

COMMISSION ON COMMUNITY INVESTMENT AND INFRASTRUCTURE

RESOLUTION NO. 02-2021

Adopted January 19, 2021

CONDITIONALLY APPROVING A VARIATION TO THE TRANSBAY REDEVELOPMENT PLAN'S ON-SITE AFFORDABLE HOUSING REQUIREMENT AS IT APPLIES TO THE MIXED-USE PROJECT AT 542-550 HOWARD STREET, SUBJECT TO APPROVAL BY THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO IN ITS CAPACITY AS LEGISLATIVE BODY FOR THE SUCCESSOR AGENCY TO THE SAN FRANCISCO REDEVELOPMENT AGENCY, AND AUTHORIZING THE PAYMENT OF AN AFFORDABLE HOUSING FEE TO FULFILL THE PROJECT'S AFFORDABLE HOUSING OBLIGATION; PROVIDING NOTICE THAT THIS APPROVAL IS WITHIN THE SCOPE OF THE TRANSIT CENTER DISTRICT PLAN PROJECT APPROVED UNDER THE TRANSIT CENTER DISTRICT PLAN FINAL ENVIRONMENTAL IMPACT REPORT ("FEIR"), A PROGRAM EIR, AND IS ADEQUATELY DESCRIBED IN THE FEIR FOR THE PURPOSES OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT; AND ADOPTING ENVIRONMENTAL REVIEW FINDINGS; TRANSBAY REDEVELOPMENT PROJECT AREA

WHEREAS, The California Legislature in 2003 enacted Assembly Bill 812 ("AB 812") authorizing the demolition of the historic Transbay Terminal building and the construction of the new Transbay Transit Center (the "TTC") (Stat. 2003, Chapter 99, codified at § 5027.1 of the Cal. Public Resources Code). AB 812 also mandated that 25 percent of the residential units developed in the area around the TTC "shall be available at affordable housing cost to, and occupied by, persons and families whose incomes do not exceed 60 percent of the area median income, and that at least an additional 10 percent of all dwelling units developed within the project area shall be available at affordable housing cost to, and occupied by, persons and families whose incomes do not exceed 120 percent of the area median income" if the City and County of San Francisco ("City") adopted a redevelopment plan providing for the financing of the TTC (the "Transbay Affordable Housing Obligation"); and,

WHEREAS, The Board of Supervisors of the City and County of San Francisco ("Board of Supervisors") approved a Redevelopment Plan for the approximately 40 acre Transbay Redevelopment Project Area ("Project Area") by Ordinance No. 124-05, adopted on June 21, 2005 and by Ordinance No. 99-06, adopted on May 9, 2006 ("Redevelopment Plan"). The Redevelopment Plan established a program for the Redevelopment Agency of the City and County of San Francisco ("Former Agency") to redevelop and revitalize the blighted Project Area; it also provided for the financing of the TTC and thus triggered the Transbay Affordable Housing Obligation; and,

WHEREAS, The 2005 Report to the Board of Supervisors on the Redevelopment Plan ("Report") estimated that the Transbay Affordable Housing Obligation would require the development of 1200 affordable units. Report at p. VI-14 (Jan. 2005). The Report also stated: "The affordable housing in the Project Area will include approximately

388 inclusionary units, or units built within market-rate housing projects... The affordable housing will also include approximately 795 units in stand-alone, 100 percent affordable projects.” Report at page VIII-7; and,

WHEREAS, The Redevelopment Plan established, under Cal. Health and Safety Code § 33333, the land use controls for the Project Area, required development to conform to those land use controls, and divided the Project Area into two land use zones: Zone One and Zone Two. The Redevelopment Plan required the Former Agency to exercise land use authority in Zone One and authorized it to delegate to the San Francisco Planning Department (“Planning Department”) the land use controls of the San Francisco Planning Code (“Planning Code”), as amended from time to time, in Zone Two; and,

WHEREAS, On May 3, 2005, the Former Agency and the Planning Department entered into a Delegation Agreement whereby the Planning Department assumed land use authority in Zone Two of the Project Area subject to certain conditions and procedures, including the requirement that the Planning Department’s approval of projects shall be consistent with the Redevelopment Plan (“Delegation Agreement”); and,

