



GENERAL PLAN EVALUATION APPEAL SUPPLEMENTAL RESPONSE 2

2395 Sacramento Street

Date: February 2, 2024
To: Angela Calvillo, Clerk of the Board of Supervisors
From: Lisa Gibson, Environmental Review Officer – (628) 652-7571
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RE: Board File No. 231285
Planning Case Nos. 2022-004172ENV and 2022-004172APL
Appeal of General Plan Evaluation for 2395 Sacramento Street

Hearing Date: February 6, 2024, continued from January 23, 2024

Project Sponsor: Tuija Catalano of Reuben Junius & Rose, LLP, on behalf of
Eduardo Sagues, Gokovacandir, LLC

Appellant: Richard Toshiyuki Drury of Lozeau Drury LLP, on behalf of Jonathan Clark

Introduction

This memorandum addresses the Planning Department's (the department's) response to the appellant's supplemental letters of appeal dated January 12, 2024 and January 26, 2024 regarding the Planning Department's general plan evaluation (GPE) determination for the proposed 2395 Sacramento Street project. Note that historic resource issues raised in these appellant submittals are addressed in the Planning Department supplemental appeal response 1 dated January 31, 2024. The department is in receipt of the appellant's February 1, 2024 supplemental brief, containing consultant comments regarding noise and vibration. We will be prepared to respond to this submittal at the February 6 appeal hearing.

Planning Department Further Supplemental Responses

Supplemental Response 11: Calling for more process by requiring a mitigated negative declaration (MND) or EIR is contrary to CEQA's mandate to reduce repetitive environmental studies. Furthermore, a MND or EIR would not identify any additional environmental impacts or mitigation measures.

The appellant asserts there would be no burden to the developer or the City to prepare an EIR for the project. This claim ignores the substantial additional amount of time and cost to prepare an EIR as compared to a GPE. This claim also ignores the mandate to streamline under CEQA Guidelines section 15183, which does

not provide an exception allowing for preparation of a repetitive EIR just because project opponents request it. The same is true for an MND, albeit less time-consuming and costly to prepare than an EIR.

By following the provisions of CEQA section 21083.3 and CEQA Guidelines section 15183 and the direction of other state laws, the GPE determination discloses the same potential environmental effects of the project as would be identified in an MND or EIR without the additional process. Moreover, the same mitigation measures would be identified in an EIR as were in the GRE, thereby accomplishing the equivalent reduction in environmental harm. And, both processes disclose to the public and decision-makers the environmental consequences of the project. A project-specific EIR would provide a process for assessing the impacts of this project in detail.

But the Housing Element EIR already did that. It disclosed a significant and unavoidable impact to historic resources (among other topics) and this GPE, following up on that document, is simply identifying one of the ways those impacts would materialize, in this circumstance.¹ Plus, the GPE process is not opaque, but open to the public. It requires findings to be made at a public hearing as to whether feasible mitigation measures will be undertaken.² And, it permits an appeal to the legislative body. In addition, it provides an appeal pathway to the Board of Supervisors more quickly than an MND does. In San Francisco (and quite possibly, only in San Francisco), MNDs can be appealed *twice*, once to the Planning Commission at the preliminary stage and once to the Board of Supervisors when final, which most like would have occurred for this project.

When it adopted the Housing Element, the Board of Supervisors made findings pursuant to CEQA, and adopted a Statement of Overriding Considerations, balancing the unavoidable significant impacts resulting of the Housing Element with the benefits to the City of its adoption. There are no new impacts here that would benefit from a lengthier, costlier process.

In summary, preparing an MND or EIR would not have resulted in any more studies, disclosure of impacts, or mitigation measures, but would have resulted in more time, cost, and repetition. The elimination of excess process is by design in the statute.

Supplemental Response 12: Tiering from the Housing Element EIR under CEQA section 21083.3 and CEQA guidelines section 15183 *is* environmental review in compliance with CEQA; a GPE is a CEQA determination.

