petitioners assert causes of action under the California Environmental Quality Act ("CEQA"), codified under Public Resources Code sections 21000 *et seq.*), the federal and state constitutions, and the California Public Records Act ("PRA"). The Court heard argument on the CEQA claim and the PRA claim only. The federal and state constitutional claims remain pending.

I. CEQA

A. Background

In 1979, the San Francisco Board of Supervisors instituted a moratorium on the conversion of residential hotel units into tourist units in response to a severe shortage of affordable rental housing for elderly, disabled, and low-income persons. (Administrative Record ("AR") 001117, 001320; S.F. Admin. Code ("HCO") §§ 41.3(g).) Subsequently, in 1981, the City enacted the Residential Hotel Unit Conversion and Demolition Ordinance (the "HCO"), Administrative Code Chapter 41, instituting permanent controls to regulate all future residential hotel conversions. (AR 1427-45; HCO § 41.1 *et seq.*) In adopting the HCO, the Board of Supervisors included findings that "the City suffers from a severe shortage of affordable rental housing; that many elderly, disabled and low-income persons reside in residential hotel units; that the number of such units had decreased by more than 6,000 between 1975 and 1979; that loss of such units had created a low-income housing "emergency" in San Francisco, making it in the public interest to regulate and provide remedies for unlawful conversion of residential hotel units; that the City had instituted a moratorium on residential hotel conversion

effective November 21, 1979; and that because tourism is also essential to the City, the public interest also demands that some moderately priced tourist hotel rooms be available, especially during the summer tourist season." (*San Remo Hotel L.P. v. City and Cty. of San Francisco* (2002) 27 Cal.4th 643, 650 [citing the original HCO § 41.3]; see AR 1427-28.)

In the original HCO, a unit's designation as "residential" or "tourist" was determined as of September 23, 1979, by its occupancy status according to definitions contained in the HCO. (AR 1428-49 at §41.4.) The HCO required single room occupancy ("SRO") hotels in San Francisco to report all residential and tourist units in a hotel as of September 23, 1979. (AR 1433 at § 41.6.) Residential units were then placed on a registry, and a hotel owner could convert residential units into tourist units only by obtaining a conversion permit from the Department of Building Inspection ("DBI").[1] (*Id.* at §§ 41.4 [definition of Conversion]; 41.12 [Permit to Convert]; 41.16 [Unlawful Conversion; Remedies; Fines].) To obtain a conversion permit, applicants were required to construct new residential units, rehabilitate old ones, or pay an "in lieu" fee into the City's Residential Hotel Preservation Fund Account. (*Id.* at §41.10.)

The original HCO also allowed seasonal tourist rentals of residential units during the summer if the unit was vacant because a permanent resident voluntarily vacated the unit or was evicted for cause by the hotel operator. (*Id.* at § 41.16.) Further, the HCO required hotel operators to maintain records to demonstrate compliance with the ordinance and to provide these records for inspection by DBI. (*Id.* at §§ 41.6(h)-41.7.)

When the City adopted the original HCO in 1981, it determined there was no possibility the ordinance would have a significant impact on the environment. (AR 1454.) The trial court disagreed and found the requirement of one-for-one replacement of residential units "creates the very real possibility of a significant environmental impact." (*Id.*) While the trial court case was pending on appeal, the City performed an initial study on the original HCO and, on April 15, 1983, issued a preliminary negative declaration concluding that the HCO could not have a significant impact on the

[1] The Department of Building Inspection was formerly termed the Bureau of Building Inspection in the original HCO.

environment. (AR 1530-33; AR 1542.) The City then readopted the HCO and adopted a final Negative Declaration on June 23, 1983. (AR 1657-64.)

The Court of Appeal eventually issued its decision finding that "the City's failure to comply with CEQA was illegal," but "the defect was cured, however, by reenactment of the ordinance following an environment evaluation and issuance of a negative declaration." (*Terminal Plaza Corp. v. City & Cty. of San Francisco* (1986) 177 Cal.App.3d 892, 905, n.6.) Environmental review of subsequent amendments to the HCO likewise determined those amendments, addressed to the administration and enforcement of the HCO, could have no impact on the environment. (See, e.g., AR 1689-1693; AR 1727-29.)

In 1987 and 1988, the City conducted a series of meetings and workshops to discuss the operation of the HCO with City staff, community housing groups, and residential hotel owners and operators. (AR 1705.) City decision makers considered the concerns of hotel operators relating to the prohibition on renting residential units for fewer than 32 days. (AR 1706-09.) Ultimately, the City repealed and readopted the HCO in 1990, making four changes from the old law. (*San Remo Hotel v. City and County of San Francisco* (9th Cir. 1998) 145 F.3d 1095, 1099.) The 1990 amendments: (1) prohibited the summer tourist use of residential rooms; (2) increased the in lieu payment from 40 percent to 80 percent; (3) added the requirement that any hotel that rents rooms to tourists during the summer must rent the rooms at least 50 percent of the time to permanent residents during the winter; and (4) the new law did not provide for relief on the ground of economic hardship. (*Id.*)

In 2014, the City did an analysis of the HCO and found that while private hotel owners are required to file an Annual Unit Usage Report ("AUUR") with DBI, only 179 of 413 private SRO hotels thought to be in operation returned the annual usage report. (AR 3523-27.) The City acknowledged that given the low rate of response to the AUUR, it was difficult to know precisely the total number of residential units available in private and non-profit owned and operated SRO hotels, and the actual vacancy rates for these buildings. (AR 3525.) However, the City determined the following vacancies (*see* Table 2 at AR 3524):

- Of 228 privately owned SROs for which data was obtained, 864 of 7,241 units (11.9 percent) were vacant.

- Of 32 non-profit hotels, 91 of 2,667 units (3.4 percent) were vacant.

The City further found that "a few of the buildings...indicated that they were serving populations other than the low-income, disabled, and elderly individuals whom the units are intended to serve," and that "the hotels may be providing long-term rental housing to students or to young technology sector workers, both of which would be allowed under the provisions of Chapter 41." (AR 3523). It confirmed that "at least three of the hotels are now providing long-term housing for students only, a use which is allowed under Chapter 41, but which does not accomplish the goal of providing rooms for low-income and disabled populations." (AR 3525.)

