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BOARD OF SUPERVISORS
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BY

Board President David Chiu and Board of Supervisors
c/o Ms. Angela Calvillo
Clerk of the Board of Supervisors
City of San Francisco
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Re: Argument in Support of Appeal of Department of Public Works approval of Subdivision Map for Project 7970 relating to Block 3706, Lots 275, 277,093 and 706 Mission Street - Residential Tower and Mexican Museum Project.

Dear President Chiu and Supervisors:

This office represents the 765 Market Street Residential Owners Association ("ROA"), the Friends of Yerba Buena ("FYB"), Paul Sedway, Ron Wornick, Matthew Schoenberg, Joe Fang, and Margaret Collins (collectively "Appellants") in their appeal of the Department of Public Works' approval of a subdivision map for Project 7970 relating to Block 3706, Lots 275, 277, 093 and 706 Mission Street - Residential Tower and Mexican Museum Project ("the Project").

Introduction

The grounds for this appeal are that the City cannot approve this tentative subdivision map because it is a project subject to the California Environmental Quality Act ("CEQA") and the City has not yet complied with CEQA; and because the tentative subdivision map is for a project that violates a number of provisions of the State Planning and Zoning Law and the San Francisco Planning Code and is inconsistent with the San Francisco Master Plan. (See Government Code sections 66473.5, 66474; San Francisco Planning Code section 101.1.)

The County Surveyor has made no determination of record regarding the Project's compliance with CEQA, nor has any other City decision-maker. CEQA cannot simply be ignored.

The County Surveyor has not made any findings regarding the adequacy of the environmental impact report prepared for this project. Despite the Board of Supervisors' prior certification of the EIR for this project, the County Surveyor's approval of this subdivision map is a new discretionary decision pursuant to CEQA Guidelines 15090(a)(2). There is no evidence that the final EIR was presented to the County Surveyor, or that the County Surveyor reviewed and considered the information contained in the EIR prior to approving this subdivision map for this Project.

Nor has the County Surveyor complied with San Francisco Administrative Code section

31.17, subdivision (b), which requires that "Before making its decision whether to carry out or approve the project, the decision-making body or appellate body shall review and consider the information contained in the EIR and shall make findings as required by CEQA" or subdivision (c), which provides that "Thereafter, the decision-making body or appellate body may make its decision whether to carry out or approve the project."

Nor has the County Surveyor made the findings required by Public Resources Code section 21081 or CEQA Guidelines 15090 through 15093, which are required here because the Project EIR identified a number of significant adverse environmental effects of the Project.

The Planning Department will presumably take the position that "since certification of the EIR, there is no new information of substantial importance raised by Appellants or that has otherwise come to light under CEQA Guidelines Section 15162." This is incorrect because there is new, "post-certification" information requiring preparation of a subsequent or supplemental EIR under Public Resources Code section 21166 and CEQA Guideline 15162, including subdivision (a)(3)(c) of section 15162 ["Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative"]. For example:

- As discussed in paragraph 26.b below, information presented by the Project Sponsor after certification of the EIR (i.e., the May 8, 2013, "EPS Report") shows there are feasible alternative tower heights higher than 351 feet but lower than 520 feet. Therefore, the City cannot lawfully make the finding that there are no feasible mitigation measures that would "substantially lessen" the significant cumulative show impact on Union Square.

- Also, as discussed in paragraph 26.c and d below, information presented by Appellant's after certification of the EIR (i.e., the June 28, 2013, "Sussman Report") shows that a tower height of 351 feet is financially feasible and the EPS Report's analysis and conclusion that the Reduced Shadow Alternative is not financially feasible does not constitute substantial evidence supporting the City's finding because it is "clearly inadequate or unsupported." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409.

To the extent the County Surveyor is relying on the Project EIR previously certified by the Planning Commission on March 21, 2013, and the Board of Supervisors on May 7, 2013, that reliance is misplaced because the EIR is defective.

Appellants have previously argued all of their grounds for appeal in detail in previous submissions to various City agencies, including this Board. Therefore, this letter will briefly summarize these arguments and provide cross-references to the previously submitted letters and briefs where these arguments are presented in more detail. This letter also lists, below, all of these previously submitted letters and briefs. Appellants also submit herewith copies of all of these previously submitted letters and briefs, in both paper and electronic (DVD) formats. These previously submitted letters and briefs are incorporated herein by this reference.

Summary of Grounds and Arguments

1. The approval does not comply with CEQA for all the reasons described in my clients prior appeal of the EIR for this Project, which is Board of Supervisors File No. 130308. These legal violations arise in connection with a number of areas of environmental impact, including the following.

