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File No. 56238

May 12, 2014

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: Response to Mr. Thomas Lippe's March 31, 2014 Letter in Support of the  
Appeal of the Department of Public Works' approval of a Subdivision Map for  
Project ID # 7969

Dear President Chiu and Supervisors:

We write on behalf of 706 Mission Street Co LLC ("Millennium Partners") in response to the March 31, 2014 letter submitted by the 765 Market Street Residential Owners Association, the Friends of Yerba Buena, Paul Sedway, Ron Wornick, Matthew Schoenberg, Joe Fang, and Margaret Collins (collectively, "Appellants") in support of Appellants' appeal of the Department of Public Works' approval of subdivision map for Project ID # 7969. This letter supplements Millennium Partners' March 31, 2014, letter in which Millennium Partners set forth the reasons why the appeal is meritless and should be rejected by the Board of Supervisors.

The purpose of this supplemental letter is to further demonstrate that the arguments that Appellants now raise in support of their appeal are nothing more than a rehashing of the same arguments that Appellants previously made and that the City and County of San Francisco ("City") previously rejected during the land use entitlement proceedings for the 706 Mission Street-The Mexican Museum Project (the "Project"). As set forth in more detail below, all of the arguments that Appellants now raise were considered and responded to by the City and Millennium Partners. Appellants make no arguments specific to the subdivision map approval at issue, but instead repeat the meritless arguments from their previously submitted administrative letters and appeals. Because the City has already considered and rejected each and every argument raised in Appellants' March 31, 2014, letter, the appeal should be rejected.

### **Air Quality**

#### **1. Air Quality - Impact AQ-1**

a. Appellants contend that 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. As explained in the Planning Department's April 29, 2013 and

May 6, 2013, appeals responses and Millennium Partners' May 6, 2013, response letter, contrary to the Appellants' statement, it is appropriate for the City to choose to use thresholds of significance established and adopted by the BAAQMD, as stated in the introduction to the Air Quality questions in the CEQA Checklist provided in Appendix G to the CEQA Guidelines, which specifies: "Where available, the significance criteria established by the applicable air quality management or air pollution control district may be relied upon to make the following determinations." Further, as expressed in Millennium Partners' May 6, 2013, response letter, "the City has discretion under CEQA to use these BAAQMD thresholds or any other threshold, provided the use of those thresholds is supported by substantial evidence. Here, the City has determined that Appendix D of the BAAQMD CEQA Air Quality Guidelines, in combination with BAAQMD's Revised Draft Options and Justification Report, provides substantial evidence to support the BAAQMD threshold."

b. Appellants next contend the City is required to undertake a rule-making procedure to adopt the BAAQMD thresholds of significance. Planning Department Staff responded to this argument in their May 6, 2013, Supplemental Appeals Response, noting that the thresholds have not been adopted for general use. A similar response was provided in Millennium Partners' May 6, 2013, response letter.

c. While Appellants contend the EIR fails to specify substantial evidence to support its use of the BAAQMD numerical thresholds, Millennium Partners' April 29, 2013, Appeals Response and May 6, 2013, Supplemental Appeals Responses explain that the substantial evidence in support of using the numerical Air Quality Significance Thresholds appears in the 'Approach to Analysis,' pp. IV.G.20-IV.G.27. Millennium Partners' May 6, 2013, response letter also identified the substantial evidence justifying the use of the standards.

d. Appellants suggest the evidence provided by BAAQMD's source documents cited in the EIR does not constitute substantial evidence, but fails to explain the basis for this contention. As explained in part (c) above, the City has provided substantial evidence to support use of the thresholds.

e. Appellants argues that the project and cumulative thresholds for ozone precursor emissions are legally flawed. However, as discussed in Millennium Partners' May 6, 2013, response letter, the EIR sufficiently analyzes the potential for overlapping construction emissions. This letter explains that Appellants' argument reflects a misunderstanding of the BAAQMD's approach to achieving air quality attainment because Appellants fail to consider that the Project is consistent with the applicable Clean Air Plan.

f. As above, Millennium Partners' May 6, 2013, response letter explains that Appellants' argument reflects a misunderstanding of the BAAQMD's approach to achieving attainment, because Appellants fail to consider that the Project is consistent with the applicable Clean Air Plan.

g. Appellants argue that the use of BAAQMD thresholds of significance is erroneous for various other reasons. Their arguments are addressed by both Millennium Partners' and the Planning Department's May 6, 2013, appeals responses.

h. Appellants note that the arguments they raise in Paragraph 2 are described in more detail in Appellants' April 28, 2013, and May 7, 2013, comment letters. Millennium Partners' and the Planning Department's responses to those comment letters are more particularly described in the Planning Department's April 29, 2013, and May 6, 2013, response letters and Millennium Partners' May 6, 2013, response letter.