Further analysis from the City showed the following vacancies in 2015 (*see* Table 3 at AR 5432):

- Of 419 hotels citywide, 1,689 of 16,611 units (10.2 percent) were vacant.
- Of 354 privately owned hotels, 1,488 of 11,473 units (13 percent) were vacant.
- Of 29 non-profit hotels, 84 of 2,028 units (4.1 percent) were vacant.
- Of 36 master-leased hotels by the City, 117 of 3,110 units (3.8 percent) were vacant.

Again, the City acknowledged that "many SROs had disconnected numbers, did not return phone calls, or were unable to provide information, [and] as a result, it was impossible to verify whether they were still in operation, or to include vacancy information for them." (*Id.*)

On December 6, 2016, Supervisor Peskin introduced substitute Ordinance No. 38-17 ("the 2017 Amendments") to update the HCO. (AR 0001; 0098-0122.) On December 16, 2016, the City determined the Ordinance was "not defined as a project under CEQA Guidelines Sections 15378 and 15060(c)(2) because it does not result in a physical change in the environment." (*Id.*)

On February 7, 2017, the Board of Supervisors unanimously adopted the 2017 Amendments. (AR 229.) Mayor Ed Lee signed the 2017 Amendments on February 17, 2017, and the 2017 Amendments became effective on March 19, 2017. (AR 204-230.) As of the proposed amendments, the HCO regulated roughly 18,000 residential units within 500 residential hotels across San Francisco. (AR 175.)

The focus of this action is subsections 41.20(a) and (b) of the amended HCO, which reads as follows:

SEC. 41.20. UNLAWFUL CONVERSION; REMEDIES; FINES.

(a) Unlawful Actions. It shall be unlawful to:

(1) Change the use of, or to eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter;

(2) Rent any residential unit for *Tourist or Transient Use* ~~*a term of tenancy less than seven days*~~ except as permitted by Section 41.19 of this Chapter;

(3) Offer for rent for ~~*nonresidential use or*~~ *T*~~*t*~~*ourist or Transient* U~~*u*~~se a residential unit except as permitted by this Chapter.

(AR 225 [added text is shown in italics and underlined; deleted text is shown in italics and strikethrough)].) The 2017 Amendments define "Tourist or Transient Use" as "any use of a guest room for less than a 32-day term of tenancy by a party other than a Permanent Resident." (AR 209.)

i. The 2019 Amendment

On May 31, 2019, after the Court heard oral argument, the City passed further legislation amending the HCO to revise the definition of "Tourist or Transient Use" to "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident." Thereafter, on June 12, 2019, the City filed a Motion to Dismiss the First through Fifth Causes of Action in the First Amended Petition as moot. An Amended Motion to Dismiss was filed on June 18, 2019. On June 18, 2019, Petitioners filed a Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint.

The Court heard oral argument on the Motion to Dismiss and Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint on August 9, 2019. The parties stipulated to continue the Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint to September 27, 2019.[2] The Court denied the City's Motion to Dismiss. As the Court stated in its August 15, 2019 order:

> Plaintiffs' Constitutional and CEQA challenges are not moot because material questions remain for the Court's determination.[3] (*Eye Dog Found. v. State Bd. of Guide Dogs for Blind* (1967) 67 Cal. 2d 536, 541 ["the general rule governing mootness becomes subject to the case

[2] The Court granted Petitioner's ex parte application on September 10, 2019 to advance the hearing to September 25, 2019 in light of the statutory deadline to challenge the 2019 Amendments under Government Code section 65009(c).

[3] San Francisco acknowledges that Plaintiffs' PRA cause of action in its First Amended Petition is not moot. (Motion to Dismiss at 4, n.1.)

recognized qualification that an appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination"]; *Davis v. Superior Court* (1985) 169 Cal. App. 3d 1054, 1057–58 ["the enactment of subsequent legislation does not automatically render a matter moot. The superseding changes may or may not moot the original challenges...This issue may only be determined by addressing the original claims in relation to the latest enactment"].) While the 2019 HCO Amendment dropped the minimum length of SRO unit use from 32 days to 30 days, this change does not moot Plaintiffs' challenge to the 2017 HCO Amendments on grounds that the HCO "redefine[ed] prohibited 'tourist or transient' use and 'unlawful actions' so as to entirely eliminate SRO operators' preexisting year-round right to rent SRO units for minimum terms of at least seven (7) days." (First Amended and Supplemental Verified Petition at ¶ 23.)

Accordingly, the Court will address the 2017 Amendments in relation to the 2019 Amendment in this order.

B. Exhaustion of Administrative Remedies

CEQA requires issue exhaustion: "No action or proceeding may be brought pursuant to [CEQA] unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency ... during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Res. Code § 21177(a).) This exhaustion requirement is jurisdictional. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.)

Under the exhaustion of administrative remedies doctrine, the "exact issue" must be presented to the agency, and neither "bland and general" references to environmental issues, nor "isolated and unelaborated comments" will suffice. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-36.) Petitioner "bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level." (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 910.)

The City argues that neither Petitioners Brent Haas nor Hotel Des Arts raised any CEQA claim during the City's administrative review of the 2017 Amendments. (Opposition ("Opp") at 11.) Petitioners argue that the City did not give proper notice and therefore, the exhaustion doctrine does not apply. (Reply at 24.) The Court finds Petitioners' notice argument unpersuasive. The record reflects that the City noticed multiple public hearings before the Board of Supervisors, providing a description of the proposed changes to the HCO and indicating that one of the issues to be discussed

would be "affirming the Planning Department's determination under the California Environmental Quality Act." (AR 645 [January 23, 2017 Meeting Agenda], 734 [January 31, 2017 Meeting Agenda], 1065 [February 7, 2017 Meeting Agenda].) Further, any argument regarding defective notice is waived since Samantha Felix, manager of Hotel Des Arts, submitted a letter to the Board of Supervisors dated January 27, 2017 and received January 31, 2017, objecting to the minimum 32 night stay under the proposed amendments. (AR 6609-6611; *see Hines v. California Coastal Com.* (2010) 186 Cal. App. 4th 830, 855 [finding that the administrative remedy exhaustion requirement of section 21177, subdivision (a) was triggered where one appellant spoke and appellants and others submitted written arguments at two public hearings].)