Project Consistency with the Housing Element 2022 Update EIR

The appellant incorrectly asserts that the project is inconsistent with the Housing Element 2022 Update EIR and cannot rely on CEQA Section 21083.3 and CEQA Guidelines 15183 because the proposed building is taller than the height limit for the project site in the EIR and the project density is greater than the density for the site in the General Plan and the City's zoning. These assertions are incorrect. As stated in the department's January 16, 2024 appeal response, the use of state density bonus law for waivers and concessions from the Planning Code does not mean a project is not consistent with the development density for the site. The state

¹ Note that the severity of the historic resources impact here for the 2395 Sacramento Street project (i.e., less than significant with mitigation) is less than what the Housing Element EIR found for historic resources (i.e., significant and unavoidable with mitigation [SUM]). Even if this project's historic resources impact had been SUM, however, it would not have been peculiar.

² For the 2395 Sacramento Street project, this requirement was satisfied by the findings adopted by the Planning Commission at the conditional use authorization hearing on November 9, 2023.

density bonus law itself says that “the granting of a density bonus shall not require, or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval.” (Gov’t Code § 65915(f)(5)). Accordingly, many state housing laws consider density bonus projects to be consistent with the General Plan and zoning. (See, e.g., Gov’t Code § 65589.5(j)(3) [Housing Accountability Act]).

Wollmer v. City of Berkeley is fully consistent with the state density bonus law statutory mandate. As explained by the court in that case, the development standards Berkeley waived pursuant to the state density bonus law were not “applicable” to the project within the meaning of the CEQA exception invoked in that case, because the state density bonus law “renders these standards inapplicable in order to allow the density bonus.” (Wollmer v. City of Berkeley (2011) 193 Cal. App. 4th 1329, 1348). The same is true here. The development standards waived pursuant to the state density bonus law for this project do not make it inconsistent with the development standards in the General Plan or in the City’s zoning ordinance. (Gov’t Code § 65915(f)(5)). The fact that the environmental review document relied upon by the City of Berkeley in Wollmer was a Class 32 “Infill” exemption to CEQA and here the City relied on a GPE is immaterial, as both contain very similar requirements. (Compare CEQA Guidelines 15183 for GPEs [“projects consistent with the development density established by existing zoning, community plan, or general plan policies”] with CEQA Guidelines 15332 for Class 32 [“project[s] consistent with the applicable general plan designation and all applicable general plan policies as well as applicable zoning designation and regulations.”]). In both cases, these requirements can be waived if the state density bonus law is invoked. (Gov’t Code § 65915(f)(5)). Appellant’s citation to Save Our Access v. City of San Diego ((2023) 92 Cal.App.5th 819) does not suggest otherwise. That case is inapplicable, as it did not address a state density bonus project, or a GPE, but rather tiering under CEQA Sections 21166 and 21094.

Environmental Review of Subsequent Projects

Despite clear evidence to the contrary in the department’s January 16, 2024 appeal response and the CEQA administrative record, the appellant continues to contend that CEQA Section 21083.3 and CEQA Guidelines section 15183 avoids all CEQA review for the project. This is incorrect. As stated in the department’s January 16, 2024 appeal response, the robust analysis in the Housing Element EIR certified by the Planning Commission on November 17, 2022 was appropriately utilized for the CEQA analysis for this project as mandated by CEQA Section 21083.3 and CEQA guidelines section 15183, but that was not the end of the story. The department also conducted project-level environmental review to assess the project- and site-specific impacts that would result from the physical changes proposed by the project. Offsite and cumulative impacts were evaluated for all topics included in the GPE. The project-level review informed the identification of which mitigation measures from the Housing Element EIR applied to the project. The department correctly determined the environmental review for the project could be streamlined under the Housing Element EIR through the use of CEQA Section 21083.3 and CEQA guidelines section 15183.