2. Air Quality - Mitigation Measure M-AQ-1

a. Appellants claim that the EIR defers the development of mitigation measures to reduce significant diesel particulate and toxic air contaminant emissions to the post-approval preparation and approval of a Construction Emission Minimization Plan. Appellants contend the Plan is not detailed enough to be enforceable or effective. Planning Staff responded to this argument in the May 6, 2013, Supplemental Appeals Response, noting that the mitigation measure include various equipment specifications and that the CEQA Guidelines permit mitigation measures which may be accomplished in more than one way. Millennium Partners also responded to this argument in its May 6, 2013, letter explaining that the mitigation measure was detailed, specific, and enforceable.

b. Appellants express concerns regarding the qualifications of the City's Environmental Planning Air Quality Specialist who will be reviewing and approving the Construction Emissions Minimization Plan prior to the commencement of construction activities. Planning Staff already responded to this in its May 6, 2013, Supplemental Appeals Response by stating that the Planning Department's Air Quality Technical Specialist is a recognized expert on air quality issues in the Bay Area, and serves on the Air Quality Advisory Counsel to the BAAQMD Board of Directors. Millennium Partners also addressed this argument in its May 6, 2013, letter, noting that the City has an experienced environmental review staff and that the specialist will have the necessary training and expertise to evaluate the adequacy of the Plan.

c. Appellants maintain the EIR fails as an informational document with respect to the City's obligation to identify mitigation measures that will substantially reduce the Project's potentially significant impacts from increased diesel particulate and toxic air contaminant emissions. As discussed above, Appellants' arguments have been fully and adequately addressed in Planning Department's April 29, 2013, and May 6, 2013, response letters and Millennium Partners' May 6, 2013, response letter.

d. Appellants note that the arguments they raise in Paragraph 3 are described in more detail in Appellants' April 28, 2013, and May 7, 2013, comment letters. Millennium Partners' and the Planning Department's responses to those comment letters are more particularly described in the Planning Department's April 29, 2013, and May 6, 2013, response letters and Millennium Partners' May 6, 2013, response letter.

### Historic Resources

3. Appellants argue the Project EIR fails as an informational document regarding the Project's impacts on historic resources, and that the EIR omits analysis of the Project tower's impacts on historic resources. As noted in Millennium Partners' May 6, 2013, letter, the EIR fully analyzes the impacts of the tower on historic resources.

4. While Appellants maintain the EIR fails to inform the public that the Historic Preservation Commission has permitting jurisdiction over the Project, the Project requires a Permit to Alter, and the Project must comply with Planning Code Article 11, the EIR makes no assumptions regarding the applicability of the procedural requirements of Article 11 to the proposed tower project and such a determination is not necessary for the adequacy of the EIR under CEQA, as more particularly discussed in Millennium Partners' and the Planning Departments' May 6, 2013, appeals responses.

a. Appellants argue that the EIR fails to inform the public that the Project will increase the height of the Aronson Building by 39 stories. The July 1, 2013, Major Permit to Alter Appeal Case Report, Millennium Partners' May 6, 2013, response letter, and the Planning Department's April 29, 2013, and May 6, 2013, appeals responses explain that the EIR adequately described and analyzed impacts to historical resources and that the only vertical addition would be a one story solarium on the roof of the Aronson Building.

b. Appellants suggest the Project tower is not compatible with the scale and character of the Aronson Building. However, as addressed in Millennium Partners' and the Planning Department's May 6, 2013, appeals responses, the Project tower is compatible with the Aronson Building in composition, massing, scale, materials and colors, and detailing and ornamentation.

c. Appellants suggest the Project tower is not compatible with the scale and design of the Conservation District. However, as addressed in Millennium Partners' and the Planning Department's May 6, 2013, appeals responses, the Project tower is compatible with the Conservation District.

d. Further and more detailed responses to Appellants' historical resources arguments are set forth in the Planning Department Appeals Response dated April 29, 2013, the Planning Department Supplemental Appeals Response, dated May 6, 2013, Millennium Partners' supplemental appeal response dated May 6, 2013, the July 1, 2013 Major Permit to Alter Appeal Case Report, and the letters submitted by Millennium Partners, on July 1, 2013, July 15, 2013, and July 23, 2013.