Air Quality

2. **Impact AQ-1.** Impact AQ-1 analyzes the significance of the Project's construction phase air quality impacts against "Thresholds of Significance" G2 and G3. Threshold of Significance G2 is "violate any air quality standard or contribute substantially to an existing or projected air quality violation." The assessment is based on numerical standards previously established by the Bay Area Air Quality Management District (BAAQMD) for the ozone precursors: Reactive Organic Gases (ROG) at 54 lbs/day and Nitrogen Oxides (NOx) at 54 lbs/day; and for Exhaust Particulate Matter 10 (PM10) at 82 lbs/day and Exhaust Particulate Matter 2.5 (PM2.5) at 54 lbs/day. The EIR's analysis of these impacts fails as an informational document for several reasons.

a. The EIR fails to inform the public that the BAAQMD no longer recommends that public agencies use its numerical thresholds to determine the significance of air quality impacts.

b. The City of San Francisco uses these numerical thresholds for virtually all land use development projects in the city that require CEQA review. Therefore, the City was required, but failed, to undertake its own rule-making proceeding to adopt these thresholds as its own and determine in a public process that they are supported by substantial evidence. (CEQA Guideline, § 15064.7.) Since the City has not formally adopted the air quality significance thresholds in a public process supported by substantial evidence, it failed to proceed in the manner required by law by using these thresholds on an ad hoc basis in this EIR.

c. The EIR fails to specify the evidence that purportedly constitutes "substantial evidence" supporting its use of these numerical thresholds.

d. The evidence provided by BAAQMD's source documents cited in the EIR does not constitute "substantial evidence" supporting the City's use of these numerical thresholds.

e. The EIR's assumption that these thresholds are appropriate for the purpose for which they are used is logically and legally flawed. Using the EIR's logic, if the City finds that one project will add 46 lbs/day of ozone precursors, it is considered a less-than-significant impact, but if that project will add 55 lbs/day of ozone precursors, it is considered significant. Yet, if the City approved 2 new large projects in the area in the same 2- or 3-year period that construction of such large projects takes, each emitting 46 lbs/day of ozone precursors, it is considered a less-than-significant impact even though the total of the two added together

equals 92 lbs/day of ozone precursors. This scenario is not hypothetical; it is unfolding in San Francisco, with the many large construction projects the City has recently approved and is considering approving in the downtown area that will be under construction at the same time. As a result, the thresholds violate a fundamental CEQA principal that regardless of whether projects' incremental impacts are deemed insignificant in isolation, they may be cumulatively significant.

f. The San Francisco Bay Area Air Quality District is in "non-attainment" status under federal and state clean air laws for criteria pollutants. This project, along with many others, will substantially contribute to that existing significant adverse impact. The City's untenable position is that public agencies in the Air Basin can approve project after project, each emitting, for example, up to 54 lbs/day of new and additional ozone precursors, without ever causing a cumulatively considerable increase in air pollution. This approach runs counter to the reason for conducting cumulative impact analysis. If the City (and other agencies in the Air Basin) continues to find that projects that make air quality worse - when it is already significantly degraded - do not have a significant adverse cumulative impact on air quality, then the City will have no legal obligation to adopt feasible mitigation measures to reduce the significant cumulative impact.

g. The DEIR's use of the BAAQMD thresholds of significance is erroneous as a matter of law for several other reasons:[1]

(1) The EIR cannot merely reference a project's compliance with another agency's regulations. Lead agencies must conduct their own fact-based analysis of project impacts, regardless of whether the project complies with other regulatory standards. The EIR uses BAAQMD's thresholds of significance uncritically, without any factual analysis of its own, in violation of CEQA;[2]

(2) This uncritical application of the BAAQMD's thresholds of significance represents a failure of the City to exercise its independent judgement in preparing the EIR;[3]

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[1] *Endangered Habitats League v County of Orange* (2005) 131 Cal.App.4th 777, 793 ("The use of an erroneous legal standard [for the threshold of significance in an EIR] is a failure to proceed in the manner required by law that requires reversal.").

[2] *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 [underscore emphasis added], citing *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 114 ("*CBE*"); accord *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342 ["A threshold of significance is not conclusive ... and does not relieve a public agency of the duty to consider the evidence under the fair argument standard."].)

[3] *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446.

(3) Just as disagreement from another agency does not deprive a lead agency of discretion under CEQA to judge whether substantial evidence supports its conclusions,[4] agreement from another agency does not relieve a lead agency of separately discharging its obligations under CEQA;

(4) The BAAQMD CEQA Guidelines do not provide any factual explanation as to why the 54 lbs. per day standard represents an appropriate threshold of significance for judging the significance of project-level ozone pollution impacts. More importantly, the DEIR also fails to include any such explanation, and is therefore inadequate as a matter of law;[5] and

(5) Compliance with other regulatory standards cannot be used under CEQA as a basis for finding that a project's effects are insignificant, nor can it substitute for a fact-based analysis of those effects.[6]

h. The grounds described in this paragraph are described in more detail in:

(1) Appellants' April 28, 2013, comment letter submitted on the Project to the Board of Supervisors; and

(2) Appellants' May 7, 2013, comment letter submitted on the Project to the Board of Supervisors.

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[4] *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.

