ZACKS, FREEDMAN & PATTERSON

A PROFESSIONAL CORPORATION

March 7, 2023

VIA ELECTRONIC SUBMISSION

President Aaron Peskin and Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

RE: Appeal of Negative Declaration (Board File No. 230240)
2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient use under Hotel Conversion Ordinance, Amortization Period
(Board File No. 220815)
(Planning Department Case No. 2020-005491ENV)

Dear President Peskin and Supervisors:

Our office represents Hotel des Arts, LLC (the "Appellant"). The Appellant filed a California Environmental Quality Act ("CEQA") appeal of the Preliminary Negative Declaration to the Planning Commission for the Hotel Conversion Ordinance Amendments on November 8, 2022. (See **Exhibit A**.) The Planning Commission denied the Appellant's appeal on January 26, 2023, and approved the Negative Declaration. The Appellant subsequently filed an appeal of the Final Negative Declaration ("FND") to the Board of Supervisors on February 24, 2023. (See **Exhibit B**.)

On March 1, 2023, the Planning Department issued an Appeal Timeliness Determination, which stated that the FND is not appealable. (See **Exhibit C**.) The Planning Department's determination is erroneous, inconsistent with the San Francisco Administrative Code, and deprives the Appellant of their right to a public hearing. Accordingly, we respectfully request the Board not take a final action on the ordinance, correct the Planning Department's determination, and schedule the FND appeal for a future Board of Supervisors hearing as required by the Administrative Code.

1. **The Administrative Code Allows for Appeals Where the Board of Supervisors Takes a Final Approval Action**

CEQA appeals are governed by Chapter 31, Section 31.16 of the San Francisco Administrative Code. The Code makes clear that CEQA appeals are permitted even when the

Board of Supervisors must take an action to approve a project. Section 31.16(b)(3) states: "For projects that require multiple City approvals, after the Clerk has scheduled the appeal for hearing and until the CEQA decision is affirmed by the Board, (A) the Board may not take action to approve the project but may hold hearings on the project and pass any pending approvals out of committee without a recommendation *for the purpose of consolidating project approvals **and** the CEQA appeal before the full Board*."

In other words, Section 31.16(b)(3) confirms that the full Board of Supervisors can hear CEQA appeals in addition to acting as the decision-making body that approves the project. The Board has, in fact, heard CEQA appeals for projects that the Board also acts as the final decision-making body, such as when the Board approves a Conditional Use Authorization and also hears a CEQA appeal of the same project. For example, this occurred for the project at 2001 37th Avenue (See Board Files 200992 and 200996, both heard by the Board on October 6, 2020).

2. The Administrative Code Requires the City to Provide the Public with the Right to Appeal an FND to the Full Board

Administrative Code Section 31.16(a) states that the following CEQA decisions may be appealed to the Board of Supervisors; "(1) certification of a final EIR by the Planning Commission; (2) *adoption of a negative declaration by the first decision-making body*; and (3) determination by the Planning Department or any other authorized City department that a project is exempt from CEQA." The Administrative Code clearly states that adoption of a negative declaration by the first decision-making body is appealable, without exception and regardless of which body is the first decision-making body.

Administrative Code Section 31.16(d)(1) similarly confirms that any person who has filed an appeal of a preliminary negative declaration with the Planning Commission "may appeal the Planning Commission's approval of the final negative declaration." Again, there is no exception for projects where the Board is the decision-making body. Administrative Code Section 31.11(h) also confirms that after a project is approved, a "public notice of the proposed action to adopt the negative declaration and take the Approval Action for the project *shall advise the public of its appeal rights to the Board of Supervisors with respect to the negative*

declaration following the Approval Action in reliance on the negative declaration." The Administrative Code clearly requires the City to provide the Public with a right to appeal an FND.

3. The Appellant Timely Filed an Appeal of the Hotel Conversion Ordinance FND.

Section 31.16(d)(2) states that an appellant "shall submit a letter of appeal to the Clerk of the Board after the Planning Commission approves the final negative declaration and within 30 days after the Date of the Approval Action for the project taken in reliance on the negative declaration." The Clerk of the Board confirms that Chapter 31.16 "allows for an appellant to file a negative declaration appeal after the Planning Commission approves a negative declaration--even if prior to the Date of the Approval Action--but the Clerk cannot process a negative declaration appeal until the Approval Action occurs. The Clerk will hold a negative declaration appeal filed before the Approval Action until the Planning Department advises the Clerk that the Date of Approval Action has occurred."

The Appellant filed an appeal of the Hotel Conversion Ordinance FND within 30 days of the Planning Commission approval and therefore the appeal is timely regardless of what constitutes the Approval Action for this project. The Appellant previously informed the City that the Hotel Conversion Ordinance is required to be reviewed by the Planning Commission pursuant to San Francisco Charter Section 4.105, which states that: "An ordinance proposed by the Board of Supervisors concerning zoning shall be reviewed by the Commission." The Hotel Conversion Ordinance clearly concerns zoning, and therefore should have been reviewed by the Planning Commission. That Planning Commission review of the ordinance *should* have constituted the first Approval Action, but this required procedural step was skipped. However, even if the City believes that the full Board's approval of the Hotel Conversion Ordinance constitutes the first Approval Action, the City must then process the Appellant's timely appeal after the Board takes action on the project.

4. The Appellant is Being Denied a Right to a Public Hearing and a Meaningful Opportunity to be Heard.

Section 31.16(b) requires a hearing on CEQA appeals before the full Board that is scheduled no less than 21 following the expiration of the time to appeal and requires the Clerk of the Board to provide no less than 14 days written notice to interested parties prior to the appeal hearing. Members of the public and appellants are allowed to submit written materials to the Board and testify at the hearing.

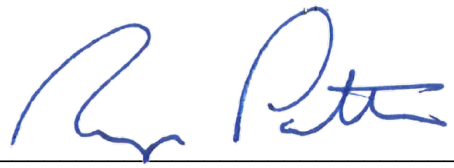
The Board is scheduled to adopt the ordinance at the March 7, 2023 Board meeting without a public hearing. No notice was provided to the Appellant. No opportunity to provide written materials was provided. No opportunity for public comment is being provided. In short, the Planning Department's determination that the FND is not appealable deprives the Appellant (and all other members of the public) their right to a public hearing in front of the full Board and denies the public a meaningful opportunity to be heard regarding the environmental impacts of the proposed ordinance. Accordingly, we respectfully request the Board correct the Planning Department's determination and schedule the FND appeal for a future Board of Supervisors hearing as required by the Administrative Code.

5. Conclusion

The Hotel Conversion Ordinance FND is clearly appealable pursuant to the Administrative Code and the Planning Department's determination otherwise is clearly erroneous and deprives the Appellant their right to public hearing. The Board must correct the Planning Department's determination and schedule the FND appeal for a future Board of Supervisors hearing. The Board should not take a final action to approve the ordinance until after the FND appeal is heard.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC



Ryan J. Patterson

EXHIBIT A

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January 25, 2023

VIA ELECTRONIC SUBMISSION

President Rachael Tanner and Commissioners
San Francisco Planning Commission
49 South Van Ness Ave, Suite 1400
San Francisco, CA 94103

Re: Appeal of Preliminary Negative Declaration
2022 Hotel Conversion Ordinance Amendments (Case No. 2020-005491ENV)

Dear President Tanner and Commissioners:

Our office represents Hotel des Arts, LLC, the appellant in Planning Case No. 2020-005491ENV regarding the Planning Department's issuance of a Preliminary Negative Declaration ("PND") and determination that the proposed 2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient use under Hotel Conversion Ordinance, Amortization Period (Board of Commissioners File No. 22081) (the "2022 HCO Amendments") will have no significant effect on the environment.

Under the California Environmental Quality Act ("CEQA"), a negative declaration is proper only where "[t]here is *no* substantial evidence, in light of the whole record before the lead agency, that the project *may* have a significant effect on the environment." (Pub. Resources Code § 21080(c), emphasis added). An environmental impact report (EIR) is therefore required if there is even a "fair argument" that a proposed project *may* have any adverse environmental impacts. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal. 4th 310, 319-320.) Here, there is a fair argument that the proposed project would have significant environmental impacts that were not adequately addressed in the PND. The PND and Planning Department's response to the appeal, rather than rebut the Appellants arguments, merely confirm that the 2022 HCO Amendments *will* lead to displacement of low-income occupants and contribute to direct physical impacts on the environment such as blight and urban decay. The Department's conclusions to the contrary are based on speculation, unsubstantiated narrative, and clearly erroneous and inaccurate assumptions.

1. <u>The Project Will Have a Significant Effect on Displacement and Vacancy Rates</u>

The Planning Department response acknowledges that the City's entire premise in regulating SRO units is that "they are a limited resource and critical housing stock that must remain available to serve a vulnerable and economically disadvantaged target population." Courts have similarly recognized that "residential hotel units serve many who *cannot afford security and rent deposits for an apartment*." (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 674, emphasis added.) The San Francisco Superior Court similarly determined in *San Francisco SRO Hotel Coalition, et al. v. CCSF, et al.* (CPF-17-515656) and *San Francisco SRO Hotel Coalition v. CCSF, et al.* (CPF-19-516864) (the "2017 HCO Amendments") that similar proposed amendments, and the possibility of SRO occupant displacement, was a reasonably foreseeable result of increasing the minimum length of stay from 7 to 32 days and that it is reasonably foreseeable that SRO owners would charge monthly rents and require security deposits. (See **Exhibit A)**

Multiple courts have found that requiring SROs to operate like apartments will lead to monthly rents and security deposits being required, and the Department's conclusions otherwise are based on nothing more than unsubstantiated opinion. The Department simply ignores these findings, callously claiming that "thousands of San Franciscans" are able to afford to pay monthly rents. This completely ignores the primary demographic that SROs are meant to serve – those in the extremely-low-income bracket. While the percentage of middle- and high-income residents in San Francisco has continued to rise and the percentage of very-low- and low-income residents has fallen, the percentage of extremely-low-income residents in San Francisco that make less than 30% of area median income has remained steady at 18%.[1] According to the Consumer Financial Protection Bureau, 37 percent of households are unable to cover expenses for longer than one month by using all sources, including savings, selling assets, borrowing, or

[1] *San Francisco Housing Needs and Trends Report July 2018,* San Francisco Planning Department, *available at* https://default.sfplanning.org/publications_reports/Housing-Needs-and-Trends-Report-2018.pdf.

seeking help from friends or family.[2] That figure rises to *51 percent* of Black and Hispanic households that cannot cover expenses for longer than a month. The 2022 HCO Amendments, which will lead to SRO units charging security deposits and monthly rents, would put such units out of reach for 37% of all households that do not have the ability to cover more than one month of expenses and likely a much higher percentage of SRO occupants.

