File No. 220815 **Committee Item No.** 2
Board Item No. 4

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: Land Use and Transportation Committee **Date** February 27, 2023

Board of Supervisors Meeting **Date** March 14, 2023

Cmte	Board	
☐	☐	**Motion**
☐	☐	**Resolution**
☒	☒	**Ordinance**
☒	☒	**Legislative Digest**
☐	☐	**Budget and Legislative Analyst Report**
☐	☐	**Youth Commission Report**
☐	☐	**Introduction Form**
☐	☐	**Department/Agency Cover Letter and/or Report**
☐	☐	**MOU**
☐	☐	**Grant Information Form**
☐	☐	**Grant Budget**
☐	☐	**Subcontract Budget**
☐	☐	**Contract/Agreement**
☐	☐	**Form 126 – Ethics Commission**
☐	☐	**Award Letter**
☐	☐	**Application**
☒	☒	**Public Correspondence**

OTHER **(Use back side if additional space is needed)**

Cmte	Board	
☒	☒	Referral CEQA 072022
☒	☒	Referral FYI 072022
☒	☒	CEQA Determination 012623
☐	☐	
☐	☐	
☐	☐	
☐	☐	
☐	☐	
☐	☐	
☐	☐	
☐	☐	

Completed by: Erica Major **Date** February 23, 2023
Completed by: Erica Major **Date** March 3, 2023

1 [Administrative Code - Definition of Tourist or Transient Use under Hotel Conversion Ordinance; Amortization Period]
2
3 **Ordinance amending the Administrative Code to add a definition of Tourist or Transient**
4 **Use under the Residential Hotel Unit Conversion and Demolition Ordinance; to set the**
5 **term of tenancy for such use at less than 7 days, for two years after the effective date**
6 **of this ordinance, and, after that two-year period, at less than 30 days; to provide an**
7 **amortization period applicable to hotels currently regulated under the ordinance; to**
8 **provide a process by which the owners or operators of regulated hotels can request**
9 **that the amortization period be longer, on a case-by-case basis; to amend the definition**
10 **of Permanent Resident, from a person who occupies a room for at least 32 days to one**
11 **who occupies a room for at least 30 days; and affirming the Planning Department's**
12 **determination under the California Environmental Quality Act.**
13 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
14 **Additions to Codes** are in *single-underline italics Times New Roman font*.
Deletions to Codes are in ~~*strikethrough italics Times New Roman font*~~.
15 **Board amendment additions** are in double-underlined Arial font.
Board amendment deletions are in ~~strikethrough Arial font~~.
16 **Asterisks (* * * *)** indicate the omission of unchanged Code subsections or parts of tables.
17
18 Be it ordained by the People of the City and County of San Francisco:
19
20 Section 1. Environmental Findings.
21 The Planning Department has determined that the actions contemplated in this
22 ordinance comply with the California Environmental Quality Act (California Public Resources
23 Code Sections 21000 et seq.). Said determination is on file with the Clerk of the Board of
24 Supervisors in File No. 220815 and is incorporated herein by reference. The Board affirms
25 this determination.

Section 2. General Findings. The Board of Supervisors finds that this ordinance is necessary to effectuate the general purpose of the Residential Hotel Unit Conversion and Demolition Ordinance, which is "to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." In the past, many residential hotel units have been rented by tourists, rather than residents. This ordinance seeks to ensure that residential rooms remain available for the stated purpose of the Residential Hotel Unit Conversion and Demolition Ordinance, while carefully balancing the interests of hotel owners and operators.

Section ~~2~~3. Chapter 41 of the Administrative Code is hereby amended by revising Sections 41.4 and 41.20, adding new Section 41.23, and renumbering existing Section 41.23 as Section 41.24, to read as follows:

SEC. 41.4. DEFINITIONS.

* * * *

Conversion. The change or attempted change of the use of a residential unit to a *Tourist or Transient* ~~*tourist*~~ use, or the elimination of a residential unit, or the voluntary demolition of a residential hotel. However, a change in the use of a residential hotel unit into a non-commercial use which serves only the needs of the permanent residents, such as a resident's lounge, community kitchen, or common area, shall not constitute a conversion within the meaning of this Chapter 41, provided that the residential hotel owner establishes that eliminating or re-designating an existing tourist unit instead of a residential unit would be infeasible.

* * * *

Permanent Resident. A person who occupies a guest room for at least *30* ~~*32*~~ consecutive days.

* * * *

Tourist or Transient Use. For two years after the effective date of Ordinance No. ____ in Board of Supervisors File No. ~~190946~~220815*, "Tourist or Transient Use" shall mean any use of a guest room for less than a 7-day term of tenancy by a party other than a Permanent Resident. After that two-year period, "Tourist or Transient Use" shall mean any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident, unless a hotel owner or operator demonstrates, in accordance with the process and factors described in Section 41.23, that a longer time is necessary to recover reasonable investments in the owner or operator's hotel.*

* * * *

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 41;

(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.

* * * *

SEC. 41.23. AMORTIZATION.

(a) A hotel owner or operator may seek a reasonable extension of the time during which the term "Tourist or Transient Use" means "any use of a guest room for less than a 7-day term of tenancy

by a party other than a Permanent Resident" for a period longer than the two-year period set forth in Section 41.4, through the process described in subsections (b) and (c), below.

(b) The owner or operator may initiate an extension by submitting a request to the Building Inspection Commission ("Commission") six months prior to the expiration of the two-year period set forth in Section 41.4. Commission staff shall amply publicize this deadline, to give notice to interested hotel owners of the provisions of this Section 41.23.

(c) The Commission shall consider the request at a public hearing and decide whether an extension (for the time requested, or for a different period of time) would be reasonable, according to the following factors:

(1) Total cost of the hotel owner or operator's investments in the hotel;

(2) 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.

SEC. 41.2~~3~~*4*. CONSTRUCTION.

* * * *

Section ~~3~~4. Effective Date. This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

Section ~~4~~5. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal

Code that are explicitly shown in this ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the ordinance.

APPROVED AS TO FORM:
DAVID CHIU, City Attorney

By: /s/ Kristen A. Jensen
KRISTEN A. JENSEN
Deputy City Attorney

n:\legana\as2020\1900242\01659205.docx

FILE NO. 220815

REVISED LEGISLATIVE DIGEST
(Amended in Committee, 2/27/2023)

[Administrative Code - Definition of Tourist or Transient Use under Hotel Conversion Ordinance; Amortization Period]

Ordinance amending the Administrative Code to add a definition of Tourist or Transient Use under the Residential Hotel Unit Conversion and Demolition Ordinance; to set the term of tenancy for such use at less than seven days, for two years after the effective date of this Ordinance, and, after that two-year period, at less than 30 days; to provide an amortization period applicable to hotels currently regulated under the Ordinance; to provide a process by which the owners or operators of regulated hotels can request that the amortization period be longer, on a case-by-case basis; to amend the definition of Permanent Resident, from a person who occupies a room for at least 32 days to one who occupies a room for at least 30 days; and affirming the Planning Department's determination under the California Environmental Quality Act.

Existing Law

Chapter 41 of the Administrative Code contains the Residential Hotel Unit Conversion Ordinance (HCO), which regulates single room occupancy (SRO) hotels in the City. Currently, the HCO does not include a definition of what constitutes a tourist of transient use.

Amendments to Current Law

This ordinance would amend the HCO to add a definition of "Tourist or Transient Use;" to mean:

- For two years after the effective date of the ordinance, "any use of a guest room for less than a 7-day term of tenancy by a party other than a Permanent Resident;" and
- After those two years, "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident," unless a hotel owner or operator demonstrates that a longer time is necessary to recover reasonable investments in the owner or operator's hotel.

The ordinance provides that a hotel owner or operator may seek to extend the time during which the terms "Tourist or Transient Use" means "any use of a guest room for less than a 7-day term of tenancy by a party other than a Permanent Resident" beyond the two year period, by filing a request with the Building Inspection Commission six months prior to the expiration of that two-year period. The ordinance sets forth criteria for the Building Inspection Commission to take into account, when considering a reasonable extension of time, such as:

the total cost of the hotel owner or operator's investments in the hotel; the length of time those investments have been in place; suitability of the investments for residential hotel use; and any other relevant factors to determining the owner or operator's reasonable return on investments.

The ordinance mandates that Building Inspection Commission staff amply publicize the deadline to request an extension with the Commission, to give notice to interested hotel owners of the provisions of the procedures to obtain such an extension. Further, the Ordinance requires that the Commission consider the application at a public hearing.

Background Information

Board of Supervisors File No. 190946 contains a similar ordinance. This ordinance updates the amortization period to run for two years from the effective date of the ordinance.

n:\legana\as2022\1900242\01612929.docx

San Francisco Planning

49 South Van Ness Avenue, Suite 1400
San Francisco, CA 94103
628.652.7600
www.sfplanning.org

NEGATIVE DECLARATION

Date:	October 19, 2022; amended January 26, 2023
Case No.:	2020-005491ENV
Zoning:	Various
Block/Lot:	Various
Lot Size:	Various
Project Sponsor:	Supervisor Aaron Peskin, San Francisco Board of Supervisors
Lead Agency:	San Francisco Planning Department
Staff Contact:	Joy Navarrete, p. 628.652.7561, joy.navarrete@sfgov.org

Project Description:

The 2022 HCO Amendments project (Board of Supervisors File No. 220815) is an ordinance amending Chapter 41 of the Administrative Code to add a definition of Tourist or Transient Use under the Residential Hotel Unit Conversion Ordinance; to set the term of tenancy for such use at less than seven days for a period of two years after the effective date of this ordinance, and at no less than 30 days following that two-year period; to provide an amortization period applicable to hotels currently regulated under the ordinance; to provide a process by which the owners or operators of regulated hotels can apply for an extension of the amortization period, on a case-by-case basis; and, to amend the definition of Permanent Resident from a person who occupies a room for 32 days to a person who occupies a room for 30 days.

Finding:

This project could not have a significant effect on the environment. This finding is based upon the criteria of the Guidelines of the State Secretary for Resources, Sections 15064 (Determining Significant Effect), 15065 (Mandatory Findings of Significance), and 15070 (Decision to prepare a Negative Declaration), and the following reasons as documented in the Initial Evaluation (Initial Study) for the project, which is attached.

In the independent judgment of the planning department, there is no substantial evidence that the project could have a significant effect on the environment.

Lisa Gibson
Environmental Review Officer

January 26, 2023
Date of Issuance of Final
Negative Declaration

ATTACHMENT A
INITIAL STUDY
2022 HOTEL CONVERSION ORDINANCE AMENDMENTS

Table of Contents

A. Project Description **2**
Background 2
2022 Proposed Amendments to the Hotel Conversion Ordinance 5
Reasonably Foreseeable Indirect Physical Change in the Environment 6
Project Approvals 12
B. Project and Cumulative Setting **12**
Site Vicinity 12
Cumulative Setting 12
C. Summary of Environmental Effects **13**
Approach to Analysis 13
No Impact or Not Applicable Environmental Topics 14
D. Evaluation of Environmental Effects **15**
1. LAND USE AND PLANNING 15
2. POPULATION AND HOUSING 16
3. CULTURAL RESOURCES 18
4. TRIBAL CULTURAL RESOURCES 20
5. TRANSPORTATION AND CIRCULATION 21
6. NOISE 23
7. AIR QUALITY 24
8. GREENHOUSE GAS EMISSIONS 26
9. WIND 27
10. SHADOW 28
11. RECREATION 28
12. UTILITIES AND SERVICE SYSTEMS 29
13. PUBLIC SERVICES 30
14. BIOLOGICAL RESOURCES 31
15. GEOLOGY AND SOILS 32
16. HYDROLOGY AND WATER QUALITY 33
17. HAZARDS AND HAZARDOUS MATERIALS 35
E. Determination **37**

Tables

TABLE 1 – Annual Usage Reports Summary 11

A. Project Description

Background

Residential Single Room Occupancy (SRO) hotels represent one of the few remaining affordable housing options for low-income households and seniors in San Francisco. But housing market pressures, illegal conversions of SRO rooms to tourist use, and legal issues with defining tenancy have, over time, led to the loss of SRO rooms and contributed to the City's rental housing affordability crisis.

SRO rooms are differentiated from tourist rooms in that they were meant to house a transient workforce, not tourists visiting the City for pleasure. Historically, SRO hotel rooms were occupied by low-wage workers, transient laborers, and recent immigrants for long stays. A typical room in a residential hotel is a single eight (8) x ten (10) foot room with shared toilets and showers on each floor. Approximately 19,000 residential SRO rooms exist in the City, and an increasing number of these rooms house several people, including families, for long periods of time. Approximately 12,400 of the City's SRO rooms are in for-profit SRO hotels and approximately 6,540 residential rooms are in non-profit owned SRO hotels.[1]

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. 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. 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).

Tourist hotels and residential hotels are defined in Planning Code Section 102, and permanent resident is defined in Administrative Code Section 41.4:

- Hotel. A Retail Sales and Services Use that provides tourist accommodations, including guest rooms or suites, which are intended or designed to be used, rented, or hired out to guests (transient visitors) intending to occupy the room for less than 32 consecutive days. This definition also applies to buildings containing six or more guest rooms designated and certified as tourist units, under Chapter 41 of the San Francisco Administrative Code. For purposes of this Code, a Hotel does not include (except within the Bayshore-Hester Special Use District as provided for in Sections 713 and 780.2 of this Code) a Motel, which contains guest rooms or suites that are independently accessible from the outside, with garage or parking space located on the lot, and designed for, or occupied by, automobile-traveling transient visitors. Hotels

1 https://projects.sfplanning.org/community-stabilization/sro-hotel-protections.htm

shall be designed to include all lobbies, offices, and internal circulation to guest rooms and suites within and integral to the same enclosed building or buildings as the guest rooms or suites.

- Hotel, Residential. A Residential Use defined in Chapter 41 of the San Francisco Administrative Code that contains one or more residential hotel units. A residential hotel unit is a guest room, as defined in Section 203.7 of Chapter XII, Part II, of the San Francisco Municipal Code (Housing Code), which had been occupied by a permanent resident on September 23, 1979, or any guest room designated as a residential unit pursuant to Sections 41.6 or 41.7 of Chapter 41 of the San Francisco Administrative Code. Residential hotels are further defined and regulated in the Residential Hotel Unit Conversion and Demolition Ordinance, Chapter 41, of the San Francisco Administrative Code.
- Permanent Resident. A person who occupies a guest room for at least 32 consecutive days.

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. The HCO required SRO hotels in San Francisco to report all residential and tourist units in a hotel as of September 23, 1979. Residential units were then placed on a registry, and a hotel owner could subsequently convert residential units into tourist units only by obtaining a conversion permit from the Department of Building Inspection ("DBI"). 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.

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. Further, the HCO required hotel operators to maintain records to demonstrate compliance with the ordinance and to provide these records for inspection by DBI.

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. City decision makers considered the concerns of hotel operators relating to the prohibition of renting residential units for fewer than 32 days[2]. Ultimately, the City repealed and readopted the HCO in 1990, making four changes from the old law. 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 months 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.

In 2014, the City analyzed 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 had submitted the required annual usage report.[3] 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. However, based on available data the City calculated the following vacancies:

2 San Francisco SRO Hotel Coalition, Hotel des Arts, LLC, and Brent Haas v. City and County of San Francisco, Department of Building Inspection, San Francisco County Superior Court, September 24, 2019

3 San Francisco Department of Building Inspection AUUR data, 2014

- Of the 228 privately owned SRO hotels for which data were obtained, 864 of 7,241 units (11.9 percent) were vacant.
- Of 32 non-profit SRO hotels, 91 of 2,667 units (3.4 percent) were vacant.

In a 2015 report to the Board of Supervisors, the Budget and Legislative Analyst Office 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."[4] 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."

Further analysis by the City showed the following vacancies in 2015:[5]

- Of 354 privately owned hotels, 1,488 of 11,473 units (12.9 percent) were vacant.
- Of 29 non-profit hotels, 84 of 2,028 units (4.1 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."[6]

Past CEQA Review for the Hotel Conversion Ordinance

On June 23, 1983, the Planning Department (formerly "Department of City Planning") issued a Final Negative Declaration for the original HCO, the addition of Chapter 41 of the San Francisco Administrative Code Hotel Conversion Ordinance ("HCO Negative Declaration"). The HCO Negative Declaration analyzed the ordinance, which regulated the conversion of rooms in residential hotels to other use, including tourist occupancy, the demolition of such rooms, as well as required construction of replacement units, if applicable. The Hotel Conversion Ordinance applied to residential hotels citywide. The project contemplated possible physical changes to the environment, such as replacement of units. No mitigation measures were required.

On January 9, 1985, the Planning Department issued a Final Negative Declaration for amendments to the Hotel Conversion Ordinance affecting the definition of interested parties, time limits for compliance, penalties for violation, and other aspects of administration of the ordinance. ("1985 Negative Declaration.") The amendments did not contemplate possible physical changes to the environment. No mitigation measures were required.