Based on the evidence discussed, the Court finds that Petitioner Hotel Des Arts exhausted its administrative remedies and has standing. However, the Court finds that Mr. Haas lacks standing to pursue the CEQA claims in this case. There is no evidence in the record that Mr. Haas participated in the administrative process before the Board of Supervisors when the City enacted the 2017 Amendments.

C. Petitioners' Motion to Augment the Administrative Record and Request for Judicial Notice

The City stipulated to augmentation of the Administrative Record with Exhibits 4 and 12 through 18 to the 9/13/18 Declaration of Arthur F. Coon In Support Of Petitioners' Motion To Augment Administrative Record ("9/13/18 Coon Decl."). The City agreed to allow a redacted version of Exhibit 11, omitting an inadvertently disclosed attorney-client communication from the email chain. Accordingly, the Court orders the record augmented only as to these specific exhibits.

The Court finds that all other exhibits attached to the 9/13/18 Coon Decl. are irrelevant as Petitioners have not shown that the documents were actually considered by the Board in making its decision. Accordingly, the Court denies the balance of the Motion to Augment. The Court denies Petitioners' Request for Judicial Notice on the same grounds.

D. Whether the amended HCO is a CEQA "Project"

CEQA and CEQA Guidelines establish a three-tier process to ensure public agencies inform their decisions with environmental considerations. (*Muzzy Ranch Co. v. Solano County Airport Land*

Use Com'n (2007) 41 Cal.4th 372, 380.) The first tier is jurisdictional—that is, an agency must "conduct a preliminary review to determine whether an activity is subject to CEQA." (*Muzzy Ranch,* 41 Cal.4th at 380; CEQA Guidelines[4] § 15060(c).) If an activity is not a "project," it is not subject to CEQA. (*Id.*) At the second tier, if the agency has determined the proposed action is a CEQA "project," it must determine whether it qualifies for any exemption from CEQA review. (*Id.*) If not, the agency "must conduct an initial study to determine whether the project may have a significant effect on the environment." (*Id.*; CEQA Guidelines § 15063(a).) If there is "no substantial evidence that the project or any of its aspects may cause a significant effect on the environment,...the agency must prepare a "negative declaration" that briefly describes the reasons supporting its determination." (*Id.* at 380-81; CEQA Guidelines § 15063(b)(2).) At the third tier, "if the agency determines substantial evidence exists that an aspect of the project may cause a significant effect on the environment...the agency must ensure that a full environmental impact report is prepared on the proposed project." (*Id.* at 381; CEQA Guidelines § 15063(b)(1).) Accordingly, no environmental review under CEQA occurs if an agency determines an activity is not a project.

A "project" is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (1) An activity directly undertaken by any public agency..." (Pub. Res. Code § 21065(a); *see also* CEQA Guidelines § 15378(a)(1) [A "project" is "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: (1) An activity directly undertaken by any public agency including but not limited to . . . enactment and amendment of zoning ordinances . . ."]; see also *Muzzy Ranch, supra,* 41 Cal.4th at 381 ["whether an activity constitutes a project subject to CEQA is a categorical question respecting whether the activity is of a general kind with which CEQA is concerned, without regard to whether the activity will actually have environmental impact"].) CEQA "shall apply to discretionary projects proposed to be carried out or

[4] References to CEQA Guidelines refers to Cal. Code Regs., tit. 14, Ch. 3 §§15000-15387.

approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances . . . ." (Pub. Res. Code § 21080(a).)

The parties dispute: 1) whether the amended HCO is categorically a "project" because it is an ordinance akin to a zoning ordinance; and 2) whether the amended HCO is an activity that may cause a reasonably foreseeable indirect physical change in the environment. The Court addresses these issues in turn.

i. Zoning Ordinance

Petitioners assert the amended HCO is "categorically a project within CEQA's purview" because: 1) the 2017 Amendments are "akin" to a zoning ordinance; and 2) zoning ordinances are categorically CEQA "projects" under § 21080(a), which specifically lists "the enactment and amendment of zoning ordinances" as among the discretionary projects subject to CEQA, citing *Rominger v. County of Colusa* (2014) 229 Cal.App.4th at 690, 702. (Petitioners' Opening Brief ["Opening Brief"] at 9-10, 25.) As to whether zoning ordinances are categorically CEQA "projects," the California Supreme Court recently disapproved of *Rominger* in *Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal. 5th 1171, holding "the various activities listed in section 21080 must satisfy the requirements of section 21065 before they are found to be a project for purposes of CEQA." Thus, CEQA applies "only to activities that qualify as projects — in other words, to specific examples of the listed activities that have the potential to cause, directly or indirectly, a physical change in the environment." (*Id.* at 328, emphasis in original.)

Regardless, the Court finds that the 2017 Amendments are not "akin" to a zoning ordinance. As the court found in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 902 regarding the original HCO:

> Zoning laws typically regulate such facets of land use as location, height, bulk, setback lines, number of stories and size of buildings, and the use to which property may be put in designated areas (Gov. Code, § 65860 et seq.; *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 59 [107 Cal.Rptr. 214].)....The ordinance, however, does not regulate land use in the same manner as zoning laws. The nature of buildings or uses permitted in specified districts are not touched upon by the ordinance; nor does it seek to control the dimensions, size, placement or distribution of structures within the City. The ordinance is of general application, and merely

regulates existing uses. The regulations governing issuance of conversion permits require purely ministerial acts; the replacement provisions do not call for land use decisions.

In other words, the land is already zoned for commercial use and remains unchanged. The HCO merely regulates how owners operate commercial use buildings once they've been built.

The cases cited by Petitioner involve ordinances that regulate initial uses of the land rather than existing uses and are therefore distinguishable. (*see e.g.*, *Morehart v. County of Santa Barbara* (1994) Cal.4th 725, 750 [purpose of the challenged ordinance was "to regulate the minimum size of a lot on which a residence may be built"]; *People v. Optimal Global Healing, Inc.* (2015) 241 Cal.App.4th Supp. 1, 7-8 [involving ordinance that makes it a misdemeanor to own, establish, operate, use, or permit the establishment or operation of a medical marijuana business]; *DeVita v. Cty. of Napa* (1995) 9 Cal. 4th 763, 773 [involving amendment to general plan that guided future local land use].)

ii. Reasonably Foreseeable Indirect Physical Change in the Environment

The next issue is whether the amended HCO is an activity that may cause a reasonably foreseeable indirect physical change in the environment. Identifying a physical change involves "comparing *existing* physical conditions with the physical conditions that are predicted to exist at a later point in time, after the proposed activity has been implemented. The difference between these two sets of physical conditions is the relevant physical change." (*Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal. App.4th 273, 289 (disapproved on other grounds in *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279) (emphasis in original, citation & footnote omitted).) Under CEQA Guidelines, "an indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." (§ 1504(d)(3).)