The PND recognizes that "exclusionary displacement occurs when a lower income household cannot afford to move into an area given the cost of housing relative to their household income," yet the PND and Department response completely ignores this aspect of displacement that the 2022 HCO Amendments will cause. There is substantial evidence that the 2022 HCO Amendments will lead to exclusionary displacement, and the PND does not address this impact at all.

The PND and Department response do recognize that the 2022 HCO Amendments will cause economic displacement, which occurs when residents and businesses can no longer afford escalating rents or property taxes. However, the PND erroneously states that the Department "conservatively" assumes that occupants of only 64 SRO units will be displaced. This clearly erroneous assumption is based on the number of vacancies that SRO owners reported were directly due to the 2017 HCO Amendments. This number plainly underrepresents the true impact that the 2022 HCO Amendments may have.

First, the City acknowledges that there is a low response rate to its "Annual Unit Usage Report" ("AUUR") survey, and that the City has difficulty determining the actual vacancy rate. Despite the fact that the data only represents a fraction of the actual number of SRO units, the City only uses the raw total number of units that were reported vacant due to the 2017 HCO Amendments. Thus the 64 total units is likely significantly less than the total number of vacancies if *all* SROs were taken into account.

Moreover, the City similarly acknowledges that at the time of the AUUR surveys, "many SROs were *not complying with 32-day minimum and were still offering 7-day rentals*." In other

[2] *Making Ends Meet in 2022: Insights from the CFPB Making Ends Meet Survey*, CFPB Office of Research Publication No. 2022-9, available at: https://files.consumerfinance.gov/f/documents/cfpb_making-ends-meet-in-2022_report_2022-12.pdf.

words, SRO owners were not reporting vacancies due to the 2017 HCO Amendments because the City was not enforcing, and SRO owners were complying, with the 32-day minimum stay requirement. If the City were to enforce the 2022 HCO Amendments, the raw total number of vacancies due to the minimum stay requirement would likely rise significantly.

Finally, the Department does not explicitly acknowledge that the AUUR form only asks SRO owners to provide an explanation for reported vacancies when *more than 50%* of the units in the building are vacant.[3] The PND conceals this fact, and does not reveal how many SRO owners actually provided an explanation for their reported vacancies. This again suggests that raw total of reported vacancies due to the 2017 HCO Amendments is far below the actual number of vacancies that were caused by the 2017 HCO Amendments.

In sum, the 64 reported vacancies due to the 2017 HCO Amendments is based on a mere fraction of the actual number of SRO units, an even smaller fraction of reporting SRO units that complied with the 32-day minimum stay requirement, and an *even smaller* fraction of reporting complying SRO units that had more than a 50% vacancy rate. The PND and Department's assumption that this number is "conservative" is clearly erroneous. The City's own data demonstrates that displacement is certain to occur from the 2022 HCO Amendments and that the impact is clearly much greater than analyzed in the PND.

The PND and Department attempt to downplay the significance of the economic displacement that the 2022 HCO Amendments may cause by arguing that students, technology sector workers, and weekly transient tourists would make up part of the number of occupants who would be displaced. With respect to students and technology workers, the City's own 2015 analysis demonstrates that students and technology workers are definitively *not* part of the group of occupants who would be displaced by the 2022 HCO Amendments. As the Department response confirmed in a 2015 report to the Board of Supervisors, the Budget and Legislative Analyst Office found that some SROs are "providing *long-term rental housing* to students or to young technology sector workers" and confirmed that "at least three of the hotels are now providing *long-term housing* for students only." The 2022 HCO Amendments, which will

[3] See 2022 AAUR Form, available at https://sf.gov/sites/default/files/2022-11/2022AUURForm.pdf; 2018 AUUR Form, available at https://sfdbi.org/sites/default/files/AUUR%20Form.pdf.

increase the minimum stay requirement from 7 days to 30 days will have no impact at all on students and technology workers who *already* utilize SROs for long-term tenancies (and for whom a month's worth of rent and security deposit would likely not pose an economic barrier).

With regard to weekly transient tourists, the PND also fails to mention that the AUUR data *already* differentiates between residential guest rooms and tourist guest rooms.[4] The data provided in the PND, however, only lists total unit vacancies without revealing the vacancies for each type of unit. This again obscures the potential impact of the 2022 HCO Amendments. For example, if a 100-unit SRO included 50 residential guest rooms with 50% vacancy due to an inability to find occupants and 50 tourist guest rooms with 0% vacancy, the data in the PND would show that the SRO has only a 25% vacancy rate. However, if the 2022 HCO Amendments went into effect, the vacancy rate of the 100-unit SRO in the example above would skyrocket to 75% as the SRO in this example could only find enough occupants to fill 25 of its 50 residential guest rooms. The PND again fails to adequately analyze the evidence in the record, and the PND's conclusions that the 2022 HCO Amendments will not have an impact on vacancy rates is clearly erroneous.

2. <u>The Project Will Have a Significant Effect on Urban Blight and Decay</u>

The City has acknowledged that SRO units can provide a temporary step in finding permanent housing for homeless individuals, and the San Francisco Department of Public Health even leases a number of rooms in privately owned SRO buildings to temporarily house homeless individuals coming off the street or out of the hospital.[5] Monthly rents in privately owned and operated SRO buildings typically range from $650 to $700.[6] Data shows that 44% of employed homeless individuals and 82% of unemployed individuals earn less than $750 a month.[7] While such individuals may be able to seek shelter in an SRO for a week or several weeks at a time,

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[4] *See id.*
[5] *Single Room Occupancy Hotels in San Francisco: A Health Impact Assessment*, San Francisco Department of Public Health, available at: https://www.sfdph.org/dph/files/EHSdocs/HIA/SFDPH-SROHIA-2017.pdf.
[6] *Id.* at 10.
[7] *San Francisco Homeless County and Survey: 2022 Comprehensive Report*, Applied Survey Research, *available at*: https://hsh.sfgov.org/wp-content/uploads/2022/08/2022-PIT-Count-Report-San-Francisco-Updated-8.19.22.pdf.

requiring SRO owners to rent their units for a month at a time will put these rooms completely out of reach for a majority of homeless individuals.

Moreover, academic research is clear that the historic loss of SRO units as a naturally affordable housing option has led to an increase in homelessness.[8] As explained above, the PND's analysis on the impact on the vacancy rate is flawed and clearly erroneous. Yet even the PND's flawed analysis demonstrates that the vacancy rate in SRO's has been steadily increasing on its own, and the 2022 HCO Amendments will only exacerbate this problem. Increased vacancy rates will inevitably lead to deferred maintenance, closures, increased homelessness, urban decay, and blight. The fact that the PND explicitly acknowledges that these issues were *not* analyzed at all confirms that the PND is inadequate.

3. <u>The Project May Have Potential Physical Impacts that Must Be Analyzed</u>

Although the PND appears to acknowledge that the 2022 HCO Amendments may potentially have social and economic impacts, the Department states that only potential physical impacts resulting from economic activities must be analyzed under CEQA. Beyond the fact that caselaw is clear that urban blight and decay *are* physical impacts that must be analyzed under CEQA, the Department explicitly acknowledges that a reasonably foreseeable impact of the potential loss of low-income units (and resulting increase in homelessness) would be for the City to "*construct* homeless shelters, supportive housing and navigation centers." Construction of replacement housing units is unquestionably a physical impact that must be analyzed, and which this PND does not anlyze.

4. <u>Conclusion</u>

The environmental review of the 2022 HCO Amendments violates CEQA for multiple reasons. The data and evidence contained in the PND clearly demonstrates that the 2022 HCO Amendments *will* have a significant impact on displacement of SRO occupants, and that will

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[8] *Single-Room Occupancy Housing in New York City: The Origins and Dimensions of a Crisis*, Sullivan, Brian J., and Jonathan Burke. 17 CUNY L. Rev. 113-144, available at: https://mobilizationforjustice.org/wp-content/uploads/CNY109_Sullivan-Burke.pdf; *see also Preserving Affordable Housing in the City of San Diego*, San Diego Housing Commission, available at: https://www.sdhc.org/wp-content/uploads/2020/05/Affordable-Housing-Preservation-Study.pdf.

ironically put SRO units out of reach for the very sector of the population that the ordinance is apparently designed to protect – extremely-low-income residents. The 2022 HCO Amendments will unquestionably lead to increased vacancies, deferred maintenance, building closures, urban decay, and blight. The PND explicitly states that these potential impacts were ignored, despite the fact that the PND acknowledges that such impacts could lead to the construction of replacement public housing. The evidence is clear that the 2022 HCO Amendments may have significant environmental impacts, and we strongly urge that a more rigorous evaluation of those impacts be conducted through a full Environmental Impact Report.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC

Brian O'Neill

EXHIBIT A

FILED
San Francisco County Superior Court
SEP 24 2019
CLERK OF THE COURT
BY: _____ Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

SAN FRANCISCO SRO HOTEL COALITION, an unincorporated association, HOTEL DES ARTS, LLC, a Delaware limited liability company, and BRENT HAAS,

Plaintiffs and Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a public agency, acting by and through the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; DEPARTMENT OF BUILDING INSPECTION OF THE CITY AND COUNTY OF SAN FRANCISCO; EDWIN LEE, in his official capacity as Mayor of the City and County of San Francisco,

Defendants and Respondents.