On September 22, 1989, the Planning Department issued a memorandum to the file for amendments to the Hotel Conversion Ordinance. ("Memorandum to File.") The proposed amendments made several administrative changes to the ordinance, such as revising definitions, notice requirements, reporting requirements, and time limit replacement requirements. The 1989 amendments included the "clarification of the requirements regarding temporary conversions, including authorization to use some units as tourist hotel units during the summer season under defined limited circumstances, or as weekly rather than monthly rentals during winter months under

4 City and County of San Francisco, Board of Supervisors Budget and Legislative Analysis, Policy Analysis Report, August 25, 2015. San Francisco Department of Building Inspection AUUR data, 2015

5 Idem.

6 Idem.

defined limited circumstances". The Memorandum to File found that the proposed amendments would be largely procedural and housekeeping measures to improve operation and enforcement of the ordinance, affecting only the administration of the ordinance. The memorandum found "Clearly, they could have no physical effect on the environment" and therefore no new environmental review was necessary under CEQA Guidelines Section 15162.

2017 and 2019 Amendments

On December 6, 2016, Supervisor Peskin introduced substitute Ordinance No. 38-17 ("the 2017 Amendments") to update the HCO by increasing the 7-day initial minimum rental period for SRO units to 32 days. On December 15, 2016, the Planning Department determined the Ordinance was "not defined as a project under CEQA Guidelines Section 15378 and 15060(c)(2) because it does not result in a physical change in the environment."[7]

On February 7, 2017, the Board of Supervisors unanimously adopted the 2017 Amendments. Mayor Ed Lee signed the 2017 Amendments on February 17, 2017, and the 2017 Amendments became effective on March 19, 2017. As of that date, the HCO regulated roughly 18,000 residential units within 500 residential hotels across San Francisco.

A CEQA lawsuit was filed against the City and County of San Francisco by San Francisco SRO Hotel Coalition challenging the Planning Department's "not a project" determination on the 2017 Amendments. (*San Francisco SRO Hotel Coalition v. City and County of San Francisco*, San Francisco County Superior Court, Case No. CPF-17-515656.)

On January 15, 2019 the City passed further legislation further 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" (the 2019 HCO Amendment).

On September 24, 2019, the San Francisco Superior Court found that potential tenant displacement is a reasonably foreseeable impact of the 2017 HCO Amendments, and that the possibility of displacement was sufficient to bring the Amendments within the definition of "project" under CEQA ("Court Order.") The court specifically rejected the challengers' argument that displacement results in homelessness or urban blight. The Court issued 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.

2022 Proposed Amendments to the Hotel Conversion Ordinance

The 2022 HCO Amendments project (Board of Supervisors File No. 220815) is an ordinance amending Chapter 41 of the Administrative Code to add a definition of Tourist or Transient Use under the Residential Hotel Unit Conversion Ordinance; to set the term of tenancy for such use at less than seven days for a period of two years after the effective date of this ordinance, and at no less than 30 days following that two-year period; to provide an amortization period applicable to hotels currently regulated under the ordinance; to provide a process by which the owners or operators of regulated hotels can apply for an extension of the amortization period, on a case-by-case basis; and, to amend the definition of Permanent Resident from a person who occupies a room for 32 days to a person who occupies a room for 30 days.

7 San Francisco Planning Department, CEQA Determination for Board File No. 161291, December 15, 2016.

Existing Law

Chapter 41 of the Administrative Code contains the Residential Hotel Unit Conversion Ordinance (HCO), which regulates single room occupancy (SRO) hotels in the City. Currently, the HCO does not include a definition of what constitutes a tourist of transient use.

Amendments to Current Law

This ordinance would amend the HCO to add a definition of "Tourist or Transient Use;" to mean:

- For two years after the effective date of the ordinance, "any use of a guest room for less than a 7-day term of tenancy by a party other than a Permanent Resident;" and
- After those two years, "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident," unless a hotel owner or operator demonstrates that a longer time is necessary to recover reasonable investments in the owner or operator's hotel.

The ordinance provides that a hotel owner or operator may seek to extend the time during which the terms "Tourist or Transient Use" means "any use of a guest room for less than a 7- day term of tenancy by a party other than a Permanent Resident" beyond the two-year period, by filing a request with the Building Inspection Commission six months prior to the expiration of that two-year period. The ordinance sets forth criteria for the Building Inspection Commission to take into account, when considering a reasonable extension of time, such as: the total cost of the hotel owner or operator's investments in the hotel; the length of time those investments have been in place; suitability of the investments for residential hotel use; and any other relevant factors to determining the owner or operator's reasonable return on investments.

The ordinance mandates that Building Inspection Commission staff amply publicize the deadline to request an extension with the Commission, to give notice to interested hotel owners of the provisions of the procedures to obtain such an extension. Further, the Ordinance requires that the Commission consider the application at a public hearing.

Board of Supervisors File No. 190946 contains a similar ordinance. This ordinance (BOS File No. 220815) updates the amortization period to run for two years from the effective date of the ordinance.

Reasonably Foreseeable Indirect Physical Change in the Environment

The Ordinance seeks to phase out the transient hotel uses that currently exist in SROs in favor of permanent residential uses by increasing the 7-day initial minimum rental period for SRO units to 30 days, at the end of the amortization period. While the Ordinance would, after a two-year amortization period, result in a change from transient hotel use to residential hotel use, it would not result in any direct environmental impacts such as those related to construction activities (e.g., loss of a cultural resource through demolition or impacts associated with construction traffic, noise, or air quality). Any environmental effects of the ordinance would be limited to potential indirect effects. The Superior Court concluded that potential tenant displacement is a reasonably foreseeable impact of the HCO Amendments, and the possibility of displacement is sufficient to bring the Amendments within the definition of "project" under CEQA.[8] However, in preparing this initial study, the Department found that substantial evidence does not support the conclusion that the HCO Amendments would result in tenant displacement.

8 San Francisco SRO Hotel Coalition, Hotel des Arts, LLC, and Brent Haas v. City and County of San Francisco, Department of Building Inspection, San Francisco County Superior Court, September 24, 2019.

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). Under the 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." (CEQA Section 15064(d)(3).)

A comparison of the HCO before and after the 2022 Amendments indicates that prior to 2022, 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 to "offer for rent for nonresidential use or tourist use a residential unit except as permitted by this Chapter." A hotel owner could not rent a residential unit for tourist use unless certain conditions applied. Following the 2022 Amendments, section 41.20(a) would make it unlawful "to rent any residential unit for Tourist or Transient Use except as permitted by Section 41.19 of this Chapter" and to "offer for rent for Tourist or Transient Use except as permitted by this Chapter."

Under the 2022 Amendments, for a period of two years beginning on the effective date of the ordinance, "Tourist or Transient Use" would be defined as "any use of a guest room for less than a 7-day term of tenancy by a party other than a Permanent Resident. After those two years, "Tourist or Transient Use" would be 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," unless a hotel owner or operator demonstrates that a longer time is necessary to recover reasonable investments in the owner or operator's hotel. A Permanent Resident, in turn, would be defined in Chapter 41 as "A person who occupies a guest room for at least 30 consecutive days."

In the prior CEQA action, the plaintiffs argued that a 30-day minimum stay would make residential rooms unaffordable to low-income tenants because tenants would be unable to prepay a month's rent plus a security deposit. The Department has found nothing in the 2022 HCO Amendments requiring hotel owners to require monthly payments from tenants. While the minimum term of tenancy is proposed to be changed to 30 days from 7 days, the 2022 Amendments do not address rental payment schedules at all. Plaintiffs argued, and ultimately the court agreed, that residential displacement is at least reasonably foreseeable, if several conditions are met. For instance, if landlords do require monthly rent payments, some tenants may potentially be displaced. If some of the for-profit hotel owners choose to leave residential hotel rooms vacant instead of accepting long-term residential tenancies, that may also potentially result in some displacement.

For those reasons, the Planning Department has decided to further analyze the displacement arguments, to see if there are indeed any impacts under CEQA. As discussed further below, the department's further analysis has found that substantial evidence does not support the conclusion that the HCO Amendments would result in tenant displacement.

Displacement

Displacement is defined as the process by which a household is forced to move from a residence—or is prevented from moving into a neighborhood that was previously accessible to them because of conditions beyond their control.[9] As indicated by Berkeley Urban Displacement Project (UDP), displacement takes many different forms—

9 UC Berkeley Urban Displacement Project, Rising Housing Costs and Re-Segregation of San Francisco, 2018. Online: https://www.urbandisplacement.org/sites/default/files/images/sf_final.pdf

direct and indirect, physical or economic, and exclusionary—and may result from either investment or disinvestment.[10]

Displacement is also defined as the involuntary relocation of current residents or businesses.[11]

Other definitions for different types of displacement include:

- Residential displacement is defined as the involuntary movement of residents from their current residence.[12]
- Physical (direct) displacement is the result of eviction, acquisition, rehabilitation, or demolition of a property, or the expiration of covenants on rent- or income-restricted housing.[13]
- Economic (indirect) displacement occurs when residents and businesses can no longer afford escalating rents or property taxes (and must move out).[14]
- Exclusion or exclusionary displacement occurs when a lower income household cannot afford to move in to an area given the cost of housing relative to their household income, which typically is the result of rising rents and/or home prices that contribute to the area becoming exclusive.[15]
- Cultural displacement occurs when there is a decline in the number of businesses and/or cultural organizations/institutions associated with a particular race, ethnicity, or other marginalized group, which can be accompanied by residential displacement.[16]

The 2022 HCO Amendments would, after an amortization period, restrict hotel owners from renting rooms to guests for tenancies as short as seven days, as is currently allowed, and would require tenancies be a minimum of 30 days.

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

10 Ibid.

11 Seattle 2035 Growth and Equity Report summarizes key terms used to define displacement from a review of research literature. https://www.seattle.gov/documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/FinalGrowthandEquityAnalysis.pdf

12 This definition is based on UDP's 2021 research, which defined displacement as a situation in which households are forced involuntarily to move out for economic or physical reasons (because of eviction, rent increase, demolition of existing housing, etc.) or are prevented from moving into a neighborhood (i.e., excluded) because of high rents or other conditions they are unable to control or prevent. https://www.urbandisplacement.org/wp-content/uploads/2021/08/19RD018-Anti-Displacement-Strategy-Effectiveness.pdf

13 Seattle 2035 Growth and Equity Report presents these terms to define various types of displacementhttps://www.seattle.gov/documents/Departments/OPCD/OngoingInitiatives/SeattlesComprehensivePlan/FinalGrowthandEquityAnalysis.pdf

14 Ibid.

15 This definition is based on UDP's research typology that defines displacement, gentrification and exclusion. https://www.urbandisplacement.org/wp-content/uploads/2021/07/udp_replication_project_methodology_10.16.2020-converted.pdf. It also builds upon the following definition used by Peter Marcuse in his 1986 research, which is cited by UDP. "Exclusionary displacement from gentrification occurs when any household is not permitted to move into a dwelling, by a change in conditions, which affect that dwelling or its immediate surroundings, which:

a) is beyond the household's reasonable ability to control or prevent;
b) occur despite the household's being able to meet all previously-imposed conditions of occupancy;
c) differs significantly and in a spatially concentrated fashion from changes in the housing market as a whole; and
d) makes occupancy by that household impossible, hazardous or unaffordable."

16 Based on draft set of terms from the San Francisco Housing Element Update.

these units to the transient tourist population in favor of making them available to permanent residents, with the reasonably foreseeable potential of displacing some individuals (tourists) in favor of others (residents).

While the 2022 HCO Amendments do not require a specific payment structure, the department considered the potential impacts if some hotel owners began requiring security and monthly deposits if required to rent for longer minimum rental terms that eliminate weekly rentals. In such a case, renters who are unable to afford monthly deposits could be displaced as a result.

Homelessness

The City's homelessness issue is a complex one with multiple causes and is not subject to simplification and linear causal relationships. Every two years during the last ten days of January, the Department of Homelessness and Supportive Housing (HSH) conducts comprehensive counts of the local population experiencing homelessness, the Point-in-Time Count (PIT Count). [17]

On February 23, 2022, there were 7,754 people experiencing homelessness in San Francisco, a 3% decrease over the 2019 Point-in-Time Count. The total number of unsheltered persons counted was 4,397. Of the 3,357 individuals included in the shelter count, 87% (2,933 people) were in emergency shelter programs while 13% (424 persons) were residing in transitional housing programs on the night of the count.

Persons in families with children, including the minor children, represented eight percent (8%) of the total population counted in the Point-in-Time Count, while 91% were individuals without children. In total, 5% of those counted on February 23, 2022, were under the age of 18, 13% were between the ages of 18-24, and 81% were over the age of 25.[18]

The San Francisco 2022 Homeless Count & Survey states:

"Widespread homelessness is the result of a severe shortage in affordable housing, a widening gap between rising housing costs and stagnant wages, and an insufficient safety net for individuals with disabling conditions. Though these drivers are structural and systemic, individuals often have one or multiple major events or factors that precipitate their homelessness. An inability to secure adequate housing can lead to an inability to address other basic needs, such as health care and adequate nutrition.

Over one-fifth (21%) of respondents identified job loss as the primary cause of their homelessness. Fourteen percent (14%) reported eviction. Twelve percent (12%) identified drugs or alcohol, 9% reported an argument with a friend or family member who asked them to leave, and 7% cited mental health issues as the primary cause of their homelessness."[19]

Some hotel owners have argued that extending the minimum tenancy required for residential tenants could result in displaced persons leading to homelessness, resulting in physical environmental impacts such as increased trash in public streets, discarded syringes, human feces and urination, abandoned shopping carts in public and private spaces, pollution of waterways, increased crime, impacts to City services, and urban decay. The Superior Court rejected this argument, finding that the plaintiffs had failed to provide evidence supporting this claim.

17 San Francisco sought an exception from HUD to postpone the 2021 unsheltered PIT count until 2022 due to COVID-19 health and safety concerns. In addition, the 2022 count took place at the end of February 2022 rather than the standard requirement to conduct the count at the end of January 2022. San Francisco was granted permission from HUD to postpone the count one month due to low staff capacity and public health concerns resulting from the COVID-19 Omicron variant surge.

18 2022-PIT-Count-Report-San-Francisco-Updated-8.19.22.pdf (sfgov.org), accessed October 6, 2022

19 Ibid.

Similarly, the department has identified no evidence to support this claim. Moreover, even if any of these speculative scenarios were to occur, they are considered under CEQA to be socioeconomic, rather than environmental impacts. CEQA generally does not require the analysis of socioeconomic impacts. Instead, CEQA Guidelines Section 15131(a) prohibits considering such impacts, stating:

> "Economic or social effects of a project shall not be treated as significant effects on the environment. An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic or social changes. The intermediate economic or social changes need not be analyzed in any detail greater than necessary to trace the chain of cause and effect. The focus of the analysis shall be on the physical changes."

As a result, CEQA's analysis of potential adverse physical impacts resulting from economic activities focuses on the question of whether an economic change would lead to physical deterioration in a community. Enactment of the 2022 HCO Amendments would not reduce the City's authority to enforce its laws, to clean up City streets, pursue affordable housing programs or construct homeless shelters, supportive housing and navigation centers, or to pursue nuisance abatement proceedings under its inherent police powers. The Department finds that the proposed legislation would not create an economic change that would lead to the physical deterioration of any community within San Francisco.

Past Vacancy Trends

According to DBI's 2016 Annual Unit Usage Report (AUUR) data, of the approximately 400 for-profit hotels for which data were reported, approximately 1,840 of 13,042 units (14.1 percent) were vacant in 2016.[20] Reasons for residential hotel vacancy in October 2016 were not required to be reported.

According to DBI's 2017 AUUR data, of the approximately 400 for-profit hotels for which data were reported, approximately 2,314 of 12,659 units (18.2 percent) were vacant in 2017.[21] Reasons for residential hotel vacancy in October 2017 included, but were not limited to: vacancy due to fire and renovation, vacancy due to renovations, vacancy due to emergency housing program usage by Chinatown Family Benevolent Associations, vacancy due to new ordinance now in place since March 2017, no demand for long term stays, no demand for 32 night stays, rent too high.[22]

According to DBI's 2018 AUUR data, of the approximately 400 for-profit hotels for which data were reported, approximately 2,176 of 12,534 units (17.3 percent) were vacant in 2018.[23] Reasons for residential hotel vacancy in October 2018 included, but were not limited to: vacancy during renovations, vacancy due to conflict in estate, vacancy due to fire, low demand in housing market, unable to find tenants.[24]

According to DBI's 2019 AUUR data, of the approximately 400 for-profit hotels for which data were reported, approximately 2,280 of 10,140 units (22.5 percent) were vacant in 2019.[25] Reasons for residential hotel vacancy in October 2019 included, but were not limited to: vacancy during renovations, vacancy due to emergency housing

20 San Francisco Department of Building Inspection Annual Unit Usage Report AUUR data, 2016-2018.

21 Idem.

22 Idem.

23 Idem.

24 Idem.

25 San Francisco Department of Building Inspection AUUR data, 2019.

program usage by Chinatown Community Development Center (CCDC), vacancy due to construction on Van Ness Avenue making renting impossible, no demand for 32 night stays, rent too high, owners making affirmative decision not to rent out rooms, low demand in housing market, unable to find tenants, fire damage, pest control abatement, tenants unable to pay rent and required deposit at check-in.[26]

According to DBI's 2020 AUUR data, of the approximately 400 for-profit hotels for which data were reported, [27] approximately 3,800 of 12,400 units (30.6 percent) were vacant in 2020. Reasons for residential hotel vacancy in 2020 included, but were not limited to: vacancy due to planned or ongoing renovations/seismic upgrade, vacancy due to the COVID-19 pandemic, no demand for rooms, low demand for housing near downtown, vacancy due to legal conflict between the Academy of Art University and the City and County of San Francisco, vacancy due to a 1985 court order, owners making affirmative decision not to rent out rooms, and fire damage.[28] It is important to note that this 2020 AUUR data was collected during the COVID-19 emergency shelter in place. The last two years of data (2019 and 2020) show a continued upward trend in the vacancy rate compared to the 2014 and 2015 data.

