

November 6, 2015

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VIA ELECTRONIC AND HAND DELIVERY

**Re: Appellant's Brief in Support of Appeal of Planning Commission's
Certification of 75 Howard Street FEIR (2011.1122E)**

The Draft Environmental Impact Report ("DEIR") is significantly deficient in its analysis of the potential environmental impacts associated with the proposed project at 75 Howard Street ("Project"). For the reasons outlined below, the Final Environmental Impact Report ("FEIR") fails to comply with the California Environmental Quality Act ("CEQA") and is insufficient as an informational document, incorrect in its conclusions, and fails to reflect the independent judgment and analysis of the City. Thus, at a minimum, the FEIR must be returned for a completely new analysis of its traffic and shadow impacts and recirculated for further public comment and review.

FACTUAL BACKGROUND

On September 3, 2015, more than *two* years after the DEIR was circulated for public review on July 31, 2013, the San Francisco Planning Commission ("Commission") certified the Final Environmental Impact Report ("FEIR") for the Project, opting for the "Code Compliant Alternative".¹

In certifying the FEIR, the Commission determined that the Project "will have a significant project-specific effect on the environment by creating new shadow in a manner that substantially affects an outdoor public area" and "will have significant cumulative effects on the environment . . . and would contribute considerably to reasonably foreseeable future cumulative traffic increases that could cause levels of

¹ The phrase "Code Compliant Alternative" is a misnomer as applied in this instance. The Project is clearly not in conformance with the Planning Code. Planning Commission Motion 19449, CEQA Findings, clearly states that the Project would "also require a Conditional use authorization for parking in excess of principally permitted amounts, [v]ariations for dwelling unit exposure for 39 units and for the width of the loading and parking access on Howard, and review and consideration by the Planning Commission of a Section 309 Determination of Compliance and Request for Exceptions for rear yard requirements, reduction of ground level wind currents requirements and bulk requirements." (*Id.*, § II.D. at p. 5.) Therefore, any assertions that this Project is "of right" are incorrect.

service to deteriorate to unacceptable levels at the intersection of Spear and Howard Streets.” (Commission Motion No. 19447 at p. 3.) Despite its reliance on a stale traffic analysis from 2011 and a new shadow study that was introduced at the 11th hour just days before the September 3, 2015 Commission hearing, the Commission approved certification of the FEIR.

In accordance with San Francisco Administrative Code Section 31.16, certain CEQA decisions, including the Commission’s certification of the FEIR for the Project, are subject to appeal to the Board of Supervisors (“Board”), applying an independent review to assess whether the Commission’s certification complies with the requirements of CEQA. Appellant contends that the following issues were not adequately analyzed as part of the FEIR and thus render certification for the Project FEIR invalid under CEQA:

1. The FEIR Includes an Inadequate Traffic Analysis and Fails to Consider Mitigation Measures Required Under CEQA

The FEIR relies on a stale traffic analysis from data collected nearly five years ago in February 2011. San Francisco’s Transportation Impact Analysis Guidelines for Environmental Review, October 2002 (SF Guidelines), requires that: “New traffic counts . . . to be taken when there have been recent changes in area conditions, traffic patterns or traffic volumes. In stable areas, where counts have been collected within the *last one or two years*, they may still be useful.” (Id., emphasis added.) Here, the FEIR’s analysis of traffic impacts is based on data that is nearly five years old and, thus, an incorrect baseline that is no longer in existence due to the passage of time. In the last five years, San Francisco has undergone one of the most drastic growth periods in its history. New housing and new office buildings have created gridlock conditions throughout the City. Yet, this EIR is using data that is over five years old.

Moreover, the study area for the traffic analysis included in the FEIR is far too narrow in scope. Though the FEIR acknowledges that the Ferry Building is less than a half-mile in distance and connected by the primary strip along the Embarcadero, not to mention AT&T Park and other high-congestion attractions along the waterfront, it erroneously deems the Ferry Building and AT&T Park to fall outside of the study area. Failure to include the Ferry Building and the AT&T Park within the study area renders the dated traffic analysis even more flawed, inaccurate, and inconclusive as to capturing actual traffic patterns.