[5] *Santiago County Water Dist. v. County of Orange*, *supra*, 118 Cal.App.3d 818.

[6] *See*, e.g., *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 (lead agencies must review the site-specific impacts of pesticide applications under their jurisdiction, because "DPR's [Department of Pesticide Regulation] registration does not and cannot account for specific uses of pesticides..., such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like"); *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1587-1588 (state agency applying pesticides cannot rely on pesticide registration status to avoid further environmental review under CEQA); *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882 (rejects contention that project noise level would be insignificant simply by being consistent with general plan standards for the zone in question). *See also City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325, 1331-1332 (EIR required for construction of road and sewer lines even though these were shown on city general plan); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712-718 (agency erred by "wrongly assum[ing] that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the overall project would not cause significant effects to air quality.").

3. **Mitigation Measure M-AQ-1.** The EIR defers the development of mitigation measures to reduce significant diesel particulate and toxic air contaminant emissions to "less than significant" to the post-approval preparation and "approval" of a "Construction Emission Minimization Plan." But the EIR presents no evidence suggesting that developing this Plan now is impractical or infeasible; therefore, this procedure violates CEQA.

a. As a result, mitigation measures intended to reduce diesel particulate and toxic air contaminant emissions to "less than significant" are not detailed enough to be enforceable or effective. For example, the Construction Emission Minimization Plan:

(1) Does not specify how vehicles with lower-emitting engines or Verified Diesel Emissions Control Strategies (VDECS) technologies will be confirmed as acceptable, either in advance or during the project's three year building period;

(2) Does not specify how idling time of diesel equipment onsite will be limited to no more than two minutes at a time;

(3) Does not define the term "feasible for use" as used in Mitigation Measure M-AQ-1's measure "Requiring use of Interim Tier 4 or Tier 4 equipment where such equipment is available and feasible for use" (See EIR, Appendix G, pg. 27); and

(4) Does not disclose the basis for the EIR's conclusion that the Construction Emission Minimization Plan will reduce construction period diesel emissions by 65%.

b. The Construction Emission Minimization Plan is to be reviewed by an "Environmental Planning Air Quality Specialist." The qualifications of this Specialist are undefined. These qualifications include intimate familiarity with diesel engines, construction vehicles and equipment, VDECS technologies, new and used construction vehicles and emission control options, and air regulations. With no assurance that this specialist will have the required qualifications, the success of this yet to be developed plan cannot be assumed.

c. Therefore, the EIR fails as an informational document with respect to the City's obligation to identify mitigation measures in the EIR that will substantially reduce the Project's potentially significant impacts from increased diesel particulate and toxic air contaminant emissions; and the EIR's conclusion that Mitigation Measure M-AQ-1 will reduce significant diesel particulate and toxic air contaminant emissions to "less than significant" is unsupported.

d. The grounds described in this paragraph are described in more detail in:

(1) Appellants' April 28, 2013, comment letter submitted on the Project to the Board of Supervisors; and

(2) Appellants' May 7, 2013, comment letter submitted on the Project to the Board of Supervisors.

Historic Resources

4. The Project will demolish part of the Aronson Building and construct a residential tower where the part to be demolished is located. The tower will be physically attached to and programmatically integrated with the Aronson building. Pursuant to San Francisco Planning Code Article 11, Appendix F, the Aronson Building is a Category I Significant Building and the Aronson Building parcel is within the New Montgomery-Mission-Second Conservation ("NMMS") District. Because the Project involves "construction, alteration, removal or demolition of a structure ... or any new or replacement construction for which a permit is required pursuant to the Building Code, on any designated Significant or Contributory Building or any building in a Conservation District" (Planning Code § 1111(a)), the developer must obtain permits from the San Francisco Historic Preservation Commission for the entire Project. The EIR fails as an informational document with respect to the Project's impacts on historic resources for many reasons.

5. The EIR fails to inform the public that the Historic Preservation Commission has permitting jurisdiction over the Project, that the Project requires a Permit to Alter from the San Francisco Historic Preservation Commission to protect historic and cultural resources, and that the Project must comply with substantive historic and cultural resource protection requirements of San Francisco Planning Code Article 11, including:

a. Planning Code section 1111.6(c)(6), which provides that any additions to height of a Category I Significant Building such as the Aronson Building, "shall be limited to one story above the height of the existing roof." The Project will increase the height of the Aronson Building by 39 stories;

b. Planning Code section 1111.6(c)(6), which provides that any additions to height of a Category I Significant Building such as the Aronson Building, "shall be compatible with the scale and character of the building." The Aronson Building is a 10-story, 154 foot high building (144 feet to the roof of the highest occupied floor plus a 10-foot-tall mechanical penthouse); the Project is approximately 40 floors and 510 feet high (480 feet to the roof of the highest occupied floor plus a 30-foot-tall elevator/mechanical penthouse);

c. Under Planning Code § 1113(a), which provides that "any new or replacement structure or for an addition to any existing structure in a Conservation District" must be "compatible in scale and design with the District as set forth in Sections 6 and 7 of the Appendix that describes the District." Sections 6 and 7 of the Appendix that describes the District (i.e., Appendix F) establishes that the scale, particularly the predominant height of the district and the predominant height of the buildings that define the conservation characteristics of the district, as three to eight floors;

d. The grounds described in this paragraph are described in more detail in:

(1) Appellants' April 25, 2013, comment letter submitted on the Project to the Board of Supervisors, section 2 and 4;

(2) Appellants' May 7, 2013, comment letter submitted on the Project to the Board of Supervisors, section 1;

(3) Appellants' May 15, 2013, comment letter submitted on the Project to the Historic Preservation Commission, sections II.A, IV, and V;

(4) Appellants' June 13, 2013, comment letter submitted on the Project to the Board of Supervisors;

(5) Appellants' July 1, 2013, comment letter submitted on the Project to the Board of Supervisors;

(6) Appellants' July 15, 2013, comment letter submitted on the Project to the Board of Supervisors;

(7) Appellants' July 16,, 2013, comment letter submitted on the Project to the Successor Agency; and

(8) Appellants' July 23, 2013, comment letter submitted on the Project to the Board of Supervisors.

6. The EIR's assessment of whether the Project's cumulative impact on historic and cultural resources significant is legally inadequate in that, without limitation:

a. It wrongly assumes the current degraded nature of the environmental setting decreases, rather than increases, the significance of the impact;

b. The EIR's conclusion that the Project's cumulative impact on historic resources is less than significant is impermissibly based in part on an arbitrary standard of "views within the district;"

c. The grounds described in this paragraph are described in more detail in:

(1) Appellants' April 25, 2013, comment letter submitted on the Project to the Board of Supervisors, section 4;

(2) Appellants' May 7, 2013, comment letter submitted on the Project to the Board of Supervisors;

(3) Appellants' May 15, 2013, comment letter submitted on the Project to the Historic Preservation Commission, sections V.A and V.B;

(4) Appellants' May 7, 2013, comment letter submitted on the Project to the Board of Supervisors; and

(5) Appellants' July 15, 2013, comment letter submitted on the Project to the Board of Supervisors.

7. As alleged in the Fourth Cause of Action, the Project violates the Planning Code provisions described paragraph 5 above. The EIR fails to discuss these violations of the Planning Code as inconsistent with the City's General Plan (San Francisco Master Plan), because the Planning Code implements the General Plan. (Planning Code § 101.) The EIR must discuss the Project's inconsistencies with the General Plan as required by CEQA Guideline § 15125(d). These General Plan inconsistencies and statutory violations represent significant adverse impacts of the Project on the conservation values that Article 11 and the NMMS Conservation District were enacted to protect. The grounds described in this paragraph are described in more detail in:

a. Appellants' April 25, 2013, comment letter submitted on the Project to the Board of Supervisors, section 4;

b. Appellants' May 15, 2013, comment letter submitted on the Project to the Historic Preservation Commission, section IV.B; and

c. Appellants' July 15, 2013, comment letter submitted on the Project to the Board of Supervisors.

Noise

8. The EIR's analysis of whether Noise Impact NO-1 (Construction Noise) will be significant with the adoption of Mitigation Measure M-NO-1a and Mitigation Measures M-NO-1b does not meet CEQA's requirements for the informational content of an EIR. The EIR does not provide sufficient information to evaluate the significance of the construction noise that will be experienced by sensitive noise receptors in the area even with adoption of the mitigation measures identified in the EIR. The missing information includes:

a. Specifying the amount of noise attenuation (i.e., reduction) that will occur as a result of the distances between the generation of noise by construction equipment and sensitive noise receptors in the area;

b. Specifying the amount of noise attenuation that will occur as a result of the various types of noise reduction techniques that are identified as mitigation measures; and

c. Specifying when mitigation measures that will only be used when "feasible" or

"possible" will actually be feasible or possible. Thus, the EIR anticipates that there will be occasions when these mitigation measure are ineffective because they are not possible or feasible. Since the EIR finds this impact to be "Less than Significant with Mitigation," the EIR must disclose that the uncertainty surrounding the implementation of these measures requires determining that the impact is "Significant."

d. The grounds described in this paragraph are described in more detail in Appellants' April 27, 2013, comment letter submitted on the Project to the Board of Supervisors, section 2.

9. Mitigation Measure M-NO-1a (for Impact NO-1, Construction Noise), includes a provision requiring 14-days advance notice for activities that will generate noise over 90 db. As the EIR recognizes, generating noise at this level is a significant noise impact. Therefore, the acknowledgment in the mitigation measure that noise will, in fact, be generated above this level, subject only to a notice requirement, demonstrates that this impact remains significant after mitigation. Therefore, the EIR fails as an informational document because its fails to disclose that this impact is significant. The grounds described in this paragraph are described in more detail Appellants' April 10, 2013, comment letter submitted on the Project to the Board of Supervisors, section 6.a.