Table 1 below summarizes the AUUR data obtained from DBI from 2016 to 2020.

TABLE 1 – Annual Usage Reports Summary

AUUR Year	Total Number of For-Profit SROs in AUUR	Total SRO units Vacant	Vacancy Percentage from Total	Reported Vacancy Due to 2017 HCO[29]	Percentage of Total Vacant due to 2017 HCO[b]
2014	7,241	864	11.9%	n/a	n/a
2015	11,473	1,488	12.9%	n/a	n/a
2016	13,042	1,840	14.1%	n/a	n/a
2017	12,659	2,314	18.2%	64	0.50%
2018	12,534	2,176	17.3%	36	0.29%
2019	10,140	2,280	22.5%	46	0.45%
2020	12,400	3,800	30.6%	n/a	n/a

a. The City acknowledges that given the low rate of response to the AUURs, it is difficult to know precisely the total number of residential units available in private owned and operated SRO hotels at any point in time, and the actual vacancy rates for these buildings.

b. Note that in 2017-2019 (before the writ of mandate reversing the 2017 and 2019 HCO Amendments) many SROs were not complying with 32-day minimum and were still offering 7-day rentals. DBIs records do not include length of stays.

26 2019 Vacancy Data, hotels reporting more than 50% vacancy as of October 15, 2019, provided by Matthew Luton, Housing Inspection Services, Department of Building Inspection.

27 San Francisco Department of Building Housing Inspection Services, AUUR data. October 2020.

28 2019 Vacancy Data, hotels reporting more than 50% vacancy as of October 15, 2019, provided by Matthew Luton, Housing Inspection Services, Department of Building Inspection.

29 Note that in 2017-2019 (before the writ of mandate reversing the 2017 and 2019 HCO Amendments) many SROs were not complying with 32-day minimum and were still offering 7-day rentals. DBIs records do not include length of stays.

Based on all of the factors discussed above, the Planning Department uses the estimated vacancy rate of 19.3 percent between 2017 (18.2%), 2018 (17.3%), and 2019 (22.5%) (before the writ of mandate reversing the 2017 and 2019 HCO Amendments) as it reflects the approximate rate of vacancy under implementation of the previous legislation (2017 HCO Amendments) before the court's order and before the impacts of the COVID-19 pandemic[30].

It is uncertain whether any tenants would be displaced indirectly through implementation of the 2022 HCO Amendments or which specific residential hotels in San Francisco would be affected. However, for the purpose of environmental review, the Planning Department has estimated a theoretical number of units which would be vacant due to the 2022 HCO Amendments, thereby theoretically indirectly displacing those tenants who would otherwise rent these units. Of the approximately 400 for-profit hotel owners reporting in the 2017, 2018 and 2019 AUUR data, it was reported that 64, 36, and 46 of the reported hotel units, respectively, were vacant because they were either unable to rent for 32 days, unable to rent due to the 2017 HCO Ordinance, found no interest in long term stays, or the rent was too high.[31] For purposes of this analysis, the department conservatively assumes the highest number of 64 SRO units as a reasonable estimation of potential indirect displacement of tenants who would otherwise rent these 64 units were it not for the 2022 HCO Amendments (i.e. if the minimum stay remains 7 days by transient tourists). To be conservative, and in the absence of any other substantial evidence, the full number of 64 units will be used for this Initial Study analysis.

Project Approvals

Approval Action: The adoption of the Ordinance by the San Francisco Board of Supervisors would be the approval action for this project.

B. Project and Cumulative Setting

Site Vicinity

San Francisco is a consolidated city and county located on the tip of the San Francisco Peninsula with the Golden Gate Strait to the north, San Francisco Bay to the east, San Mateo County to the south, and the Pacific Ocean to the west. San Francisco has an area of approximately 49 square miles.

While residential hotels exist throughout the City, they are concentrated in three major sub-areas of the City: Chinatown/North Beach, Union Square/North of Market, and South of Market. Over two-thirds of all residential hotel units in San Francisco are in these three general areas, mostly located in commercially-zoned districts.

Cumulative Setting

CEQA Guidelines section 15130(b)(1)(A) defines cumulative projects as past, present, and reasonably foreseeable projects producing related or cumulative impacts. CEQA Guidelines section 15130(b)(1) provides two methods for cumulative impact analysis: the "list-based approach" and the "projections-based approach". The list-based approach uses a list of projects producing closely related impacts that could combine with those of a proposed project to evaluate whether the project would contribute to significant cumulative impacts. The projections-based

30 The City acknowledges that given the low rate of response to the AUURs, it is difficult to know precisely the total number of residential units available in private owned and operated SRO hotels at any point in time, and the actual vacancy rates for these buildings.

31 Note that in 2017 to 2019 many SROs were not complying with 32-day minimum and were still offering 7-day rentals.

approach uses projections contained in a general plan or related planning document to evaluate the potential for cumulative impacts.

This PND concludes that the 2022 HCO Amendments would not result in adverse physical effects on the environment; all issues are discussed in Section D below. By its nature as a city-wide ordinance, the analysis of the effects related to implementation of the 2022 HCO Amendments is cumulative; therefore, checklist responses consider individual and cumulative effects together.

These 2022 HCO Amendments under the proposed Ordinance are intended preserve low-cost housing and eliminate the use of residential rooms by weekly tourists that could displace permanent residents by increasing the duration of initial minimum stay from 7 to 30 days.

The substantive change is increasing the duration of initial minimum stays in SROs from 7 to 30 days. Increased compliance with the Ordinance is the intention and a resulting decrease in illegal conversions of residential hotel rooms would be a likely result of the incorporation of the proposed amendments into the Ordinance.

C. Summary of Environmental Effects

The proposed project could potentially affect the environmental factor(s) checked below. The following pages present a more detailed checklist and discussion of each environmental topic.

☐ Land Use and Land Use Planning	☐ Greenhouse Gas Emissions	☐ Geology and Soils
☐ Population and Housing	☐ Wind	☐ Hydrology and Water Quality
☐ Cultural Resources	☐ Shadow	☐ Hazards and Hazardous Materials
☐ Tribal Cultural Resources	☐ Recreation	☐ Mineral Resources
☐ Transportation and Circulation	☐ Utilities and Service Systems	☐ Energy Resources
☐ Noise	☐ Public Services	☐ Agriculture and Forestry Resources
☐ Air Quality	☐ Biological Resources	☐ Wildfire

Approach to Analysis

This initial study examines the proposed project's impacts on the environment. For each item in the checklist, the evaluation considered the impacts of the proposed project both individually and cumulatively.

All items in the checklist are checked one of the following:

- Potentially Significant Impact
- Less than Significant with Mitigation Incorporated
- Less than Significant Impact
- No Impact
- Not Applicable

All items on the initial study checklist below that have been checked "Less than Significant with Mitigation Incorporated," "Less Than Significant Impact," "No Impact," or "Not Applicable" indicate that, upon evaluation,

staff has determined that the proposed project could not have a significant adverse environmental effect relating to that topic. A discussion is included for these items. Items on the initial study checklist that have been checked "Potentially Significant" may require the preparation of a Draft Environmental Impact Report to further evaluate the potentially significant impact. There are no environmental topics for which the proposed project would have a potential individual or cumulative significant environmental effect. A discussion of items that are checked "No Impact" or "Not Applicable" are described below.

No Impact or Not Applicable Environmental Topics

The proposed project would have no impact on the following environmental topics and as a result are not discussed in detail in this initial study: Aesthetics, Mineral Resources, Agriculture and Forestry Resources, and Wildfire. This section briefly describes why the proposed project has no impact on these topics or why these topics are not applicable to the proposed project. These topics are not discussed further in the remainder of the initial study.

Aesthetics and Parking

CEQA Section 21099CEQA Section 21099(d) states: "Aesthetic and parking impacts of a residential, mixed-use residential, or employment center project on an infill site located within a transit priority area shall not be considered significant impacts on the environment."[32] Accordingly, aesthetics and parking are not to be considered in determining if a project has the potential to result in significant environmental effects for projects that meet all of the following three criteria:

a) The project is in a transit priority area;
b) The project is on an infill site; and
c) The project is residential, mixed-use residential, or an employment center.

Residential hotels, in general, meet each of the above three criteria; thus, this checklist does not consider aesthetics or parking in determining the significance of project impacts under CEQA.

Mineral Resources

The project site is not located in an area with known mineral resources and would not extract mineral resources. Therefore, the proposed project would have no impact on mineral resources and would not have the potential to contribute to any cumulative mineral resource impact.

Agriculture and Forestry Resources

The project site is within an urbanized area in the City and County of San Francisco that does not contain any prime farmland, unique farmland, or farmland of statewide importance; forest land; or land under Williamson Act contract. The area is not zoned for any agricultural uses. Therefore, the project would have no impact, either individually or cumulatively, on agricultural or forest resources.

Wildfire

The project site is not located in or near state responsibility lands for fire management or lands classified as very high fire hazard severity zones. Therefore, this topic is not applicable to the project.

32 See CEQA Section 21099(d)(1).

D. Evaluation of Environmental Effects

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
1. LAND USE AND PLANNING. Would the project:					
a) Physically divide an established community?	☐	☐	☒	☐	☐
b) Cause a significant physical environmental impact due to a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect?	☐	☐	☒	☐	☐

D.1.a) The proposed project would not result in the construction of a physical barrier to neighborhood access or the removal of an existing means of access. The 2022 HCO Amendments under the proposed Ordinance are intended to preserve low-cost housing and eliminate the use of residential rooms by weekly tourists that could displace permanent residents by increasing the duration of initial minimum stay from 7 to 30 days. It is not anticipated that the 2022 HCO Amendments would lead to zoning change proposals that make development on property in the city more restrictive than is currently allowed. Implementation of the 2022 HCO Amendments would not physically divide existing communities or neighborhoods, both individually or cumulatively. The proposed project would not alter the established street grid or permanently close any streets or sidewalks. Therefore, the proposed project would not physically divide an established community and no impacts would occur.

D.1.b) Land use impacts would be considered significant if the proposed project would conflict with any plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect. The project sites under the HCO are currently developed with residential hotels and no physical changes are proposed as part the 2022 HCO Amendments project. Implementation of the proposed project would not result in physical changes to any residential hotel units throughout the city. The proposed project would not substantially conflict with any plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect and no impacts would occur.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
2. POPULATION AND HOUSING. Would the project:					
a) Induce substantial unplanned population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure)?	☐	☐	☒	☐	☐
b) Displace substantial numbers of existing people or housing units, necessitating the construction of replacement housing?	☐	☐	☒	☐	☐

According to the U.S. Census Bureau, the City and County of San Francisco had an estimated population of about 873,965 in 2020.[33] The Association of Bay Area Governments (ABAG) prepares projections of employment and housing growth for the Bay Area. The latest projections were prepared as part of Plan Bay Area 2050, adopted by ABAG and the Metropolitan Transportation Commission in October 2021. The growth projections for San Francisco County anticipate an increase of 213,000 households and 236,000 jobs between 2015 and 2050.[34] Plan Bay Area 2050 calls for an increasing percentage of Bay Area growth to occur as infill development in areas with good transit access and the services necessary for daily living in proximity to housing and jobs. With its abundant transit services and mixed-use neighborhoods, San Francisco is expected to accommodate an increasing share of future regional growth.

In the last few years, the supply of housing has not met demand in San Francisco. In December 2021, ABAG projected regional housing needs in the *Regional Housing Need Plan for the San Francisco Bay Area: 2023-2031*. ABAG projected that the housing need in San Francisco for 2023-2031 will be 82,069 dwelling units, consisting of 20,867 dwelling units that would be affordable to households at the very low-income level (below 50 percent of the Area Median Income [AMI]), 12,014 at the low-income level (50–80 percent), 13,717 at the moderate-income level (80–120 percent), and 35,471 above the moderate-income level (above 120 percent).[35]

D.2.a) In general, a project would be considered growth-inducing if its implementation would result in a substantial population increase and/or new development that might not occur if the project were not implemented. The project sites under the HCO are currently developed with residential hotels and no physical changes are proposed as part the 2022 HCO Amendments project. The 2022 HCO Amendments under the proposed Ordinance are intended to preserve low-cost housing and eliminate the use of residential rooms by weekly tourists that could displace permanent residents by increasing, after an amortization period, the duration of initial minimum stay from 7 to 30 days.

33 U.S. Census Bureau, Quick Facts, San Francisco County, California. Available at https://www.census.gov/quickfacts/fact/dashboard/sanfranciscocountycalifornia/PST045219, accessed February 15, 2022.

34 Association of Bay Area Governments, Plan Bay Area 2050: The Final Blueprint – Growth Pattern, January 21, 2021. Available at https://www.planbayarea.org/sites/default/files/FinalBlueprintRelease_December2020_GrowthPattern_Jan2021Update.pdf, accessed February 15, 2022.

35 Association of Bay Area Governments, Regional Housing Needs Plan: San Francisco Bay Area, 2023-2031, December 2021. Available at https://abag.ca.gov/sites/default/files/documents/2021-12/Final_RHNA_Allocation_Report_2023-2031-approved_0.pdf, accessed February 15, 2022.

Therefore, the proposed 2022 HCO Amendments would not induce substantial population growth in the area and the project would not result in a significant impact related to population growth, both directly and indirectly.

D.2.b) The project sites under the HCO are currently developed with residential hotels and no physical changes are proposed as part the 2022 HCO Amendments project. Implementation of the proposed project would not directly displace any existing residential hotel units or their existing tenants throughout the city. 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 transient tourist population in favor of permanent residents, with the reasonably foreseeable potential of displacing some individuals (tourists) in favor of others (residents).

It is uncertain how many, if any, transient tourist tenants could be indirectly displaced through implementation of the 2022 HCO Amendments or which specific residential hotels in San Francisco would be affected.

Based on the 2020 AUUR, there are approximately 12,400 residential hotel units within 400 for-profit hotels in the Hotel Conversion Ordinance program. Based on all of the factors discussed above, the Planning Department uses the vacancy rate of 19.3 percent, as it reflects the approximate rate of vacancy under implementation of the previous legislation before the court's order and before the impacts of the COVID-19 pandemic (AUUR data from 2017 to 2019).

The reported reasons shown above for hotel vacancy in 2017, 2018 and 2019[36] vary from hotel owner to hotel owner, and only a small portion of the reported reasons for vacancy (less than 0.50 percent) appear to be attributed to the 2017 and 2019 HCO Amendments ,[37][38] As a result, and without finding any other substantial evidence, the Planning Department uses the highest of those three reports with hotel SRO vacancies reporting "no demand for 32-night stays", "rent too high", and "tenants unable to pay rent and deposit at check-in", at 64 hotel units with , as the theoretical number of hotel units with transient tourist tenants anticipated to be indirectly displaced due to the 2022 HCO Amendments project implementation.

The HCO's purpose is to provide and preserve affordable housing for elderly, disabled, and low-income persons; its premise in 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 Section 41.3.)

The 2022 HCO Amendments would neither displace existing residential hotel tenants nor create demand for additional housing, the construction of which could have potential adverse environmental effects. The potential theoretical anticipated indirect displacement of tenants in approximately 64 SRO units would not be considered substantial as the past vacancy trends show the consistent vacancy rate of SROs at about 19.3 percent throughout approximately 400 for-profit residential hotels, which translates to approximately 2,393 vacant units which are reported by for-profit hotel owners as vacant for various other reasons including the lack of ability to pay security and initial month's rent. . Any indirect displacement increase in the number of tenants as a result of the 2022 HCO Amendments would not be substantial relative to the existing and historic number of vacant SRO units located

36 It is important to note that this October 2019 AUUR data was collected while the 2017 and 2019 HCO Amendments increasing the 7-day minimum rental period for SRO units to 32 days were in effect.

37 2019 Vacancy Data, hotels reporting more than 50% vacancy as of October 15, 2019 and San Francisco Department of Building Inspection AUUR data, 2016-2018., provided by Matthew Luton, Housing Inspection Services, Department of Building Inspection.