In light of the San Francisco Superior Court’s recent ruling, courts have taken the position that adequate and relevant traffic analyses are an important and critical component of CEQA. In *Neighbors to Preserve the Waterfront v. City and County of San Francisco*, the court deemed various environmental approvals as invalid when the city approved an FEIR in 2012 based on outdated traffic data from 2007. Specifically, the court noted that the data in the environmental study was “inadequate to provide the public, the city decision-makers, and this court with information about the project’s environmental impacts . . . precluding informed decision-making and public participation.” The study failed to consider other weekdays, when traffic and parking demand picked up during farmers’ markets, and also did not look at traffic increases during the next five years as businesses grew and parking sites dwindled. In response to this holding, the

Board approved a motion (M15-118), effectively rescinding the certification of the FEIR for the 8 Washington Street/Seawall lot No. 351 Project on July 21, 2015. The 8 Washington Street Project is analogous to the facts at issue here because both projects are located on the waterfront, which is part of San Francisco's prime business and tourism industry that is constantly riddled with automobile, bicycle, and pedestrian traffic. Thus, an accurate traffic analysis is critical to mitigating adverse impacts, particularly taking into account the cumulative impacts of projects in surrounding areas.

2. The Project's Shadow Impacts Have Not Been Fully Assessed and are Inadequate as Certified in the FEIR

The Project's analysis of the Shadow Impacts, that have been classified as significant and unavoidable, is also at issue for several reasons. At the request of RDF 75 Howard LP, the project sponsor, Turnstone Consulting prepared a Shadow Analysis for the Project on August 19, 2015 ("July 2015 Shadow Study").² (Also attached is a Technical Memorandum, dated July 8, 2015, that was not included as part of the materials available for public review and comment during the environmental review process.) As noted in the technical memorandum, attached hereto as Exhibit A, the July 2015 shadow study differs from the analysis prepared for and included as part of the FEIR in two important ways:

(a) the FEIR analyzes the revised Code Compliant Alternative as a solid massing, whereas the July 2015 shadow study purports to include the Project's rooftop lattice, which would presumably reduce the potential shadow on Rincon Park, and

(b) the July 2015 shadow study adds to existing shadow on Rincon Park the shadow cast by projects that are now under construction or have been built since the baseline for existing conditions.

² Moreover, the City failed to include any of the technical studies in the appendices to the EIR, inclusive of the shadow analysis that was provided just days before the September 3, 2015 Planning Commission hearing and was not included as part of the materials for public review and comment in advance of the Review and Comment period that closed on September 23, 2013.

CEQA and CEQA case law places a significant emphasis on public disclosure and transparency as being a key component of the environmental review process. Here, the City did not provide copies of the technical documents but rather noted that the documents were in the project files located at the Planning Department. CEQA requires more. First, where technical materials are not included directly in an EIR, CEQA requires the EIR summarize the technical data. (CEQA Guidelines, 15147.) This did not occur here. Second, where technical reports are not provided, CEQA requires that "supporting information and analyses [should be included] as appendices to the main body of the EIR . . . and shall be readily available for public examination." (CEQA Guidelines, 15147.) For these reasons, the City failed to comply with the requirements of CEQA in releasing the DEIR, thus triggering the need for recirculation of the DEIR.

This presumes that the shadow analysis incorporated into the FEIR does not take into account surrounding projects that are now underway and will cumulatively impact the shadow analysis. This confirms that the baseline used in the DEIR and FEIR have changed since the initial shadow analysis and baseline conditions were established in 2012. Again, this analysis becomes dramatically flawed with time due to the lack of consideration regarding cumulative project impacts.

3. Flawed Feasibility of Alternatives Analysis

In conjunction with the shadow analysis, the FEIR erroneously includes several conclusions concerning the alternative analysis that are incorrect. The FEIR explains that a reduced-height alternative was not considered because “construction of a building on the site equal to or lower than the height of the existing parking garage or the Code Compliant Alternative would not be considered a reasonable alternative, as a substantially reduced development program would not meet any of the project sponsor objectives nor would there be sufficient economic viability to warrant construction of such a building.” (FEIR, p. 4.N.19.)

There are a number of flaws with this conclusion. First, this sentence suggests an alternative at the “Code Compliant Alternative” height is not feasible, which is clearly erroneous given that the Developer now seeks to build a project similar to the Code Compliant Alternative. Second, stating that a 100-foot alternative would not meet “any of the project sponsor objectives” is false on its face.