A comparison of the HCO before and after the 2017 Amendments indicates that prior to 2017, section 41.20(a) made it unlawful to "rent any residential unit for a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter" and "offer for rent for nonresidential use or

tourist use a residential unit except as permitted by this Chapter." (AR 225.) Hence, a hotel owner could rent a residential unit for as few as seven days as long as it was for residential use. A hotel owner could not rent a residential unit for tourist use unless certain conditions applied. Following the 2017 Amendments, section 41.20(a) makes it unlawful "to rent any residential unit for Tourist or Transient Use except as permitted by Section 41.19 of this Chapter" and "offer for rent for Tourist or Transient Use a residential unit except as permitted by this Chapter." (*Id.*)

Under the 2017 Amendments, "Tourist or Transient Use" was defined as "any use of a guest room for less than a 32-day term of tenancy by a party other a Permanent Resident.[5]" (AR 209.) As such, a guest who occupied a residential unit of an initial term of 32 continuous days became subject to the provisions of San Francisco's rent ordinance. (S. F. Admin. Code § 37.2(r) [definition of a rental unit].) In effect, the 2017 Amendments no longer permitted rentals to non-permanent residents for short term tenancies lasting from seven days to thirty-one days. Under the recent 2019 Amendment, "Tourist or Transient Use" is defined as "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident." (HCO § 41.20(a).) The significance of the minimum 30-day rule is that guests who stay the minimum 30-day tenancy cannot be evicted unless an unlawful detainer proceeding is brought. (see Civil Code § 1940.1)

The Court finds that tenant displacement is a reasonably foreseeable impact of the amended HCO. The HCO's purpose is to provide and preserve affordable housing for elderly, disabled, and low-income persons; its premise in extensively regulating the terms of occupancy for SRO units is that they are a limited resource and critical housing stock that must remain available to serve a vulnerable and economically-disadvantaged target population. (HCO § 41.3.) While the 2019 Amendment reduced the 32-day minimum tenancy to 30 days, it still restricts hotel owners from renting rooms to guests for tenancies as short as seven days, as was previously allowed prior to the 2017 Amendments.

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[5] Permanent Resident is defined as "A person who occupies a guest room for at least 32 consecutive days." (HCO § 41.4.)

A change in regulation that increases the minimum term of occupancy for the finite number of available SRO units from weekly hotel rentals to monthly apartment rentals foreseeably restricts the availability of the limited stock of these units to the target population, with the reasonably foreseeable effect of displacing that population elsewhere.

The Court rejects the City's argument that the HCO will not result in displacement of short-term tenants because it does not require private SRO hotel owners to charge first and last months' rent and security deposits. While the 2017 Amendments does not require a specific payment structure, it is reasonably foreseeable that hotel owners could begin requiring security and monthly deposits if forced to rent for longer minimum rental terms that eliminate weekly rentals. It is also reasonably foreseeable that renters who are unable to afford monthly deposits would be displaced as a result. (*San Remo Hotel,* 27 Cal.4th at 674 ["residential hotel units serve many who cannot afford security and rent deposits for an apartment"].) Such reasonably foreseeable actions by hotel owners resulting in displacement is sufficient for purposes of the first tier of CEQA analysis. (Pub. Res. Code § 21065(a) ["'Project' means an activity which *may* cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment"] (emphasis added).)

The Court of Appeal's opinion[6] reversing this Court's denial of Petitioners' motion for a preliminary injunction based on their constitutional due process and takings claims is also instructive in this regard. In its unpublished October 15, 2018 opinion, the court held that the pre-amendment version of HCO "precluded rentals of less than seven days, regardless of a showing of the renter's purpose, and it is the seven-day period which demarcates residential from tourist rentals." (10/15/18

[6] The Court of Appeal's relevant findings and holdings are considered the law of the case and govern the disposition of subsequent issues in this litigation. (*Santa Clarita Org. for Planning the Env't v. Cty. of Los Angeles* (2007) 157 Cal. App. 4th 149, 156 [holding "where an appellate court states in its opinion a principle or rule of law necessary to its decision, that principle or rule becomes the law of the case"].) After reversal of the order denying the preliminary injunction and upon remand, this Court re-set Petitioners' preliminary injunction motion for hearing to balance the parties' relative hardships. Upon the parties' stipulation, this Court entered an injunction on against operation or enforcement of the HCO's minimum rental term by anyone and for any purpose pending resolution of this litigation or further order of this Court. (11/30/18 Injunction Order.)

Opinion at 8.) The court further held "the 2017 Amendments effected a substantial change by making the minimum term 32 days unless the person was already a permanent resident." (*Id.*) Noting that the 2017 HCO Amendments do not provide for compensation or a reasonable amortization period, the court held, "they do, on their face, require owners of SROs to forego more classically styled hotel rentals in favor of more traditional tenancies. This changes the fundamental nature of their business, by making them landlords rather than hotel operators." (*Id.* at 10.) As such, even a 30-day minimum term, which, as discussed, would make the hotel owner subject to landlord-tenant laws under state law, could foreseeably cause SRO hoteliers forced to become apartment landlords to begin requiring the security and rent deposits customary to that fundamentally changed business model. This is assuming they wish to rent their SRO units at all.