38 Note that in 2017 to 2019 many SROs were not complying with 32-day minimum and were still offering 7-day rentals

throughout the City. Further, some of the tenants that might be indirectly displaced would be students, technology sector workers, and weekly transient tourists – none of which fall under the low-income category above. The Department finds no evidence that members of these groups would be likely to become homeless or otherwise experience displacement as a result of the 2022 Amendments. Thus, the potentially displaced tenants in approximately 64 hotel units is likely to be an overestimate. This indirect displacement is not anticipated to Induce substantial unplanned population growth in the area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure), nor would it necessitate the construction of replacement housing, because there is an approximate 19.3 percent vacancy across the 400 for-profit hotels, estimated at 2,393 vacant units Therefore, implementation of the 2022 HCO Amendments is anticipated to result in less-than-significant impacts, both individual and cumulative, on population and housing.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
3. CULTURAL RESOURCES. Would the project:					
a) Cause a substantial adverse change in the significance of a historical resource pursuant to §15064.5, including those resources listed in article 10 or article 11 of the San Francisco Planning Code?	☐	☐	☐	☒	☐
b) Cause a substantial adverse change in the significance of an archaeological resource pursuant to §15064.5?	☐	☐	☐	☒	☐
c) Disturb any human remains, including those interred outside of formal cemeteries?	☐	☐	☐	☒	☐

D.3.a) Pursuant to Section 15064.5 of the CEQA Guidelines, historical resources include properties listed in, or formally determined eligible for listing in, the California Register of Historical Resources or in an adopted local historic register. Historical resources also include resources identified as significant in a historical resource survey meeting certain criteria. Additionally, properties that are not listed but are otherwise determined to be historically significant, based on substantial evidence, would also be considered historical resources. The significance of a historical resource is materially impaired when a project "demolishes or materially alters in an adverse manner those physical characteristics of a historical resource that convey its historical significance …"[39]

In evaluating whether the proposed project would cause a substantial adverse change in the significance of a historical resource, the Planning Department must first determine whether the existing buildings on the project site are historical resources. A property may be considered a historical resource if it meets any of the California Register criteria related to (1) events, (2) persons, (3) architecture, or (4) information potential, that make it eligible for listing in the California Register, or if it is considered a contributor to a potential historic district.

39 CEQA Guidelines 15064.5(b)(2)(A).

The 2022 HCO Amendments do not include any projects that may directly or indirectly result in material changes to buildings, structures, objects, and sites. In accordance with the Planning Department's CEQA review policy, any project that involves the major alteration or demolition of a property over 50 years of age is required to undergo environmental review that includes an evaluation of the property's historical significance and, if a resource is present, an analysis of project impacts.

For the reasons stated above, implementation of the 2022 HCO Amendments would not result in adverse impacts to historical resources since they do not include the demolition or alteration of historic buildings and do not directly propose material changes to buildings, structures, objects, sites, historic districts and cultural landscapes. As such, the 2022 HCO Amendments are considered to have no significant effect on historical resources, both individually and cumulatively.

D.3.b) In addition to assessing impacts to archeological resources that would meet the requirements for listing as a historical resource, impacts to unique archeological resources are also considered under CEQA, as described in section 15064.5 of the CEQA Guidelines, as well as under the California Public Resources Doe (section 21083.2). If an archeological site does not meet the criteria for inclusion in the California Register of Historic Resources but does meet the definition of a unique archeological resource as outlined in Public Resources Code section 21083.2, it is entitled to special protection under CEQA. A unique archeological resource implies an archeological artifact, object, or site about which it can be clearly demonstrated that – without merely adding to the current body of knowledge – there is a high probability that it meets one of the following criteria:

· The archeological artifact, object, or site contains information needed to answer important scientific questions, and there is a demonstrable public interest in that information;

· The archeological artifact, object, or site has a special and particular quality, such as being the oldest of its type or the best available example of its type; or

· The archeological artifact, object, or site is directly associated with a scientifically recognized important prehistoric or historic event or person.

A non-unique archeological resource indicates an archeological artifact, object, or site that does not meet the above criteria. Impacts to non-unique archeological resources and resources that do not qualify for listing in the California Register of Historical Resources receive no further consideration under CEQA. It should also be noted herein that a disturbed or secondarily deposited prehistoric midden is presumed to be significant for its information potential; under CEQA, and it is legally significant unless or until it is demonstrated to the contrary.

The 2022 HCO Amendments do not include any projects that may directly or indirectly result in material changes to buildings, structures, objects, and sites. Implementation of the 2022 HCO Amendments would not result in any adverse effects to archeological resources since they would not directly involve any material change to the physical environment, including subsurface soils that may contain archeological resources. Thus, the potential of the 2022 HCO Amendments to result in any direct or indirect effect to archeological resources is not significant.

D.3.c) Archeological resources may include human burials. Human burials outside of formal cemeteries often occur in prehistoric or historic period archeological contexts. The potential for the proposed project to affect archeological resources, which may include human burials is addressed above under D.3.b.

Furthermore, the treatment of human remains and of associated or unassociated funerary objects must comply with applicable state laws. This includes immediate notification to the county coroner (San Francisco Office of the

Chief Medical Examiner) and, in the event of the coroner's determination that the human remains are Native American, notification of the California Native American Heritage Commission, which shall appoint a most likely descendant.42

Implementation of the 2022 HCO Amendments would not result in any adverse effects to archeological resources including human remains since they would not directly involve any material change to the physical environment, including subsurface soils that may contain archeological resources or human remains. Thus, the potential of the 2022 HCO Amendments to result in any direct or indirect effect to archeological resources is not significant.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
4. TRIBAL CULTURAL RESOURCES. Would the project:					
a) Cause a substantial adverse change in the significance of a tribal cultural resource, defined in Public Resources Code section 21074 as either a site, feature, place, or cultural landscape that is geographically defined in terms of the size and scope of the landscape, sacred place, or object with cultural value to a California Native American tribe, and that is:					
i) Listed or eligible for listing in the California Register of Historical Resources, or in a local register of historical resources as defined in Public Resources Code section 5020.1(k), or	☐	☐	☐	☒	☐
ii) A resource determined by the lead agency, in its discretion and supported by substantial evidence, to be significant pursuant to criteria set forth in subdivision (c) of Public Resources Code section 5024.1. In applying the criteria set forth in subdivision (c) of Public Resources Code section 5024.1, the lead agency shall consider the significance of the resource to a California Native American tribe.	☐	☐	☐	☒	☐

D.4.a) Public Resources Code Section 21074(a)(2) requires the lead agency to consider the effects of a project on tribal cultural resources. As defined in Section 21074(a)(1), tribal cultural resources are sites, features, places, cultural landscapes, sacred places, and objects with cultural value to a California Native American tribe that are listed, or determined to be eligible for listing, in a national, state, or local register of historical resources.

Pursuant to Assembly Bill 52, effective July 1, 2015, within 14 days of a determination that an application for a project is complete or a decision by a public agency to undertake a project, the lead agency is required to contact the Native American tribes that are culturally or traditionally affiliated with the geographic area in which the

project is located. Notified tribes have 30 days to request consultation with the lead agency to discuss potential impacts on tribal cultural resources and measures for addressing those impacts.

On April 18, 2022, the planning department mailed a "Tribal Notification Regarding Tribal Cultural Resources and CEQA" to the appropriate Native American tribal representatives who have requested notification. During the 30-day comment period, no Native American tribal representatives contacted the planning department to request consultation.

As discussed in the Cultural Resources section of this document above, the 2022 HCO Amendments do not include any projects that may directly or indirectly result in material changes to buildings, structures, objects, and sites, and therefore would have no impacts to tribal cultural resources.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
5. TRANSPORTATION AND CIRCULATION. Would the project:					
a) Involve construction that would require a substantially extended duration or intensive activity, and the effects would create potentially hazardous conditions for people walking, bicycling, or driving, or public transit operations; or interfere with emergency access or accessibility for people walking or bicycling; or substantially delay public transit?	☐	☐	☐	☒	☐
b) Create potentially hazardous conditions for people walking, bicycling, or driving or public transit operations?	☐	☐	☐	☒	☐
c) Interfere with accessibility of people walking or bicycling to and from the project site, and adjoining areas, or result in inadequate emergency access?	☐	☐	☐	☒	☐
d) Substantially delay public transit?	☐	☐	☐	☒	☐
e) Cause substantial additional vehicle miles traveled or substantially induce additional automobile travel by increasing physical roadway capacity in congested areas (i.e., by adding new mixed-flow travel lanes) or by adding new roadways to the network?	☐	☐	☐	☒	☐
f) Result in a loading deficit, and the secondary effects would create potentially hazardous conditions for people walking, bicycling, or driving; or substantially delay public transit?	☐	☐	☐	☒	☐

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
g) Result in a substantial vehicular parking deficit, and the secondary effects would create potentially hazardous conditions for people walking, bicycling, or driving; or interfere with accessibility for people walking or bicycling or inadequate access for emergency vehicles; or substantially delay public transit?	☐	☐	☐	☒	☐

D.5.a to d) The project sites affected by the 2022 HCO Amendments are currently developed with residential hotels. No physical changes are proposed as part the 2022 HCO Amendments, and the amendments would not generate new person trips, including vehicle trips. As a result, the 2022 HCO Amendments would not result in impacts to traffic conditions, operations or hazards. No direct person trip generation is associated with adopting these amendments.

Pursuant to the planning department's *Transportation Impact Analysis Guidelines for Environmental Review*, tourist hotels generate higher numbers of daily person trips and vehicle trips compared to residential hotels.[40] During and after the amortization period, the number of daily person trips and vehicle trips at the various hotel sites is expected to decrease slightly as a result of the change of use from tourist hotel to residential hotel. With this decrease in daily person trips and vehicle trips, transportation impacts resulting from implementation of the 2022 HCO Amendments would be similar to or slightly less severe than under existing conditions.

The 2022 HCO Amendments project would not include any projects that may directly or indirectly result in material changes to buildings, structures, objects, and sites. Implementation of the 2022 HCO Amendments would not substantially or adversely affect traffic conditions in the City. In addition, the 2022 HCO Amendments would not conflict with an applicable plan, ordinance, or policy establishing measures of effectiveness for the performance of the circulation system, or with an applicable congestion management system.

Future projects that would occur indirectly in the context of the 2022 HCO Amendments would be subject to separate, independent study and environmental review. Therefore, the 2022 HCO Amendments would not conflict with the General Plan's Transportation Element and would not significantly impact traffic conditions in the City. Thus, implementation of the 2022 HCO Amendments would not have a significant impact on traffic, individually and cumulatively.

---

40 San Francisco Planning Department, Transportation Impact Analysis Guidelines for Environmental Review, Appendix F, Travel Demand, February 2019 (updated October 2019). Available at https://sfplanning.org/project/transportation-impact-analysis-guidelines-environmental-review-update, accessed April 29, 2022.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
6. NOISE. Would the project result in:					
a) Generation of a substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?	☐	☐	☐	☒	☐
b) Generation of excessive groundborne vibration or groundborne noise levels?	☐	☐	☐	☐	☒
c) For a project located within the vicinity of a private airstrip or an airport land use plan area or, where such a plan has not been adopted, in an area within two miles of a public airport or public use airport, would the project expose people residing or working in the area to excessive noise levels?	☐	☐	☐	☐	☒

D.6.a) The proposed project would not directly result in construction noise impacts because the 2022 HCO Amendments do not include construction at any of the hotel sites. As previously discussed under Section D.5, Transportation, there would be a decrease in the number of daily vehicle trips at the various hotel sites, resulting in slightly lower operational noise levels associated with vehicle trips. Operational noise impacts resulting from implementation of the 2022 HCO Amendments would be similar to or slightly less severe than under existing conditions.

The 2022 HCO Amendments project does not include any projects that may directly or indirectly result in material changes to buildings, structures, objects, and sites. Implementation of the 2022 HCO Amendments would not directly increase ambient noise levels, or directly result in construction noise effects. No future construction work would occur indirectly in the context of the 2022 HCO Amendments. In addition, implementation of the 2022 HCO Amendments would not be substantially affected by existing noise. As such, the 2022 HCO Amendments would have no impacts on noise at both the individual and cumulative level.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
7. AIR QUALITY. Would the project:					
a) Conflict with or obstruct implementation of the applicable air quality plan?	☐	☐	☐	☒	☐
b) Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is non-attainment under an applicable federal, state, or regional ambient air quality standard?	☐	☐	☐	☒	☐
c) Expose sensitive receptors to substantial pollutant concentrations?	☐	☐	☐	☒	☐
d) Result in other emissions (such as those leading to odors) adversely affecting a substantial number of people?	☐	☐	☐	☒	☐

D.7.a) The most recently adopted air quality plan for the air basin is the Bay Area Air Quality Management District's 2017 Clean Air Plan. The primary goals of the clean air plan are to: (1) protect air quality and health at the regional and local scale; (2) eliminate disparities among Bay Area communities in cancer health risk from toxic air contaminants; and (3) reduce greenhouse gas emissions. The clean air plan recognizes that to a great extent, community design dictates individual travel modes, and that a key long-term control strategy to reduce emissions of criteria pollutants, air toxics, and greenhouse gases from motor vehicles is to channel future Bay Area growth into vibrant urban communities where goods and services are close at hand, and people have a range of viable transportation options.

The 2022 HCO Amendments project does not include any projects that may directly or indirectly result in material changes to buildings, structures, objects, and sites. In terms of GHG emissions, the City and County has adopted an ordinance which implements citywide "Strategies to Reduce Greenhouse Gas Emissions." As discussed further under topic D.8, Greenhouse Gas Emissions, the 2022 HCO Amendments would not conflict with the CAP's overarching goal to "reduce GHG emissions and protect the climate." As such, the 2022 HCO Amendments would not conflict with or obstruct implementation of the 2017 Clean Air Plan.

D.7.b) In accordance with the state and federal Clean Air Acts, air pollutant standards are identified for the following six criteria air pollutants: ozone, carbon monoxide (CO), particulate matter ($PM_{2.5}$, and PM_{10}[41]), nitrogen dioxide (NO2), sulfur dioxide (SO2), and lead. These air pollutants are termed criteria air pollutants because they are regulated by developing specific public health- and welfare-based criteria as the basis for setting permissible levels. The bay area air basin is designated as either in attainment or unclassified for most criteria pollutants except for ozone, $PM_{2.5}$, and PM_{10}. For these pollutants, the air basin is designated as non-attainment for either the state or federal standards. By its very nature, regional air pollution is largely a cumulative impact in that no single project is sufficient in size to, by itself, result in non-attainment of air quality standards. Instead, a project's individual emissions contribute to existing cumulative air quality impacts. If a project's contribution to cumulative

41 PM10 is often termed "coarse" particulate matter and is made of particulates that are 10 microns in diameter or smaller. PM2.5, termed "fine" particulate matter, is composed of particles that are 2.5 microns or less in diameter.

air quality impacts is considerable, then the project's impact on air quality would be considered significant.[42] Regional criteria air pollutant impacts resulting from the proposed project are evaluated below.

Criteria Air Pollutants

The Bay Area Air Quality Management District prepared updated 2017 CEQA Air Quality Guidelines,[43] which provide methodologies for analyzing air quality impacts. These guidelines also provide thresholds of significance for ozone and particulate matter. The planning department uses these thresholds to evaluate air quality impacts under CEQA.

The air district has developed screening criteria to determine whether to undertake detailed analysis of criteria pollutant emissions for construction and operations of development projects. Projects that are below the screening criteria would result in less-than-significant criteria air pollutant impacts, and no further project-specific analysis is required. As a policy document, implementation of the 2022 HCO Amendments would not involve construction activities and therefore the 2022 HCO Amendments would not affect criteria air pollutant screening sizes identified in the BAAQMD's CEQA Air Quality Guidelines. Thus, quantification of construction-related criteria air pollutant emissions is not required, and implementation of the 2022 HCO Amendments would result in no impacts to construction criteria air pollutants.

Construction Criteria Air Pollutants

The proposed project would not directly result in construction-related emissions of criteria air pollutants because the 2022 HCO Amendments do not include construction at any of the hotel sites. Therefore, the proposed project would not result in any construction-related air quality impacts.

Operational Criteria Air Pollutants

As previously discussed under Section D.5, Transportation, there would be a decrease in the number of daily vehicle trips at the various hotel sites, resulting in slightly lower operational emissions of criteria air pollutants associated with vehicle trips. Operational air quality impacts resulting from implementation of the 2022 HCO Amendments would be similar to or slightly less severe than under existing conditions.

As stated above, tourist hotels generate higher numbers of daily person trips and vehicle trips compared to residential hotels.[44] During and after the amortization period, the number of daily person trips and vehicle trips at the various hotel sites is expected to decrease slightly as a result of the change of use from tourist hotel to residential hotel. With this decrease in daily person trips and vehicle trips, air quality impacts resulting from implementation of the 2022 HCO Amendments would be similar to or slightly less severe than under existing conditions. and the proposed project would not exceed any of the significance thresholds for criteria air pollutants.

D.7.c) The San Francisco Board of Supervisors approved amendments to the San Francisco Building and Health Codes, referred to as Enhanced Ventilation Required for Urban Infill Sensitive Use Developments or Health Code, article 38 (Ordinance 224-14, amended December 8, 2014). The purpose of article 38 is to protect the public health and welfare by establishing an *air pollutant exposure zone* and imposing an enhanced ventilation requirement for

42 Bay Area Air Quality Management District (BAAQMD), California Environmental Quality Act Air Quality Guidelines, May 2017, page 2-1.

43 Bay Area Air Quality Management District, CEQA Air Quality Guidelines, updated May 2017.

44 San Francisco Planning Department, Transportation Impact Analysis Guidelines for Environmental Review, Appendix F, Travel Demand, February 2019 (updated October 2019). Available at https://sfplanning.org/project/transportation-impact-analysis-guidelines-environmental-review-update, accessed April 29, 2022.

all new sensitive uses within this zone. The air pollutant exposure zone as defined in article 38 includes areas that exceed health protective standards for cumulative $PM_{2.5}$ concentration and cumulative excess cancer risk and incorporates health vulnerability factors and proximity to freeways. Projects within the air pollutant exposure zone require special consideration to determine whether the project's activities would expose sensitive receptors to substantial air pollutant concentrations or add emissions to areas already adversely affected by poor air quality.