The DEIR includes four objectives:

- To improve the architectural and urban design character of the City’s waterfront by replacing the existing above-grade parking garage with a high-quality residential project with ground floor retail uses and sufficient parking.
- To increase the City’s supply of housing.
- To construct streetscape improvements and open space that serve neighborhood residents, and workers, and enliven pedestrian activity on the waterfront during evening and nighttime hours.
- To construct a high-quality project that includes a sufficient number of residential units to make economically feasible the demolition and replacement of the existing above-grade parking garage, produce a reasonable return on investment for the project sponsor and its investors, attract investment capital and construction financing, and generate sufficient revenue to finance the open space amenities proposed as part of the project.

An 100-foot alternative could achieve three of these goals: (1) “improve the architectural and urban design character of the City’s waterfront by replacing the existing above-grade parking garage with a high-quality residential project with ground floor retail uses and sufficient parking”, (2) “increase the City’s supply of housing”, and (3) provide space to “construct streetscape improvements and open space that serve neighborhood residents, and workers, and enliven pedestrian activity.”

The only objective that the alternative arguably cannot achieve is the fourth objective regarding “economic feasibility”. The FEIR, however, has provided no evidence to support this assertion – the FEIR simply asserts that the alternative would not have “sufficient economic viability to warrant construction of such a building.” While the City is correct that economic feasibility is not required to be discussed in an EIR, where the EIR rejects an alternative on the basis of financial feasibility the EIR should include sufficient analysis to support that conclusion. Instead, the City should have included the alternative in the EIR as potentially feasible and noted that the applicant may demonstrate that the alternative is not in fact financially feasible and that the City may reject the alternative on that basis. To exclude the alternative from the EIR in the first instance improperly combines the two steps in the feasibility analysis under CEQA.

The inherent flaw with the City’s effort to justify excluding the 100-foot alternative on the basis of financial feasibility is highlighted by the FEIR’s revisions concerning the discussion of the Code Compliant Alternative. The DEIR determined that the Code Compliant Alternative did not include “sufficient number of residential units to make economically feasible the demolition and replacement of the existing above-grade parking garage”; yet, the Developer *now seeks a variation of that alternative as the project*. Just as earlier conclusions regarding feasibility of the Code Compliant Alternative were evidently incorrect, so might be the now alleged and yet-to-be supported conclusions regarding the economic feasibility of the 100-foot alternative.

Therefore, Appellant asks that the Board grant the appeal to mandate a more thorough economic analysis that quantifies the level of alleged economical infeasibility for the reduced-height alternative. Thus, the project sponsor should provide a detailed financial analysis of a 100-foot alternative, along with a financial analysis of the Code Complaint Alternative. This information is critical to formulating a conceptual framework for such an alternative, if possible, including an assessment of the feasible number of residential units, retail space, parking, etc.

4. Failure to Consider Public Health and Safety Concerns with Tsunami & Sea Level Rise

The FEIR acknowledges the possibility of flooding from a tsunami but concludes the DEIR LTS findings are correct because “the building is very unlikely to suffer catastrophic damage. Rather, sheetrock, paint, and perhaps wiring would need to be replaced. Furniture on the first floor may need to be replaced. The building would remain standing and, after repair, would be functional.” (FEIR, p. 4. L.4.) The FEIR fails to acknowledge the public health and safety implications that could ensue if such a natural disaster were to occur. Property damage to cars, furniture, and equipment in the sublevel and ground floor should be considered a significant impact. The threshold as stated in the DEIR (and in CEQA Guidelines) is where a project proposes a “significant risk of loss, injury or death...” The FEIR’s conclusion is not supportable in light of the evidence that flooding may occur.

5. FEIR’s Failure to Include any Analysis of Hazardous Materials Attributable to the Project

The DEIR fails to include a Hazardous Materials chapter because the Project’s Initial Study allegedly adequately addresses the issue. This exclusion from further environmental review is appropriate under CEQA so long as there are not subsequent findings of significance.

The FEIR reiterates evidence demonstrating that fill on the project site is “likely to contain fill associated with the 1906 earthquake and fire” and the project fill likely “would be classified as hazardous waste...” (FEIR, p. 4.T.7.) The potential to disturb contaminated soil is without question not “clearly insignificant” and should have been included as part of the FEIR. In fact, the FEIR actually deleted the mitigation measure included in the Initial Study relating to Hazardous Materials on the basis that the City expanded the “Maher Ordinance” to cover the entire Project site. (FEIR, p. 4.T.3.)