### 5. Historic Resources - Cumulative Impact Analysis

a. Appellants argue the EIR wrongly assumes the current degraded nature of the environmental setting decreases, rather than increases, the significance of the Project's impacts. This argument was addressed in the Millennium Partners' and the Planning Department's

appeals letters dated May 6, 2013, which discussed how the Project is compatible with its surroundings under the relevant legal standards. Millennium Partners explained in its May 6, 2013, letter that the Aronson Building, together with St. Patrick's Church and the Jessie Street Substation, do not collectively form a coherent historic district, and accordingly, the EIR reasonably concludes that construction of the tower would not further harm this altered context in a manner that would be significant.

b. Appellants contend that the Project impermissibly relies on an arbitrary standard of "views within the district." This claim was addressed in the July 1, 2013, Major Permit to Alter Appeal Case Report, which, after noting that it is not clear exactly what the Appellants mean by this claim, explained that the Project would not block any views of the Aronson Building and that the Aronson Building would continue to relate to the historic architectural character of nearby buildings.

c. Further and more detailed responses to Appellants' historical resources arguments are set forth in the Planning Department Appeals Response dated April 29, 2013, the Planning Department Supplemental Appeals Response, dated May 6, 2013, Millennium Partners' supplemental appeal response dated May 6, 2013, the July 1, 2013 Major Permit to Alter Appeal Case Report, and the letters submitted by Millennium Partners, on July 1, 2013, and July 15, 2013.

6. Appellants next assert that the Project violates Article 11 of the Planning Code and related provisions of the General Plan, and that the EIR fails to discuss inconsistencies and impacts resulting from these violations. As indicated in the Planning Department's and Millennium Partners' appeals responses dated May 6, 2013, the Project is consistent with existing applicable height and bulk limitations of the Planning Code and General Plan, and these issues were discussed in the EIR on pages III.4-III.7.

#### **Noise**

7. Appellants maintain that the EIR fails to provide sufficient information and analysis to evaluate the significance of construction noise. The specific arguments are as follows:

a. First, Appellants claim that the EIR fails to specify the amount of noise attenuation that will occur as a result of the distances between the generation of noise and sensitive noise receptors in the area. Millennium Partners' May 6, 2013, letter responded to this argument, explaining that EIRs cannot, and are not required to, quantify decibel reduction associated with noise attenuation due to distance because such a calculation is based on a complex, unpredictable multitude of factors, and any attempt at such an analysis would be speculative.

b. Second, Appellants argue the EIR should specify the amount of noise attenuation that will occur as a result of the various noise reduction mitigation measures. This argument is addressed in Millennium Partner's May 6, 2013, response letter, which explains that EIRs do not typically quantify the decibel reduction associated with construction noise mitigation measures because there is no reliable methodology for doing so.

c. Third, Appellants seek further information regarding when mitigation measures that will only be used when “feasible” or “possible” will actually be feasible or possible. Millennium Partner’s May 6, 2013, response letter, addressed these arguments, explaining that the Project must meet its obligation to comply with the Noise Ordinance no matter which mitigation measures will ultimately prove feasible. The “feasible” or “possible” modifiers merely acknowledge that certain mitigation measures may not be feasible in all situations.

d. Responses to Appellants arguments regarding noise impacts are provided in more detail in the Planning Department’s April 29, 2013, and May 6, 2013, response letters, and Millennium Partners’ May 6, 2013, response letter.

8. Appellants argue that the Project’s construction noise impact should be found to be significant. As addressed in the Planning Department April 29, 2013, letter and Millennium Partners’ May 6, 2013, letter, substantial evidence in the record supports the conclusion that construction noise impacts would be less than significant with mitigation.