10. Subdivision (d) of section 2909 of the San Francisco Noise Ordinance establishes thresholds for determining significance of noise impacts on nearby residents of 45 dBA nighttime/55 dBA daytime noise, stating:

> Fixed Residential Interior Noise Limits. In order to prevent sleep disturbance, protect public health and prevent the acoustical environment from progressive deterioration due to the increasing use and influence of mechanical equipment, no fixed noise source may cause the noise level measured inside any sleeping or living room in any dwelling unit located on residential property to exceed 45 dBA between the hours of 10:00 p.m. to 7:00 a.m. or 55 dBA between the hours of 7:00 a.m. to 10:00 p.m. with windows open except where building ventilation is achieved through mechanical systems that allow windows to remain closed.

This standard is based on the experience of sensitive receptors (i.e., preventing sleep disturbance, protecting public health, and preventing the acoustical environment from progressive deterioration). But the EIR suggests that the Project can violate these interior noise standards without causing a significant impact because, as "non-permanent" generators of noise, the Project's construction equipment is exempt from section 2909(d).

a. The EIR does so by falsely asserting that section 2909 includes the word "permanent" as a limitation on the types of noise sources that will be considered "fixed" and therefore subject to these interior noise standards. (DEIR, p. IV.F-16.) Therefore, the EIR fails as an informational document because this less-than-significant impact conclusion is based on misleading information.

b. The EIR assumes that compliance with the San Francisco Noise Ordinance equates to achieving less-than-significant impacts. Therefore, the EIR fails as an informational document because this less-than-significant impact conclusion is based on a legally erroneous threshold of significance. Compliance with regulatory standards cannot be used as a substitute for a fact based analysis of whether an impact is significant. While San Francisco is free to adopt a Noise Ordinance that exempts specific noise sources from its regulatory effect, it is not free, under CEQA, to fail to disclose the significance of noise that exceeds these interior noise limits.

c. The grounds described in this paragraph are described in more detail in:

(1) Appellants' April 27, 2013, comment letter submitted on the Project to the Board of Supervisors, section 2; and

(2) Appellants' May 7, 2013, comment letter submitted on the Project to the Board of Supervisors.

Shadow Impacts on Union Square

11. The EIR fails as an informational document because it does not include information relating to the feasibility or effectiveness of mitigation measures or alternatives that would avoid or substantially reduce the Project's significant shadow impact on Union Square. The EIR finds the Project's incremental shadow impact on Union Square is "less than significant" but its cumulative shadow impact on Union Square to be "significant." This latter finding triggers an obligation that the EIR identify feasible mitigation measures that would "substantially reduce" the impact. The EIR fails to do so.

a. The grounds described in this paragraph are described in more detail in:

(1) Appellants' April 10, 2013, comment letter submitted on the Project to the Board of Supervisors, section 3;

(2) Appellants' May 7, 2013, comment letter submitted on the Project to the Board of Supervisors, section 4;

(3) Appellants' May 23, 2013, comment letter submitted on the Project to the Board of Supervisors, Section 1.a and Appendix 1;

(4) Appellants' July 11, 2013, brief to the Board of Appeals, section III.B.1;

(5) Appellants' July 16, 2013, comment letter submitted on the Project to the Successor Agency; and

(6) Appellants' July 23, 2013, comment letter submitted on the Project to the Board of Supervisors.

12. Information relating to the feasibility or effectiveness of mitigation measures or alternatives that would avoid or substantially reduce the Project's significant shadow impact on Union Square was not provided by the City until well after the close of comment on that Draft EIR. Therefore, the EIR should have been recirculated for public comment.

a. The grounds described in this paragraph are described in more detail in:

(1) Appellants' May 7, 2013, comment letter submitted on the Project to the Board of Supervisors, section 4;

(2) Appellants' May 23, 2013, comment letter submitted on the Project to the Board of Supervisors, section 1.a and Appendix 1;

(3) Appellants' July 11, 2013, brief to the Board of Appeals, section III.B.2;

(4) Appellants' July 16, 2013, comment letter submitted on the Project to the Successor Agency; and

(5) Appellants' July 23, 2013, comment letter submitted on the Project to the Board of Supervisors.