Case No. CPF-17-515656

CEQA

ORDER RE. PETITION FOR WRIT OF MANDAMUS

Date Action Filed:	May 8, 2017
Trial Date:	May 3, 2019
Hearing Judge:	Cynthia Ming-mei Lee
Time:	9:30 a.m.
Place:	Department 503

INTRODUCTION

This matter was heard on May 3, 2019 at 9:30 a.m. in Department 503 of the San Francisco County Superior Court, the Honorable Cynthia Ming-mei Lee presiding. Bryan Wenter and Arthur Coon of the law firm Miller Starr Regalia, and Andrew Zacks of the law firm Zacks Friedman & Patterson P.C. appeared for plaintiffs and petitioners San Francisco SRO Hotel Coalition, Hotel Des Arts, LLC, and Brent Haas (collectively, "Petitioners"). Deputy City Attorneys Andrea Ruiz-Esquide, Kristen Jensen, and James Emery appeared on behalf of defendants and respondents, the City and County of San Francisco, the Board of Supervisors, the Department of Building Inspection, and the Mayor (collectively, "San Francisco").

In their First Amended Petition and Complaint ("FAP"), Petitioners assert causes of action under the California Environmental Quality Act ("CEQA"), codified under Public Resources Code sections 21000 *et seq.*), the federal and state constitutions, and the California Public Records Act ("PRA"). The Court heard argument on the CEQA claim and the PRA claim only. The federal and state constitutional claims remain pending.

I. CEQA

A. Background

In 1979, the San Francisco Board of Supervisors instituted a moratorium on the conversion of residential hotel units into tourist units in response to a severe shortage of affordable rental housing for elderly, disabled, and low-income persons. (Administrative Record ("AR") 001117, 001320; S.F. Admin. Code ("HCO") §§ 41.3(g).) Subsequently, in 1981, the City enacted the Residential Hotel Unit Conversion and Demolition Ordinance (the "HCO"), Administrative Code Chapter 41, instituting permanent controls to regulate all future residential hotel conversions. (AR 1427-45; HCO § 41.1 *et seq.*) In adopting the HCO, the Board of Supervisors included findings that "the City suffers from a severe shortage of affordable rental housing; that many elderly, disabled and low-income persons reside in residential hotel units; that the number of such units had decreased by more than 6,000 between 1975 and 1979; that loss of such units had created a low-income housing "emergency" in San Francisco, making it in the public interest to regulate and provide remedies for unlawful conversion of residential hotel units; that the City had instituted a moratorium on residential hotel conversion

effective November 21, 1979; and that because tourism is also essential to the City, the public interest also demands that some moderately priced tourist hotel rooms be available, especially during the summer tourist season." (*San Remo Hotel L.P. v. City and Cty. of San Francisco* (2002) 27 Cal.4th 643, 650 [citing the original HCO § 41.3]; see AR 1427-28.)

In the original HCO, a unit's designation as "residential" or "tourist" was determined as of September 23, 1979, by its occupancy status according to definitions contained in the HCO. (AR 1428-49 at §41.4.) The HCO required single room occupancy ("SRO") hotels in San Francisco to report all residential and tourist units in a hotel as of September 23, 1979. (AR 1433 at § 41.6.) Residential units were then placed on a registry, and a hotel owner could convert residential units into tourist units only by obtaining a conversion permit from the Department of Building Inspection ("DBI").[1] (*Id.* at §§ 41.4 [definition of Conversion]; 41.12 [Permit to Convert]; 41.16 [Unlawful Conversion; Remedies; Fines].) To obtain a conversion permit, applicants were required to construct new residential units, rehabilitate old ones, or pay an "in lieu" fee into the City's Residential Hotel Preservation Fund Account. (*Id.* at §41.10.)

The original HCO also allowed seasonal tourist rentals of residential units during the summer if the unit was vacant because a permanent resident voluntarily vacated the unit or was evicted for cause by the hotel operator. (*Id.* at § 41.16.) Further, the HCO required hotel operators to maintain records to demonstrate compliance with the ordinance and to provide these records for inspection by DBI. (*Id.* at §§ 41.6(h)-41.7.)

When the City adopted the original HCO in 1981, it determined there was no possibility the ordinance would have a significant impact on the environment. (AR 1454.) The trial court disagreed and found the requirement of one-for-one replacement of residential units "creates the very real possibility of a significant environmental impact." (*Id.*) While the trial court case was pending on appeal, the City performed an initial study on the original HCO and, on April 15, 1983, issued a preliminary negative declaration concluding that the HCO could not have a significant impact on the

[1] The Department of Building Inspection was formerly termed the Bureau of Building Inspection in the original HCO.

environment. (AR 1530-33; AR 1542.) The City then readopted the HCO and adopted a final Negative Declaration on June 23, 1983. (AR 1657-64.)

The Court of Appeal eventually issued its decision finding that "the City's failure to comply with CEQA was illegal," but "the defect was cured, however, by reenactment of the ordinance following an environment evaluation and issuance of a negative declaration." (*Terminal Plaza Corp. v. City & Cty. of San Francisco* (1986) 177 Cal.App.3d 892, 905, n.6.) Environmental review of subsequent amendments to the HCO likewise determined those amendments, addressed to the administration and enforcement of the HCO, could have no impact on the environment. (See, e.g., AR 1689-1693; AR 1727-29.)

In 1987 and 1988, the City conducted a series of meetings and workshops to discuss the operation of the HCO with City staff, community housing groups, and residential hotel owners and operators. (AR 1705.) City decision makers considered the concerns of hotel operators relating to the prohibition on renting residential units for fewer than 32 days. (AR 1706-09.) Ultimately, the City repealed and readopted the HCO in 1990, making four changes from the old law. (*San Remo Hotel v. City and County of San Francisco* (9th Cir. 1998) 145 F.3d 1095, 1099.) The 1990 amendments: (1) prohibited the summer tourist use of residential rooms; (2) increased the in lieu payment from 40 percent to 80 percent; (3) added the requirement that any hotel that rents rooms to tourists during the summer must rent the rooms at least 50 percent of the time to permanent residents during the winter; and (4) the new law did not provide for relief on the ground of economic hardship. (*Id.*)

In 2014, the City did an analysis of the HCO and found that while private hotel owners are required to file an Annual Unit Usage Report ("AUUR") with DBI, only 179 of 413 private SRO hotels thought to be in operation returned the annual usage report. (AR 3523-27.) The City acknowledged that given the low rate of response to the AUUR, it was difficult to know precisely the total number of residential units available in private and non-profit owned and operated SRO hotels, and the actual vacancy rates for these buildings. (AR 3525.) However, the City determined the following vacancies (*see* Table 2 at AR 3524):

- Of 228 privately owned SROs for which data was obtained, 864 of 7,241 units (11.9 percent) were vacant.

- Of 32 non-profit hotels, 91 of 2,667 units (3.4 percent) were vacant.

The City further found that "a few of the buildings...indicated that they were serving populations other than the low-income, disabled, and elderly individuals whom the units are intended to serve," and that "the hotels may be providing long-term rental housing to students or to young technology sector workers, both of which would be allowed under the provisions of Chapter 41." (AR 3523). It confirmed that "at least three of the hotels are now providing long-term housing for students only, a use which is allowed under Chapter 41, but which does not accomplish the goal of providing rooms for low-income and disabled populations." (AR 3525.)

Further analysis from the City showed the following vacancies in 2015 (*see* Table 3 at AR 5432):

- Of 419 hotels citywide, 1,689 of 16,611 units (10.2 percent) were vacant.
- Of 354 privately owned hotels, 1,488 of 11,473 units (13 percent) were vacant.
- Of 29 non-profit hotels, 84 of 2,028 units (4.1 percent) were vacant.
- Of 36 master-leased hotels by the City, 117 of 3,110 units (3.8 percent) were vacant.

Again, the City acknowledged that "many SROs had disconnected numbers, did not return phone calls, or were unable to provide information, [and] as a result, it was impossible to verify whether they were still in operation, or to include vacancy information for them." (*Id.*)

On December 6, 2016, Supervisor Peskin introduced substitute Ordinance No. 38-17 ("the 2017 Amendments") to update the HCO. (AR 0001; 0098-0122.) On December 16, 2016, the City determined the Ordinance was "not defined as a project under CEQA Guidelines Sections 15378 and 15060(c)(2) because it does not result in a physical change in the environment." (*Id.*)

On February 7, 2017, the Board of Supervisors unanimously adopted the 2017 Amendments. (AR 229.) Mayor Ed Lee signed the 2017 Amendments on February 17, 2017, and the 2017 Amendments became effective on March 19, 2017. (AR 204-230.) As of the proposed amendments, the HCO regulated roughly 18,000 residential units within 500 residential hotels across San Francisco. (AR 175.)

The focus of this action is subsections 41.20(a) and (b) of the amended HCO, which reads as follows:

SEC. 41.20. UNLAWFUL CONVERSION; REMEDIES; FINES.

(a) Unlawful Actions. It shall be unlawful to:

(1) Change the use of, or to eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter;

(2) Rent any residential unit for *Tourist or Transient Use* ~~*a term of tenancy less than seven days*~~ except as permitted by Section 41.19 of this Chapter;

(3) Offer for rent for ~~*nonresidential use or*~~ *T*~~*t*~~*ourist or Transient* U~~*u*~~se a residential unit except as permitted by this Chapter.

(AR 225 [added text is shown in italics and underlined; deleted text is shown in italics and strikethrough)].) The 2017 Amendments define "Tourist or Transient Use" as "any use of a guest room for less than a 32-day term of tenancy by a party other than a Permanent Resident." (AR 209.)

i. The 2019 Amendment

On May 31, 2019, after the Court heard oral argument, the City passed further legislation amending the HCO to revise the definition of "Tourist or Transient Use" to "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident." Thereafter, on June 12, 2019, the City filed a Motion to Dismiss the First through Fifth Causes of Action in the First Amended Petition as moot. An Amended Motion to Dismiss was filed on June 18, 2019. On June 18, 2019, Petitioners filed a Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint.