9. Appellants repeat concerns over the EIR’s application of Section 2909 of the San Francisco Noise Ordinance as follows:

a. Appellants claim that the EIR falsely asserts that Section 2909 does not apply to “non-permanent” generators of noise. Millennium Partners responded to this argument in its May 6, 2013, letter, stating that section 2909 specifically refers to “fixed noise sources” and does not apply to construction noise.

b. Appellants objects to the City’s use of compliance with the Noise Ordinance as a threshold of significance. Millennium Partners’ addressed this argument in its May 6, 2013, letter, explaining that compliance with the Noise Ordinance combined with feasible mitigation to ensure that any potentially significant impacts are less than significant is a reasonable and acceptable means of evaluating the significance of construction noise and mitigating any such impacts.

#### **Shadow Impacts on Union Square**

10. Appellants repeat their assertion that 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. Appellants further maintain that because the Project’s cumulative shadow impact is “significant,” the Project had an obligation to identify additional mitigation. As discussed in the Planning Department’s April 29, 2013, appeals response, the EIR reasonably concludes there is no feasible mitigation for the Project’s contribution to significant cumulative shadow impacts, because any theoretical mitigation would fundamentally alter the Project’s basic design and programming parameters, and that any significant development on the Project site would shadow some public open spaces. The appeals response also explains that the EIR identified two Project alternatives that would not result in net new shadow on Union Square, although neither of which would reduce cumulative shadow impacts to a less than significant level.

11. Appellants next contend that 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 made available until after the close of comment on the Draft EIR, and therefore, the EIR should have been recirculated for public comment. The Planning Department's April 29, 2013, appeals response responded that any new information did not rise to the level of requiring recirculation.

12. Appellants reiterate arguments previously made about the Project's compliance with Planning Code Section 295:

a. Appellants argue that Proposition K and, by extension, Planning Code Section 295, serve as CEQA thresholds of significance for shadow impacts and that the shadow budgets established by the Parks and Recreation and Planning Commissions function as mitigation measures. The Planning Department's and Millennium Partners' May 6, 2013, letters explain that Section 295 and Prop K are not CEQA thresholds of significance.

b. See part (a) above.

c. Appellants argue the City made the absolute cumulative shadow limit for Union Square less environmentally protective by increasing the shadow budget. As explained in Millennium Partners' May 6, 2013, letter, the Parks and Recreation and Planning Commissions have the authority to increase shadow budgets where the Commissions determine that to do so would not result in additional shadow that would be adverse to the use and enjoyment of the applicable parks.

d. See part (c) above.

e. Appellants again argue that Planning Code Section 295 and Prop K establish thresholds of significance and mitigation measures under CEQA. Millennium Partners' May 6, 2013, letter explains why significance under CEQA and significance under Section 295 are not the same.

f. See part (e) above.

g. Further responses to Appellants' shadow related arguments are set forth in the Planning Department's appeals responses dated April 29, 2013, and May 6, 2013, Millennium Partners' appeal response dated May 6, 2013, and Millennium Partners' brief before the Board of Appeals dated July 25, 2013.

13. Appellants argue that the City's decision to increase the absolute cumulative shadow limit is inconsistent with several policies of the Downtown Plan. The Planning Department addressed this comment in its May 6, 2013, response letter, finding the Project is consistent with the Plan because the Project does not include development of new open space and would minimize shadow on Union Square, among other reasons.

### **Shadow Impacts on Jessie Square**

14. Appellants repeat their argument that the main text of the DEIR impermissibly fails to quantify new shadow that the Project would generate on Jessie Square. The Planning Department's April 29, 2013, appeals response explains that this information was added to the EIR on pp. III.F.22-III.F.23 of the RTC document using technical background studies that were available to the public in the case file for the Project at the time of publication of the DEIR.

15. Appellants also maintain that the EIR fails to explain how the Project's spring and summer shadow impacts would be less than significant. The Planning Department's April 29, 2013, appeals response state that p. III.F.23 of the RTC document explains what factors were used in reaching the conclusion that the Project's shadow impacts on public open spaces (including Jessie Square) would be less than significant. Further, Planning staff noted that, on p. IV.I. 58, the EIR concluded that, due to the times of day and times of year that would be affected, the duration of shadow, the proportion of open space that would be affected by net new shadow, and the use of the areas affected, the Project-related shadows would not substantially impair the use and enjoyment of public open spaces (including Jessie Square), and that the proposed Project would have a less than significant shadow impact on public open spaces (including Jessie Square).