13. By adopting Proposition K (codified at Planning Code § 295), the voters of San Francisco adopted a substantive limit on development prohibiting the approval of buildings subject to the ordinance casting new shadows on Union Square between one hour after sunrise and one hour before sunset unless the Planning Commission finds the resulting adverse impact on use of the park to be less than significant.

a. For purposes of CEQA, this ordinance establishes a threshold of significance for shadow impacts: i.e., any new shadow between one hour after sunrise and one hour before sunset is potentially significant. It also establishes a mitigation measure: disapproval of the project unless the Planning Commission finds the impact on use of the park is less than significant.

b. Proposition K tasked the Planning Commission and the Recreation and Park Commission with adopting "criteria for the implementation" of this law. In 1989, these agencies adopted numerical performance standards (known as "cumulative shadow limits") for each park under the jurisdiction the Recreation and Park Commission. These numerical limits are the performance standard by which the Planning Commission determines if individual projects will have a significant or less-than-significant impact on use of a park. In CEQA terminology, the "cumulative shadow limits" are mitigation measures.

c. In October of 2012, the City increased the cumulative shadow limit for Union Square, making it less environmentally protective.

d. For purposes of approving the Project, the City again increased the cumulative shadow limit for Union Square, making it less environmentally protective.

e. Under CEQA however, before deleting or modifying a previously adopted mitigation measure, the lead agency "must state a legitimate reason" and "must support that statement of reason with substantial evidence." (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 359 ["when an earlier adopted mitigation measure has been deleted, the deference provided to governing bodies with respect to land use planning decisions must be tempered by the presumption that the governing body adopted the mitigation measure in the first place only after due investigation and consideration"]; accord *Katzeff v. California Dept. of Forestry and Fire Protection* (2010) 181 Cal.App.4th 601, 612; *Lincoln Place Tenants Association v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1507-1508.)

f. Here, the EIR offers no legitimate reason to water down the protections afforded by Proposition K and the previous decision of the Planning and Recreation and Park Commissions establishing the cumulative shadow limit for Union Square. The EIR's casual assertion that "There is no feasible mitigation for the proposed project's contribution to cumulative shadow impacts, because any theoretical mitigation would fundamentally alter the project's basic design and programming parameters"[7] is not a legitimate reason, because these are not legally valid grounds to find that leaving the cumulative shadow limit intact is infeasible. "The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181.

g. The grounds described in this paragraph are described in more detail in:

(1) Appellants' April 27, 2013, comment letter submitted on the Project to the Board of Supervisors, section 1; and

(2) Appellants' July 11, 2013, comment letter submitted on the Project to the Board of Appeals, section III.B.2.

14. The City's decision to increase the cumulative shadow limit for Union Square as described in paragraph 13.c is inconsistent with several policies of the Downtown Plan, including:

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[7]DEIR, p. IV.I-60.

> POLICY 9.3 Give priority to development of two categories of highly valued open space; sunlit plazas and parks.
> Providing ground level plazas and parks benefits the most people. If developed according to guidelines for access, sunlight design, facilities, and size, these spaces will join those existing highly prized spaces such as Redwood Park, Sidney Walton Park, Justin Herman Plaza, and the State Compensation Building Plaza.
> POLICY 10.5 Address the need for human comfort in the design of open spaces by minimizing wind and maximizing sunshine.

The EIR fails as an informational document because it fails to discuss the Project's inconsistency with these General Plan policies. The grounds described in this paragraph are described in more detail in Appellants' April 27, 2013, comment letter submitted on the Project to the Board of Supervisors, section 1.

Shadow Impacts on Jessie Square

15. The main text of the DEIR fails to quantify new shadow the Project would generate on Jessie Square. The reader must find the letters from Turnstone Consulting buried in the Shadow Appendix to learn that the Project will add 8,031,176 square feet of new shadow to Jessie Square, i.e, more than eight million new square feet of shadow. The EIR fails as an informational document because "Information scattered here and there in EIR appendices' or a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis.'" *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442. The grounds described in this paragraph are described in more detail in Appellants' April 10, 2013, comment letter submitted on the Project to the San Francisco Board of Supervisors, section 4.

16. The DEIR finds the shadow impact on Jessie Square less-than-significant based on its assertions that in the spring, the Project's new shadowing of Jessie Square and CJM's outdoor seating area would end by 11:00 a.m. and in the summer the new shadows on Jessie Square and the outdoor seating area of the CJM would end by 12:30 PM and noon, respectively. (DEIR. page IV.I.47.) The EIR fails as an informational document because it fails to explain why this level of impact is less-than-significant. The grounds described in this paragraph are described in more detail in Appellants' April 10, 2013, comment letter submitted on the Project to the San Francisco Board of Supervisors, section 4.

17. The EIR fails as an informational document because it fails to present any Project alternative that would substantially reduce the Project's new shadow impacts on Jessie Square. The grounds described in this paragraph are described in more detail in Appellants' April 10, 2013, comment letter submitted on the Project to the San Francisco Board of Supervisors, section 4.

Greenhouse Gases

18. The EIR does not lawfully assess the significance of the Project's impacts on greenhouse gases (GHG), lawfully identify and discuss mitigation measures or Project alternatives to substantially reduce these significant impacts, or adequately respond to public comments submitted

on these issues. Therefore, the EIR fails as an informational document.