The Court heard oral argument on the Motion to Dismiss and Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint on August 9, 2019. The parties stipulated to continue the Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint to September 27, 2019.[2] The Court denied the City's Motion to Dismiss. As the Court stated in its August 15, 2019 order:

> Plaintiffs' Constitutional and CEQA challenges are not moot because material questions remain for the Court's determination.[3] (*Eye Dog Found. v. State Bd. of Guide Dogs for Blind* (1967) 67 Cal. 2d 536, 541 ["the general rule governing mootness becomes subject to the case

[2] The Court granted Petitioner's ex parte application on September 10, 2019 to advance the hearing to September 25, 2019 in light of the statutory deadline to challenge the 2019 Amendments under Government Code section 65009(c).

[3] San Francisco acknowledges that Plaintiffs' PRA cause of action in its First Amended Petition is not moot. (Motion to Dismiss at 4, n.1.)

recognized qualification that an appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination"]; *Davis v. Superior Court* (1985) 169 Cal. App. 3d 1054, 1057–58 ["the enactment of subsequent legislation does not automatically render a matter moot. The superseding changes may or may not moot the original challenges...This issue may only be determined by addressing the original claims in relation to the latest enactment"].) While the 2019 HCO Amendment dropped the minimum length of SRO unit use from 32 days to 30 days, this change does not moot Plaintiffs' challenge to the 2017 HCO Amendments on grounds that the HCO "redefine[ed] prohibited 'tourist or transient' use and 'unlawful actions' so as to entirely eliminate SRO operators' preexisting year-round right to rent SRO units for minimum terms of at least seven (7) days." (First Amended and Supplemental Verified Petition at ¶ 23.)

Accordingly, the Court will address the 2017 Amendments in relation to the 2019 Amendment in this order.

B. Exhaustion of Administrative Remedies

CEQA requires issue exhaustion: "No action or proceeding may be brought pursuant to [CEQA] unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency ... during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Res. Code § 21177(a).) This exhaustion requirement is jurisdictional. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.)

Under the exhaustion of administrative remedies doctrine, the "exact issue" must be presented to the agency, and neither "bland and general" references to environmental issues, nor "isolated and unelaborated comments" will suffice. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-36.) Petitioner "bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level." (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 910.)

The City argues that neither Petitioners Brent Haas nor Hotel Des Arts raised any CEQA claim during the City's administrative review of the 2017 Amendments. (Opposition ("Opp") at 11.) Petitioners argue that the City did not give proper notice and therefore, the exhaustion doctrine does not apply. (Reply at 24.) The Court finds Petitioners' notice argument unpersuasive. The record reflects that the City noticed multiple public hearings before the Board of Supervisors, providing a description of the proposed changes to the HCO and indicating that one of the issues to be discussed

would be "affirming the Planning Department's determination under the California Environmental Quality Act." (AR 645 [January 23, 2017 Meeting Agenda], 734 [January 31, 2017 Meeting Agenda], 1065 [February 7, 2017 Meeting Agenda].) Further, any argument regarding defective notice is waived since Samantha Felix, manager of Hotel Des Arts, submitted a letter to the Board of Supervisors dated January 27, 2017 and received January 31, 2017, objecting to the minimum 32 night stay under the proposed amendments. (AR 6609-6611; *see Hines v. California Coastal Com.* (2010) 186 Cal. App. 4th 830, 855 [finding that the administrative remedy exhaustion requirement of section 21177, subdivision (a) was triggered where one appellant spoke and appellants and others submitted written arguments at two public hearings].)

Based on the evidence discussed, the Court finds that Petitioner Hotel Des Arts exhausted its administrative remedies and has standing. However, the Court finds that Mr. Haas lacks standing to pursue the CEQA claims in this case. There is no evidence in the record that Mr. Haas participated in the administrative process before the Board of Supervisors when the City enacted the 2017 Amendments.

C. Petitioners' Motion to Augment the Administrative Record and Request for Judicial Notice

The City stipulated to augmentation of the Administrative Record with Exhibits 4 and 12 through 18 to the 9/13/18 Declaration of Arthur F. Coon In Support Of Petitioners' Motion To Augment Administrative Record ("9/13/18 Coon Decl."). The City agreed to allow a redacted version of Exhibit 11, omitting an inadvertently disclosed attorney-client communication from the email chain. Accordingly, the Court orders the record augmented only as to these specific exhibits.

The Court finds that all other exhibits attached to the 9/13/18 Coon Decl. are irrelevant as Petitioners have not shown that the documents were actually considered by the Board in making its decision. Accordingly, the Court denies the balance of the Motion to Augment. The Court denies Petitioners' Request for Judicial Notice on the same grounds.

D. Whether the amended HCO is a CEQA "Project"

CEQA and CEQA Guidelines establish a three-tier process to ensure public agencies inform their decisions with environmental considerations. (*Muzzy Ranch Co. v. Solano County Airport Land*

Use Com'n (2007) 41 Cal.4th 372, 380.) The first tier is jurisdictional—that is, an agency must "conduct a preliminary review to determine whether an activity is subject to CEQA." (*Muzzy Ranch,* 41 Cal.4th at 380; CEQA Guidelines[4] § 15060(c).) If an activity is not a "project," it is not subject to CEQA. (*Id.*) At the second tier, if the agency has determined the proposed action is a CEQA "project," it must determine whether it qualifies for any exemption from CEQA review. (*Id.*) If not, the agency "must conduct an initial study to determine whether the project may have a significant effect on the environment." (*Id.*; CEQA Guidelines § 15063(a).) If there is "no substantial evidence that the project or any of its aspects may cause a significant effect on the environment,...the agency must prepare a "negative declaration" that briefly describes the reasons supporting its determination." (*Id.* at 380-81; CEQA Guidelines § 15063(b)(2).) At the third tier, "if the agency determines substantial evidence exists that an aspect of the project may cause a significant effect on the environment...the agency must ensure that a full environmental impact report is prepared on the proposed project." (*Id.* at 381; CEQA Guidelines § 15063(b)(1).) Accordingly, no environmental review under CEQA occurs if an agency determines an activity is not a project.

A "project" is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (1) An activity directly undertaken by any public agency..." (Pub. Res. Code § 21065(a); *see also* CEQA Guidelines § 15378(a)(1) [A "project" is "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: (1) An activity directly undertaken by any public agency including but not limited to . . . enactment and amendment of zoning ordinances . . ."]; see also *Muzzy Ranch, supra,* 41 Cal.4th at 381 ["whether an activity constitutes a project subject to CEQA is a categorical question respecting whether the activity is of a general kind with which CEQA is concerned, without regard to whether the activity will actually have environmental impact"].) CEQA "shall apply to discretionary projects proposed to be carried out or

[4] References to CEQA Guidelines refers to Cal. Code Regs., tit. 14, Ch. 3 §§15000-15387.

approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances . . . ." (Pub. Res. Code § 21080(a).)

The parties dispute: 1) whether the amended HCO is categorically a "project" because it is an ordinance akin to a zoning ordinance; and 2) whether the amended HCO is an activity that may cause a reasonably foreseeable indirect physical change in the environment. The Court addresses these issues in turn.

i. Zoning Ordinance

Petitioners assert the amended HCO is "categorically a project within CEQA's purview" because: 1) the 2017 Amendments are "akin" to a zoning ordinance; and 2) zoning ordinances are categorically CEQA "projects" under § 21080(a), which specifically lists "the enactment and amendment of zoning ordinances" as among the discretionary projects subject to CEQA, citing *Rominger v. County of Colusa* (2014) 229 Cal.App.4th at 690, 702. (Petitioners' Opening Brief ["Opening Brief"] at 9-10, 25.) As to whether zoning ordinances are categorically CEQA "projects," the California Supreme Court recently disapproved of *Rominger* in *Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal. 5th 1171, holding "the various activities listed in section 21080 must satisfy the requirements of section 21065 before they are found to be a project for purposes of CEQA." Thus, CEQA applies "only to activities that qualify as projects — in other words, to specific examples of the listed activities that have the potential to cause, directly or indirectly, a physical change in the environment." (*Id.* at 328, emphasis in original.)

Regardless, the Court finds that the 2017 Amendments are not "akin" to a zoning ordinance. As the court found in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 902 regarding the original HCO:

> Zoning laws typically regulate such facets of land use as location, height, bulk, setback lines, number of stories and size of buildings, and the use to which property may be put in designated areas (Gov. Code, § 65860 et seq.; *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 59 [107 Cal.Rptr. 214].)....The ordinance, however, does not regulate land use in the same manner as zoning laws. The nature of buildings or uses permitted in specified districts are not touched upon by the ordinance; nor does it seek to control the dimensions, size, placement or distribution of structures within the City. The ordinance is of general application, and merely

regulates existing uses. The regulations governing issuance of conversion permits require purely ministerial acts; the replacement provisions do not call for land use decisions.

In other words, the land is already zoned for commercial use and remains unchanged. The HCO merely regulates how owners operate commercial use buildings once they've been built.

The cases cited by Petitioner involve ordinances that regulate initial uses of the land rather than existing uses and are therefore distinguishable. (*see e.g.*, *Morehart v. County of Santa Barbara* (1994) Cal.4th 725, 750 [purpose of the challenged ordinance was "to regulate the minimum size of a lot on which a residence may be built"]; *People v. Optimal Global Healing, Inc.* (2015) 241 Cal.App.4th Supp. 1, 7-8 [involving ordinance that makes it a misdemeanor to own, establish, operate, use, or permit the establishment or operation of a medical marijuana business]; *DeVita v. Cty. of Napa* (1995) 9 Cal. 4th 763, 773 [involving amendment to general plan that guided future local land use].)

ii. Reasonably Foreseeable Indirect Physical Change in the Environment

The next issue is whether the amended HCO is an activity that may cause a reasonably foreseeable indirect physical change in the environment. Identifying a physical change involves "comparing *existing* physical conditions with the physical conditions that are predicted to exist at a later point in time, after the proposed activity has been implemented. The difference between these two sets of physical conditions is the relevant physical change." (*Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal. App.4th 273, 289 (disapproved on other grounds in *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279) (emphasis in original, citation & footnote omitted).) Under CEQA Guidelines, "an indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." (§ 1504(d)(3).)