16. While Appellants argue that the EIR fails to present any Project alternative that would substantially reduce the Project's new shadow impacts on Jessie Square, the EIR included a reasonable range of alternatives, and the City provided thorough and well-reasoned responses to these comments on pp. III.I.15-III.I.25 of the RTC document. The Planning Department's April 29, 2013, appeals response also addressed this claim.

### **Greenhouse Gases**

17. Appellants suggest the EIR fails to assess the Project's greenhouse gas impacts, fails to identify adequate mitigation or Project alternatives, and fails to adequately respond to public comments on these issues. The Planning Department's April 29, 2013, appeals response addressed these arguments, noting that the EIR contains a thorough and accurate analysis of Project impacts related to greenhouse gases, and that no public comments received on the DEIR related to greenhouse gases.

18. Appellants argue that because the EIR fails to quantify greenhouse gas emissions, the document does not properly assess the significance of the Project's impact. As above, the Planning Department's April 29, 2013, appeals response addresses this comment. It stated the approach employed by the City to determine the significance of greenhouse gas impacts is consistent with CEQA Guidelines 15064.4(2), which states that a lead agency may rely on a qualitative analysis or performance standards when determining the significance of a projects GHG impact.

### **Recreation**

19. Appellants contend the EIR fails to adequately assess the significance of the Project's impacts on recreation, fails to identify adequate mitigation measures or alternatives, or fails



to adequately respond to public comments. The Planning Department's April 29, 2013, appeal response responded to these comments, explaining that the FEIR contains a thorough, detailed analysis of the impacts of Project-related increases in the use of public parks and recreation facilities and public open spaces, and that the document accurately concludes that less than significant impacts would result from the Project. Further, there were no public comments on the DEIR related to recreation, so no responses were required.

20. Next, Appellants claim the EIR lacks information on rates of utilization of nearby parks and fails to assess the overcrowding of these parks. Please see the response to comment 20 above. Furthermore, the April 29, 2013, appeals response noted that the EIR's impact analysis under Impact RE-1, Impact RE-2, and Impact RE-3 on EIR pp. IV.J.10-IV.J.15 evaluates the increased demand on existing public recreation resources.

### **Traffic**

22. Appellants claim that the EIR fails as an informational document with respect to traffic and circulation impacts. The EIR assessed traffic and circulation impacts, as noted by staff on pages 10 through 16 of the Planning Department's April 29, 2013, appeals response. Appellants have failed to state why the assessment of traffic and circulation impacts in the EIR failed to adequately inform the public.

23. Appellants claim that the traffic impact analysis is flawed for the following reasons:

a. Appellants argue that the EIR misidentifies eastbound traffic through movement at Market and Fourth Street as a critical movement. Planning Department staff addressed this comment in the appeals response dated April 29, 2013. As staff noted, the comment was addressed in the RTC document for the Draft EIR, which explains why the eastbound through movement at the intersection of Fourth and Market Streets is the critical movement.

b. Appellants argue that the EIR failed to account for vehicle delays caused by increases in pedestrian volumes at the intersection of Third Street and Stevenson Street. Planning Department staff addressed this comment in the appeals response dated April 29, 2013. As staff noted, the comment was addressed on pages III.E.41 through III.E.49 of the RTC document, under the subtopic, "Consideration of Pedestrians and Parking Supply in Traffic Analysis." As explained there, the analysis of intersection delay takes into account the general inefficiency of traffic and pedestrian flows affecting the capacity of an intersection and acknowledges the existing conflicts between pedestrians and vehicular traffic at the intersection.

c. Appellants reiterate by reference the traffic and circulation arguments that they made in Section 1 of the comment letter they submitted to the Board of Supervisors on April 10, 2013. The Planning Department's April 29, 2013, appeal response responded to these comments.