19. The EIR fails as an informational document because it does not quantify the Project's GHG emissions; therefore, it cannot and does not apply the first of its two stated "thresholds of significance" (i.e., threshold H.1.)[8] Instead, it folds the first threshold into its second one to produce one threshold, i.e., the Project's compliance with the City's "Strategies to Address Greenhouse Gas Emissions." But the "Strategies" does not have a provision addressing GHG emissions associated with the manufacture or transportation to the project site of construction materials to be used in the building. The grounds described in this paragraph are described in more detail in Appellants' April 10, 2013, comment letter submitted on the Project to the San Francisco Board of Supervisors, section 9.

Recreation

20. The EIR fails as an informational document because the EIR does not lawfully assess the significance of the Project's impacts on recreation in this area, lawfully identify and discuss mitigation measures or Project alternatives to substantially reduce these significant impacts, or adequately respond to public comments submitted on these issues.

21. The EIR fails as an informational document because it only looks at impacts in terms of physical deterioration and degradation of nearby parks and park facilities. It does not include any information of rates of utilization of these parks and whether the additional population brought to the area will degrade recreation by causing more overcrowding of these parks. The grounds described in this paragraph are described in more detail in Appellants' April 10, 2013, comment letter submitted on the Project to the San Francisco Board of Supervisors, section 7.

Traffic

22. The EIR fails as an informational document with respect to its assessment of traffic and circulation impacts.

23. The EIR's conclusion that Project's traffic impact is less than significant is based in part on:

a. The EIR's misidentification of the eastbound traffic through movement at Market and Fourth Street as a critical movement;

b. The EIR's failure to account for vehicle delays caused by increases in pedestrian

[8]"Implementation of the proposed project would have a significant effect on greenhouse gas emissions if the project would: H.1. Generate GHG emissions, either directly or indirectly, that may have a significant impact on the environment; or H.2. Conflict with an applicable plan, policy, or regulation of an agency adopted for the purpose of reducing the emissions of GHGs." (DEIR 4.H-16.)

volumes at the intersection of Third and Stevenson Street.

c. The grounds described in this paragraph are described in more detail in Appellants' April 10, 2013, comment letter submitted on the Project to the San Francisco Board of Supervisors, section 1.

24. The EIR's analysis of alternatives is flawed in that:

a. The EIR's conclusion that Traffic Variants 6 and 7 would cause significant traffic impacts is based in part on:

(1) The EIR's misidentification of the eastbound through movement at Market and Fourth Street as a critical movement;

(2) The EIR's inaccurate trip distribution assumptions;

(3) The proposed Project's residential parking supply of one space per unit exceeds the standard set in the Planning Code, resulting in higher traffic volumes. The EIR fails to consider variants of Variants 6 and 7 involving reducing the allowable parking supply, which would reduce vehicle trips and both traffic and transit impacts; and

(4) The EIR's failure to include improvement measures designed to reduce vehicle traffic generated by the Project.

b. The grounds described in this paragraph are described in more detail in Appellants' April 10, 2013, comment letter submitted on the Project to the San Francisco Board of Supervisors, section 1.

Recirculation

25. Because significant new information was presented to the City after the close of comment on the Draft EIR, but before final certification of the EIR or Project approval, the City must recirculate the Project's draft EIR or prepare a supplemental EIR to include this new information. Such new information includes:

a. Information relating to the Historic Preservation Commission's permitting jurisdiction over the Project; and

b. Information relating to the feasibility or effectiveness of mitigation measures or alternatives that would avoid or substantially reduce the Project's significant shadow impact on Union Square.

c. The grounds described in this paragraph are described in more detail in:

(1) Appellants' April 10, 2013, comment letter submitted on the Project to the Board of Supervisors, section 10;

(2) Appellants' May 15, 2013, comment letter submitted on the Project to the Historic Preservation Commission, section VI; and

(3) Appellants' July 16, 2013, comment letter submitted on the Project to the Successor Agency.

CEQA Findings

26. The City (including the Historic Preservation Commission, the Planning Commission, the Board of Supervisors, and the Board of Appeals with respect to each agencies' approvals of the permits or required findings within its jurisdiction) abused its discretion in finding that further mitigation of the Project's significant cumulative shadow impact on Union Square is infeasible. Because the Project EIR finds that the Project's cumulative shadow impacts on Union Square are "significant," CEQA requires that the City adopt all feasible mitigation measures that will "substantially lessen" that impact or find that there is no feasible mitigation available. (Pub. Res. Code §§ 21002, 21002.1, 21081(a).) The City adopted a CEQA Finding that further mitigation of the Project's significant cumulative shadow impact on Union Square by reducing the height of the tower is infeasible. This finding is not supported by substantial evidence because:

a. The applicant's analysis of the financial feasibility of Project alternatives (i.e., the May 8, 2013, report by Economic and Planning Systems ("EPS report")) finds the Reduced Shadow Alternative (i.e. a tower height of 351 feet with 27 stories, as discussed in the Project EIR) is not financially feasible. But neither the Project EIR nor the EPS Report analyze any mitigation measure or alternative that calls for a tower lower than 520 feet but higher than 351 feet that would "substantially lessen" the impact, even if it would not entirely avoid the impact.