A comparison of the HCO before and after the 2017 Amendments indicates that prior to 2017, section 41.20(a) made it unlawful to "rent any residential unit for a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter" and "offer for rent for nonresidential use or

tourist use a residential unit except as permitted by this Chapter." (AR 225.) Hence, a hotel owner could rent a residential unit for as few as seven days as long as it was for residential use. A hotel owner could not rent a residential unit for tourist use unless certain conditions applied. Following the 2017 Amendments, section 41.20(a) makes it unlawful "to rent any residential unit for Tourist or Transient Use except as permitted by Section 41.19 of this Chapter" and "offer for rent for Tourist or Transient Use a residential unit except as permitted by this Chapter." (*Id.*)

Under the 2017 Amendments, "Tourist or Transient Use" was defined as "any use of a guest room for less than a 32-day term of tenancy by a party other a Permanent Resident.[5]" (AR 209.) As such, a guest who occupied a residential unit of an initial term of 32 continuous days became subject to the provisions of San Francisco's rent ordinance. (S. F. Admin. Code § 37.2(r) [definition of a rental unit].) In effect, the 2017 Amendments no longer permitted rentals to non-permanent residents for short term tenancies lasting from seven days to thirty-one days. Under the recent 2019 Amendment, "Tourist or Transient Use" is defined as "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident." (HCO § 41.20(a).) The significance of the minimum 30-day rule is that guests who stay the minimum 30-day tenancy cannot be evicted unless an unlawful detainer proceeding is brought. (see Civil Code § 1940.1)

The Court finds that tenant displacement is a reasonably foreseeable impact of the amended HCO. The HCO's purpose is to provide and preserve affordable housing for elderly, disabled, and low-income persons; its premise in extensively regulating the terms of occupancy for SRO units is that they are a limited resource and critical housing stock that must remain available to serve a vulnerable and economically-disadvantaged target population. (HCO § 41.3.) While the 2019 Amendment reduced the 32-day minimum tenancy to 30 days, it still restricts hotel owners from renting rooms to guests for tenancies as short as seven days, as was previously allowed prior to the 2017 Amendments.

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[5] Permanent Resident is defined as "A person who occupies a guest room for at least 32 consecutive days." (HCO § 41.4.)

A change in regulation that increases the minimum term of occupancy for the finite number of available SRO units from weekly hotel rentals to monthly apartment rentals foreseeably restricts the availability of the limited stock of these units to the target population, with the reasonably foreseeable effect of displacing that population elsewhere.

The Court rejects the City's argument that the HCO will not result in displacement of short-term tenants because it does not require private SRO hotel owners to charge first and last months' rent and security deposits. While the 2017 Amendments does not require a specific payment structure, it is reasonably foreseeable that hotel owners could begin requiring security and monthly deposits if forced to rent for longer minimum rental terms that eliminate weekly rentals. It is also reasonably foreseeable that renters who are unable to afford monthly deposits would be displaced as a result. (*San Remo Hotel,* 27 Cal.4th at 674 ["residential hotel units serve many who cannot afford security and rent deposits for an apartment"].) Such reasonably foreseeable actions by hotel owners resulting in displacement is sufficient for purposes of the first tier of CEQA analysis. (Pub. Res. Code § 21065(a) ["'Project' means an activity which *may* cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment"] (emphasis added).)

The Court of Appeal's opinion[6] reversing this Court's denial of Petitioners' motion for a preliminary injunction based on their constitutional due process and takings claims is also instructive in this regard. In its unpublished October 15, 2018 opinion, the court held that the pre-amendment version of HCO "precluded rentals of less than seven days, regardless of a showing of the renter's purpose, and it is the seven-day period which demarcates residential from tourist rentals." (10/15/18

[6] The Court of Appeal's relevant findings and holdings are considered the law of the case and govern the disposition of subsequent issues in this litigation. (*Santa Clarita Org. for Planning the Env't v. Cty. of Los Angeles* (2007) 157 Cal. App. 4th 149, 156 [holding "where an appellate court states in its opinion a principle or rule of law necessary to its decision, that principle or rule becomes the law of the case"].) After reversal of the order denying the preliminary injunction and upon remand, this Court re-set Petitioners' preliminary injunction motion for hearing to balance the parties' relative hardships. Upon the parties' stipulation, this Court entered an injunction on against operation or enforcement of the HCO's minimum rental term by anyone and for any purpose pending resolution of this litigation or further order of this Court. (11/30/18 Injunction Order.)

Opinion at 8.) The court further held "the 2017 Amendments effected a substantial change by making the minimum term 32 days unless the person was already a permanent resident." (*Id.*) Noting that the 2017 HCO Amendments do not provide for compensation or a reasonable amortization period, the court held, "they do, on their face, require owners of SROs to forego more classically styled hotel rentals in favor of more traditional tenancies. This changes the fundamental nature of their business, by making them landlords rather than hotel operators." (*Id.* at 10.) As such, even a 30-day minimum term, which, as discussed, would make the hotel owner subject to landlord-tenant laws under state law, could foreseeably cause SRO hoteliers forced to become apartment landlords to begin requiring the security and rent deposits customary to that fundamentally changed business model. This is assuming they wish to rent their SRO units at all.

To the extent Petitioners argue that this displacement also leads to increased homelessness and urban blight, the Court acknowledges *San Remo*, which found that "while a single room without a private bath and kitchen may not be an ideal form of housing, [SRO] units accommodate many whose only other options might be sleeping in public spaces or in a City shelter." (27 Cal.4th at 674.) However, the Court finds that Petitioners fail to provide evidence in the record that links tenant displacement due to the amended HCO with homelessness and/or urban blight. (*see e.g.*, AR 3534 [internal e-mail between HSA/DSS employees discussing "public health risk" and "individual human suffering that results from homelessness" in the context of a building a mandatory shelter]; 3539 [HSH-HAS draft policy document noting homelessness as the City's "#1 problem" and "public health crisis" that "poses risks to the general public due to the presence of excrement, used needles, vermin, etc. that are often byproducts of persons living on the streets or in our parks," and proposing that the City "provide a nightly shelter bed to ALL individuals who are living on the streets or in our parks a night; 1375-1389 [San Francisco Leasing Strategies Report Draft discussing generally strategies for encouraging landlords to rent to individuals who are, were, or are at risk of being homeless].) The

Court also rejects Petitioners' further assertion that resort to record evidence is unnecessary to resolve the threshold issue raised here as a categorical matter. (*Muzzy Ranch.*, 41 Cal.4th at 382 [holding "whether an activity is a project is an issue of law that can be decided on undisputed data in the record on appeal"].)

Regardless, the Court need not reach this issue, since a finding of tenant displacement is within the purview of CEQA. In *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 451, the project at issue included demolition of housing units in a redevelopment plan. The court held that CEQA "is made relevant here by the Ellis Act's explicit exceptions for a public entity's power to regulate, among other things, "planning," "subdivision map approvals," the "demolition and redevelopment of residential property," *and the mitigation of adverse impacts on persons displaced by reason of the withdrawal of rental accommodations*. Such items are the common focus and byproducts of the CEQA process, as they were in the case here." (emphasis added.)

The record further reflects that short-term renter displacement as a result of change in the minimum term of tenancy was foreseen and documented by the City. (AR 1706 [1988 Report on Residential Hotels Policy and Legislative Issues noting, "The 32 day rental requirement often works against the rental of vacant residential hotel units as operators have to refuse occupancy to weekly tenants, even though some residential units may have been vacant for long periods"] see also AR 1341, 1345 [City memo suggesting section 41.20 be revised to a 32 day minimum rental, also suggesting that "low income, elderly, and disabled persons should be allowed to pay in seven (7) day increments so they, as the target population to be served, have access to this housing"].) The City also foresaw, in connection with its consideration of prior HCO amendments, that hoteliers not wanting to risk permanently committing to undesirable tenants not vetted through weekly rentals, might hold SRO units off the rental market. (AR 1707 [1988 City Planning report: "Weekly rentals are used by

operators to screen potential trouble making tenants. Without this option, operators are leaving units vacant rather than risk renting to potentially troublesome tenants on a monthly basis."].)

In summary, it is reasonably foreseeable that the 2017 HCO Amendments may lead to indirect physical changes in the environment in the form of tenant displacement, and tenant displacement is the general sort of activity with which CEQA is concerned. Accordingly, the Court finds that the amended HCO is "project" and the City failed to proceed in the manner required by law in summarily dispensing with CEQA review. The Court therefore grants the CEQA writ petition and orders the issuance of a writ of mandate setting aside the City's adoption of the 2017 HCO Amendments pending its compliance with CEQA.

II. The Public Records Act Requests

A. Background

Petitioners filed their verified FAP on August 23, 2017, adding the Sixth Cause of Action for PRA violations and seeking a writ of mandate under Code of Civil Procedure Section 1085. They thus "bear the burden of pleading and proving the facts on which the claim for relief is based." (*Cal. Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153 (internal citations omitted).)