To the extent Petitioners argue that this displacement also leads to increased homelessness and urban blight, the Court acknowledges *San Remo*, which found that "while a single room without a private bath and kitchen may not be an ideal form of housing, [SRO] units accommodate many whose only other options might be sleeping in public spaces or in a City shelter." (27 Cal.4th at 674.) However, the Court finds that Petitioners fail to provide evidence in the record that links tenant displacement due to the amended HCO with homelessness and/or urban blight. (*see e.g.*, AR 3534 [internal e-mail between HSA/DSS employees discussing "public health risk" and "individual human suffering that results from homelessness" in the context of a building a mandatory shelter]; 3539 [HSH-HAS draft policy document noting homelessness as the City's "#1 problem" and "public health crisis" that "poses risks to the general public due to the presence of excrement, used needles, vermin, etc. that are often byproducts of persons living on the streets or in our parks," and proposing that the City "provide a nightly shelter bed to ALL individuals who are living on the streets or in our parks a night; 1375-1389 [San Francisco Leasing Strategies Report Draft discussing generally strategies for encouraging landlords to rent to individuals who are, were, or are at risk of being homeless].) The

Court also rejects Petitioners' further assertion that resort to record evidence is unnecessary to resolve the threshold issue raised here as a categorical matter. (*Muzzy Ranch.*, 41 Cal.4th at 382 [holding "whether an activity is a project is an issue of law that can be decided on undisputed data in the record on appeal"].)

Regardless, the Court need not reach this issue, since a finding of tenant displacement is within the purview of CEQA. In *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 451, the project at issue included demolition of housing units in a redevelopment plan. The court held that CEQA "is made relevant here by the Ellis Act's explicit exceptions for a public entity's power to regulate, among other things, "planning," "subdivision map approvals," the "demolition and redevelopment of residential property," *and the mitigation of adverse impacts on persons displaced by reason of the withdrawal of rental accommodations*. Such items are the common focus and byproducts of the CEQA process, as they were in the case here." (emphasis added.)

The record further reflects that short-term renter displacement as a result of change in the minimum term of tenancy was foreseen and documented by the City. (AR 1706 [1988 Report on Residential Hotels Policy and Legislative Issues noting, "The 32 day rental requirement often works against the rental of vacant residential hotel units as operators have to refuse occupancy to weekly tenants, even though some residential units may have been vacant for long periods"] see also AR 1341, 1345 [City memo suggesting section 41.20 be revised to a 32 day minimum rental, also suggesting that "low income, elderly, and disabled persons should be allowed to pay in seven (7) day increments so they, as the target population to be served, have access to this housing"].) The City also foresaw, in connection with its consideration of prior HCO amendments, that hoteliers not wanting to risk permanently committing to undesirable tenants not vetted through weekly rentals, might hold SRO units off the rental market. (AR 1707 [1988 City Planning report: "Weekly rentals are used by

operators to screen potential trouble making tenants. Without this option, operators are leaving units vacant rather than risk renting to potentially troublesome tenants on a monthly basis."].)

In summary, it is reasonably foreseeable that the 2017 HCO Amendments may lead to indirect physical changes in the environment in the form of tenant displacement, and tenant displacement is the general sort of activity with which CEQA is concerned. Accordingly, the Court finds that the amended HCO is "project" and the City failed to proceed in the manner required by law in summarily dispensing with CEQA review. The Court therefore grants the CEQA writ petition and orders the issuance of a writ of mandate setting aside the City's adoption of the 2017 HCO Amendments pending its compliance with CEQA.

II. The Public Records Act Requests

A. Background

Petitioners filed their verified FAP on August 23, 2017, adding the Sixth Cause of Action for PRA violations and seeking a writ of mandate under Code of Civil Procedure Section 1085. They thus "bear the burden of pleading and proving the facts on which the claim for relief is based." (*Cal. Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153 (internal citations omitted).)

Petitioners allege and argue that they were required to sue the City to obtain relevant public records which they had requested and to which they are entitled under the PRA because the City had: (1) refused to search for relevant and responsive records in all City departments possessing them; (2) intentionally narrowly interpreted the scope of Petitioners' facially broad requests; (3) improperly stopped producing responsive documents for over two months before Petitioners filed their FAP alleging the PRA claim; and (4) ultimately and belatedly provided a large number of previously withheld responsive documents (many of which became part of the certified Administrative Record on the CEQA claim) after the PRA claim was filed. (Coon PRA decl. at ¶¶ 18-25, 36-37.) Petitioners

also allege the City improperly failed to produce required affidavits from certain City officials and employees verifying that adequate searches for responsive public records on their personal electronic devices were made (*Id.* at ¶¶ 5, 8, 13, 17, 37.) On this issue, the Court directed the City to provide executed declarations from the specified individuals at the May 3, 2019 hearing. Thereafter, on May 24, 2019, the City produced the declarations except for the custodian of records for the Department of Building Inspection who supervised the collection of documents including materials from Rosemary Bosque (now retired). The City indicated that the custodian was away from the office until May 29, 2019, but that they would the would forward her declaration after her return.

As to document production, Petitioners acknowledge the City has produced all responsive documents. However, they assert they have prevailed on their PRA claim under the catalyst theory. Under the catalyst theory, "the question whether the plaintiff prevailed, in the absence of a final judgment in his or her favor, is really a question of causation—the litigation must have resulted in the release of records that would not otherwise have been released." (*Sukumar v. City of San Diego* (2017) 14 Cal. App. 5th 451, 464.) In determining whether a PRA lawsuit caused an agency to release requested public records, "it is necessary to examine the parties' communications, the timing of the public record productions, and the nature of the records produced." (*Id.* at 454.) Petitioners must show "more than a mere temporal connection between the filing of litigation to compel production of records under the PRA and the production of those records." (*Id.* at 464.) As the court in *Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 901-902 similarly held:

> A party is considered the prevailing party if his lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result. The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two.

(internal citations omitted.) Based on the evidence in the record, the Court finds the City acted reasonably in responding to Petitioners' PRA requests, and Petitioners' PRA cause of action was not "the motivating factor" for the City's document production.

B. Evidence in the Record

On February 7, 2017, the Board of Supervisors enacted the 2017 Amendments. On the same day, counsel for Petitioners sent a letter to the Board commenting on the pending legislation, and requesting "relevant documents to include records that comprise, constitute or relate to:"

- The person, persons, organizations, or entities that suggested the Proposed Amendments or that in any way initiated the Proposed Amendments or caused the Proposed Amendments to be initiated.
- The rationale or justification for the Proposed Amendments.
- CEQA review or studies for any aspect of the Proposed Amendments or potential environmental effect of the Proposed Amendments, including but not limited to displacement of tenants.
- The City's record retention policies

(Dec. of Arthur Coon in Supp. of Writ ["Coon Decl."] at Ex. 1.) In response to this request, the custodian of records for the Board of Supervisors provided documents in installments between February 7 and March 6, 2017. (*Id.* at Ex. 2.)