The change in law expanding the “Maher Ordinance” to cover the Project site reiterates why the Hazardous Materials issue should have been analyzed in the DEIR and was not an appropriate exclusion under the scope of the Initial Study. In expanding the Maher Ordinance, the City stated that the goal is “to protect the public health and safety by requiring appropriate handling, treatment, disposal and when necessary, mitigation of contaminated soils...” (http://www.sf-planning.org/ftp/files/legislative_changes/new_code_summaries/130369.pdf.)

The FEIR erroneously asserts that the City may properly rely on the “Maher Ordinance” without mitigation to address this issue. Even if that were true, the DEIR should still have included a detailed analysis of this issue to allow the public a full opportunity to consider and comment on it. Moreover, CEQA does not permit a lead agency to merely conclude an impact will be rendered a low threshold of significance because future “site mitigation plan would identify measures to limit any significant environmental or health and safety risks posed by the presence of hazardous wastes in the soil or groundwater.” (FEIR, p. 4.T.7.) The FEIR includes no concrete performance standards applicable to this site mitigation plan. It merely states:

“The site mitigation plan would contain procedures to be followed in case unknown hazardous materials are encountered on the project site, including cordoning off the area around the material and notifying the appropriate regulatory agency. The site

mitigation plan would contain protections for workers, identify procedures for handling any hazardous materials disposed off site, and identify and implement any remedial measures needed for any hazardous materials that remain on site.”

This is a quintessential example of improperly deferred mitigation. Moreover, the FEIR concludes the Hazardous Materials issue is less than significant because in the “City experience, Mitigation Measure M-HZ-1a is appropriate, reasonable, and sufficient.” (FEIR, p. 4.T.9.) Yet, the FEIR deleted Mitigation Measure M-HZ-1a so the FEIR is internally inconsistent.

CONCLUSION

For all the above reasons, the FEIR should at a minimum be returned to City Planning for further, more current analyses of traffic and shadow impacts and be recirculated for additional public review. The need for recirculation is further emphasized by (i) the changes to the project that, City staff itself, acknowledges demonstrates the “Project has been significantly revised”, and (ii) the significant changes to conclusions regarding project objectives as they relate to the Code Compliant Alternative.

Specifically, the DEIR once concluded that the “Code Compliant Alternative... would not meet the project sponsor’s objective to construct streetscape improvements and open space that serve the neighborhood residents and workers, and enliven pedestrian activity on the waterfront during evening and nighttime hours, nor would it meet the sponsor’s objectives to construct a high-quality project that includes a sufficient number of residential units to make economically feasible the demolition and replacement of the existing above-grade parking garage, produce a reasonable return on investment for the project sponsor and its investors, and attract investment.” (DEIR, pp. 6-30 to 31.)

The FEIR now concludes, however, the alternative would meet most of the Project objectives. Given that the EIR’s view of what is or is not consistent with the project objectives has shifted dramatically, it is reasonable to conclude that alternatives that the City may previously have assumed to be infeasible are at least potentially feasible. The public should have an opportunity to comment on the Project, including any updated analyses and possible alternatives to identify an appropriate range of alternatives.

Sincerely,

David Osgood

TECHNICAL MEMORANDUM

DATE: August 19, 2015
TO: Don Lewis and Kevin Guy, San Francisco Planning Department
FROM: Julie Tilley Barlow, Senior Planner
RE: 75 Howard Street
July 2015 Shadow Analysis for 75 Howard Street Preferred Project
Prepared for Presentation to the Planning Commission
Case No. 2011.1122E

Introduction

This memorandum summarizes the results of a shadow study for the preferred project design¹ that was prepared in July 2015 at the request of RDF 75 Howard LP, the project sponsor for the 75 Howard Street Project. It was conducted by CADP, under the direction of Skidmore, Owings and Merrill, the project architects.² The purpose of the study is to showcase the benefits of the preferred project design for consideration by the Planning Commission.