Supplemental Response 13: The GPE’s conclusion that the project would not result in any peculiar significant impacts not identified in the HE EIR is supported by substantial evidence. The Housing Element EIR included maps of all city landmarks and indicated that these could be significantly impacted by development under the Housing Element.

Peculiar Impacts

As stated in the department's January 16, 2024 appeal response, the department analyzed whether the project would result in any significant impacts not identified in the programmatic EIR that:

- (1) Are peculiar to the project or the parcel on which the project would be located,
- (2) Were not analyzed as significant effects in a prior EIR on the zoning action, general plan, or community plan, with which the project is consistent,
- (3) Are potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the general plan, community plan or zoning action, or
- (4) Are previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse impact than discussed in the prior EIR.

The development of the Housing Element EIR was a multi-year effort to comprehensively evaluate direct and indirect physical, environmental impacts of the Housing Element's goal of producing 150,000 more housing units across the city through the year 2050. The programmatic analysis in the EIR was comprehensive and addressed the indirect impacts of subsequent housing development in the city. Assumptions regarding the locations where the updated housing element's policies would focus housing growth were developed and represent the department's best efforts to identify all foreseeable impacts of the project. The Housing Element EIR identifies over 35 significant impacts and developed 30 mitigation measures to reduce or avoid significant impacts of future housing development project scenarios, including physical construction impacts.

The Housing Element EIR provides a comprehensive analysis of cultural resource impacts, including Article 10 city landmarks. When describing the department's CEQA review process, the Housing Element EIR clearly states a property designated as an article 10 landmark is considered a historic resource and must be assessed against CEQA impact thresholds.³ Further, the Housing Element EIR's 2021 Built-Environmental Resources Setting provides maps of the landmarks designated under Article 10 and indicates that landmarks are historic resources and that could be affected by development under the Housing Element.⁴ ***Map 4.2-7b on page 4.2-47 of the Housing Element EIR depicts 2395 Sacramento Street as an historic resource that could be affected by development under the Housing Element.***

Similarly, the Housing Element EIR's evaluation of impacts on known built-environment historic resources through 2050 notes that future development could include projects that buildings that qualify as historic resources, such as Article 10 landmarks, to produce additional housing units. The Housing Element EIR recognizes that there would be future projects that would impair the significance of a historic resource, and also that there would be future projects sensitively preserving or restoring the character-defining features of the built environment historic resources, which would not cause a substantial diverse change in significance.⁵ ***The Housing Element EIR addressed cultural resource impacts at a programmatic level and explicitly called out impacts to Article 10 resources, including landmarks.***

³ San Francisco Planning Department, Housing Element 2022 Update EIR, pp. 4.2-30-31, April 2022.

⁴ San Francisco Planning Department, Housing Element 2022 Update EIR, pp. 4.2-44, Figures 4.2-7a through 4.2-7d, April 2022.

⁵ San Francisco Planning Department, Housing Element 2022 Update EIR, p. 4.2-82, p. 4.2-85, April 2022.

Therefore, the significant impact to historic resources identified in the 2395 Sacramento Street GPE is not peculiar to, or dissimilar from, impacts identified for development anticipated under the Housing Element EIR. Rather, this is an impact that the Housing Element EIR specifically and explicitly identified, and that the City acknowledged when it adopted the findings that CEQA requires in cases like this one, where the EIR identifies significant impacts – including in the Statement of Overriding Considerations adopted by the Board of Supervisors when it adopted the Housing Element on January 31, 2023 in 010-23 (Board File 230001).⁶ This is true even though the Housing Element EIR did not anticipate this exact project at this exact site. That impossible standard is not required to streamline under CEQA Guidelines section 15183, despite suggestions to the contrary by the appellant.

In addition, the department's January 31, 2024 supplemental appeal response 1 provides detail regarding the evidence for finding the historic resource impact to be less than significant with mitigation. The department's finding is supported by substantial evidence.