WHEREAS, In 2012, the City adopted the Transit Center District Plan, which covers the entirety of the Project Area north of Folsom Street, including Zone 2 of the Redevelopment Plan wherein the Planning Department has land use authority; and,

WHEREAS, To fulfill the Transbay Affordable Housing Obligation, both the Redevelopment Plan and the Planning Code require that all housing developments within the Project Area contain on-site affordable housing. Redevelopment Plan, § 4.9.3 (a minimum of 15 percent); Planning Code, § 249.28 (b) (6) (incorporating the higher inclusionary requirements of Planning Code § 415.6, namely a minimum of 20 percent) (together the “On-Site Requirement”). Neither the Redevelopment Plan nor the Planning Code authorizes off-site affordable housing construction or an “in-lieu” fee payment as an alternative to the On-Site Requirement in the Project Area; and,

WHEREAS, The Redevelopment Plan provides a procedure and standards by which certain of its requirements and the provisions of the Planning Code may be waived or modified. Section 3.5.5 of the Redevelopment Plan states: “The Agency Commission, in its sole discretion, may grant a variation from the Plan, the Development Controls and Design Guidelines, or the Planning Code where enforcement would otherwise result in practical difficulties for development creating undue hardship for the property owner and constitute an unreasonable limitation beyond the intent of the Plan, the Design for Development or the Development Controls and Design Guidelines... Variations to the Plan or the Development Controls and Design Guidelines shall only be granted because of unique physical constraints or other extraordinary circumstances applicable to the property. The granting [of] a variation must be in harmony with the Plan, the Design for Development and the Development Controls and Design Guidelines and shall not be materially detrimental to the public welfare or materially injurious to neighboring property or improvements in the vicinity... In granting any variation,

the Agency Commission shall specify the character and extent thereof, and shall also prescribe any such conditions as are necessary to secure the goals of the Plan, the Design for Development and the Development Controls and Design Guidelines;” and,

WHEREAS, On February 1, 2012, state law dissolved the Former Agency. Cal. Health & Safety Code §§ 34170 et seq. (the “Redevelopment Dissolution Law.”); and,

WHEREAS, Under the Redevelopment Dissolution Law, all of the Former Agency’s assets (other than certain housing assets) and obligations were transferred to the Successor Agency to the Former Agency, also known as the Office of Community Investment and Infrastructure (“Successor Agency” or “OCII”). Some of the Former Agency’s housing assets were transferred to the Mayor’s Office of Housing and Community Development (“MOHCD”), acting as the housing successor; and,

WHEREAS, To implement the Redevelopment Dissolution Law, the Board of Supervisors adopted Resolution No. 11-12 (Jan. 26, 2012) and Ordinance No. 215-12 (Oct. 4, 2012), which granted land use authority over the Former Agency’s Major Approved Development Projects, including the Transbay Redevelopment Project, to the Successor Agency and its Commission. The Delegation Agreement, however, remains in effect and the Planning Department continues to exercise land use authority under the Planning Code over development in Zone Two; and,

WHEREAS, On April 15, 2013, the California Department of Finance (“DOF”) determined finally and conclusively that the Successor Agency has enforceable obligations under Redevelopment Dissolution Law to complete certain development in the Project Area, including the Transbay Affordable Housing Obligation; Letter, S. Szalay, DOF Local Government Consultant, to T. Bohee, Successor Agency Executive Director (April 15, 2012 [sic]); and,