Petitioners' Counsel sent a second document request on March 24, 2017. (*Id.*, at Ex. 3.) This time, the request was addressed to both the Board of Supervisors and the Department of Building Inspection, and requested documents relating to:

- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any member of the Board of Supervisors, Planning Commission, Building Inspection Commission, and Single Room Occupancy Task Force.
- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any member of the Land Use and Transportation Committee, Rules Committee, and Budget and Finance Committee.
- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any City representative [including ten specifically named City employees and departments].
- Any record pertaining to any potential environmental effect (including but not limited to displacement of SRO tenants) of the HCO prepared, owned, used, retained, created, received, or exchanged by the City of any of the individuals or entities referenced in this Public Records Act request.

(*Id.* at Ex. 3.) The request also stated "Please note, we are only seeking records prepared, owner, used, retained, created, received, or exchanged by the City since January 1, 2016. In the case of Supervisor Peskin, however, we are seeking records dating from December 8, 2015." (*Id.*)

In response, the custodian of records from DBI contacted counsel asking for clarification regarding the scope of the request and, on April 4, 2017, provided a first production to the requestor, followed by a second and final production on June 6, 2017. (*Id.* at Exs. 4 and 5.) The custodian indicated on June 6, 2017 that parts of the record had been redacted where they were "legally required to do so to protect the privacy interests of individuals" under California Constitution, Article I, section 1 and California Government Code sections 6254(k) and 6254(c), and that attorney-client privileged records had been withheld. (*Id.* at Ex. 5.) The custodian further stated "We have finished conducting our search and found no other documents responsive to your request. Therefore, we consider your request closed." (*Id.*)

On July 12, 2017, counsel for Petitioners submitted a third records request to the records managers for the Board of Supervisors and Department of Building Inspections, asserting that the City's productions to date were inadequate, and objected to duplications and the redactions by DBI. (*Id.* at Ex. 6.) The request exponentially increased the chronological scope by requesting documents over a 36-year period, cast a wider net to non-specified City agencies, and added categories of requested information including homelessness. It was somewhat ambiguous in terminology and lacked distinct parameters. Among the new requests, Petitioners sought the following:

- All writings that address or relate to displacement of persons from SRO hotels since the adoption of the HCO in 1981
- All documents reflecting laws, programs, procedures, policies, and efforts developed by the City to assist tenants or potential tenants who are displaced from housing options
- All documents prepared, owned, used, retained, created, received, or exchanged by the City, and/or any of its departments, agents, consultants, volunteers, or employee between January 1, 2008 and [2017] that survey, study, analyze, catalogue, count, estimate, quantify, or reflect (a) The number of homeless persons within the City and/or (b) the environmental impacts caused by homeless persons living or sleeping in public

places not meant for human habitation in the City (e.g., urination or defecation, waste, tent encampment, discarded hypodermic needles, panhandling, loitering, crime, etc."

- Added the Tenderloin Housing Clinic and Randy Shaw to the list of city agencies referenced in the second PRA request.

(*Id.* at Ex. 6.) Petitioners' counsel explained the July PRA request was "made to facilitate our preparation of the administrative record in [this action], and we believe such documents should be included in the administrative record." (*Id.*) The third request was only served on the records manager for the Board and custodian of records for DBI. (*Id.*) No other City agencies, commissions, or individuals were served. The request caused the records manager for the Board of Supervisors to contact Petitioner to affirm that the Board of Supervisors did not have any additional records responsive to the new request and suggested Petitioner contact the Department of Building Inspections directly for other documents. (*Id.* at Ex. 9).

On August 2, 2017, the Custodian of Records for the Department of Building Inspections responded to Petitioners, acknowledging its production of responsive documents related to Petitioners' March 24, 2017 request, and stated "it seems you now have three new requests for DBI." (*Id.* at Ex. 10). The custodian requested clarifications on the "new" requests as follows: (1) for the new request for additional documents relating to the HCO, "provide the keywords/topics of interest along with the timeframe;" (2) provide a definition of "displacement of persons," in addition to identifying the subject matter of interest in light of the burden of responding, to allow narrowing the search and getting Petitioner the documents sought; (3) noted the request for all HCO documents since its adoption in 1981 and expressed a desire to work with Petitioner to identify the particular HCO sub-topic and narrow the time frame if possible; and (4) directed contact with the Department of Homelessness and Supportive Housing or SF Human Services Agency for the information sought. (*Id.*)

Petitioners responded in a letter on August 4, 2017, in which they rejected the requests for definition of "displacement," clarified the scope of the request to "records that address or relate to displacement of persons, whether low income, elderly, disabled, or otherwise from SRO hotels since the adoption of the HCO in 1981, and (sic) regardless of the reason for the displacement," and reiterated that "records" included "electronic records in all forms wherever located, including

privately-owned computers, tablets, phones and electronic devices, including privately-owned and maintained accounts or servers," citing *City of San Jose v. Superior Court (Smith)* (2017) 2 Cal.5th 608. (*Id.* at Ex. 11.) Petitioners noted that thus far, no documents had been produced regarding "the environmental impacts caused by homeless persons in the City" and rejected the City's implied response of lack of documents regarding the number of homeless persons within the City, citing two of City's websites containing data. Petitioners further requested affidavits with sufficient facts to show whether the requested records were personal or public. (*Id.*)

On August 7, 2017, the records manager for the Board of Supervisors responded that all relevant documents had been provided, referred Petitioner to the Legislative Research Center for other legislative files and indicated that follow up inquires for records should be made to DBI. (*Id.* at Ex. 12.) For litigation matters, Petitioners were told to contact Deputy City Attorney Robb Kapla. (*Id.*)

On August 8, Petitioners responded to the Records and Project Manager for the Board of Supervisors and Custodian for the Department of building Inspections, excoriating both individuals for the responses to the three Public Records Acts requests and reminding them of the obligation to provide the documents or an affidavit from all relevant individuals to show whether any information withheld is public or private. (*Id.* at 13.)