b. The EPS report shows that there are feasible alternative tower heights higher than 351 feet but lower than 520 feet. Therefore, the City cannot lawfully make the finding that there are no feasible mitigation measures that would "substantially lessen" this impact.

c. The EPS Report's analysis and conclusion that the Reduced Shadow Alternative is not financially feasible does not constitute substantial evidence supporting the City's finding because it is "clearly inadequate or unsupported." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409.

d. The grounds described in this paragraph are described in more detail in:

(1) Appellants' May 23, 2013, comment letter submitted on the Project to the Planning Commission, section 1.a, b;

(2) Appellants' July 11, 2013, brief submitted on the Project to the Board of Appeals, section III.B.1;

(3) Appellants' July 12, 2013 (1 of 3), comment letter submitted on the Project to the Board of Supervisors, section 1;

(4) Appellants' July 16, 2013, comment letter submitted on the Project to the Successor Agency; and

(5) Appellants' July 23, 2013, comment letter submitted on the Project to the Board of Supervisors.

27. The City failed to proceed in the manner required by law in making this finding because the EIR fails to include any information relating to the feasibility or effectiveness of mitigation measures or alternatives that would avoid or substantially reduce the Project's significant shadow impact on Union Square.

a. The grounds described in this paragraph are described in more detail in:

(1) Appellants' April 10, 2013, comment letter submitted on the Project to the Board of Supervisors, section 3;

(2) Appellants' May 23, 2013, comment letter submitted on the Project to the Board of Supervisors, section 1.a, b and Appendix 1;

(3) Appellants' July 11, 2013, brief to the Board of Appeals, section III.B.1;

(4) Appellants' July 12, 2013, (1 of 3) comment letter submitted on the Project to the Board of Supervisors, section 1;

(5) Appellants' July 16, 2013, comment letter submitted on the Project to the Successor Agency; and

(6) Appellants' July 23, 2013, comment letter submitted on the Project to the Board of Supervisors.

28. The approval violates a number of provisions of Article 11 of the Planning Code. These violations are described in more detail in:

a. Appellants' April 25, 2013, comment letter submitted on the Project to the Board of Supervisors.

b. Appellants' May 15, 2013, comment letter submitted on the Project to the Historic

Preservation Commission.

c. Appellants' June 13, 2013, comment letter submitted on the Project to the Board of Supervisors (Appeal of Permit to Alter).

d. Appellants' July 1, 2013, comment letter submitted on the Project to the Board of Supervisors.

e. Appellants' July 15, 2013, comment letter submitted on the Project to the Board of Supervisors (Appeal of Permit to Alter).

f. Appellants' July 16, 2013, comment letter submitted on the Project to the Successor Agency.

g. Appellants' July 23, 2013, comment letter submitted on the Project to the Board of Supervisors.

29. The approval violates Planning Code §§ 295 and 309. These violations are described in more detail in:

a. Appellants' May 23, 2013, comment letter submitted on the Project to the Planning Commission.

b. Appellants' July 11, 2013, brief submitted on the Project to the Board of Appeals.

30. The approval violates the uniformity requirements of state and local law. These violations are described in more detail in:

a. Appellants' July 12, 2013 (1 of 3), letter to the Board of Supervisors, section 2.

Thank you for your attention to this matter.

Very Truly Yours,

Tom Lippe

Thomas N. Lippe

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Enclosed herewith: Previously Submitted Letters and Briefs

1. Appellants' April 10, 2013, letter to the Board of Supervisors (Appeal of EIR)

2. Appellants' April 25, 2013, letter to the Board of Supervisors (Appeal of EIR)

3. Appellants' April 27, 2013, letter to the Board of Supervisors (Appeal of EIR)

4. Appellants' April 28, 2013, letter to the Board of Supervisors (Appeal of EIR)

5. Appellants' May 7, 2013, letter to the Board of Supervisors (Appeal of EIR)

6. Appellants' May 15, 2013 letter to the Historic Preservation Commission (Permit to Alter)

7. Appellants' May 23, 2013, letter to the Planning Commission (Planning Code 295 and 309)

8. Appellants' June 13, 2013, letter to the Board of Supervisors (Appeal of Permit to Alter)

9. Appellants' July 1, 2013, letter to the Board of Supervisors (Appeal of Permit to Alter)

10. Appellants' July 11, 2013, brief to the Board of Appeals (Planning Code 295 and 309)

11. Appellants' July 12, 2013 (1 of 3), letter to the Board of Supervisors (Appeal of EIR; Special Use District and zoning height)

12. Appellants' July 15, 2013, letter to the Board of Supervisors (Appeal of Permit to Alter)

13. Appellants' July 16, 2013, letter to the Successor Agency (Purchase and Sale Agreement)

14. Appellants' July 23, 2013, letter to the Board of Supervisors (Appeal of Permit to Alter; Special Use District and zoning height)