Construction Health Risks

The proposed project would not directly result in construction-related emissions of air pollutants because the 2022 HCO Amendments do not include construction at any of the hotel sites. Therefore, the proposed project would not result in any construction-related air quality impacts.

Operational Health Risks

The 2022 HCO Amendments would not cause the disruption, delay or otherwise hinder the implementation of the 2017 Clean Air Plan. The 2022 HCO Amendments would be, on balance, consistent with applicable BAAQMD control measures. In terms of GHG emissions, the City and County has adopted an ordinance which implements citywide "Strategies to Reduce Greenhouse Gas Emissions." As discussed further under topic D.8, Greenhouse Gas Emissions, the 2022 HCO Amendments would not conflict with the CAP's overarching goal to "reduce GHG emissions and protect the climate." As such, the 2022 HCO Amendments would not conflict with or obstruct implementation of the 2017 Clean Air Plan.

D.7.d) Typical odor sources of concern include wastewater treatment plants, sanitary landfills, transfer stations, composting facilities, petroleum refineries, asphalt batch plants, chemical manufacturing facilities, fiberglass manufacturing facilities, auto body shops, rendering plants, and coffee roasting facilities. As an ordinance, implementation of the 2022 HCO Amendments would not create significant sources of new odors, and therefore, odor impacts would be less than significant.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
8. GREENHOUSE GAS EMISSIONS. Would the project:					
a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?	☐	☐	☐	☒	☐
b) Conflict with any applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?	☐	☐	☐	☒	☐

D.8.a and b) Individual projects contribute to the cumulative effects of climate change by directly or indirectly emitting GHGs during construction and operational phases. Direct emissions include GHG emissions from new vehicle trips and area sources (natural gas combustion). Indirect emissions include emissions from electricity

providers, energy required to pump, treat, and convey water, and emissions associated with waste removal, disposal, and landfill operations.

The proposed project would not directly result in construction impacts related to GHG emissions because the 2022 HCO Amendments do not include construction at any of the hotel sites. As previously discussed under Section D.5, Transportation, there would be a decrease in the number of daily vehicle trips at the various hotel sites, resulting in slightly lower operational GHG emissions associated with vehicle trips. Operational impacts related to GHG emissions resulting from implementation of the 2022 HCO Amendments would be similar to or slightly less severe than under existing conditions.

All development projects in San Francisco would be required to comply with the energy efficiency requirements of the City's Green Building Code, Building Code, Stormwater Management Ordinance, Water Conservation and Irrigation ordinances and Environment Code, which would promote energy and water efficiency, thereby reducing the proposed project's energy-related GHG emissions.[45] A project's waste-related emissions would be reduced through compliance with the City's Recycling and Composting Ordinance, Construction and Demolition Debris Recovery Ordinance and Construction Site Runoff Pollution Prevention for New Construction Ordinance. These regulations reduce the amount of materials sent to a landfill, thus reducing GHGs emitted by landfill operations. These regulations also promote reuse of materials, conserving their embodied energy[46] and reducing the energy required to produce new materials. Compliance with other regulations, including those requiring low-emitting finishes, would reduce volatile organic compounds (VOCs).[47]

The 2022 HCO Amendments project would not include any projects that may directly or indirectly result in material changes to buildings, structures, objects, and sites. As such, the 2022 HCO Amendments would not result in any significant impacts with respect to GHG emissions.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
9. WIND. Would the project:					
a) Create wind hazards in publicly accessible areas of substantial pedestrian use?	☐	☐	☐	☒	☐

D.9.a) Wind impacts are directly related to the height, orientation, design, location, and surrounding development context of a proposed project. Based on wind analyses for other development projects in San Francisco, a building that does not exceed a height of 85 feet generally has little potential to cause substantial changes to ground-level wind conditions. The 2022 HCO Amendments do not include any projects that could result in adverse wind effects,

45 Compliance with water conservation measures reduce the energy (and GHG emissions) required to convey, pump and treat water required for the project.

46 Embodied energy is the total energy required for the extraction, processing, manufacture and delivery of building materials to the building site.

47 While not a GHG, VOCs are precursor pollutants that form ground level ozone. Increased ground level ozone is an anticipated effect of future global warming that would result in added health effects locally. Reducing VOC emissions would reduce the anticipated local effects of global warming.

and as an ordinance, no specific projects are proposed at this time. Therefore, implementation of the 2022 HCO Amendments would not result in impacts related to wind.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
10. SHADOW. Would the project:					
a) Create new shadow that substantially and adversely affects the use and enjoyment of publicly accessible open spaces?	☐	☐	☐	☒	☐

D.10.a) Planning Code section 295 generally prohibits new structures above 40 feet in height that would cast additional shadows on open space that is under the jurisdiction of the San Francisco Recreation and Park Commission between one hour after sunrise and one hour before sunset, at any time of the year, unless that shadow would not result in a significant adverse effect on the use of the open space.

The 2022 HCO Amendments do not include any projects that could result in adverse shadow effects, and as an ordinance, no specific projects are proposed at this time. Therefore, the proposed 2022 HCO Amendments would not create shadow in a manner "that substantially and adversely affects the use and enjoyment of publicly accessible open spaces." Implementation of the 2022 HCO Amendments would result in no impacts related to shadow.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
11. RECREATION. Would the project:					
a) Increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facilities would occur or be accelerated?	☐	☐	☐	☒	☐
b) Include recreational facilities or require the construction or expansion of recreational facilities that might have an adverse physical effect on the environment?	☐	☐	☐	☒	☐

D.11.a-b) The 2022 HCO Amendments do not include any projects that may directly or indirectly result in material changes to buildings, structures, objects, and sites. It would not include any projects that could result in adverse recreation effects, and as an ordinance, no specific projects are proposed at this time. Therefore, the proposed

2022 HCO Amendments would not increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facilities would occur or be accelerated and no impacts related to recreation would occur.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
12. UTILITIES AND SERVICE SYSTEMS. Would the project:					
a) Require or result in the relocation or construction of new or expanded, water, wastewater treatment, or storm water drainage, electric power, natural gas, or telecommunications facilities, the construction or relocation of which could cause significant environmental effects?	☐	☐	☐	☒	☐
b) Have sufficient water supplies available to serve the project and reasonably foreseeable future development during normal, dry, and multiple dry years?	☐	☐	☐	☒	☐
c) Result in a determination by the wastewater treatment provider which serves or may serve the project that it has inadequate capacity to serve the project's projected demand in addition to the provider's existing commitments?	☐	☐	☐	☒	☐
d) Generate solid waste in excess of state or local standards, or in excess of the capacity of local infrastructure, or otherwise impair the attainment of solid waste reduction goals?	☐	☐	☐	☒	☐
e) Comply with federal, state, and local management and reduction statutes and regulations related to solid waste?	☐	☐	☐	☒	☐

D.12.a) and c) The project site is served by San Francisco's combined sewer system, which handles both sewage and stormwater runoff. The Southeast Treatment Plant and the Oceanside Treatment Plant provide wastewater and stormwater treatment and management for the city. Project related wastewater and stormwater currently flows into the city's combined sewer system and is treated to standards contained in the city's National Pollutant Discharge Elimination System Permit prior to discharge into the San Francisco Bay. The treatment and discharge standards are set and regulated by the Regional Water Quality Control Board.

As an ordinance, no specific projects are proposed at this time. Therefore, the proposed 2022 HCO Amendments would not directly result in an exceedance of wastewater treatment requirements. The 2022 HCO Amendments would also not conflict with the City's Green Building Ordinance.

D.12.b) As an ordinance, no specific projects are proposed at this time. The 2022 HCO Amendments would not result in an increase in the demand for water in San Francisco. Thus, the proposed project would have no impacts related to water supply.

D.12.d and e) The city disposes of its municipal solid waste at the Recology Hay Road Landfill, and that practice is anticipated to continue until 2025, with an option to renew the agreement thereafter for an additional six years. San Francisco Ordinance No. 27-06 requires mixed construction and demolition debris to be transported to a facility that must recover for reuse or recycling and divert from landfill at least 65 percent of all received construction and demolition debris. San Francisco's Mandatory Recycling and Composting Ordinance No. 100-09 requires all properties and persons in the city to separate their recyclables, compostables, and landfill trash.

The proposed project would not increase the total city waste generation as no development is proposed. Thus, the proposed project would have no impacts related to solid waste.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
13. PUBLIC SERVICES. Would the project:					
a) Result in substantial adverse physical impacts associated with the provision of new or physically altered governmental facilities, need for new or physically altered governmental facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times, or other performance objectives for any of the public services such as fire protection, police protection, schools, parks, or other public facilities?	☐	☐	☐	☒	☐

D.13.a) The San Francisco Police Department provides police services to residents, visitors and workers in the City and County from the following ten stations: Central, Southern, Bayview, Mission, North, Park, Richmond, Ingleside, Taraval, and the Tenderloin. Because the proposed project is an ordinance, no individual projects are proposed, and the 2022 HCO Amendments would not require new or physically altered governmental facilities such as police stations.

With respect to fire protection, the San Francisco Fire Department (SFFD) provides emergency services to the City and County of San Francisco. The SFFD consists of 42 engine companies, 19 truck companies, 20 ambulances, 2 rescue squads, 2 fire boats and 19 special purpose units. The engine companies are organized into 9 battalions. There are 41 permanently-staffed fire stations, and although the SFFD system has evolved over the years to respond to changing needs, the current station configuration has not changed substantially since the 1970s.

Implementation of the 2022 HCO Amendments would not conflict with the General Plan's Community Facilities Element pertaining to police facilities, nor would it conflict with the General Plan's "Principles for Fire Facilities," related to the siting of future fire stations. As such, the 2022 HCO Amendments would have no impact on police or fire services.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
14. BIOLOGICAL RESOURCES. Would the project:					
a) Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special-status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Wildlife or U.S. Fish and Wildlife Service?	☐	☐	☐	☒	☐
b) Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Wildlife or U.S. Fish and Wildlife Service?	☐	☐	☐	☒	☐
c) Have a substantial adverse effect on federally protected wetlands (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?	☐	☐	☐	☒	☐
d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?	☐	☐	☐	☒	☐
e) Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?	☐	☐	☐	☒	☐

D.14.a)-f) Implementation of the 2022 HCO Amendments would not conflict with existing or foreseeable conservation plans or programs that pertain to the protection of special status species or other natural resources, as no physical projects are proposed. Therefore, implementation of the 2022 HCO Amendments would not have a significant effect either directly or through habitat modifications, on any special status species, sensitive natural community, protected wetlands, or conflict with an adopted conservation plan. The 2022 HCO Amendments would not conflict with any local policies or ordinances protecting biological resources.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
15. GEOLOGY AND SOILS. Would the project:					
a) Directly or indirectly cause potential substantial adverse effects, including the risk of loss, injury, or death involving:					
i) Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.	☐	☐	☐	☒	☐
ii) Strong seismic ground shaking?	☐	☐	☐	☒	☐
iii) Seismic-related ground failure, including liquefaction?	☐	☐	☐	☒	☐
iv) Landslides?	☐	☐	☐	☒	☐
b) Result in substantial soil erosion or the loss of topsoil?	☐	☐	☐	☒	☐
c) Be located on geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction, or collapse?	☐	☐	☐	☒	☐
d) Be located on expansive soil, as defined in Table 18-1-B of the Uniform Building Code (1994), creating substantial direct or indirect risks to life or property?	☐	☐	☐	☒	☐
e) Have soils incapable of adequately supporting the use of septic tanks or alternative wastewater disposal systems where sewers are not available for the disposal of waste water?	☐	☐	☐	☐	☒
f) Directly or indirectly destroy a unique paleontological resource or site or unique geologic feature?	☐	☐	☐	☒	☐

CEQA does not require lead agencies to consider how existing hazards or conditions might impact a project's users or residents, except for specified projects or where the project would significantly exacerbate an existing environmental hazard.[48] Accordingly, hazards resulting from a project that places development in an existing or future seismic hazard area or an area with unstable soils are not considered impacts under CEQA unless the project would significantly exacerbate the seismic hazard or unstable soil conditions. Thus, the analysis below evaluates whether the proposed project would exacerbate future seismic hazards or unstable soils at the project site and result in a substantial risk of loss, injury, or death. The impact is considered significant if the proposed

48 California Building Industry Association v. Bay Area Air Quality Management District, December 17, 2015, Case No. S213478, http://www.courts.ca.gov.

project would exacerbate existing or future seismic hazards or unstable soils by increasing the severity of these hazards that would occur or be present without the project.

D.15.a)-d) Although the potential for seismic ground shaking and ground failure to occur within San Francisco is unavoidable, no structures or specific projects are proposed under the 2022 HCO Amendments that would significantly exacerbate seismic hazard or unstable soil conditions.

The 2022 HCO Amendments would not directly result in the construction of new facilities and, would therefore, have no impacts with respect to exacerbating the seismic hazard or unstable soil conditions.

D.15.e) The project would not necessitate connection to the city's existing sewer system. Therefore, septic tanks or alternative waste disposal systems would not be required, and this topic is not applicable to the project.

D.15.f) Paleontological resources include fossilized remains or traces of mammals, plants, and invertebrates, as well as their imprints. Such fossil remains as well as the geological formations that contain them are also considered a paleontological resource. Together, they represent a limited, non-renewable scientific and educational resource. The potential to affect fossils varies with the depth of disturbance, construction activities and previous disturbance.

The 2022 HCO Amendments not would not directly or indirectly result in the construction of new facilities. Therefore, impacts to paleontological resources would not be significant.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
16. HYDROLOGY AND WATER QUALITY. Would the project:					
a) Violate any water quality standards or waste discharge requirements or otherwise substantially degrade surface or groundwater quality?	☐	☐	☐	☒	☐
b) Substantially decrease groundwater supplies or interfere substantially with groundwater recharge such that the project may impede sustainable groundwater management of the basin?	☐	☐	☐	☒	☐
c) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river or through the addition of impervious surfaces, in a manner that would:					
i) Result in substantial erosion or siltation on- or offsite;	☐	☐	☐	☒	☐
ii) Substantially increase the rate or amount of surface runoff in a manner which would result in flooding on or offsite;	☐	☐	☐	☒	☐
iii) Create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff; or	☐	☐	☐	☒	☐

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
iv) Impede or redirect flood flows?	☐	☐	☐	☒	☐
d) In flood hazard, tsunami, or seiche zones, risk release of pollutants due to project inundation?	☐	☐	☐	☒	☐
e) Conflict with or obstruct implementation of a water quality control plan or sustainable groundwater management plan?	☐	☐	☐	☒	☐

D.16.a) The 2022 HCO Amendments do not include any physical projects that would conflict with existing policies, regulations or programs that pertain to water quality. As such, implementation of the 2022 HCO Amendments would have no significant impact with regard to degradation of water quality or contamination of public water supply, individually or cumulatively.

D.16.b) The project site is located within the boundaries of the South San Francisco Groundwater Basin.[49] This groundwater basin is not currently used as a water supply, nor are there plans for it to be used as a future water supply.[50] Implementation of the 2022 HCO Amendments would not directly result in the removal of water, either from the ground or other sources. Therefore, the 2022 HCO Amendments would result in no significant effects related to groundwater.

D.16.c) The 2022 HCO Amendments project does not include any physical projects that may directly or indirectly alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river.

D.16.d) The 2022 HCO Amendments would not involve any activities that could release pollutants due to project inundation because there would be no construction of any buildings or structures that could be inundated.

D.16.e) For the reasons discussed in topic D.16a, the project would not interfere with the San Francisco Bay water quality control plan. Further, the project site is not located within an area subject to a sustainable groundwater management plan and the project would not routinely extract groundwater supplies.

---

49 State of California Department of Water Resources, DWR Mapping Tool, https://sgma.water.ca.gov/webgis/index.jsp?appid=gasmaster&rz=true, Accessed June 12, 2019.

50 Torrey, Irina P., Bureau Manager, Bureau of Environmental Management, San Francisco Public Utilities Commission (SFPUC), letter correspondence with Jennifer McKellar, Environmental Planner, San Francisco Planning Department, August 24, 2018.

Topics:	Potentially Significant Impact	Less than Significant with Mitigation Incorporated	Less than Significant Impact	No Impact	Not Applicable
17. HAZARDS AND HAZARDOUS MATERIALS. Would the project:					
a) Create a significant hazard to the public or the environment through the routine transport, use, or disposal of hazardous materials?	☐	☐	☐	☒	☐
b) Create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment?	☐	☐	☐	☒	☐
c) Emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed school?	☐	☐	☐	☒	☐
d) Be located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Code section 65962.5 and, as a result, would it create a significant hazard to the public or the environment?	☐	☐	☐	☒	☐
e) For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard or excessive noise for people residing or working in the project area?	☐	☐	☐	☐	☒
f) Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan?	☐	☐	☐	☒	☐
g) Expose people or structures, either directly or indirectly, to a significant risk of loss, injury, or death involving wildland fires?	☐	☐	☐	☒	☐

D.17.a) The 2022 HCO Amendments do not identify site-specific projects for the City, and as such, no specific development projects are analyzed in this Initial Study. Therefore, potential impacts related to the routine use, transport, and disposal of hazardous materials would not be significant.

D.17.b and c) The following discusses the project's potential to emit hazardous materials.