24. Appellants claim that the EIR's analysis of alternatives is flawed because the EIR's conclusion that Traffic Variants 6 and 7 would cause significant traffic impacts is inaccurate for the following reasons: (1) the EIR misidentifies the eastbound through movement at Market and Fourth Street as a critical movement (2) the analysis is based on inaccurate trip distribution assumptions, (3) the analysis considers only the proposed Project's residential parking supply of one space per unit, which exceeds the standard set in the Planning Code, resulting in higher traffic volumes and 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 alternatives fail to include improvement measures designed to reduce vehicle traffic generated by the Project. Appellants note that their reasons for claiming that the EIR's alternatives analysis is flawed are described in more detail in Appellants' April 10, 2013, comment letter submitted on the Project to the San Francisco Board of Supervisors.

Planning Department staff responded to Appellants' April 10 comments, repeated in their March 31 letter, in the April 29, 2013, response letter. Staff noted that the comments raised issues that had already been addressed in the RTC document and Appellants provided no evidence showing the RTC's responses were inadequate. Appellants also did not submit such evidence with their March 31, 2014, letter. As noted above, staff found that substantial evidence supported the EIR's conclusion of the critical movement at the intersection of Market and Fourth Streets. Staff also found that the RTC document, particularly pages III.E.17 through III.E.25, addressed Appellants' trip distribution claim and explained the substantial evidence in the record to support the appropriateness of the EIR's analysis and conclusions. Similarly, staff found that Appellants claim regarding the number of on-site parking spaces was addressed in the RTC document under the subtopic, "Consideration of Pedestrians and Parking Supply in Traffic Analysis." The RTC response stated that the on-site parking was code compliant and "research does not support the comment that states that by limiting the amount of parking on site, the traffic impact analysis for both the proposed project and vehicle access Variants 1 to 7 would lead to different transportation impact results." Appellants' comment concerning improvement measures also was addressed in the RTC document and staff's April 29, 2013, appeal response. These documents explain that the Planning Code incorporates travel demand management elements that encourage alternative mode use and the proposed project would meet all applicable Planning Code requirements and, although not required by CEQA, the EIR includes Improvement Measure I-TR-M, Transportation Demand Management, to encourage use of alternative transportation modes.

### **Recirculation**

25. Appellants claim that 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, and therefore the City should have recirculated the Project's draft EIR or prepared a supplemental EIR to include this new information. Appellants allege that the following constituted new information:

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 contribution to significant cumulative shadow impacts on Union Square.

According to Appellants, the grounds for alleging that the DEIR should have been recirculated or that a supplemental EIR was required are described in more detail in the following documents: (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.

As Appellants note, Appellants recirculation claims are not new and Appellants have not presented any reason why prior responses to comments on this issue were inadequate or incorrect. Appellants claims were adequately addressed in the appeal response dated April 29, 2013, (pages 53–56), in which staff explains why the information cited by Appellants does not meet CEQA's standards for recirculation or preparation of a supplemental EIR. Millennium Partners also addressed Appellants' recirculation claims in its July 1, 2013, letter, noting that new information regarding the shadow budget for Union Square did not trigger the need for recirculation of the EIR because that change did not change the baseline used in the EIR to determine whether impacts would be potentially significant. Further, both Planning Department staff (see July 1, 2013, report, pages 10–12) and the Millennium Partners' response (see July 1, 2013, letter to the Board of Supervisors, pages 2, 9–10) specifically addressed Appellants claims regarding the Historic Preservation Commission's permitting jurisdiction over the Project. Both Planning Department staff (see the Board of Appeals Brief dated July 25, 2013, page 11) and Millennium Partners (see July 23, 2013, letter to the Board of Supervisors, pages 1–2) also specifically addressed Appellants' claim regarding the feasibility of lower height alternatives that created less shadow.

### CEQA Findings

26. Appellants claim that 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 cumulatively considerable contribution to cumulative shadow impacts on Union Square is infeasible because the finding is not supported by substantial evidence. Specifically, Appellants argue that the City should have analyzed a project that was between 351 feet and 520 feet because such a project was financially feasible and would have lessened the Project's shadow impacts on Union Square, and the financial feasibility report relied on by the City is not substantial evidence. As Appellants note, they raised these claims multiple times since 2013 and no new information has been introduced in the current appeal.