The July 2015 shadow study prepared for the project sponsor differs from the analysis conducted for the EIR in two important ways. First, it makes use of refinements in shadow modeling technology that allow for modeling the transparent elements of the preferred project's rooftop lattice to show how this design would reduce potential project shadow on Rincon Park. In comparison, the EIR conservatively analyzes the revised Code Compliant Alternative (the preferred project) as a solid massing. Second, the July 2015 shadow study adds to existing shadow on Rincon Park the shadow cast by projects that are now under construction or have been built since the baseline for existing conditions was set for the EIR.

Baseline Conditions

A Notice of Preparation for the 75 Howard Street Project was published on December 12, 2012, which established the baseline existing conditions in the EIR. The Draft EIR was published on July 31, 2013. The EIR analysis was done in accordance with methods typical for an open space property not subject to

¹ The preferred project design is referred to as the revised Code Compliant Alternative in the 75 Howard Street Project EIR Responses to Comments document.

² The July 2015 shadow calculations and projections prepared for the project sponsor for the preferred project are available for review at the San Francisco Planning Department, 1650 Mission Street, Suite 400, as part of Case File No. 2011.1122E.

Section 295 of the Planning Code.³ The existing shadow on Rincon Park used in the EIR to establish net new project shadow is shown as 38,552,842 shadow foot hours (sfh).⁴

Since the establishment of the EIR existing baseline conditions in 2012, projects that were not part of the baseline have been approved and are now built or under construction around Rincon Park.⁵ This July 2015 shadow study adds them to the EIR baseline condition, increasing the amount of existing shadow in its analysis. This study identifies 77,108,318 sfh of existing shadow on Rincon Park.

The theoretical annual available sunlight (TAAS) on Rincon Park is an absolute number, 471,910,734 sfh. It is derived from the area of the park, and is the same in the EIR analysis and July 2015 shadow study.

Summary of Shadow Results

As noted above, and described on pp. 4.I.2-4.I.3 of the RTC, Rincon Park receives about 471,910,734 sfh of TAAS. The original proposed project (as analyzed in the EIR) would cast about 9,715,526 sfh of net new shadow per year (about 2.1% of the TAAS) on Rincon Park.

As analyzed in the EIR (p. 2.38 of the RTC), the revised Code Compliant Alternative (the project sponsor's preferred project) would cast about 6,276,795 sfh of net new shadow per year (about 1.3 % of the TAAS).

The July 2015 shadow study shows that the preferred project would cast approximately 3,604,113 sfh of net new shadow per year on Rincon Park (about 0.76 % of the TAAS). This reduction in net new shadow from that shown in the EIR for the preferred project is due to two factors. The July 2015 study analyzes a more-detailed version of the preferred project design and makes use of refinements in shadow modeling technology that allow for modeling the transparent elements of the preferred project's rooftop lattice, so the net new shadow from the preferred project is presented more accurately and is reduced. In addition, the July 2015 study includes shadows on Rincon Park cast by buildings that have been built or that are under construction since the baseline for the EIR was established. Where shadows from the preferred project would overlap shadow from the buildings added to the baseline in the July 2015 study, the net new project shadow may also be somewhat reduced.

³ Cumulative shadow analysis for the 75 Howard Street Project is described on DEIR pp. 4.H.30-4.H.39.

⁴ Sunlight and shadow are measured in units known as square-foot-hours (sfh), which are calculated by multiplying the area that is in sunlight or shadow (in square feet) by the amount of time that the sunlight or shadow is present (in hours).

⁵ These projects include 101 First Street (Transit Center Tower), 181 Fremont Street, 299 Fremont Street, 399 Fremont Street, 201 Folsom Street, 222 Second Street, and 535 Mission Street, and 325 Fremont Street.

Conclusion

As described on EIR p. 4.H.24, the proposed project would cast net new shadow on the lawn, seating areas and pedestrian paths in the northern and central portions of Rincon Park in the afternoon on most days throughout the year, where many park users prefer to sit. Similar conditions are identified for the revised Code Compliant Alternative (EIR pp. 6.26-6.27). Given the number of people who sit in the sunlit areas of Rincon Park in the afternoon, the net new shadows from both the proposed project and revised Code Compliant Alternative are determined in the EIR to adversely affect the use of these areas, and therefore result in significant and unavoidable shadow impacts on Rincon Park. The results presented in the July 2015 shadow study show similar conditions in Rincon Park for the preferred project, and would not alter any conclusions presented in the EIR.