Petitioners allege and argue that they were required to sue the City to obtain relevant public records which they had requested and to which they are entitled under the PRA because the City had: (1) refused to search for relevant and responsive records in all City departments possessing them; (2) intentionally narrowly interpreted the scope of Petitioners' facially broad requests; (3) improperly stopped producing responsive documents for over two months before Petitioners filed their FAP alleging the PRA claim; and (4) ultimately and belatedly provided a large number of previously withheld responsive documents (many of which became part of the certified Administrative Record on the CEQA claim) after the PRA claim was filed. (Coon PRA decl. at ¶¶ 18-25, 36-37.) Petitioners

also allege the City improperly failed to produce required affidavits from certain City officials and employees verifying that adequate searches for responsive public records on their personal electronic devices were made (*Id.* at ¶¶ 5, 8, 13, 17, 37.) On this issue, the Court directed the City to provide executed declarations from the specified individuals at the May 3, 2019 hearing. Thereafter, on May 24, 2019, the City produced the declarations except for the custodian of records for the Department of Building Inspection who supervised the collection of documents including materials from Rosemary Bosque (now retired). The City indicated that the custodian was away from the office until May 29, 2019, but that they would the would forward her declaration after her return.

As to document production, Petitioners acknowledge the City has produced all responsive documents. However, they assert they have prevailed on their PRA claim under the catalyst theory. Under the catalyst theory, "the question whether the plaintiff prevailed, in the absence of a final judgment in his or her favor, is really a question of causation—the litigation must have resulted in the release of records that would not otherwise have been released." (*Sukumar v. City of San Diego* (2017) 14 Cal. App. 5th 451, 464.) In determining whether a PRA lawsuit caused an agency to release requested public records, "it is necessary to examine the parties' communications, the timing of the public record productions, and the nature of the records produced." (*Id.* at 454.) Petitioners must show "more than a mere temporal connection between the filing of litigation to compel production of records under the PRA and the production of those records." (*Id.* at 464.) As the court in *Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 901-902 similarly held:

> A party is considered the prevailing party if his lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result. The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two.

(internal citations omitted.) Based on the evidence in the record, the Court finds the City acted reasonably in responding to Petitioners' PRA requests, and Petitioners' PRA cause of action was not "the motivating factor" for the City's document production.

B. Evidence in the Record

On February 7, 2017, the Board of Supervisors enacted the 2017 Amendments. On the same day, counsel for Petitioners sent a letter to the Board commenting on the pending legislation, and requesting "relevant documents to include records that comprise, constitute or relate to:"

- The person, persons, organizations, or entities that suggested the Proposed Amendments or that in any way initiated the Proposed Amendments or caused the Proposed Amendments to be initiated.
- The rationale or justification for the Proposed Amendments.
- CEQA review or studies for any aspect of the Proposed Amendments or potential environmental effect of the Proposed Amendments, including but not limited to displacement of tenants.
- The City's record retention policies

(Dec. of Arthur Coon in Supp. of Writ ["Coon Decl."] at Ex. 1.) In response to this request, the custodian of records for the Board of Supervisors provided documents in installments between February 7 and March 6, 2017. (*Id.* at Ex. 2.)

Petitioners' Counsel sent a second document request on March 24, 2017. (*Id.*, at Ex. 3.) This time, the request was addressed to both the Board of Supervisors and the Department of Building Inspection, and requested documents relating to:

- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any member of the Board of Supervisors, Planning Commission, Building Inspection Commission, and Single Room Occupancy Task Force.
- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any member of the Land Use and Transportation Committee, Rules Committee, and Budget and Finance Committee.
- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any City representative [including ten specifically named City employees and departments].
- Any record pertaining to any potential environmental effect (including but not limited to displacement of SRO tenants) of the HCO prepared, owned, used, retained, created, received, or exchanged by the City of any of the individuals or entities referenced in this Public Records Act request.

(*Id.* at Ex. 3.) The request also stated "Please note, we are only seeking records prepared, owner, used, retained, created, received, or exchanged by the City since January 1, 2016. In the case of Supervisor Peskin, however, we are seeking records dating from December 8, 2015." (*Id.*)

In response, the custodian of records from DBI contacted counsel asking for clarification regarding the scope of the request and, on April 4, 2017, provided a first production to the requestor, followed by a second and final production on June 6, 2017. (*Id.* at Exs. 4 and 5.) The custodian indicated on June 6, 2017 that parts of the record had been redacted where they were "legally required to do so to protect the privacy interests of individuals" under California Constitution, Article I, section 1 and California Government Code sections 6254(k) and 6254(c), and that attorney-client privileged records had been withheld. (*Id.* at Ex. 5.) The custodian further stated "We have finished conducting our search and found no other documents responsive to your request. Therefore, we consider your request closed." (*Id.*)

On July 12, 2017, counsel for Petitioners submitted a third records request to the records managers for the Board of Supervisors and Department of Building Inspections, asserting that the City's productions to date were inadequate, and objected to duplications and the redactions by DBI. (*Id.* at Ex. 6.) The request exponentially increased the chronological scope by requesting documents over a 36-year period, cast a wider net to non-specified City agencies, and added categories of requested information including homelessness. It was somewhat ambiguous in terminology and lacked distinct parameters. Among the new requests, Petitioners sought the following:

- All writings that address or relate to displacement of persons from SRO hotels since the adoption of the HCO in 1981
- All documents reflecting laws, programs, procedures, policies, and efforts developed by the City to assist tenants or potential tenants who are displaced from housing options
- All documents prepared, owned, used, retained, created, received, or exchanged by the City, and/or any of its departments, agents, consultants, volunteers, or employee between January 1, 2008 and [2017] that survey, study, analyze, catalogue, count, estimate, quantify, or reflect (a) The number of homeless persons within the City and/or (b) the environmental impacts caused by homeless persons living or sleeping in public

places not meant for human habitation in the City (e.g., urination or defecation, waste, tent encampment, discarded hypodermic needles, panhandling, loitering, crime, etc."

- Added the Tenderloin Housing Clinic and Randy Shaw to the list of city agencies referenced in the second PRA request.

(*Id.* at Ex. 6.) Petitioners' counsel explained the July PRA request was "made to facilitate our preparation of the administrative record in [this action], and we believe such documents should be included in the administrative record." (*Id.*) The third request was only served on the records manager for the Board and custodian of records for DBI. (*Id.*) No other City agencies, commissions, or individuals were served. The request caused the records manager for the Board of Supervisors to contact Petitioner to affirm that the Board of Supervisors did not have any additional records responsive to the new request and suggested Petitioner contact the Department of Building Inspections directly for other documents. (*Id.* at Ex. 9).

On August 2, 2017, the Custodian of Records for the Department of Building Inspections responded to Petitioners, acknowledging its production of responsive documents related to Petitioners' March 24, 2017 request, and stated "it seems you now have three new requests for DBI." (*Id.* at Ex. 10). The custodian requested clarifications on the "new" requests as follows: (1) for the new request for additional documents relating to the HCO, "provide the keywords/topics of interest along with the timeframe;" (2) provide a definition of "displacement of persons," in addition to identifying the subject matter of interest in light of the burden of responding, to allow narrowing the search and getting Petitioner the documents sought; (3) noted the request for all HCO documents since its adoption in 1981 and expressed a desire to work with Petitioner to identify the particular HCO sub-topic and narrow the time frame if possible; and (4) directed contact with the Department of Homelessness and Supportive Housing or SF Human Services Agency for the information sought. (*Id.*)

Petitioners responded in a letter on August 4, 2017, in which they rejected the requests for definition of "displacement," clarified the scope of the request to "records that address or relate to displacement of persons, whether low income, elderly, disabled, or otherwise from SRO hotels since the adoption of the HCO in 1981, and (sic) regardless of the reason for the displacement," and reiterated that "records" included "electronic records in all forms wherever located, including

privately-owned computers, tablets, phones and electronic devices, including privately-owned and maintained accounts or servers," citing *City of San Jose v. Superior Court (Smith)* (2017) 2 Cal.5th 608. (*Id.* at Ex. 11.) Petitioners noted that thus far, no documents had been produced regarding "the environmental impacts caused by homeless persons in the City" and rejected the City's implied response of lack of documents regarding the number of homeless persons within the City, citing two of City's websites containing data. Petitioners further requested affidavits with sufficient facts to show whether the requested records were personal or public. (*Id.*)

On August 7, 2017, the records manager for the Board of Supervisors responded that all relevant documents had been provided, referred Petitioner to the Legislative Research Center for other legislative files and indicated that follow up inquires for records should be made to DBI. (*Id.* at Ex. 12.) For litigation matters, Petitioners were told to contact Deputy City Attorney Robb Kapla. (*Id.*)

On August 8, Petitioners responded to the Records and Project Manager for the Board of Supervisors and Custodian for the Department of building Inspections, excoriating both individuals for the responses to the three Public Records Acts requests and reminding them of the obligation to provide the documents or an affidavit from all relevant individuals to show whether any information withheld is public or private. (*Id.* at 13.)

On August 15, 2017, the records manager for the Board again stated there were no additional responsive records and advised Petitioners to "contact DBI if you have follow up inquiries that address or pertain to any of records that they may have, or contact the respective City Department(s) if you are extending your search to all City Departments, and lateraled all follow-up to Deputy City Attorney Robb Kapla. (*Id.* at Ex. 14). The City Attorney's office had not been served with any of the three records requests. There is no evidence that the City Attorney was actively involved with responses to the multiple requests. Rather, the evidence indicates that each agency responded individually to requests within their purview.

Petitioners responded with an email to the custodians of records for the Board of Supervisors, DBI, and Deputy City Attorney Kapla on August 16, stating "we are still being told to figure out ourselves which other city departments might have responsive documents and to make separate requests to those departments (each of our requests has always been intended to include all City

departments)," and further, "if the City Attorney is responsible for coordinating with all City departments, we obviously request for that to occur." (*Id.* at Ex. 15.) This e-mail stated what was already apparent—a lack of notice to individual City agencies despite Petitioners' requests for documents encompassing over 160 City departments, commissions, task forces, and numerous named individuals. Rather, the three records requests had only been served on the Board of Supervisors and DBI, the only two agencies named in the requests. Petitioners inexplicably assumed one of the two agencies would somehow be responsible for the coordination of records collection for all the other independent City agencies, each with a unique custodian of records.