Further, the department's January 16, 2024 appeal responses 2 through 8 describe how the department determined that the project would not result in any peculiar significant impacts to built-environment historic resources, vibration, air quality, wind, shadow, pedestrian safety, and biological resources. The conclusions are based on substantial evidence.

Supplemental Response 14: The standard of review for GPEs that tier from programmatic EIRs is substantial evidence, not fair argument.

The appellant incorrectly asserts that the fair argument standard rather than the substantial evidence standard applies under CEQA Section 21083.3 and Guidelines section 15183. As stated in the department's January 16, 2024 appeal response, the courts have established that the applicable standard of review for projects that tier from EIRs under CEQA and CEQA Guidelines is the substantial evidence standard. A lead agency's finding that a project qualifies for the exemption pursuant these sections of CEQA and the CEQA guidelines will be upheld if substantial evidence supports the finding even if another conclusion could be reached.⁷ The fair argument standard does not apply.

The appellant attempts to distinguish *Lucas v. City of Pomona*, which the City cited in its previous appeal response, by highlighting factual differences between that case and this one. The appellant fails. When the court in that case concluded that an agency's finding that a statutory exemption (specifically, a GPE) applies to a project “will be upheld if substantial evidence supports the finding of exemption” (*Lucas v. City of Pomona* (2023) 92 Cal. App. 5th 508 537), it relied on decades of consistent, relevant case law. (*Id.*, citing *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 174 [“[F]air argument is not the proper standard of review. Substantial evidence is the proper standard where ... an agency determines that a project consistent with a prior program EIR presents no significant, unstudied adverse effect.”]; *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 611, 36 Cal.Rptr.3d 249 [“the fair argument standard does not apply to review of an agency's determination that a project's potential environmental impacts were adequately analyzed in a prior program EIR”]; *Concerned Dublin Citizens v. City of Dublin* (2013) 214

⁶ In adopting Ordinance 010-23 for the Housing Element the San Francisco Board of Supervisors adopted the CEQA Findings and Statement of Overriding Considerations adopted by the Planning Commission.

⁷ *Lucas v. City of Pomona*, 92 Cal.App.5th 508 (2023).

Cal.App.4th 1301, 1311; N. Coast Rivers All. v. Westlands Water Dist., (2014) 227 Cal. App. 4th 832, 850; Chico Advocates for a Responsible Economy v. City of Chico (2019) 40 Cal.App.5th 839, 845). Further, the court in Lucas specifically rebuffed the petitioner's attempt to rely on Gentry v. City of Murrieta for the proposition that the fair argument standard applies, since that case involved a challenge to a negative declaration, not a GPE. (Lucas, supra, 92 Cal. App. 5th at 537, citing Gentry v. City of Murrieta (1995) 36 Cal. App. 4th 1359). Disregarding the court's clear words, the appellant here tries, in vain, to rely on Gentry.

As described in Supplemental Response 1 above and in the department's January 16, 2024 appeal response, project-level environmental review was conducted to determine whether peculiar impacts are present based on substantial evidence. CEQA Guidelines section 15064(f) provides that the determination of whether a project may have one or more significant effects shall be based on substantial evidence in the record of the lead agency.

Supplemental Response 15: The department's analysis of project-related offsite and cumulative impacts was conducted in accordance with the requirements of CEQA. The GPE's determination is based on substantial evidence.

Offsite and Cumulative Impacts

The appellant's supplemental appeal letter dated January 26, 2024 includes a list of environmental impacts incorrectly asserted to be offsite impacts ineligible for streamlined review under section 15183. As previously stated, over 150 pages of project-specific assessments and technical studies were prepared by qualified professionals based on the scope of the project to identify significant impacts and applicable mitigation measures from the Housing Element EIR. This analysis includes identifying project-level impacts, both onsite and offsite, as well as cumulative impacts, as applicable. Each section of the GPE identifies and summarizes project-level impacts, including offsite impacts, and assesses whether the project would have a considerable contribution to cumulative impacts as required by CEQA. In summary:

- Impacts to the project and adjacent historic resources were evaluated in the GPE. The department prepared a Historic Resource Evaluation Response, Part 2, which appropriately evaluated the setting of the historic building and potential impacts to nearby historic resources. Further details of this process are in Attachment B to the initial appeal response and further clarified in Department Supplemental Response 1.
- Significant air quality health risk impacts and vibration impacts were identified in the GPE. The analysis in the GPE specifically evaluates offsite and cumulative impacts in its determination of their level of significance.⁸ As stated in the department's original appeal response, air quality project mitigation measure 6 (EIR mitigation measure M-AQ-3) requires construction air quality mitigation measures during all construction activities to address project-level and cumulative impacts. Vibration project mitigation measure 5 (EIR mitigation measure M-NO-3a) requires a pre-construction survey and vibration management and monitoring plan to address project construction vibration impacts on and offsite. The mitigation identified would reduce impacts to a less than significant level. The analysis of these significant offsite and cumulative impacts, reduced to less than

⁸ GPE air quality pgs. 18-19, vibration pgs. 15-17.

significant with mitigation, is supported by comprehensive analysis in the Housing Element EIR and also conducted specifically for the project.⁹

- Based on the department's threshold for determining a significant wind impact under CEQA and independently prepared qualitative wind assessments, the GPE concluded the project would not cause hazardous wind impacts to the pedestrian right of way around the project site. In appellant supplemental letter dated January 26, the appellant has provided the resume of the consultant who conducted the computational fluid dynamics analysis for wind in the original appeal letter. However, the appellant does not address the department's comments and questions regarding the deficiencies in the study, or provide information regarding the methodology and its inputs. (Department Appeal Response, pp. 17-18).
- The appellant asserts the project would create significant biological, shadow, and noise impacts. The appellant has not demonstrated that the department's findings for biological, shadow, and noise impacts as analyzed in the GPE and described in the department's original appeal response are not supported by substantial evidence.

Supplemental Response 16: The department was years from having the option of preparing a Housing Element GPE when development review of the proposed project began, which is why a GPE was not initially considered. Once the Housing Element was adopted, the department prepared a GPE for the project because that is precisely what is mandated by CEQA.

The appellant incorrectly characterizes the department's environmental review for this project as not just legally inadequate, but also shadowed by ethically questionable behavior by staff. As this response shows, nothing could be further from the truth. The department finds the appellant's attacks on the character of hard-working, talented, and dedicated city employees to be baseless, unprofessional, unnecessary, and frankly, disheartening.

The project sponsor submitted a Preliminary Project Assessment (PPA) Application on November 30, 2021, about two years before the Board of Supervisors adopted the Housing Element. The department issued a PPA letter (PPA) for the project on February 4, 2022, stating that the project required compliance with CEQA, identifying information required to be submitted by the sponsor in the Project Application to support the CEQA review, and stating the likely environmental document.

The PPA indicated that the project would be required to complete an initial study, which could result in a mitigated negative declaration (MND) or focused EIR as the potential environmental document for the project. Had the Housing Element been adopted at that time, pursuant to CEQA section 21083.3 and CEQA Guidelines section 15183, the department would have instead stated that the initial study would be a GPE initial study, with the environmental document to be a GPE or a GPE plus MND or GPE plus EIR, depending on whether the project would result in peculiar impacts. But, again, the department did not have that option because the Housing Element EIR was years from completion, and a GPE requires tiering from a prior EIR.

⁹ The GPE does not rely on improper deferred mitigation. The mitigation identified in GPE and described in the 2395 Sacramento Street Mitigation Monitoring and Reporting Program is accordance with the requirements of CEQA. For example, vibration project mitigation measure 5 (EIR mitigation measures M-NO-3) cannot be adequality completed until the construction documents are prepared and a contractor can provide project-specific vibration plan, not a study, based upon the actual equipment.