Appellants' claims have been addressed multiple times by both the Planning Department staff and Millennium Partners. Planning Department staff addressed Appellants' CEQA findings claims on pages 44 to 46 of the appeals response dated April 29, 2013, on pages 9 to 10 of their July 1, 2013, report, and on page 11 of staff's July 25, 2013 Board of Appeals Brief. As staff noted in those documents, Appellants failed to provide evidence that a project between 351 feet

and 520 feet would lessen the Project's contribution to significant cumulative shadow impacts and failed "to provide credible evidence that the economic analysis of the financial feasibility of the project alternatives described in the EIR . . . which was peer reviewed by an independent economic consultant . . . retained by and working under the direction of the Successor Agency is flawed or invalid."

Millennium Partners also addressed Appellants' CEQA findings claims in its July 1, 2013, July 15, 2013, and July 23, 2013, letters to the Board of Supervisors. Millennium Partners noted that the EIR considered a reasonable range of alternatives, the financial feasibility findings were based on substantial evidence, the City could rely on experts of its own choosing when evaluating evidence and reaching conclusions as to the environmental review for the Project.

27. Appellants claim that the City failed to proceed in the manner required by law in making its finding that no feasible mitigation or alternatives existed to reduce the Project's cumulatively considerable contribution to cumulative shadow impacts because the EIR fails to include information regarding feasibility. Appellants note that they raised this claim in at least six comment letters and have not submitted any new information to support their claim.

Planning Department staff adequately addressed this claim in the April 29, 2013, appeals response as well as in subsequent reports. As staff explained on page 44 of its April 29, 2013, report, the EIR explained "that there is no feasible mitigation for the proposed project's cumulative shadow impacts on public open spaces because any theoretical mitigation would fundamentally alter the project's basic design and programming parameters, and any significant development on the project site would shadow downtown open spaces and sidewalks that may also be affected by other downtown development." Staff also explained that "no further modification of the tower could eliminate the tower's net new shadow on Union Square unless the height of the tower were reduced to approximately 351 feet or less, but even then the proposed project would still shadow other downtown open spaces and sidewalks" and result in cumulatively considerable contribution to cumulative shadow impacts on public open spaces. Thus, the EIR explained why mitigation was infeasible.

Millennium Partners also addressed Applicants' claim that the City failed to proceed in the manner required by law, particularly on pages 7 to 8 of its July 1, 2013, letter and pages 1 to 2 of its July 23, 2013, letter to the Board of Supervisors. Millennium Partners reiterated staff's points that substantial evidence, including peer reviewed financial feasibility studies and the shadow analysis in the EIR, supported the City's finding that no feasible mitigation measures or alternatives could lessen the Project's cumulatively considerable contribution to cumulative shadow impacts on public open spaces.

28. Appellants claim that the City's approval of the Project violates a number of provisions of Article 11 of the Planning Code, as described in Appellants' comments letters submitted on April 25, May 15, June 13, July 1, July 15, July 16, and July 23, 2013. Both Planning Department staff and Millennium Partners responded to Appellants' claim and Appellants have not explained why those responses were inadequate. For example, staff in its July 1, 2013, report to the Board of Supervisors explained in detail how the Project is consistent with Article 11, including the

tower portion (pages 6 to 7), and the Project's massing, composition, scale, materials and colors, and detailing and ornamentations, (pages 7 to 9). Millennium Partners also explained the myriad reasons that the Project is consistent with Article 11 in a July 1, 2013, letter to the Board of Supervisors, including the reasons that the Project would not increase the height of the Aronson Building by more than one story, the tower would not be an addition to the Aronson Building and in any case would be compatible with it, the Project would be compatible with the NMMS Conservation District, the Project effectuates the purposes of Article 11, and the Project complies with the Secretary of the Interior's Standards for the Treatment of Historic Properties and Rehabilitation.

29. Appellants argue that the Project approval violates Planning Code sections 295 and 309 for the reasons stated in their May 23, 2013, comment letter and July 11, 2013, brief submitted to the Board of Appeals. Staff addressed these claims in its July 1, 2013, report (page 10–11) and July 25, 2013, Board of Appeals Brief, explaining that Section 295 provides the Planning and Recreation and Park Commissions with the authority to adopt criteria to implement that provision and the authority was properly exercised, determinations of significance under CEQA and Section 295 are not interchangeable, and the reasons that the Planning Commission's Determination of Compliance with Planning Code section 309 should be upheld, Appellants offer no reason why staff's prior responses to their claim is inadequate or incorrect.