As of mid-August 2017, the City had produced a total of 2,500 pages of responsive documents and efforts continued to fulfill the requests in a "rolling production" process. Subsequently, on August 23, 2017, Petitioners filed their "First Amended and Supplemental Verified Petition for Writ of Mandate; Complaint for Declaratory and Injunctive Relief For Takings, Denial of Due Process, and Denial of Equal Protection," which added a Sixth Cause of Action seeking a writ of mandamus for violations of the California Public Records Act – Government Code sections 6258 and 6259, and Code of Civil Procedure section 1085. (FAP at 20.)

On August 28, Petitioners wrote to the two City Attorneys assigned to the CEQA litigation referencing the history of requests to the custodians of the Board of Supervisors and DBI. (*Id.* at Ex. 17.) Petitioners disclaimed that the requests were limited to the Board of Supervisors or DBI, and asserted that their requests had "always included and been intended to include all City departments," which "should be broadly construed to include any council, board, commission, department, committee, official, officer, council member, commissioner, employee, agent, or representative of the City." (*Id.*) In a separate letter also on August 28, Petitioners further wrote to the City with regard to the delay in certification of the administrative record. (*Id.* at Ex. 16.)

On September 6, 2017, the Deputy City Attorney Ruiz-Esquide wrote to Petitioner indicating readiness to certify the administrative record, explaining previous hesitancy to do so because of the "broad and evolving document requests to city agencies, explicitly stating that Petitioners seek additional documents for inclusion in the administrative record." (*Id.* at Ex. 18.) Two days later, on September 8, 2017, DCA Ruiz-Esquide responded to the records issues and stated "as you know, the

documents you requested are voluminous. Different City departments are diligently searching their records. We will be producing them to you on a rolling basis, as we receive them from the different departments," and enclosed a disc with records from the Human Services Agency and Department of Homelessness and Supportive Housing. (*Id.* at Ex. 19). In another letter three days later, on September 11, 2017, Petitioners denied knowing or having any reason to know the records were voluminous, given the response by the Board and DBI. (*Id.* at Ex. 20.) This was despite Petitioners' insistence that the request was intended to include all city departments and city agencies, and to be broadly construed.

At the Case Management Conference on September 29, 2017, the parties brought the Public Records Act production issues to the Court's attention. (See parties' Case Management Conf. Statements, filed Aug. 30, 2017). Of concern to the parties was the increased scope of the request, volume of documents and dispute about what was properly part of the Administrative Record. A central question emerged regarding whether all documents generated by City employees or agencies properly part of the Administrative Record, even if the decision-makers (Board of Supervisors) did not consider the documents in the CEQA decision.

At the September 29, 2017 Case Management Conference, and at subsequent conferences on November 17, 2017 and January 11, 2018, the Court supervised further negotiations between the parties. City department searches for the documents with the terminology in the requests identified "truckloads" of material of questionable relevance. The Court and the parties discussed appropriate ways for the Petitioners to fine-tune the search through more specific search terms and how to narrow the search to the relevant City departments. In addition, the Court imposed production deadlines for the City and reviewed the progress of production by each City department selected. The City conducted a review for privilege and redaction of personal identifying information.

At the November 17, 2017 conference, the Court directed the City to collect and produce documents "to be located through the use of search terms as discussed" and refine search terms including "environmental impact of homelessness" and "environmental impact caused by homelessness." (Petitioners' CMC Statement, filed Dec. 27, 2017.) Other search terms were discussed at length. The search term "homeless" produced documents from the Department of Public

Health which were not relevant to the issues, while a broad search involving documents from the Mayor's Office of Housing and Community Development yielded individual applications for housing which would require redaction of personal identifying information. Petitioners requested more specific terms be utilized, (eg. urination, defecation, human waste, tent encampment, needles) to reflect the environmental impacts of homelessness.

As for document production, the City Attorney represented that documents aggregated by their office were being processed and redacted as needed. Production of documents from the Department of Public Works, Department of Public Health, Planning Department, Planning Commission, Budget/Legislative Analyst Office, Single Room Occupancy Task Force among others were in progress. Other agencies, such as the Department of Human Services completed production. The search with some terms ("environmental impact of homelessness") continued for all city departmental files. By the end of December, almost 4,000 additional documents were produced.

At the January 11, 2018 conference, Petitioners' counsel "further narrowed" their requests. (See Petitioners' CMC Statement, filed March 27, 2018.) An additional 9,600 pages from various city departments had been produced. The City represented that all documents that had been produced using the new search parameters were being processed.

On February 14, 2018, San Francisco completed its production in response to Petitioners' revised and narrowed Public Records Act Requests. San Francisco's rolling production totaled nearly 40,000 pages from twelve City agencies, commissions or departments. (See Petitioners' CMC Statement, filed March 27, 2018; Coon Decl., Exs. 27, 33.) Throughout this process, it became apparent that the ambiguous and overbroad terminology of the third request produced too many documents, some of which Petitioners acknowledged were not relevant to the litigation.

Petitioners argue that the filing of the lawsuit resulted in production of documents withheld. The evidence indicates that with the filing of the PRA claim, the City Attorney's Office became the point-persons to direct the search, aggregate response, assert privilege where appropriate, and coordinate and communicate with the appropriate city agencies, since many agencies performed duties unrelated to the issues in this litigation. However, Petitioners have not shown that there is "more than a mere temporal connection between the filing of litigation to compel production of records under the

PRA and the production of those records" or that the litigation was "the motivating factor for the production of documents." (*Sukumar*, 14 Cal.App.5th at 464; *Belth*, 232 Cal.App.3d at 901-902.) Petitioners ignore the crucial fact that service of each request upon the Board of Supervisors and DBI only resulted in responses by each department. The communication between Petitioner and the City was limited to the custodians of each of these two departments, who had no control or ability to produce documents from other departments. The response by the two city departments served with the records request and by only those departments should have signified to Petitioners that their assumption that one of those departments would act as the "aggregator" for the other city agencies was faulty.

Under the current City infrastructure, each city department is responsible to respond to PRA claims, each having a separate custodian of records. The delay in production and response by departments not served with the three requests was not prompted by the litigation nor lack of willingness to comply with the request. Rather, it was that each city department not served with the requests had no knowledge or opportunity to respond. One cannot respond to that which one does not have knowledge of. Petitioners were on notice as to the city infrastructure and their need to serve individual City departments, but did not do so. Unlike respondent in *Belth,* who initially refused plaintiff's request for documents she claimed were confidential, but obtained consent to disclose the documents after plaintiff filed a writ petition, there is little if any evidence that the BOS or DBI refused to provide or withheld requested documents in the first request. (232 Cal.App.3d at 902.) There is evidence that other city departments were never served with any request.

Moreover, the alleged delay in production of documents is not persuasive given that the PRA claim was filed on August 23, and by August 31, contact had been made with the Human Services Agency. (Coon Decl. at Ex. 22.) Delay in production was caused by the ever-widening and increased time frame to include a 36-year period from 1981-2017, and uncertainty over the scope of the request. Petitioner alleges that an August 31, 2017 email from Matt Braun of the Human Services Agency demonstrates frustration of the PRA request. (*Id.*) While the email acknowledges the "first phase of this search" to identify official city documents using a "rather narrow definition of 'documents,'" it then states "you may receive a subsequent request or requests for such documents," and that the plan is

that "the City Attorney will produce documents responsive to this request on a rolling basis" with the intent that the materials be collected before his last day of September 8, reflecting prioritization of the materials to be produced. (*Id.*)

The facts here are distinguishable from *Sukumar*, in which the City "unequivocally claimed it had produced every responsive nonexempt document." (14 Cal.App.5th at 464.) The City's lawyer even told the court in that case that it had produced "everything." (*Id.*) Upon depositions of the city's PMK, however, further documents were discovered. (*Id.*) The holding of the *Sukumar* court relies upon the City's facile representations to the court in the face of failure to perform a complete search. There is no evidence here that the City failed to perform a complete search for responsive documents in compliance with the requests, upon direction from the City Attorney's office. Since having taken over the responses to the three requests, it was incumbent upon the City Attorney to communicate with all City departments to determine which departments had materials relevant to the each of the three requests, using search terms from the requests and as modified from ambiguous and overbroad terms of the third request. As the aggregator of the materials, and coordinator of the document productions across over all city departments, commissions, task forces, councils, boards, employees, representatives and officials, the City Attorney was obligated to conduct privilege review and redactions when necessary (eg. HIPPA, personal identifying information). The evidence indicates the City Attorney's Office commenced coordination and communication with multiple City departments, appropriately reviewing all documents for privileged information and redacting as necessary to protect third party privacy.

The sole change effected by adding the PRA claim to the existing CEQA litigation was to compel the City Attorney to take responsibility and control of the responses to the PRA requests, which was required by its ethical duty of representation. At the time of filing the claim, production of responsive documents had already begun by the departments served with requests.

Accordingly, the Court finds the City acted reasonably in responding to Petitioners' PRA requests. Petitioner has failed to meet the burden of proof for the Sixth Cause of Action.

CONCLUSION

With respect to Petitioners' First Cause of Action for CEQA violations, the Court GRANTS the petition. The Court orders issuance of a writ of mandate setting aside and voiding the City's adoption of the 2017 HCO Amendments, and thereby the 2019 HCO Amendment, ordering the City to comply with CEQA before proceeding with any HCO legislation increasing the 7-day minimum rental period for SRO units. The City shall file a return demonstrating compliance with this court's writ within 60 days of this order. The Court shall retain continuing jurisdiction to enforce and ensure compliance with the writ and CEQA under Public Resources Code § 21168.9(b). (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 479-480.)

With respect to Petitioners' Sixth Cause of Action for PRA violations, the Court DENIES the petition and finds in favor of Respondent.

In light of this Court's Order setting aside the challenged 2017 HCO Amendments on CEQA grounds, Petitioners' Second through Fifth Causes of Action seeking to invalidate the Ordinance on constitutional due process, equal protection and takings grounds are now moot. The Court need not reach and decide those claims, which are hereby ordered dismissed without prejudice.