On August 15, 2017, the records manager for the Board again stated there were no additional responsive records and advised Petitioners to "contact DBI if you have follow up inquiries that address or pertain to any of records that they may have, or contact the respective City Department(s) if you are extending your search to all City Departments, and lateraled all follow-up to Deputy City Attorney Robb Kapla. (*Id.* at Ex. 14). The City Attorney's office had not been served with any of the three records requests. There is no evidence that the City Attorney was actively involved with responses to the multiple requests. Rather, the evidence indicates that each agency responded individually to requests within their purview.

Petitioners responded with an email to the custodians of records for the Board of Supervisors, DBI, and Deputy City Attorney Kapla on August 16, stating "we are still being told to figure out ourselves which other city departments might have responsive documents and to make separate requests to those departments (each of our requests has always been intended to include all City

departments)," and further, "if the City Attorney is responsible for coordinating with all City departments, we obviously request for that to occur." (*Id.* at Ex. 15.) This e-mail stated what was already apparent—a lack of notice to individual City agencies despite Petitioners' requests for documents encompassing over 160 City departments, commissions, task forces, and numerous named individuals. Rather, the three records requests had only been served on the Board of Supervisors and DBI, the only two agencies named in the requests. Petitioners inexplicably assumed one of the two agencies would somehow be responsible for the coordination of records collection for all the other independent City agencies, each with a unique custodian of records.

As of mid-August 2017, the City had produced a total of 2,500 pages of responsive documents and efforts continued to fulfill the requests in a "rolling production" process. Subsequently, on August 23, 2017, Petitioners filed their "First Amended and Supplemental Verified Petition for Writ of Mandate; Complaint for Declaratory and Injunctive Relief For Takings, Denial of Due Process, and Denial of Equal Protection," which added a Sixth Cause of Action seeking a writ of mandamus for violations of the California Public Records Act – Government Code sections 6258 and 6259, and Code of Civil Procedure section 1085. (FAP at 20.)

On August 28, Petitioners wrote to the two City Attorneys assigned to the CEQA litigation referencing the history of requests to the custodians of the Board of Supervisors and DBI. (*Id.* at Ex. 17.) Petitioners disclaimed that the requests were limited to the Board of Supervisors or DBI, and asserted that their requests had "always included and been intended to include all City departments," which "should be broadly construed to include any council, board, commission, department, committee, official, officer, council member, commissioner, employee, agent, or representative of the City." (*Id.*) In a separate letter also on August 28, Petitioners further wrote to the City with regard to the delay in certification of the administrative record. (*Id.* at Ex. 16.)

On September 6, 2017, the Deputy City Attorney Ruiz-Esquide wrote to Petitioner indicating readiness to certify the administrative record, explaining previous hesitancy to do so because of the "broad and evolving document requests to city agencies, explicitly stating that Petitioners seek additional documents for inclusion in the administrative record." (*Id.* at Ex. 18.) Two days later, on September 8, 2017, DCA Ruiz-Esquide responded to the records issues and stated "as you know, the

documents you requested are voluminous. Different City departments are diligently searching their records. We will be producing them to you on a rolling basis, as we receive them from the different departments," and enclosed a disc with records from the Human Services Agency and Department of Homelessness and Supportive Housing. (*Id.* at Ex. 19). In another letter three days later, on September 11, 2017, Petitioners denied knowing or having any reason to know the records were voluminous, given the response by the Board and DBI. (*Id.* at Ex. 20.) This was despite Petitioners' insistence that the request was intended to include all city departments and city agencies, and to be broadly construed.

At the Case Management Conference on September 29, 2017, the parties brought the Public Records Act production issues to the Court's attention. (See parties' Case Management Conf. Statements, filed Aug. 30, 2017). Of concern to the parties was the increased scope of the request, volume of documents and dispute about what was properly part of the Administrative Record. A central question emerged regarding whether all documents generated by City employees or agencies properly part of the Administrative Record, even if the decision-makers (Board of Supervisors) did not consider the documents in the CEQA decision.

At the September 29, 2017 Case Management Conference, and at subsequent conferences on November 17, 2017 and January 11, 2018, the Court supervised further negotiations between the parties. City department searches for the documents with the terminology in the requests identified "truckloads" of material of questionable relevance. The Court and the parties discussed appropriate ways for the Petitioners to fine-tune the search through more specific search terms and how to narrow the search to the relevant City departments. In addition, the Court imposed production deadlines for the City and reviewed the progress of production by each City department selected. The City conducted a review for privilege and redaction of personal identifying information.

At the November 17, 2017 conference, the Court directed the City to collect and produce documents "to be located through the use of search terms as discussed" and refine search terms including "environmental impact of homelessness" and "environmental impact caused by homelessness." (Petitioners' CMC Statement, filed Dec. 27, 2017.) Other search terms were discussed at length. The search term "homeless" produced documents from the Department of Public

Health which were not relevant to the issues, while a broad search involving documents from the Mayor's Office of Housing and Community Development yielded individual applications for housing which would require redaction of personal identifying information. Petitioners requested more specific terms be utilized, (eg. urination, defecation, human waste, tent encampment, needles) to reflect the environmental impacts of homelessness.

As for document production, the City Attorney represented that documents aggregated by their office were being processed and redacted as needed. Production of documents from the Department of Public Works, Department of Public Health, Planning Department, Planning Commission, Budget/Legislative Analyst Office, Single Room Occupancy Task Force among others were in progress. Other agencies, such as the Department of Human Services completed production. The search with some terms ("environmental impact of homelessness") continued for all city departmental files. By the end of December, almost 4,000 additional documents were produced.

At the January 11, 2018 conference, Petitioners' counsel "further narrowed" their requests. (See Petitioners' CMC Statement, filed March 27, 2018.) An additional 9,600 pages from various city departments had been produced. The City represented that all documents that had been produced using the new search parameters were being processed.

On February 14, 2018, San Francisco completed its production in response to Petitioners' revised and narrowed Public Records Act Requests. San Francisco's rolling production totaled nearly 40,000 pages from twelve City agencies, commissions or departments. (See Petitioners' CMC Statement, filed March 27, 2018; Coon Decl., Exs. 27, 33.) Throughout this process, it became apparent that the ambiguous and overbroad terminology of the third request produced too many documents, some of which Petitioners acknowledged were not relevant to the litigation.