Hazardous Building Materials

Some building materials commonly used in older buildings could present a public health risk if disturbed during an accident or during demolition or renovation of an existing building. Hazardous building materials could include asbestos, electrical equipment such as transformers and fluorescent light ballasts that contain PCBs or di (2 ethylhexyl) phthalate (DEHP), fluorescent lights containing mercury vapors, and lead-based paints. Asbestos and lead based paint may also present a health risk to existing building occupants if they are in a deteriorated condition. If removed during demolition of a building, these materials would also require special disposal procedures. Regulations are in place to address the proper removal and disposal of asbestos containing building

materials and lead based paint. Compliance with these regulations would ensure the proposed project would not result in significant impacts from the potential release of hazardous building materials.

Soil and Groundwater Contamination

Article 22A of the Health Code, also known as the Maher Ordinance, was expanded to include properties throughout the city where there is potential to encounter hazardous materials, primarily industrial zoning districts, sites with current or former industrial uses or underground storage tanks, sites with historic bay fill, and sites close to freeways or underground storage tanks. The Maher Ordinance, which is implemented by the San Francisco Department of Public Health, requires appropriate handling, treatment, disposal, and remediation of contaminated soils that are encountered in the building construction process. All projects in the city that disturb 50 cubic yards or more of soil that are located on sites with potentially hazardous soil or groundwater are subject to this ordinance. Some projects that disturb less than 50 cubic yards may also be subject to the Maher Ordinance if they propose to a change of use from industrial (e.g., gas stations, dry cleaners, etc.) to sensitive uses (e.g., residential, medical, etc.).

The 2022 HCO Amendments do not identify site-specific projects for the City, and as such, no specific development projects are analyzed in this Initial Study. Implementation of the 2022 HCO Amendments would not create a significant hazard through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment, and therefore this impact would not be significant.

D.17.d) The 2022 HCO Amendments do not identify site-specific projects for the City, and as such, no specific development projects are analyzed in this Initial Study. For the reasons described in the analysis of topic D.17.b and c, above, the proposed project would not create a significant hazard to the public or environment.

D.17.e) The project site is not located within an airport land use plan area or within 2 miles of a public airport. Therefore, topic 16.e is not applicable to the proposed project.

D.17.f) The 2022 HCO Amendments do not identify site-specific projects for the City, and as such, no specific development projects are analyzed in this Initial Study. The proposed project would not impair implementation of an emergency response or evacuation plan adopted by the City of San Francisco. The project would not close roadways or impede access to emergency vehicles or emergency evacuation routes. Thus, the proposed project would not obstruct implementation of the city's emergency response and evacuation plans, and potential impacts would not be significant.

D.17.g) Implementation of the 2022 HCO Amendments would not expose people or structures to a significant risk of loss, injury, or death involving fires, and would not interfere with the implementation of an emergency response plan. Therefore this impact would not be significant.

Appeal of PND

On November 8, 2022, Zacks, Freedman & Patterson, on behalf of Hotel des Arts, LLC, filed an appeal of the PND. On January 19, 2023, the planning department transmitted an appeal response to the planning commission (available as part of planning department case file no. 2020-005491ENV). On January 26, 2023, the planning commission held a public hearing on the appeal, rejected the appeal, and upheld the PND.

E. Determination

On the basis of this Initial Study:

☒ I find that the proposed project COULD NOT have a significant effect on the environment, and a NEGATIVE DECLARATION will be prepared.

☐ I find that although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions in the project have been made by or agreed to by the project proponent. A MITIGATED NEGATIVE DECLARATION will be prepared.

☐ I find that the proposed project MAY have a significant effect on the environment, and an ENVIRONMENTAL IMPACT REPORT is required.

☐ I find that the proposed project MAY have a "potentially significant impact" or "potentially significant unless mitigated" impact on the environment, but at least one effect (1) has been adequately analyzed in an earlier document pursuant to applicable legal standards, and (2) has been addressed by mitigation measures based on the earlier analysis as described on attached sheets. An ENVIRONMENTAL IMPACT REPORT is required, but it must analyze only the effects that remain to be addressed.

☐ I find that although the proposed project could have a significant effect on the environment, because all potentially significant effects (a) have been analyzed adequately in an earlier EIR or NEGATIVE DECLARATION pursuant to applicable standards, and (b) have been avoided or mitigated pursuant to that earlier EIR or NEGATIVE DECLARATION, including revisions or mitigation measures that are imposed upon the proposed project, no further environmental documentation is required.

Lisa Gibson
Environmental Review Officer
for
Rich Hillis
Director of Planning

DATE January 26, 2023

March 7, 2023

VIA ELECTRONIC SUBMISSION

President Aaron Peskin and Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

RE: Appeal of Negative Declaration (Board File No. 230240)
2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient use under Hotel Conversion Ordinance, Amortization Period
(Board File No. 220815)
(Planning Department Case No. 2020-005491ENV)

Dear President Peskin and Supervisors:

Our office represents Hotel des Arts, LLC (the "Appellant"). The Appellant filed a California Environmental Quality Act ("CEQA") appeal of the Preliminary Negative Declaration to the Planning Commission for the Hotel Conversion Ordinance Amendments on November 8, 2022. (See **Exhibit A**.) The Planning Commission denied the Appellant's appeal on January 26, 2023, and approved the Negative Declaration. The Appellant subsequently filed an appeal of the Final Negative Declaration ("FND") to the Board of Supervisors on February 24, 2023. (See **Exhibit B**.)

On March 1, 2023, the Planning Department issued an Appeal Timeliness Determination, which stated that the FND is not appealable. (See **Exhibit C**.) The Planning Department's determination is erroneous, inconsistent with the San Francisco Administrative Code, and deprives the Appellant of their right to a public hearing. Accordingly, we respectfully request the Board not take a final action on the ordinance, correct the Planning Department's determination, and schedule the FND appeal for a future Board of Supervisors hearing as required by the Administrative Code.

1. The Administrative Code Allows for Appeals Where the Board of Supervisors Takes a Final Approval Action

CEQA appeals are governed by Chapter 31, Section 31.16 of the San Francisco Administrative Code. The Code makes clear that CEQA appeals are permitted even when the

Board of Supervisors must take an action to approve a project. Section 31.16(b)(3) states: "For projects that require multiple City approvals, after the Clerk has scheduled the appeal for hearing and until the CEQA decision is affirmed by the Board, (A) the Board may not take action to approve the project but may hold hearings on the project and pass any pending approvals out of committee without a recommendation *for the purpose of consolidating project approvals* ***and*** *the CEQA appeal before the full Board*."

In other words, Section 31.16(b)(3) confirms that the full Board of Supervisors can hear CEQA appeals in addition to acting as the decision-making body that approves the project. The Board has, in fact, heard CEQA appeals for projects that the Board also acts as the final decision-making body, such as when the Board approves a Conditional Use Authorization and also hears a CEQA appeal of the same project. For example, this occurred for the project at 2001 37th Avenue (See Board Files 200992 and 200996, both heard by the Board on October 6, 2020).

2. The Administrative Code Requires the City to Provide the Public with the Right to Appeal an FND to the Full Board

Administrative Code Section 31.16(a) states that the following CEQA decisions may be appealed to the Board of Supervisors; "(1) certification of a final EIR by the Planning Commission; (2) *adoption of a negative declaration by the first decision-making body*; and (3) determination by the Planning Department or any other authorized City department that a project is exempt from CEQA." The Administrative Code clearly states that adoption of a negative declaration by the first decision-making body is appealable, without exception and regardless of which body is the first decision-making body.

Administrative Code Section 31.16(d)(1) similarly confirms that any person who has filed an appeal of a preliminary negative declaration with the Planning Commission "may appeal the Planning Commission's approval of the final negative declaration." Again, there is no exception for projects where the Board is the decision-making body. Administrative Code Section 31.11(h) also confirms that after a project is approved, a "public notice of the proposed action to adopt the negative declaration and take the Approval Action for the project *shall advise the public of its appeal rights to the Board of Supervisors with respect to the negative*

declaration following the Approval Action in reliance on the negative declaration." The Administrative Code clearly requires the City to provide the Public with a right to appeal an FND.

3. The Appellant Timely Filed an Appeal of the Hotel Conversion Ordinance FND.

Section 31.16(d)(2) states that an appellant "shall submit a letter of appeal to the Clerk of the Board after the Planning Commission approves the final negative declaration and within 30 days after the Date of the Approval Action for the project taken in reliance on the negative declaration." The Clerk of the Board confirms that Chapter 31.16 "allows for an appellant to file a negative declaration appeal after the Planning Commission approves a negative declaration--even if prior to the Date of the Approval Action--but the Clerk cannot process a negative declaration appeal until the Approval Action occurs. The Clerk will hold a negative declaration appeal filed before the Approval Action until the Planning Department advises the Clerk that the Date of Approval Action has occurred."

The Appellant filed an appeal of the Hotel Conversion Ordinance FND within 30 days of the Planning Commission approval and therefore the appeal is timely regardless of what constitutes the Approval Action for this project. The Appellant previously informed the City that the Hotel Conversion Ordinance is required to be reviewed by the Planning Commission pursuant to San Francisco Charter Section 4.105, which states that: "An ordinance proposed by the Board of Supervisors concerning zoning shall be reviewed by the Commission." The Hotel Conversion Ordinance clearly concerns zoning, and therefore should have been reviewed by the Planning Commission. That Planning Commission review of the ordinance *should* have constituted the first Approval Action, but this required procedural step was skipped. However, even if the City believes that the full Board's approval of the Hotel Conversion Ordinance constitutes the first Approval Action, the City must then process the Appellant's timely appeal after the Board takes action on the project.

San Francisco | 601 Montgomery Street, Suite 400, San Francisco, CA 94111 • Tel: (415) 956-8100 • Fax: (415) 288-9755
Oakland | 1970 Broadway, Suite 1270, Oakland, CA 94612 • Tel: (510) 469-0555
Soquel | 2805 Porter Street, Soquel, CA 95073 • Tel: (831) 309-4010
(Please respond to San Francisco Office) | www.zfplaw.com

4. The Appellant is Being Denied a Right to a Public Hearing and a Meaningful Opportunity to be Heard.

Section 31.16(b) requires a hearing on CEQA appeals before the full Board that is scheduled no less than 21 following the expiration of the time to appeal and requires the Clerk of the Board to provide no less than 14 days written notice to interested parties prior to the appeal hearing. Members of the public and appellants are allowed to submit written materials to the Board and testify at the hearing.

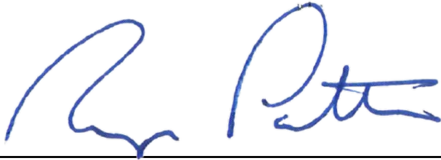
The Board is scheduled to adopt the ordinance at the March 7, 2023 Board meeting without a public hearing. No notice was provided to the Appellant. No opportunity to provide written materials was provided. No opportunity for public comment is being provided. In short, the Planning Department's determination that the FND is not appealable deprives the Appellant (and all other members of the public) their right to a public hearing in front of the full Board and denies the public a meaningful opportunity to be heard regarding the environmental impacts of the proposed ordinance. Accordingly, we respectfully request the Board correct the Planning Department's determination and schedule the FND appeal for a future Board of Supervisors hearing as required by the Administrative Code.

5. Conclusion

The Hotel Conversion Ordinance FND is clearly appealable pursuant to the Administrative Code and the Planning Department's determination otherwise is clearly erroneous and deprives the Appellant their right to public hearing. The Board must correct the Planning Department's determination and schedule the FND appeal for a future Board of Supervisors hearing. The Board should not take a final action to approve the ordinance until after the FND appeal is heard.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC



Ryan J. Patterson

EXHIBIT A

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

[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,

---

[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

[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.

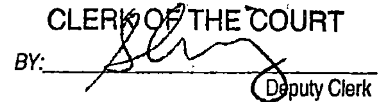
ironically put SRO units out of reach for the very sector of the population that the ordinance is apparently designed to protect – extremely-low-income residents. The 2022 HCO Amendments will unquestionably lead to increased vacancies, deferred maintenance, building closures, urban decay, and blight. 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



SEP 24 2019

CLERK OF THE COURT
BY: Deputy Clerk

1
2
3
4
5
6
7
8 SUPERIOR COURT OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
10 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

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

ANDREA RUIZ-ESQUIDE
DEPUTY CITY ATTORNEYS
CITY HALL, RM 234
1 DR. CARLTON GOODLETT PLACE
SAN FRANCISCO, CA 94102

ANDREW M. ZACKS
ZACKS, FREEDMAN & PATTERSON, P.C.
235 MONTGOMERY STREET
SUITE 400
SAN FRANCISCO, CA 94104

ARTHUR F. COON
MILLER STARR REGALIA
1331 N.CALIFORNIA BLVD.,
FIFTH FLOOR
WALNUT CREEK, CALIFORNIA 94596

EXHIBIT B

February 24, 2023

VIA ELECTRONIC SUBMISSION

President Aaron Peskin and Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

RE: Appeal of Negative Declaration
2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient use under Hotel Conversion Ordinance, Amortization Period
(Board of Commissioners File No. 22081)
(Planning Department Case No. 2020-005491ENV)

Dear President Peskin and Supervisors:

Our office represents Hotel des Arts, LLC (the "Appellant"). The purpose of this letter is to file an appeal, pursuant to San Francisco Administrative Code § 31.16(d), of the Planning Commission's approval of the Final Negative Declaration (FND) 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) (collectively the "Amendments") will have no significant effect on the environment. The Appellant filed an appeal of the Preliminary Negative Declaration on November 8, 2022 during the public comment period and therefore has standing to file this appeal. The Planning Commission denied the Appellant's appeal on January 26, 2023, and approved the FND.

The FND violates the California Environmental Quality Act (CEQA) because there is substantial evidence to support a fair argument that the Amendments will have a significant effect on the environment. Moreover, the Planning Department failed to disclose relevant information prior to the hearing, which constitutes a prejudicial abuse of discretion regardless of whether a different outcome would have resulted if the information had been properly disclosed. The Planning Commission's approval of the negative declaration therefore does not conform to the requirements of CEQA, and this Board should reverse the approval and remand the negative declaration to the Planning Department for additional review.

1. Substantial Evidence Supports a Fair Argument that the Amendments Will Have a Significant Effect on the Environment.

The San Francisco Superior Court 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 "Prior CEQA Actions") that similar proposed amendments, and the possibility of tenant displacement, fell within the definition of "project" under CEQA. In the Prior CEQA Actions, the Court found that it was reasonably foreseeable that a 30-day minimum stay would make residential rooms unaffordable to low-income tenants because tenants would be unable to prepay a month's rent plus a security deposit and that the resultant tenant displacement impacts were an environmental impact that must be analyzed. (See **Exhibit A**)

Under CEQA, an environmental impact report (EIR) is required, rather than a negative declaration, if there is even a "fair argument" that a proposed project *may* have any significant adverse environmental impacts. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.) The proposed project will likely have many significant environmental impacts that were not adequately addressed in the FND, and the FND largely ignores the significant impacts the project will have. The FND's conclusions are based on speculation, unsubstantiated narrative, and clearly erroneous and inaccurate assumptions that directly contradict the court's findings in the Prior CEQA Actions.

A. Population and Housing Impacts

The Amendments are likely to have population and housing impacts. The PND states that the Amendments are intended to preserve low-cost housing and eliminate the use of residential rooms by weekly tourists. (FND at p. 16.) However, the FND, by its own admission, *does not know* how many residents could be indirectly displaced by the adoption of the Amendments or which hotels would be affected. (*Id.*) The PND's failure to investigate these critical facts further undermines its conclusion that there is less than a significant impact. The PND summarily concludes that only 64 individuals would be affected by the Amendments, even though the data it relies on is "uncertain" and erroneous. This number is based on the total number of vacancies that SRO owners reported were directly due to the prior 2017 HCO Amendments, which clearly

underrepresents the true impact of the current Amendments.

The FND acknowledges that there is a low response rate to its "Annual Unit Usage Report" ("AUUR") survey, and the City has difficulty determining the actual SRO vacancy rate. Even though the underlying data only represents a fraction of the actual number of SRO units, the FND relies solely on the raw total numbers and does not extrapolate the raw total based on overall response rates. For example, the 2018 AUUR Survey includes data for 10,292 of the estimated 19,000 SRO residential units, a response rate of approximately 54%. The data shows that 2,176 units were reported vacant, a vacancy rate of 21%. To provide an accurate estimate of the actual number of vacant units, the reported vacancy rate of 21% must be extrapolated and applied to the total number existing units. If all 19,000 SRO units suffered from a 21% vacancy rate, the *actual* number of vacant units would be approximately 3,990 — nearly double the raw total number of *reported* vacancies. Thus, the FND's analysis that is based solely on raw totals significantly undercounts the total number of vacancies if *all* SROs were taken into account. The FND 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 words, SRO owners were not reporting vacancies due to the prior 2017 Amendments because the City was not enforcing, and SRO owners were complying with, the 32-day minimum stay requirement. If the City *does* enforce the current Amendments, the raw total number of displaced tenants would likely rise significantly.