Moreover, Millennium Partners also addressed Appellants' claim, including in its July 23, 2013, letter to the Board of Supervisors and July 25, 2013, Board of Appeals brief. For the reasons stated in the brief, the Planning Commission's section 309 action and the actions regarding the shadow budget were proper and supported by substantial evidence in the record.

30. Finally, Appellants claim that the Project approval violates the uniformity requirements of state and local law as explained in Appellants' July 12, 2013 comment letter. Millennium Partners provided a detailed response to Appellants' July 12, 2013, letter in a letter dated July 23, 2013, which explained that state "uniformity" requirements, as set forth in section 65852, do not apply to charter cities, such as the City. Even if the City were subject to the uniformity requirement of Section 65852, the adoption of the SUD or zoning map amendment would not violate that section because that section expressly permits differences of treatment among zones. In addition, that letter explained that the Project did not violate Planning Code section 101.1, which states that zoning ordinances and development agreements shall not be adopted unless they are found to be consistent with the City's General Plan and the Priority Policies set forth in Section 101.1(b), because the Project is consistent with both the General Plan and the Priority Policies. Once again, Appellants fail to explain how the prior response to this comment is inadequate or inaccurate.

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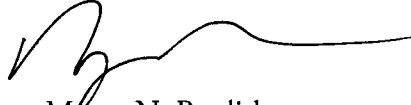
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For the foregoing reasons, Appellants' appeal of the subdivision map only serves to reiterate stale arguments already considered by the City. Therefore, this appeal should be dismissed.

Sincerely,



Margo N. Bradish

**Enclosed Herewith on CD: Previously Submitted Letters, Appeal Responses, and Memoranda**

1. Planning Department Appeal Response of EIR Certification, April 29, 2013
2. Planning Department Supplemental Appeal of EIR Certification, May 6, 2013
3. Planning Department Board of Appeals Brief, July 15, 2013
4. Planning Department Board of Appeals Brief, July 25, 2013
5. Major Permit to Alter Case Report, May 15, 2013
6. Major Permit to Alter Appeal Report, July 1, 2013
7. EPS Response to "Expert Report of Eric Sussman," July 9, 2013
8. Project Sponsor letter to Board of Supervisors, July 1, 2013
9. Project Sponsor letter to Board of Supervisors, July 15, 2013
10. Project Sponsor letter to Board of Supervisors, July 23, 2013 (1)
11. Project Sponsor letter to Board of Supervisors, July 23, 2013 (2)
12. Project Sponsor letter to Board of Supervisors, July 23, 2013 (3)
13. Project Sponsor letter to Board of Supervisors, July 30, 2013
14. Planning Executive Summary Section 309 Determination of Compliance, March 28, 2013 with Board of Supervisors stamp of receipt dated June 3, 2013
15. Keyser Marston Memorandum to Christine Maher, July 15, 2013
16. Keyser Marston Memorandum to Christine Maher, July 23, 2013
17. Memorandum from Stacy Radine Bradley, to Recreation and Park Commission, May 23, 2013 (addendum and amendments to resolutions)
18. Memorandum from Stacy Radine Bradley, to Recreation and Park Commission, May 23, 2013 (addendum)
19. Memorandum from Calvillo to Jon Givner, June 20, 2013
20. Planning Memorandum from Debra Dwyer to Kevin Guy, May 22, 2013
21. Memorandum from Mauney-Brodek, to Recreation and Park Commission, May 23, 2013

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22. Memorandum from Mauney-Brodek, to Recreation and Park Commission, Evaluation of Shadow Impact on Union Square, May 23, 2013
23. Memorandum to the Planning Commission, May 20, 2013
24. Memorandum to the Planning Commission, May 20, 2013 with Board of Appeals June 23, 2013 stamp of receipt
25. Motion Holder's Brief before Board of Appeals, July 25, 2013

All other documents in the City's files that were before City decisionmakers in considering and acting on the land use entitlements for the Project are herein incorporated by this reference.

MNB