WHEREAS, In furtherance of its land use authority under the Delegation Agreement, Redevelopment Plan, and Transit Center District Plan, the Planning Commission approved, by Resolutions 20613 and 20614, and Motions 20615, 20616, 20617, 20618 (Jan. 9, 2020) a project at 542-550 Howard Street (Assessor’s Parcel Block No. 3721, Lots 016, 135, 136, and 138, also known as Transbay Parcel F, located in Zone 2 of the Redevelopment Plan on the north side of Howard Street, between 1st and 2nd Streets in the Project Area. (the “Project Site”). Subsequently, on June 5, 2020, the Zoning Administrator issued a variance decision. (Together the Planning Commission approvals and the Zoning Administrator decision are referred to as the "Approvals"). The Approvals approved a project that would include a new 61-story mixed use building reaching a height of approximately 750 feet (approximately 800 feet including rooftop screen/mechanical equipment), and including 165 dwelling units, 189 hotel rooms, 275,674 gross square feet of office use floor area, approximately 9,000 square feet of retail space, approximately 20,000 square feet of open space, 178 Class 1 and 34 Class 2 bicycle parking spaces, and four below-grade levels to accommodate up to 183 vehicle parking spaces for the residential, hotel, and office uses (the "Project"). The Project also includes a bridge to the future elevated park situated on top of the TTC; and,

WHEREAS, To comply with the On-Site Requirement, the Approvals require the Project to include approximately 33 inclusionary below-market-rate units that are affordable to income-eligible households. All of the Project's approximately 165 residential units are located on the highest 17 floors of the building. The residential units will be for-sale units with homeowners' association ("HOA") assessments that the Project's developer estimates will exceed \$2500 per month; and,

WHEREAS, On June 28, 2018, OCII received a request from Developer for a variation from the On-Site Requirement whereby the Developer would construct off-site affordable units instead of providing on-site inclusionary units. Letter, Parcel F Owner LLC, to N. Sesay (June 28, 2018) (the "Original Variation Request"). OCII did not act on the Original Variation Request pending additional negotiations with the Developer. On December 17, 2020, OCII received an amended and restated request in which the Developer proposed that the obligation to provide on-site BMR units for the Project be fulfilled instead by paying to OCII an amount equal to one hundred fifty percent (150%) of the inclusionary housing fee (the "Affordable Housing Fee") that Section 415.5 of the Planning Code would otherwise require if the Project were not subject to the On-Site Requirement. Letter, Parcel F Owner LLC to S. Oerth, OCII (Dec. 17, 2020) ("Revised Variation Request"), attached as Exhibit B to the Commission Memorandum related to this Resolution; and,

WHEREAS, In the Revised Variation Request, the Developer explained that the Project was unique in that it will include a mix of hotel, offices, and residential units in the same high-rise building, its residential units are located on the upper 17 floors of an approximately 61-story tower, it provides desirable public amenities such as a public pedestrian way connecting Howard Street to the Transbay Transit Center, a pedestrian bridge providing public access to the Transit Center's new rooftop park, and its HOA dues will be in excess of \$2500 per month. The Revised Variation Request concludes that the application of the On-Site Requirement to the Project creates practical difficulties that would prevent the administration of a successful affordable housing program because the HOA may raise fees at any time without regard to the effect on the BMR units resulting in it simply not being feasible for a BMR unit owner to be protected, over time, and thus creates an undue hardship for the Developer, the HOA, the MOHCD, and future owners of the BMR units; and,

WHEREAS, The Revised Variation Request proposes that the Successor Agency grant a variation on the condition that the Developer pay the Affordable Housing Fee, which is significantly higher than the fee that Section 415.5 of the Planning Code would require if the Project was located outside of the Project Area and not subject to the On-Site Requirement. Payment of the Affordable Housing Fee for OCII's development of affordable housing within the Project Area ensures that the variation's removal of on-site affordable units does not adversely affect the Successor Agency's compliance with the Transbay Affordable Housing Obligation; and,

WHEREAS, The following facts support a finding that the On-Site Requirement imposes practical difficulties for the Project creating undue hardships for the owners of the inclusionary below-market-rate units (“BMR Owners”) and MOHCD, as the housing successor responsible for enforcing the long-term affordability restrictions on the units:

- 1) HOA fees pay for the costs of operating and maintaining the common areas and facilities of a luxury condominium project, including in this case the shared use of luxury hotel amenities in the lower hotel floors of the Project, such as a spa and fitness center, and generally must be allocated equally among all of the units subject to the assessment, Cal. Code Reg., title 10, § 2792.16(a). HOA fees may not be adjusted based on the below-market-rate (“BMR”) status of the unit or the income level of the homeowner. If HOA fees increase, BMR Owners will generally be required to pay the same amount of increases in regular assessments and of special assessments as other owners.
- 2) The Successor Agency’s Limited Equity Homeownership Program (“LEHP”) ensures that income-eligible households are able to afford, at initial occupancy, all of the housing costs, but does not cover increases in HOA dues that occur over time. Initially, the LEHP will decrease the cost of the BMR unit itself to ensure that income-eligible applicants are able to meet all of the monthly costs, including HOA fees. Moreover, the Successor Agency nor MOHCD (which ultimately assumes authority over the BMR unit as a transferred housing asset) does not have a program for assisting owners in BMR units when increases in regular monthly HOA fees occur.
- 3) Members of homeowner associations may approve increases in HOA fees without the support of the BMR Owners because BMR Owners, particularly in a development with inclusionary units, typically constitute a small minority of the total HOA membership. Increases less than 20 percent of the regular assessment may occur without a vote of the HOA; increases exceeding 20 percent require a majority vote of members in favor. Cal. Civil Code § 5605 (b). In addition, a homeowner association may impose special assessments to cover the costs of capital expenditures for repairs and other purposes. *Id.*
- 4) When HOA fees increase or special assessments are imposed, BMR Owners whose incomes have not increased comparably may have difficulty making the higher monthly payments for HOA fees. *See e.g.* Carol Lloyd, *Owners’ Dues Keep Going Up*, S.F. Chronicle, Aug. 5, 2007, *available at*: <http://www.sfgate.com/default/article/Owners-dues-keep-going-up-2526988.php>. The result is that housing costs may become unaffordable and some BMR Owners will face the hardship of having to sell their unit at the reduced prices required under the limited equity programs of the Successor Agency and MOHCD.
- 5) If the BMR Owner is forced to sell the inclusionary unit because of the high HOA fees, the cost of the restricted affordable unit, which will now include the high HOA fees, will be assumed by either the subsequent income-eligible buyer or by MOHCD, as the housing successor required to comply with the affordability restrictions. In either case, the high HOA dues will have caused an additional hardship, and it is not feasible for a BMR Owner to be protected, over time, from increases in regular and special HOA assessments; and,

WHEREAS, The hardship imposed by the On-Site Requirement constitutes an unreasonable limitation beyond the intent of the Redevelopment Plan to create affordable housing for the longest feasible time, as required under the Transbay Affordable Housing Obligation; and,

WHEREAS, The following facts support a finding that extraordinary circumstances apply to the Project:

1) The Project is unique in that it is a mixed-use building with its residential units located on the upper 17 floors of a 61-story tower. Of the high-rise developments recently approved or proposed in the Project Area, the Project will be the first building in San Francisco to include a mix of hotel, offices, and residential units in the same high-rise building. As noted above, the construction of affordable housing units at the top of a high-rise creates practical difficulties for maintaining the affordability of the units.

2) The Developer will pay OCII approximately \$45 - 47 million, which is an amount equal to one hundred fifty percent (150%) of the inclusionary housing fee that Section 415.5 of the Planning Code would otherwise require if the Project was located outside of the Project Area and not subject to the On-Site Requirement.. *See* San Francisco Planning Code, §§ 415.1 et seq; and,

WHEREAS, OCII's use of the Affordable Housing Fee for affordable housing in the Project Area ensures that the variation will not be materially detrimental to the public welfare and is necessary to comply with Transbay Affordable Housing Obligation; and,

WHEREAS, Approval of the Revised Variation Request would be subject to approval by the Board of Supervisors, in its capacity as legislative body for the Successor Agency, because it constitutes a material change to a Successor Agency affordable housing program, Ordinance No. 215-12, §6(a) (providing that "the Successor Agency Commission shall not modify the Major Approved Development Projects or the Retained Housing Obligations in any manner that would . . . materially change the obligations to provide affordable housing without obtaining the approval of the Board of Supervisors...."); and,