Finally, 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.[1] According to the City's 2017 data, only seven of the 505 SRO owners provided a reason for their vacancies. In total, these seven SROs reported 104 vacancies, representing *less than 5%* of the total 2,314 reported vacancies for that year. In other words, the City does not have *any* data regarding the reasons for the other 2,214 vacancies, yet erroneously assumes that not a single one of these vacancies was

---

[1] 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.

due to the minimum stay requirements. This again shows that the raw total of *reported* vacancies due to the 2017 Amendments is far below the likely *total* number of vacancies that were actually caused by the prior 2017 Amendments.

In sum, the 64 reported vacancies due to the prior 2017 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 FND's assumption that this number is "conservative" is clearly erroneous. The City's own data demonstrates that displacement is *certain* to occur, and that the impact is clearly much more significant than analyzed in the FND.

The FND attempts to downplay the significance of the displacement that the Amendments may cause by stating that students, technology sector workers, and weekly transient tourists will make up part of the number of SRO occupants who would be displaced. With respect to students and technology workers, the 2025 Budget and Legislative Analyst Office analysis demonstrates that students and technology workers are definitively *not* part of the group of occupants who would be displaced by the Amendments. This report 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 Amendments, which will 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 FND fails to mention that the AUUR data *already* differentiates between residential guest rooms and tourist guest rooms.[2] Again, the City's own data demonstrates that displacement is certain to occur, and that the impact is clearly much greater than analyzed in the FND.

B. Urban Decay and Blight Impacts

The Amendments fail to conduct any analysis of urban decay or blight. The PND

---

[2] *See id.*

explicitly declines to conduct any analysis by claiming that these impacts are socioeconomic rather than environmental impacts. (PND at p. 10.) However, "[s]ocial and economic changes *must* be addressed under CEQA if they will cause changes in the physical environment." (*Chico Advocates for a Responsible Economy v. City of Chico* (2019) 40 Cal.App.5th 839, 847 [citing CEQA Guidelines, § 15131; emph. added].) There is a long line of case law establishing that urban decay or blight *must* be considered as an indirect environmental effect of a project. (*See Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1205-1208 [discussing relevant caselaw].)

The PND simply states that the Amendments would not lead to physical deterioration in the community because the City can continue to "enforce its laws, to clean up City streets, pursue affordable housing programs or construct homeless shelters, supportive housing and navigation centers, or to pursue nuisance abatement proceedings under its inherent police powers." (PND at p. 10.) However, it is clear that are insufficient resources to address the existing homelessness crisis in San Francisco as recent data shows that for every one household that the San Francisco Department of Homelessness and Supportive Housing is able to house, four households become newly homeless or return to homelessness.[3] Furthermore, the PND contains no analysis as to whether these alleged available resources are sufficient to address the potential displacement and resulting spillover effects resulting from the Amendments. Many occupants will not be able to pay the monthly costs, leaving more units vacant and the SROs unable to maintain their buildings. This will lead to building closures and result in urban decay and blight.

The data provided in the FND again obscures the potential impact of the Amendments by only discussing total vacancies, without analyzing vacancies for each type of unit (i.e. residential and tourist units). For example, in 2018 the 168-unit SRO at 54 4th Street reported 61 vacancies, a 36% vacancy rate. However, all 61 reported vacancies were in the SRO's 81 residential units, a

[3] *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.

75% vacancy rate for the residential SRO units. If this SRO were required to rent all 87 tourist units on a long-term basis as residential units and these units suffered from the same vacancy rate, the raw total number of vacant units would skyrocket from 61 vacant units to 126 vacant units. There would simply be no way that this SRO could continue to operate at a 75% vacancy rate, and would ultimately lead to the business ceasing to operate – and *all* existing tenants would be displaced. The FND again fails to adequately analyze the evidence in the record, and the FND's conclusion that the Amendments will not have an impact on vacancy rates, or result in urban decay and blight, is clearly erroneous.

Even the FND's flawed analysis demonstrates that vacancy rates have been steadily increasing, and the Amendments will only exacerbate this problem. Increased vacancy rates will inevitably lead to deferred maintenance, closures, increased homelessness, urban decay, and blight. The PND acknowledges the Amendments may potentially have social and economic impacts, but 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 Planning Department explicitly acknowledged in response to the PND appeal 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, but one which the FND fails to analyze. The fact that the FND explicitly acknowledges that these issues were specifically *not* analyzed confirms that the FND is inadequate.

C. *Land Use and Planning*

The Amendments are likely to have land use and planning impacts. In May 2022, Ordinance No. 050-22 went into effect, which, in part, modified the definition of group housing under the Planning Code to change the minimum length of stay from 7 days to 30 days. On July 7, 2022, the Zoning Administrator issued a letter of determination (record no. 2022-003800ZAD), confirming that this change did *not* apply to legally established existing group housing uses, because the length of occupancy is part of the definition of group housing and is

"*fundamental* to the use itself." Therefore, the Zoning Administrator determined that this fundamental change would only apply to *new* group housing units, and that existing group housing units could continue to operate as a nonconforming use.

Just like Ordinance No. 050-22, the Amendments here fundamentally change the entire category of land use by increasing minimum stay requirements. This change will completely and permanently disrupt the existing SRO use, and is entirely inconsistent with the intent of the existing SRO policies that were designed to protect existing businesses. The fundamental land use policy shift will have a significant impact on the preservation of SROs city-wide, and the FND should have evaluated these environmental impacts.

2. Failure to Disclose Relevant Information

CEQA states that "it is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented" may constitute a prejudicial abuse of discretion "regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (Pub. Res. Code § 21005) Any document relied upon by an agency in the preparation of an environmental document is part of the public record for that project. (*Id.* § 21167.6.)

The Appellant submitted an Immediate Disclosure Sunshine Ordinance and Public Records Act request to the Planning Department for the information cited and relied upon in the FND on December 1, 2022. Despite the fact that the information cited in the FND should have already been part of the public record, the Planning Department failed to respond to Appellant's request until January 26, 2023, *the morning of the Planning Commission hearing regarding the Appellant's PND appeal.* The response included nearly 1,000 pages of documents, including years of AUUR Survey data that the Department heavily relied upon in the FND. Multiple Commissioners raised concerns regarding the failure to disclose this relevant information and that it may have impacted the Appellant's ability to adequately prepare for the hearing. The City attorney erroneously told the Commissioners that the Appellant likely already had access to this information due to the prior litigation. This is undoubtedly false, as the vast majority of the AUUR Survey data was not even in existence at the time of the prior litigation.

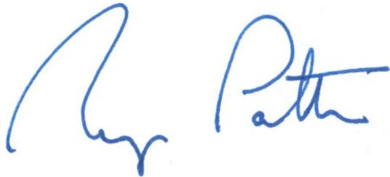
The FND's analyses and conclusions rely almost exclusively on the AUUR Survey data. The failure to disclose this information during the public comment period, and withholding this information until the morning, of the PND hearing not only violated the Public Records Act's disclosure requirement but prevented any meaningful review by the public and the Commissioners prior to adoption of the FND. This failure to disclose relevant information was a prejudicial abuse of discretion and failed to conform to the requirements of CEQA.

3. Conclusion

The FND violates CEQA because there is substantial evidence to support a fair argument that the Amendments will have a significant effect on the environment, and the failure to disclose relevant information constitutes a prejudicial abuse of discretion. The Planning Commission's approval therefore does not conform to the requirements of CEQA, and this Board should reverse the approval and remand the negative declaration to the Planning Department for additional review.

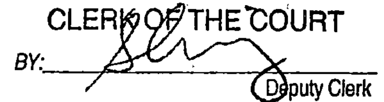
Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC



Ryan J. Patterson

EXHIBIT A



SEP 24 2019

CLERK OF THE COURT
BY: Deputy Clerk

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

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

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

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

17 On February 14, 2018, San Francisco completed its production in response to Petitioners'
18 revised and narrowed Public Records Act Requests. San Francisco's rolling production totaled nearly
19 40,000 pages from twelve City agencies, commissions or departments. (See Petitioners' CMC
20 Statement, filed March 27, 2018; Coon Decl., Exs. 27, 33.) Throughout this process, it became
21 apparent that the ambiguous and overbroad terminology of the third request produced too many
22 documents, some of which Petitioners acknowledged were not relevant to the litigation.

23 Petitioners argue that the filing of the lawsuit resulted in production of documents withheld.
24 The evidence indicates that with the filing of the PRA claim, the City Attorney's Office became the
25 point-persons to direct the search, aggregate response, assert privilege where appropriate, and
26 coordinate and communicate with the appropriate city agencies, since many agencies performed duties
27 unrelated to the issues in this litigation. However, Petitioners have not shown that there is "more than
28 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

ANDREA RUIZ-ESQUIDE
DEPUTY CITY ATTORNEYS
CITY HALL, RM 234
1 DR. CARLTON GOODLETT PLACE
SAN FRANCISCO, CA 94102

ANDREW M. ZACKS
ZACKS, FREEDMAN & PATTERSON, P.C.
235 MONTGOMERY STREET
SUITE 400
SAN FRANCISCO, CA 94104

ARTHUR F. COON
MILLER STARR REGALIA
1331 N.CALIFORNIA BLVD.,
FIFTH FLOOR
WALNUT CREEK, CALIFORNIA 94596

EXHIBIT C

San Francisco Planning

1650 MISSION STREET, SUITE 400
SAN FRANCISCO, CA 94103
SFPLANNING.ORG / 415.575.9010

FINAL NEGATIVE DECLARATION APPEAL TIMELINESS DETERMINATION

DATE: March 1, 2023
TO: Angela Calvillo, Clerk of the Board of Supervisors
FROM: Devyani Jain, Deputy Environmental Review Officer – (628) 652-7574

RE: **Appeal Timeliness Determination – BOS File 220815, 2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient Use under Hotel Conversion Ordinance; Amortization Period; Planning Department Case No. 2020-005491ENV**

On February 24, 2023, Ryan Patterson of Zacks, Freedman & Patterson, PC, representing Hotel des Arts, LLC (the "Appellant"), filed an appeal with the Office of the Clerk of the Board of Supervisors of the Final Negative Declaration for the proposed project. As explained below, because the Board of Supervisors is the approving decision-making body for this project, the Final Negative Declaration is not appealable to the Board of Supervisors in this case.

Date of Approval Action	30 Days after Approval Action	Appeal Deadline (Must Be Day Clerk of Board's Office Is Open)	Date of Appeal Filing	Timely?
To be determined	Not applicable	Not applicable	Friday, February 24, 2023	Not applicable; not appealable

Approval Action: On January 26, 2023 the Planning Department issued a Final Negative Declaration for the proposed project. Section 31.04(h) of the San Francisco Administrative Code defines Approval Action and Date of Approval Action. In this case, the Approval Action for the project is the Board of Supervisors' adoption of the ordinance amending Chapter 41 of the Administrative Code (BOS File 220815). This Approval Action has not yet occurred.

Appeal Timeliness: Because the Approval Action will be taken by the Board of Supervisors, the Final Negative Declaration is not appealable to the Board of Supervisors, and no timeliness determination is applicable.

Members of the public may comment on the Final Negative Declaration for the proposed ordinance (BOS File 220815). For information concerning the date and time of any associated Board of Supervisors hearing on the proposed ordinance and how to convey comments concerning the proposed ordinance, please contact the Office of the Clerk of the Board at (415) 554-5184.

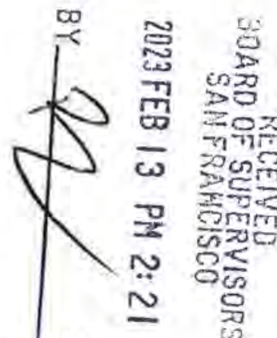
ZACKS, FREEDMAN & PATTERSON

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)

San Francisco | 601 Montgomery Street, Suite 400, San Francisco, CA 94111 · Tel: (415) 956-8100 · Fax: (415) 288-9755
East Bay | 1970 Broadway, Suite 1270, Oakland, CA 94612 · Tel: (510) 469-0555
Central Coast | 2805 Porter Street, Soquel, CA 95073 · Tel: (831) 309-4010
www.zfplaw.com | *Please direct correspondence to San Francisco office*

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

ARTHUR F. COON (Bar No. 124206)
BRYAN W. WENTER (Bar No. 236257)
MILLER STARR REGALIA
A Professional Law Corporation
1331 N. California Blvd., Fifth Floor
Walnut Creek, California 94596
Telephone: 925 935 9400
Facsimile: 925 933 4126
Email: arthur.coon@msrlegal.com
bryan.wenter@msrlegal.com

Attorneys for Petitioner and Plaintiff
SAN FRANCISCO SRO HOTEL COALITION

ANDREW M. ZACKS (Bar No. 147794)
SCOTT A. FREEDMAN (Bar No. 240872)
JAMES B. KRAUS (Bar No. 184118)
ZACKS, FREEDMAN & PATTERSON, P.C.
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415 956 8100
Facsimile: 415 288 9755
Email: az@zfplaw.com
scott@zfplaw.com
james@zfplaw.com

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

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
05/30/2017
Clerk of the Court
BY:BOWMAN LIU
Deputy Clerk

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

1 I, Andrew M. Zacks, declare as follows:

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

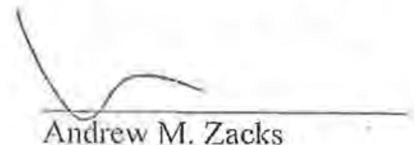
5 2. My office was primarily responsible for drafting this motion. Because of my
6 nearly 30 years experience with the HCO, I intended to take the lead in drafting this reply.
7 Unfortunately, last week my schedule was so impacted, I had to delegate responsibility to
8 my associate, James Kraus. I had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

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

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

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

27 Date: May 30, 2017



28 Andrew M. Zacks

ARTHUR F. COON (Bar No. 124206)
BRYAN W. WENTER (Bar No. 236257)
MILLER STARR REGALIA
A Professional Law Corporation
1331 N. California Blvd., Fifth Floor
Walnut Creek, California 94596
Telephone: 925 935 9400
Facsimile: 925 933 4126
Email: arthur.coon@msrlegal.com
bryan.wenter@msrlegal.com

Attorneys for Petitioner and Plaintiff
SAN FRANCISCO SRO HOTEL COALITION

ANDREW M. ZACKS (Bar No. 147794)
SCOTT A. FREEDMAN (Bar No. 240872)
JAMES B. KRAUS (Bar No. 184118)
ZACKS, FREEDMAN & PATTERSON, P.C.
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415 956 8100
Facsimile: 415 288 9755
Email: az@zfplaw.com
scott@zfplaw.com
james@zfplaw.com

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 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

1 I, Brent Haas, declare as follows:

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

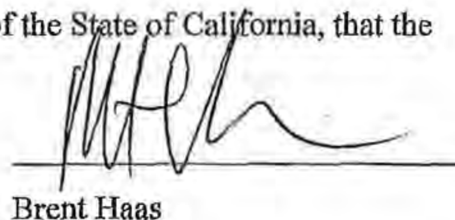
4 2. I am a hair stylist and visual artist. (www.brenthaas.com) I also care for
5 my elderly, widowed mother (age 82) who lives alone in Ohio. I moved to San Francisco
6 right after Loma Prieta in 1989. My father died about 30 years ago and I have been
7 visiting my mother regularly since. These visits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

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

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

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

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



26 Date: April 24, 2017

27 Brent Haas

28

ARTHUR F. COON (Bar No. 124206)
BRYAN W. WENTER (Bar No. 236257)
MILLER STARR REGALIA
A Professional Law Corporation
1331 N. California Blvd., Fifth Floor
Walnut Creek, California 94596
Telephone: 925 935 9400
Facsimile: 925 933 4126
Email: arthur.coon@msrlegal.com
bryan.wenter@msrlegal.com

Attorneys for Petitioner and Plaintiff
SAN FRANCISCO SRO HOTEL COALITION

ANDREW M. ZACKS (Bar No. 147794)
SCOTT A. FREEDMAN (Bar No. 240872)
JAMES B. KRAUS (Bar No. 184118)
ZACKS, FREEDMAN & PATTERSON, P.C.
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415 956 8100
Facsimile: 415 288 9755
Email: az@zfplaw.com
scott@zfplaw.com
james@zfplaw.com

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

ELECTRONICALLY
FILED
Superior Court of California, County of San Francisco
05/09/2017
Clerk of the Court
BY: CAROL BALISTRERI
Deputy Clerk

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 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 – Ø 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.

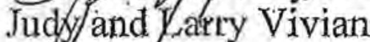
We want to thank you for your help and flexibility with a surgery we had no idea about, or how long Larry would be in the hospital. It took so much stress away with your flexability on our days in the hotel.

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,

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

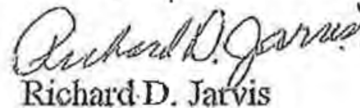
Hamed (sp?),

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

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 @ UBSF a little bit easier.

All the best,

Erik & Stephanie Schen
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

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 come Hamed had Eddie take us, in his car. to the emergency room.