Petitioners argue that the filing of the lawsuit resulted in production of documents withheld. The evidence indicates that with the filing of the PRA claim, the City Attorney's Office became the point-persons to direct the search, aggregate response, assert privilege where appropriate, and coordinate and communicate with the appropriate city agencies, since many agencies performed duties unrelated to the issues in this litigation. However, Petitioners have not shown that there is "more than a mere temporal connection between the filing of litigation to compel production of records under the

PRA and the production of those records" or that the litigation was "the motivating factor for the production of documents." (*Sukumar*, 14 Cal.App.5th at 464; *Belth*, 232 Cal.App.3d at 901-902.) Petitioners ignore the crucial fact that service of each request upon the Board of Supervisors and DBI only resulted in responses by each department. The communication between Petitioner and the City was limited to the custodians of each of these two departments, who had no control or ability to produce documents from other departments. The response by the two city departments served with the records request and by only those departments should have signified to Petitioners that their assumption that one of those departments would act as the "aggregator" for the other city agencies was faulty.

Under the current City infrastructure, each city department is responsible to respond to PRA claims, each having a separate custodian of records. The delay in production and response by departments not served with the three requests was not prompted by the litigation nor lack of willingness to comply with the request. Rather, it was that each city department not served with the requests had no knowledge or opportunity to respond. One cannot respond to that which one does not have knowledge of. Petitioners were on notice as to the city infrastructure and their need to serve individual City departments, but did not do so. Unlike respondent in *Belth,* who initially refused plaintiff's request for documents she claimed were confidential, but obtained consent to disclose the documents after plaintiff filed a writ petition, there is little if any evidence that the BOS or DBI refused to provide or withheld requested documents in the first request. (232 Cal.App.3d at 902.) There is evidence that other city departments were never served with any request.

Moreover, the alleged delay in production of documents is not persuasive given that the PRA claim was filed on August 23, and by August 31, contact had been made with the Human Services Agency. (Coon Decl. at Ex. 22.) Delay in production was caused by the ever-widening and increased time frame to include a 36-year period from 1981-2017, and uncertainty over the scope of the request. Petitioner alleges that an August 31, 2017 email from Matt Braun of the Human Services Agency demonstrates frustration of the PRA request. (*Id.*) While the email acknowledges the "first phase of this search" to identify official city documents using a "rather narrow definition of 'documents,'" it then states "you may receive a subsequent request or requests for such documents," and that the plan is

that "the City Attorney will produce documents responsive to this request on a rolling basis" with the intent that the materials be collected before his last day of September 8, reflecting prioritization of the materials to be produced. (*Id.*)

The facts here are distinguishable from *Sukumar*, in which the City "unequivocally claimed it had produced every responsive nonexempt document." (14 Cal.App.5th at 464.) The City's lawyer even told the court in that case that it had produced "everything." (*Id.*) Upon depositions of the city's PMK, however, further documents were discovered. (*Id.*) The holding of the *Sukumar* court relies upon the City's facile representations to the court in the face of failure to perform a complete search. There is no evidence here that the City failed to perform a complete search for responsive documents in compliance with the requests, upon direction from the City Attorney's office. Since having taken over the responses to the three requests, it was incumbent upon the City Attorney to communicate with all City departments to determine which departments had materials relevant to the each of the three requests, using search terms from the requests and as modified from ambiguous and overbroad terms of the third request. As the aggregator of the materials, and coordinator of the document productions across over all city departments, commissions, task forces, councils, boards, employees, representatives and officials, the City Attorney was obligated to conduct privilege review and redactions when necessary (eg. HIPPA, personal identifying information). The evidence indicates the City Attorney's Office commenced coordination and communication with multiple City departments, appropriately reviewing all documents for privileged information and redacting as necessary to protect third party privacy.

The sole change effected by adding the PRA claim to the existing CEQA litigation was to compel the City Attorney to take responsibility and control of the responses to the PRA requests, which was required by its ethical duty of representation. At the time of filing the claim, production of responsive documents had already begun by the departments served with requests.

Accordingly, the Court finds the City acted reasonably in responding to Petitioners' PRA requests. Petitioner has failed to meet the burden of proof for the Sixth Cause of Action.

CONCLUSION

With respect to Petitioners' First Cause of Action for CEQA violations, the Court GRANTS the petition. The Court orders issuance of a writ of mandate setting aside and voiding the City's adoption of the 2017 HCO Amendments, and thereby the 2019 HCO Amendment, ordering the City to comply with CEQA before proceeding with any HCO legislation increasing the 7-day minimum rental period for SRO units. The City shall file a return demonstrating compliance with this court's writ within 60 days of this order. The Court shall retain continuing jurisdiction to enforce and ensure compliance with the writ and CEQA under Public Resources Code § 21168.9(b). (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 479-480.)

With respect to Petitioners' Sixth Cause of Action for PRA violations, the Court DENIES the petition and finds in favor of Respondent.

In light of this Court's Order setting aside the challenged 2017 HCO Amendments on CEQA grounds, Petitioners' Second through Fifth Causes of Action seeking to invalidate the Ordinance on constitutional due process, equal protection and takings grounds are now moot. The Court need not reach and decide those claims, which are hereby ordered dismissed without prejudice.

The Court's preliminary injunction against the City's enforcement of the HCO's minimum rental period is hereby modified to be a permanent injunction pending City's compliance with CEQA, and is modified to allow City's enforcement of the HCO's 7-day minimum rental period, which is the law validly in effect due to the Court's invalidation of the 2017 and 2019 HCO Amendments.

Having disposed of all causes of action framed by the pleadings between all the parties, this Order shall constitute the Court's final Judgment in this action. Any claims for prevailing party attorneys' fees and costs shall be made by timely post-judgment motion(s) and cost bill(s) pursuant to all applicable law.

IT IS SO ORDERED.

Dated: 9/24/19

Hon. Cynthia Ming-mei Lee
JUDGE OF THE SUPERIOR COURT

CPF-17-515656 SAN FRANCISCO SRO HOTEL COALITION, AN ET AL VS. CITY AND COUNTY OF SAN FRANCISCO A PUBLIC AGENCY ET AL (CEQA Case)

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on September 24, 2019 I served the foregoing CEQA - Order RE: Petition for Writ of Mandamus on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: September 24, 2019

By: S. LE

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