

PATTERSON & O'NEILL, PC

600 California Street, 11th Floor
San Francisco, CA 94108
Telephone: (415) 907-9110
Facsimile: (415) 907-7704
www.pattersononeill.com

June 16, 2023

VIA E-MAIL

President Aaron Peskin and Supervisors
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: 1151 Washington Street (2022-010833CUA)
Conditional Use Authorization Appeal (Board File No. 230630)

Dear President Peskin and Supervisors:

Our office represents Alison and Todd Davis, owners of 1151 Washington Street. The proposed project includes the construction of a four-story, 40-foot-tall building with 10 total dwelling units, including 1 three-bedroom and 9 two-bedroom units (the Project²). The Project provides one Below Market Rate (BMR) unit that will be sold at an affordable rate to moderate-income individuals, which entitles the Project to a 5% density bonus and a waiver of development standards pursuant to the state Density Bonus Law (DBL), codified at Gov. Code § 65915.

The Project is located within a transit-rich, well-resourced neighborhood on a site that was identified in the City's inventory of land suitable for residential development in the 2022 Housing Element, as well as the last Housing Element Cycle. The owners previously sought approval to expand the existing single-family residence on this site, which the Planning Commission denied on the basis that the project did not maximize the allowable density on the site. (Planning File No. 2019-005907PRJ.) The current Density Bonus Project is consistent with the goals of the Housing Element, and the Planning Commission's explicit direction.

Alex Baum and Leigh Silkunas, neighbors who live behind the project at 1155 Washington, have submitted an appeal of the project that raises a scattershot laundry list of complaints, with the most recurring theme being that the Project will block their windows (aka views). Although the appellants claim to "support the need for more housing in San Francisco," the appellants disagree that a site identified in the Housing Element as suitable for residential development is the appropriate place to build it.

The project meets or exceeds all objective Planning Code standards or qualifies for a waiver from such standards under the state Density Bonus Law. The Project will not cause any specific, adverse impacts on public health and safety, and therefore the City is required by law to deny this appeal and approve the project.

The Project is Entitled to a Density Bonus and Development Standard Waivers

Pursuant to the state DBL, a housing development that provides a certain percentage of the project's units as affordable housing is entitled to a waiver of any development standards that preclude the construction of the project at the density proposed. Gov. Code § 65915(e) states that an agency may not refuse to grant a developer's proposal for a waiver from a development standard that will have the effect of physically precluding the construction of the project unless the waiver would have a specific, adverse impact on public health and safety. A waiver may not be denied based on the theory that another project with a similar number of units might conceivably be designed and accommodated without waivers. (*See Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346-1347; *see also Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 775.)

This project provides one BMR unit that must be sold at an affordable rate to moderate-income individuals, which entitles the Project to a 5% density bonus and a waiver of development standards pursuant to the DBL. The Project is requesting four waivers from front setback, rear yard, dwelling unit exposure, and bike parking requirements.

The appellants assert, without evidence or explanation, that the Project waivers should be denied because the Project does not meet "code required life safety impacts." (Appeal Contentions 5-6.) The contentions further state that the Project fails to meet "specific California and San Francisco Building Code requirements," without identifying those purported requirements nor explaining how the Project fails to meet them. The appellants' cryptic statements regarding unidentified health and safety requirements are not a legally valid basis to deny the proposed waivers.

The appellants also assert that the project should not be eligible for waivers because the "benefits" of providing an affordable unit does not outweigh "impacts." (Appeal Contention 12.) As explained above, the DBL provides precise charts that entitle housing projects to waivers when the project provides a certain percentage of affordable housing. (Gov. Code § 65915(e).) Appellants' complaints appear directed toward the DBL, not the Project. Again, a waiver may only be denied if the waiver would have a specific, adverse impact on public health and safety, which is not the case here.

Finally, the appellants assert that the bicycle parking waiver should be denied because the owners have not explained how the bicycle parking requirements physically preclude the development at the proposed density. (Appeal Contention 11.) To clarify, the Project is providing the required *amount* of bicycle parking spaces. The Project will provide each unit with a Class 1 bicycle parking space on the ground floor that will be accessed via a bike ramp installed on the stairs. However, Planning Code § 155.1 requires each space to be accessible *without* the use of stairs, and the applicant is seeking a waiver from this requirement. Due to the unique narrow sloping site, providing all of the bike parking spaces without the use of stairs would require all of the spaces to be provided at the front street level, separate from the units, or would require a complete project redesign. The Project instead seeks a waiver to provide in-unit bike parking, which would be more convenient for residents. The caselaw is clear that a waiver may not be denied based on the theory that another project with a similar number of units might conceivably be designed and accommodated without waivers. (*See Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346-1347; *see also Bankers Hill 150 v. City of San Diego* (2022) 74

Cal.App.5th 755, 775.)

The Code-Compliant Project Must Be Approved

The Housing Accountability Act (HAA) also restricts the ability of local agencies to disapprove a proposed housing development project that complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards. (Gov. Code § 65589.5(j)(1).) Gov't. Code § 65589.5(j)(3) makes clear that receipt of a density bonus “shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.” This is reiterated in Planning Director Bulletin No. 5, explaining that “[a]ny waivers, concessions, or incentives, conferred through the State Density Bonus Law are considered code-complying, and therefore are consistent with the objective standards of the Planning Code.”