On May 9, 2022, the applicant submitted a Project Application, including some of the required consultant-prepared technical studies and/or scopes of work for those studies. The Historic Resource Evaluation, for example, was submitted to the department on April 11, 2022 and revised on August 18, 2022. The department then commenced environmental review on June 13, 2022, once the applicant had provided all initial materials. Environmental review proceeded in parallel with the current planning division's review for entitlements, which included a Planning Code compliance check and design review. The department preservation staff issued the HRER 1 on November 9, 2022 and issued an updated HRER 1 August 18, 2023, which corrected typographical errors and provided clarifications. The department undertook research and analysis for the HRER 2 and finalized the HRER 2 on September 28, 2023. During the time the department prepared the historic resource analysis, the Planning Commission certified the Housing Element EIR (November 17, 2022) and the Board adopted the Housing Element (January 31, 2023).

Following the adoption of the Housing Element and in anticipation of the Housing Element implementation milestones, department staff began preparing a GPE document template containing the legally required content. The goal was to develop a GPE template such that staff and consultants could more easily prepare CEQA determinations that would be easy to understand by the public and decision-makers. This was no easy task, which is why staff working on the project were so delighted when their first test case using the GPE document template, which happened to be for the 2395 Sacramento Street project, was a success. What the appellant describes as a "cynical" email from department staff was a pat-on-the-back sharing of good news amongst colleagues about how the GPE template had proved to be a time saver, including being less buggy and difficult to use than the department's older community plan evaluation (CPE) templates. The department strongly rejects the appellant's attempt to cast management's praise of staff accomplishments in a negative light and instead wishes to highlight that this laudable work was performed in order to satisfy Housing Element action 8.5.9, which the department has completed ahead of schedule.

Specifically, on January 31, 2023 the Board of Supervisors adopted Housing Element Action 8.5.9, which directs the city to "Develop a streamlined process for implementing use of the Housing Element Environmental Impact Report for future housing projects and future planning code amendments related to housing consistent with the Housing Element 2022." This action was assigned a "medium" timeframe, allowing for completion within three to five years from adoption of the Housing Element. The department has already completed this action, by working closely with the Office of the City Attorney to establish a legally defensible strategy and documentation for completing GPEs for housing projects which are consistent with the development density established by the Housing Element policies. This strategy began with the preparation of the Housing Element EIR itself, which was scoped and written in a manner that would facilitate streamlining for future housing development.

For these reasons, staff who developed a GPE template to streamline environmental review for housing projects were not doing anything improper. Rather, they were doing their jobs in accordance with state environmental law and local housing policy. The objections of the appellant to streamlining provisions in state laws and local policy are immaterial to the CEQA appeal.

Conclusion

The planning department conducted site-specific, project-level CEQA review for the project and prepared over 150 pages of documentation supporting the GPE analysis and conclusions. Preparation of an MND or EIR would have resulted in the same level of technical analysis, disclosure of impacts, and reduction of environmental harm as the GPE. With GPEs, compliance takes less time, and projects are still required to implement applicable mitigation measures to provide environmental protection. The use of state density bonus law does not mean a project is not consistent with the development density of the site in the general plan or zoning. This is supported by case law. The comprehensive analysis in the Housing Element EIR was appropriately used for the streamlined CEQA analysis for this project as mandated by CEQA section 21083.3 and CEQA Guidelines section 15183. The significant impacts identified in the 2395 Sacramento Street GPE, including to historic resources, are not dissimilar from impacts identified for development anticipated under the Housing Element EIR. The Housing Element EIR acknowledged that in the furtherance of the city's housing production goals, there could be significant and unavoidable impacts to historic resources, including to designated landmarks. The department determined that the significant impacts for this project can be mitigated to less than significant with the identified measures. The determinations in the GPE are based on substantial evidence. The appellant has not provided substantial evidence demonstrating otherwise. Therefore, the planning department respectfully recommends that the board of supervisors uphold the department's determination that the GPE conforms with the requirements of CEQA and reject the appeal.