WHEREAS, The San Francisco Planning Commission and Board of Supervisors will consider approving a development agreement that would be consistent with this Resolution by providing relief from the on-site affordable housing requirement in Section 249.28 of the Planning Code, and would require the Developer to pay the Affordable Housing Fee (based on the 2021 San Francisco Citywide Development Impact Fee Register) to OCII for affordable housing in the Project Area to further the Successor Agency's obligation to fulfill the Transbay Affordable Housing Obligation (the "Development Agreement"). The proposed Development Agreement would also provide that the Developer may pay the Affordable Housing Fee on the earlier to occur of: (a) issuance of the temporary certificate of occupancy associated with the residential portions of the Project; or (b) on the date that is two years after the effective date of the Project's Development Agreement between the City and the Parcel F Owner LLC (but only if the "first construction document," as defined in Section 401 of the Planning Code and Section 107A.13.1 of the Building

Code, has been issued for the Project). In addition, the proposed Development Agreement would require the Developer to provide OCII, prior to payment of the Affordable Housing Fee, with an irrevocable letter of credit for the full amount of the fee if the Developer and OCII reach agreement on a project at Transbay Block 4; and,

WHEREAS, On May 24, 2012, the San Francisco Planning Commission, as lead agency under the California Environmental Quality Act (“CEQA”), certified the FEIR, which analyzed the development of land under the Transit Center District Plan, including the development of the Project on the Project site. The Transit Center District is located approximately between Folsom and Market Streets, and between New Montgomery Street and the Embarcadero and includes Zone 2 of the Redevelopment Plan wherein the Planning Commission has land use authority under the Delegation Agreement. The FEIR is available for review at the Planning Department’s website at: http://sfmea.sfplanning.org/2007.0558E_FEIR1.pdf, http://sfmea.sfplanning.org/2007.0558E_FEIR2.pdf, and, http://sfmea.sfplanning.org/2007.0558E_FEIR3.pdf; and,

WHEREAS, Prior to the Approvals for the Project, the Planning Department determined that the Project was eligible for review under CEQA Guideline § 15183 and issued a Certificate of Determination for a Community Plan Evaluation on August 27, 2019 (the “CPE”), determining the following: the Project would not result in effects on the environment that are peculiar to the Project or the Project site or that were not identified as significant effects in the FEIR; the Project would not result in potentially significant off-site or cumulative impacts that were not identified in the FEIR; the Project would not result in significant effects, which, as a result of substantial new information that was not known at the time the FEIR was certified, would be more severe than were already analyzed and disclosed in the FEIR; and the Project sponsor will undertake feasible mitigation measures specified in the FEIR to mitigate project-related significant impacts; and,

WHEREAS, A copy of the CPE is on file with the Commission Secretary and are incorporated herein by reference; now, therefore, be it

RESOLVED, That the Commission determines that its approval of the Revised Variation Request is not subject to further environmental review pursuant to CEQA Guidelines Section 15183 for the following reasons: the Project, irrespective of whether it provides affordable housing units off-site or the Affordable Housing Fee, would have the same density and would not result in effects on the environment that are peculiar to the Project or the Project site that were not identified as significant effects in the FEIR; the Project and the Variation Request would not result in potentially significant off-site or cumulative impacts that were not identified in the FEIR; the Project and the Variation Request would not result in significant effects, which, as a result of substantial new information that was not known at the time the FEIR was certified, would be more severe than were already analyzed and disclosed in the FEIR; and the Project sponsor will undertake feasible mitigation measures specified in the FEIR to mitigate project-related significant impacts; and, be it further

RESOLVED, That the Commission hereby approves a variation to the Redevelopment Plan's On-Site Requirement for the Project at 543-550 Howard Street that relieves the Developer from complying with the On-Site Requirements ,but that requires the Developer to pay OCII an amount equal to one hundred fifty percent (150%) of the inclusionary housing fee that Section 415.5 of the Planning Code would otherwise require if the Project were not subject to the On-Site Requirement, subject to approval by the Board of Supervisors, acting in its capacity as the legislative body for the Successor Agency; and, be it further

RESOLVED, The Commission on Community Investment and Infrastructure authorizes the Executive Director to take appropriate and necessary actions to effectuate the purpose of this resolution.

I hereby certify that the foregoing resolution was adopted by the Commission at its meeting of January 19, 2021.



Commission Secretary