Very special people
Regards
Lorraine Parriott

Mr Edardo Shrikamiri;

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 extermely 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

[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,

---

[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

---

[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

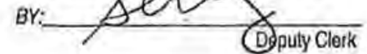
Brian O'Neill

EXHIBIT A

FILED
San Francisco County Superior Court

SEP 24 2019

CLERK OF THE COURT



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 <u>*Tourist or Transient Use*</u> ~~*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*~~ <u>*T*</u>~~*t*~~ourist <u>*or Transient*</u> 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*

1 *Use Com'n* (2007) 41 Cal.4th 372, 380.) The first tier is jurisdictional—that is, an agency must
2 "conduct a preliminary review to determine whether an activity is subject to CEQA." (*Muzzy Ranch,*
3 41 Cal.4th at 380; CEQA Guidelines[4] § 15060(c).) If an activity is not a "project," it is not subject to
4 CEQA. (*Id.*) At the second tier, if the agency has determined the proposed action is a CEQA
5 "project," it must determine whether it qualifies for any exemption from CEQA review. (*Id.*) If not,
6 the agency "must conduct an initial study to determine whether the project may have a significant
7 effect on the environment." (*Id.*; CEQA Guidelines § 15063(a).) If there is "no substantial evidence
8 that the project or any of its aspects may cause a significant effect on the environment,...the agency
9 must prepare a "negative declaration" that briefly describes the reasons supporting its determination."
10 (*Id.* at 380-81; CEQA Guidelines § 15063(b)(2).) At the third tier, "if the agency determines
11 substantial evidence exists that an aspect of the project may cause a significant effect on the
12 environment...the agency must ensure that a full environmental impact report is prepared on the
13 proposed project." (*Id.* at 381; CEQA Guidelines § 15063(b)(1).) Accordingly, no environmental
14 review under CEQA occurs if an agency determines an activity is not a project.
15 A "project" is "an activity which may cause either a direct physical change in the environment,
16 or a reasonably foreseeable indirect physical change in the environment, and which is any of the
17 following: (1) An activity directly undertaken by any public agency..." (Pub. Res. Code § 21065(a);
18 *see also* CEQA Guidelines § 15378(a)(1) [A "project" is "the whole of an action, which has a potential
19 for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect
20 physical change in the environment, and that is any of the following: (1) An activity directly
21 undertaken by any public agency including but not limited to . . . enactment and amendment of zoning
22 ordinances . . ."]; see also *Muzzy Ranch, supra*, 41 Cal.4th at 381 ["whether an activity constitutes a
23 project subject to CEQA is a categorical question respecting whether the activity is of a general kind
24 with which CEQA is concerned, without regard to whether the activity will actually have
25 environmental impact"].) CEQA "shall apply to discretionary projects proposed to be carried out or
26
27
28 [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

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

3 In summary, it is reasonably foreseeable that the 2017 HCO Amendments may lead to indirect
4 physical changes in the environment in the form of tenant displacement, and tenant displacement is the
5 general sort of activity with which CEQA is concerned. Accordingly, the Court finds that the
6 amended HCO is "project" and the City failed to proceed in the manner required by law in summarily
7 dispensing with CEQA review. The Court therefore grants the CEQA writ petition and orders the
8 issuance of a writ of mandate setting aside the City's adoption of the 2017 HCO Amendments pending
9 its compliance with CEQA.
10
11 **II. The Public Records Act Requests**

12 **A. Background**

13 Petitioners filed their verified FAP on August 23, 2017, adding the Sixth Cause of Action for
14 PRA violations and seeking a writ of mandate under Code of Civil Procedure Section 1085. They thus
15 "bear the burden of pleading and proving the facts on which the claim for relief is based." (*Cal.*
16 *Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153 (internal
17 citations omitted).)
18
19 Petitioners allege and argue that they were required to sue the City to obtain relevant public
20 records which they had requested and to which they are entitled under the PRA because the City had:
21 (1) refused to search for relevant and responsive records in all City departments possessing them;
22 (2) intentionally narrowly interpreted the scope of Petitioners' facially broad requests; (3) improperly
23 stopped producing responsive documents for over two months before Petitioners filed their FAP
24 alleging the PRA claim; and (4) ultimately and belatedly provided a large number of previously
25 withheld responsive documents (many of which became part of the certified Administrative Record on
26 the CEQA claim) after the PRA claim was filed. (Coon PRA decl. at ¶¶ 18-25, 36-37.) Petitioners
27
28

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.

1 (*Id.* at Ex. 3.) The request also stated "Please note, we are only seeking records prepared, owner, used,
2 retained, created, received, or exchanged by the City since January 1, 2016. In the case of Supervisor
3 Peskin, however, we are seeking records dating from December 8, 2015." (*Id.*)
4 In response, the custodian of records from DBI contacted counsel asking for clarification
5 regarding the scope of the request and, on April 4, 2017, provided a first production to the requestor,
6 followed by a second and final production on June 6, 2017. (*Id.* at Exs. 4 and 5.) The custodian
7 indicated on June 6, 2017 that parts of the record had been redacted where they were "legally required
8 to do so to protect the privacy interests of individuals" under California Constitution, Article I, section
9 1 and California Government Code sections 6254(k) and 6254(c), and that attorney-client privileged
10 records had been withheld. (*Id.* at Ex. 5.) The custodian further stated "We have finished conducting
11 our search and found no other documents responsive to your request. Therefore, we consider your
12 request closed." (*Id.*)
13
14 On July 12, 2017, counsel for Petitioners submitted a third records request to the records
15 managers for the Board of Supervisors and Department of Building Inspections, asserting that the
16 City's productions to date were inadequate, and objected to duplications and the redactions by DBI.
17 (*Id.* at Ex. 6.) The request exponentially increased the chronological scope by requesting documents
18 over a 36-year period, cast a wider net to non-specified City agencies, and added categories of
19 requested information including homelessness. It was somewhat ambiguous in terminology and
20 lacked distinct parameters. Among the new requests, Petitioners sought the following:
21
22
23 - All writings that address or relate to displacement of persons from SRO hotels since the adoption of the HCO in 1981
24 - 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
25 - 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
26
27
28

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

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

9 As of mid-August 2017, the City had produced a total of 2,500 pages of responsive documents
10 and efforts continued to fulfill the requests in a "rolling production" process. Subsequently, on August
11 23, 2017, Petitioners filed their "First Amended and Supplemental Verified Petition for Writ of
12 Mandate; Complaint for Declaratory and Injunctive Relief For Takings, Denial of Due Process, and
13 Denial of Equal Protection," which added a Sixth Cause of Action seeking a writ of mandamus for
14 violations of the California Public Records Act – Government Code sections 6258 and 6259, and Code
15 of Civil Procedure section 1085. (FAP at 20.)

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

24 On September 6, 2017, the Deputy City Attorney Ruiz-Esquide wrote to Petitioner indicating
25 readiness to certify the administrative record, explaining previous hesitancy to do so because of the
26 "broad and evolving document requests to city agencies, explicitly stating that Petitioners seek
27 additional documents for inclusion in the administrative record." (*Id.* at Ex. 18.) Two days later, on
28 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.

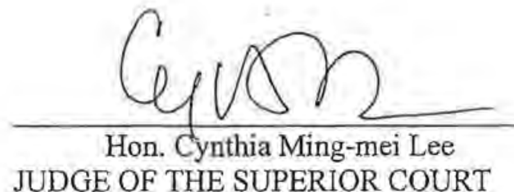
In light of this Court's Order setting aside the challenged 2017 HCO Amendments on CEQA grounds, Petitioners' Second through Fifth Causes of Action seeking to invalidate the Ordinance on constitutional due process, equal protection and takings grounds are now moot. The Court need not reach and decide 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

ANDREA RUIZ-ESQUIDE
DEPUTY CITY ATTORNEYS
CITY HALL, RM 234
1 DR. CARLTON GOODLETT PLACE
SAN FRANCISCO, CA 94102

ANDREW M. ZACKS
ZACKS, FREEDMAN & PATTERSON, P.C.
235 MONTGOMERY STREET
SUITE 400
SAN FRANCISCO, CA 94104

ARTHUR F. COON
MILLER STARR REGALIA
1331 N.CALIFORNIA BLVD.,
FIFTH FLOOR
WALNUT CREEK, CALIFORNIA 94596

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)

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

ARTHUR F. COON (Bar No. 124206)
BRYAN W. WENTER (Bar No. 236257)
MILLER STARR REGALIA
A Professional Law Corporation
1331 N. California Blvd., Fifth Floor
Walnut Creek, California 94596
Telephone: 925 935 9400
Facsimile: 925 933 4126
Email: arthur.coon@msrlegal.com
bryan.wenter@msrlegal.com

Attorneys for Petitioner and Plaintiff
SAN FRANCISCO SRO HOTEL COALITION

ANDREW M. ZACKS (Bar No. 147794)
SCOTT A. FREEDMAN (Bar No. 240872)
JAMES B. KRAUS (Bar No. 184118)
ZACKS, FREEDMAN & PATTERSON, P.C.
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415 956 8100
Facsimile: 415 288 9755
Email: az@zfplaw.com
scott@zfplaw.com
james@zfplaw.com

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

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
05/30/2017
Clerk of the Court
BY:BOWMAN LIU
Deputy Clerk

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.

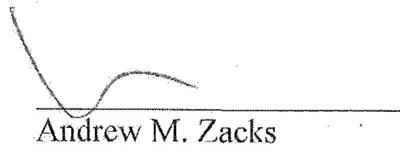
2. My office was primarily responsible for drafting this motion. Because of my nearly 30 years experience with the HCO, I intended to take the lead in drafting this reply. Unfortunately, last week my schedule was so impacted, I had to delegate responsibility to my associate, James Kraus. I had to attend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

ARTHUR F. COON (Bar No. 124206)
BRYAN W. WENTER (Bar No. 236257)
MILLER STARR REGALIA
A Professional Law Corporation
1331 N. California Blvd., Fifth Floor
Walnut Creek, California 94596
Telephone: 925 935 9400
Facsimile: 925 933 4126
Email: arthur.coon@msrlegal.com
bryan.wenter@msrlegal.com

Attorneys for Petitioner and Plaintiff
SAN FRANCISCO SRO HOTEL COALITION

ANDREW M. ZACKS (Bar No. 147794)
SCOTT A. FREEDMAN (Bar No. 240872)
JAMES B. KRAUS (Bar No. 184118)
ZACKS, FREEDMAN & PATTERSON, P.C.
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415 956 8100
Facsimile: 415 288 9755
Email: az@zfplaw.com
scott@zfplaw.com
james@zfplaw.com

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 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

SFSR\54041\1095736.1

1 I, Brent Haas, declare as follows:

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

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

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

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

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

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

26 Date: April 24, 2017

27 Brent Haas

28

ELECTRONICALLY
FILED
Superior Court of California, County of San Francisco
05/09/2017
Clerk of the Court
BY: CAROL BALISTRERI
Deputy Clerk

ARTHUR F. COON (Bar No. 124206)
BRYAN W. WENTER (Bar No. 236257)
MILLER STARR REGALIA
A Professional Law Corporation
1331 N. California Blvd., Fifth Floor
Walnut Creek, California 94596
Telephone: 925 935 9400
Facsimile: 925 933 4126
Email: arthur.coon@msrlegal.com
bryan.wenter@msrlegal.com

Attorneys for Petitioner and Plaintiff
SAN FRANCISCO SRO HOTEL COALITION

ANDREW M. ZACKS (Bar No. 147794)
SCOTT A. FREEDMAN (Bar No. 240872)
JAMES B. KRAUS (Bar No. 184118)
ZACKS, FREEDMAN & PATTERSON, P.C.
235 Montgomery Street, Suite 400
San Francisco, CA 94104
Telephone: 415 956 8100
Facsimile: 415 288 9755
Email: az@zfplaw.com
scott@zfplaw.com
james@zfplaw.com

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 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:

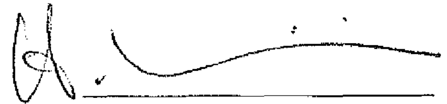
1. I am over the age of 18 years. I have personal knowledge of the following facts and could testify truthfully thereto if called to do so.

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 – Ø 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

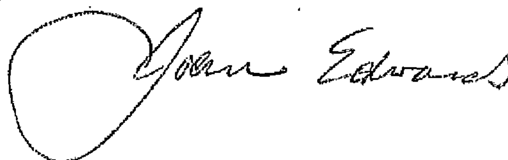
May 26, 2010

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,



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

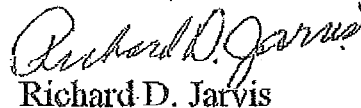
Hamed (sp?),

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

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

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 Parriott

Mr Edardo Shrihamiri,

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 extermly 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

[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,

---

[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

[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,

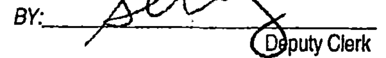
ZACKS, FREEDMAN & PATTERSON, PC

Brian O'Neill

EXHIBIT A

FILED
San Francisco County Superior Court

SEP 24 2019

CLERK OF THE COURT
BY: 
Deputy Clerk

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

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

5 In the original HCO, a unit's designation as "residential" or "tourist" was determined as of
6 September 23, 1979, by its occupancy status according to definitions contained in the HCO. (AR
7 1428-49 at §41.4.) The HCO required single room occupancy ("SRO") hotels in San Francisco to
8 report all residential and tourist units in a hotel as of September 23, 1979. (AR 1433 at § 41.6.)
9 Residential units were then placed on a registry, and a hotel owner could convert residential units into
10 tourist units only by obtaining a conversion permit from the Department of Building Inspection
11 ("DBI").[1] (*Id.* at §§ 41.4 [definition of Conversion]; 41.12 [Permit to Convert]; 41.16 [Unlawful
12 Conversion; Remedies; Fines].) To obtain a conversion permit, applicants were required to construct
13 new residential units, rehabilitate old ones, or pay an "in lieu" fee into the City's Residential Hotel
14 Preservation Fund Account. (*Id.* at §41.10.)

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

20 When the City adopted the original HCO in 1981, it determined there was no possibility the
21 ordinance would have a significant impact on the environment. (AR 1454.) The trial court disagreed
22 and found the requirement of one-for-one replacement of residential units "creates the very real
23 possibility of a significant environmental impact." (*Id.*) While the trial court case was pending on
24 appeal, the City performed an initial study on the original HCO and, on April 15, 1983, issued a
25 preliminary negative declaration concluding that the HCO could not have a significant impact on the
26
27

28 [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.

1 **CONCLUSION**

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

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

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

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

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

24 IT IS SO ORDERED.

25

26 Dated: 9/24/19

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

28

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

ANDREA RUIZ-ESQUIDE
DEPUTY CITY ATTORNEYS
CITY HALL, RM 234
1 DR. CARLTON GOODLETT PLACE
SAN FRANCISCO, CA 94102

ANDREW M. ZACKS
ZACKS, FREEDMAN & PATTERSON, P.C.
235 MONTGOMERY STREET
SUITE 400
SAN FRANCISCO, CA 94104

ARTHUR F. COON
MILLER STARR REGALIA
1331 N.CALIFORNIA BLVD.,
FIFTH FLOOR
WALNUT CREEK, CALIFORNIA 94596

BOARD of SUPERVISORS

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689
Tel. No. (415) 554-5184
Fax No. (415) 554-5163
TDD/TTY No. (415) 554-5227

MEMORANDUM

TO: Patrick O'Riordan, Interim Director, Department of Building Inspection
Sonya Harris, Commission Secretary, Building Inspection Commission

FROM: Erica Major, Assistant Clerk, Land Use and Transportation Committee

DATE: July 20, 2022

SUBJECT: LEGISLATION INTRODUCED

The Board of Supervisors' Land Use and Transportation Committee has received the following proposed legislation, introduced by Supervisor Peskin on July 20, 2022:

File No. 220815

Ordinance amending the Administrative Code to add a definition of Tourist or Transient Use under the Residential Hotel Unit Conversion and Demolition Ordinance; to set the term of tenancy for such use at less than seven days, for two years after the effective date of this Ordinance, and, after that two-year period, at less than 30 days; to provide an amortization period applicable to hotels currently regulated under the Ordinance; to provide a process by which the owners or operators of regulated hotels can request that the amortization period be longer, on a case-by-case basis; to amend the definition of Permanent Resident, from a person who occupies a room for at least 32 days to one who occupies a room for at least 30 days; and affirming the Planning Department's determination under the California Environmental Quality Act.

If you have comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102 or by email at: erica.major@sfgov.org.

cc: Patty Lee, Department of Building Inspection
Jeff Buckley, Department of Building Inspection

BOARD of SUPERVISORS

City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689
Tel. No. (415) 554-5184
Fax No. (415) 554-5163
TDD/TTY No. (415) 554-5227

July 20, 2022

File No. 220815

Lisa Gibson
Environmental Review Officer
Planning Department
49 South Van Ness Avenue, Suite 1400
San Francisco, CA 94103

Dear Ms. Gibson:

On July 12, 2022, Supervisor Peskin introduced the following legislation:

File No. 220815

Ordinance amending the Administrative Code to add a definition of Tourist or Transient Use under the Residential Hotel Unit Conversion and Demolition Ordinance; to set the term of tenancy for such use at less than seven days, for two years after the effective date of this Ordinance, and, after that two-year period, at less than 30 days; to provide an amortization period applicable to hotels currently regulated under the Ordinance; to provide a process by which the owners or operators of regulated hotels can request that the amortization period be longer, on a case-by-case basis; to amend the definition of Permanent Resident, from a person who occupies a room for at least 32 days to one who occupies a room for at least 30 days; and affirming the Planning Department's determination under the California Environmental Quality Act.

This legislation is being transmitted to you for environmental review.

Angela Calvillo, Clerk of the Board

By: Erica Major, Assistant Clerk
Land Use and Transportation Committee

Attachment

c: Joy Navarrete, Environmental Planning
Don Lewis, Environmental Planning