Here, the proposed Project is consistent with all applicable, objective Planning Code standards, or qualifies for a waiver from such standards, and therefore the City is obligated to approve the Project at the proposed density unless the City provided substantial evidence to establish that the proposed project will have a specific, adverse impact upon public health or safety. (*See Cal. Renters Legal Advocacy and Educ. Fund v. City of San Mateo* (2021) 68 Cal. App. 5th 820.) In this case, the City has not identified any specific, adverse impacts to public health and safety that would be caused by the project, nor could it, and thus the project must be approved at the density proposed.

The appellants raise vague, subjective concerns related to neighborhood context, visual character, light impacts, and relationship with the urban form. (Appeal Contentions 7, 8, 14.) None of these contentions is based on any purported inconsistency with any applicable, *objective* Planning Code standard. Thus, none of these contentions provides a valid basis to disapprove the project at the density proposed.

The appellants also bizarrely claim that the project is inconsistent with the Housing Element goals and the Conditional Use findings. (Appeal Contention 4.) As explained above, this property has been identified in the last two Housing Element cycles as a suitable site for residential development and a prior CUA was *denied* because the project did not maximize density. The Housing Element specifically prioritizes infill housing in transit-rich well-resourced neighborhoods such as this. None of the goals or findings quoted by the appellants are objective standards that provide a legally valid basis to deny the Project at the density proposed, but regardless, the Project clearly meets the criteria for CUA and furthers the goals of the Housing Element by maximizing density on this site inventory identified property.

The Project Will Comply with All Hazard Mitigation Requirements

The appellants acknowledge that project has developed a soil hazard mitigation plan, which was reviewed and approved by the San Francisco Department of Public Health, Environmental Health Branch, Contaminated Sites Assessment and Mitigation Program (“EHB-SAM”). However, they argue that they need more information regarding how the mitigation measures will be implemented. (Appeal Contention 4.) Compliance with the mitigation plan is legally

required, and in addition to regular DBI site inspections, the owners are also required to submit a Final Report to EHB-SAM to demonstrate compliance with the mitigation measures. This is the same process that all sites subject to the Maher Ordinance follow.

The Project Does Not Require a Shadow Study

The appellants also erroneously claim that the Project required a shadow study and approval by the Recreation and Park Department because the project exceeds forty feet in height. (Appeal Contention 10.) This is simply incorrect, as the proposed building is forty feet in height. The Project includes unenclosed roof deck space on top of each unit, separated by seven-foot windscreens. Per Planning Code Sec. 260(b)(2)(D), any unenclosed seating areas including “tables, chairs and benches, and related windscreens, lattices and sunshades with a maximum height of 10 feet” are exempt from height limit calculations. The proposed building is forty feet in height, well below the 65-foot height limit, and is therefore exempt from the shadow requirements of Planning Code § 295.

Nonetheless, the appellants argue that the project will cause excessive shadow impacts. (Appeal Contention 1.) The appellants provide a small excerpt from their own shadow study in order to obscure the significant limitations of the study. First, the shadow study was preliminary and acknowledges that it does not comply with the standards for shadow analysis required by the Planning Department. Moreover, this study was based on an earlier iteration of the project that included larger penthouses, which were significantly reduced in the final version of the Project. In short, the results of the appellants’ shadow study are unreliable and incorrect. Regardless, the Project is exempt from shadow requirements.

The appellants also claim that the project will create excessive glare due to glazing. (Appeal Contention 3.) Bird-safe glazed windows are required by Planning Code § 139(c)(2). We also note that the final materials have not been selected, and Special Condition 6 requires the owners to continue to work with the Planning Department to select the final glazing, color, texture, landscaping, and detailing that is subject to Department staff review and approval.

The Project Does Not Require a Large Project CUA

The appellants also erroneously argue that the Project needed to obtain a CUA under the Large Residential Projects Interim Controls enacted by the Board pursuant to Res. No. 404-22. (Appeal Contention 9.) Under these Interim Controls, a CUA for residential expansion projects is *only* required if the expansion project does not maximize the principally permitted residential density. This Project *does* maximize the principally permitted density, and therefore is exempt from the CUA requirement.

Construction Safety

The appellants make vague claims that they are worried about public safety from the potential use of cranes during construction. (Appeal Contention 13.) The owners will develop and submit a construction plan at the appropriate time, utilize licensed contractors, and comply with all construction safety requirements.

President Peskin and Supervisors

June 16, 2023

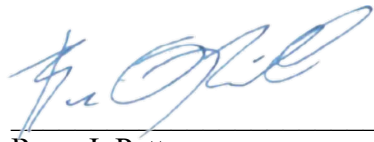
Page 5

Conclusion

The Project maximizes density by providing ten units of housing within a transit-rich, well-resourced neighborhood on a site that has been specifically identified as a site that is suitable for residential development. The project meets or exceeds all objective Planning Code standards or qualifies for a waiver from such standards under the state Density Bonus Law. The Project will not cause any specific, adverse impacts on public health and safety, and therefore the City is required by law to deny this appeal and approve the Project.

Very truly yours,

PATTERSON & O'NEILL, PC

A handwritten signature in blue ink, appearing to read "R. Patterson", is written over a horizontal line.

Ryan J. Patterson

Brian J. O'Neill

Attorneys for Alison and Todd Davis