The Court's preliminary injunction against the City's enforcement of the HCO's minimum rental period is hereby modified to be a permanent injunction pending City's compliance with CEQA, and is modified to allow City's enforcement of the HCO's 7-day minimum rental period, which is the law validly in effect due to the Court's invalidation of the 2017 and 2019 HCO Amendments.

Having disposed of all causes of action framed by the pleadings between all the parties, this Order shall constitute the Court's final Judgment in this action. Any claims for prevailing party attorneys' fees and costs shall be made by timely post-judgment motion(s) and cost bill(s) pursuant to all applicable law.

IT IS SO ORDERED.

Dated: 9/24/19

Hon. Cynthia Ming-mei Lee
JUDGE OF THE SUPERIOR COURT

CPF-17-515656 SAN FRANCISCO SRO HOTEL COALITION, AN ET AL VS. CITY AND COUNTY OF SAN FRANCISCO A PUBLIC AGENCY ET AL (CEQA Case)

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on September 24, 2019 I served the foregoing CEQA - Order RE: Petition for Writ of Mandamus on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: September 24, 2019

By: S. LE

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EXHIBIT B

ZACKS, FREEDMAN & PATTERSON

A PROFESSIONAL CORPORATION

February 24, 2023

VIA ELECTRONIC SUBMISSION

President Aaron Peskin and Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

RE: Appeal of Negative Declaration
2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient use under Hotel Conversion Ordinance, Amortization Period
(Board of Commissioners File No. 22081)
(Planning Department Case No. 2020-005491ENV)

Dear President Peskin and Supervisors:

Our office represents Hotel des Arts, LLC (the "Appellant"). The purpose of this letter is to file an appeal, pursuant to San Francisco Administrative Code § 31.16(d), of the Planning Commission's approval of the Final Negative Declaration (FND) and determination that the proposed 2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient use under Hotel Conversion Ordinance, Amortization Period (Board of Commissioners File No. 22081) (collectively the "Amendments") will have no significant effect on the environment. The Appellant filed an appeal of the Preliminary Negative Declaration on November 8, 2022 during the public comment period and therefore has standing to file this appeal. The Planning Commission denied the Appellant's appeal on January 26, 2023, and approved the FND.

The FND violates the California Environmental Quality Act (CEQA) because there is substantial evidence to support a fair argument that the Amendments will have a significant effect on the environment. Moreover, the Planning Department failed to disclose relevant information prior to the hearing, which constitutes a prejudicial abuse of discretion regardless of whether a different outcome would have resulted if the information had been properly disclosed. The Planning Commission's approval of the negative declaration therefore does not conform to the requirements of CEQA, and this Board should reverse the approval and remand the negative declaration to the Planning Department for additional review.

1. Substantial Evidence Supports a Fair Argument that the Amendments Will Have a Significant Effect on the Environment.

The San Francisco Superior Court determined in *San Francisco SRO Hotel Coalition, et al. v. CCSF, et al.* (CPF-17-515656) and *San Francisco SRO Hotel Coalition v. CCSF, et al.* (CPF-19-516864) (the "Prior CEQA Actions") that similar proposed amendments, and the possibility of tenant displacement, fell within the definition of "project" under CEQA. In the Prior CEQA Actions, the Court found that it was reasonably foreseeable that a 30-day minimum stay would make residential rooms unaffordable to low-income tenants because tenants would be unable to prepay a month's rent plus a security deposit and that the resultant tenant displacement impacts were an environmental impact that must be analyzed. (See **Exhibit A**)

Under CEQA, an environmental impact report (EIR) is required, rather than a negative declaration, if there is even a "fair argument" that a proposed project *may* have any significant adverse environmental impacts. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.) The proposed project will likely have many significant environmental impacts that were not adequately addressed in the FND, and the FND largely ignores the significant impacts the project will have. The FND's conclusions are based on speculation, unsubstantiated narrative, and clearly erroneous and inaccurate assumptions that directly contradict the court's findings in the Prior CEQA Actions.

A. Population and Housing Impacts

The Amendments are likely to have population and housing impacts. The PND states that the Amendments are intended to preserve low-cost housing and eliminate the use of residential rooms by weekly tourists. (FND at p. 16.) However, the FND, by its own admission, *does not know* how many residents could be indirectly displaced by the adoption of the Amendments or which hotels would be affected. (*Id.*) The PND's failure to investigate these critical facts further undermines its conclusion that there is less than a significant impact. The PND summarily concludes that only 64 individuals would be affected by the Amendments, even though the data it relies on is "uncertain" and erroneous. This number is based on the total number of vacancies that SRO owners reported were directly due to the prior 2017 HCO Amendments, which clearly

underrepresents the true impact of the current Amendments.

The FND acknowledges that there is a low response rate to its "Annual Unit Usage Report" ("AUUR") survey, and the City has difficulty determining the actual SRO vacancy rate. Even though the underlying data only represents a fraction of the actual number of SRO units, the FND relies solely on the raw total numbers and does not extrapolate the raw total based on overall response rates. For example, the 2018 AUUR Survey includes data for 10,292 of the estimated 19,000 SRO residential units, a response rate of approximately 54%. The data shows that 2,176 units were reported vacant, a vacancy rate of 21%. To provide an accurate estimate of the actual number of vacant units, the reported vacancy rate of 21% must be extrapolated and applied to the total number existing units. If all 19,000 SRO units suffered from a 21% vacancy rate, the *actual* number of vacant units would be approximately 3,990 — nearly double the raw total number of *reported* vacancies. Thus, the FND's analysis that is based solely on raw totals significantly undercounts the total number of vacancies if *all* SROs were taken into account. The FND similarly acknowledges that at the time of the AUUR surveys, "many SROs were *not complying with 32-day minimum and were still offering 7-day rentals*." In other words, SRO owners were not reporting vacancies due to the prior 2017 Amendments because the City was not enforcing, and SRO owners were complying with, the 32-day minimum stay requirement. If the City *does* enforce the current Amendments, the raw total number of displaced tenants would likely rise significantly.

Finally, the AUUR form only asks SRO owners to provide an explanation for reported vacancies when *more than 50%* of the units in the building are vacant.[1] According to the City's 2017 data, only seven of the 505 SRO owners provided a reason for their vacancies. In total, these seven SROs reported 104 vacancies, representing *less than 5%* of the total 2,314 reported vacancies for that year. In other words, the City does not have *any* data regarding the reasons for the other 2,214 vacancies, yet erroneously assumes that not a single one of these vacancies was

[1] See 2022 AAUR Form, available at https://sf.gov/sites/default/files/2022-11/2022AUURForm.pdf; 2018 AUUR Form, available at https://sfdbi.org/sites/default/files/AUUR%20Form.pdf.

due to the minimum stay requirements. This again shows that the raw total of *reported* vacancies due to the 2017 Amendments is far below the likely *total* number of vacancies that were actually caused by the prior 2017 Amendments.

In sum, the 64 reported vacancies due to the prior 2017 Amendments is based on a mere fraction of the actual number of SRO units, an even smaller fraction of reporting SRO units that complied with the 32-day minimum stay requirement, and an *even smaller* fraction of reporting complying SRO units that had more than a 50% vacancy rate. The FND's assumption that this number is "conservative" is clearly erroneous. The City's own data demonstrates that displacement is *certain* to occur, and that the impact is clearly much more significant than analyzed in the FND.

The FND attempts to downplay the significance of the displacement that the Amendments may cause by stating that students, technology sector workers, and weekly transient tourists will make up part of the number of SRO occupants who would be displaced. With respect to students and technology workers, the 2025 Budget and Legislative Analyst Office analysis demonstrates that students and technology workers are definitively *not* part of the group of occupants who would be displaced by the Amendments. This report found that some SROs are "providing *long-term rental housing* to students or to young technology sector workers" and confirmed that "at least three of the hotels are now providing *long-term housing* for students only." The Amendments, which will increase the minimum stay requirement from 7 days to 30 days will have no impact at all on students and technology workers who *already* utilize SROs for long-term tenancies (and for whom a month's worth of rent and security deposit would likely not pose an economic barrier). With regard to weekly transient tourists, the FND fails to mention that the AUUR data *already* differentiates between residential guest rooms and tourist guest rooms.[2] Again, the City's own data demonstrates that displacement is certain to occur, and that the impact is clearly much greater than analyzed in the FND.

B. Urban Decay and Blight Impacts

The Amendments fail to conduct any analysis of urban decay or blight. The PND

[2] *See id.*

explicitly declines to conduct any analysis by claiming that these impacts are socioeconomic rather than environmental impacts. (PND at p. 10.) However, "[s]ocial and economic changes *must* be addressed under CEQA if they will cause changes in the physical environment." (*Chico Advocates for a Responsible Economy v. City of Chico* (2019) 40 Cal.App.5th 839, 847 [citing CEQA Guidelines, § 15131; emph. added].) There is a long line of case law establishing that urban decay or blight *must* be considered as an indirect environmental effect of a project. (*See Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1205-1208 [discussing relevant caselaw].)

The PND simply states that the Amendments would not lead to physical deterioration in the community because the City can continue to "enforce its laws, to clean up City streets, pursue affordable housing programs or construct homeless shelters, supportive housing and navigation centers, or to pursue nuisance abatement proceedings under its inherent police powers." (PND at p. 10.) However, it is clear that are insufficient resources to address the existing homelessness crisis in San Francisco as recent data shows that for every one household that the San Francisco Department of Homelessness and Supportive Housing is able to house, four households become newly homeless or return to homelessness.[3] Furthermore, the PND contains no analysis as to whether these alleged available resources are sufficient to address the potential displacement and resulting spillover effects resulting from the Amendments. Many occupants will not be able to pay the monthly costs, leaving more units vacant and the SROs unable to maintain their buildings. This will lead to building closures and result in urban decay and blight.

The data provided in the FND again obscures the potential impact of the Amendments by only discussing total vacancies, without analyzing vacancies for each type of unit (i.e. residential and tourist units). For example, in 2018 the 168-unit SRO at 54 4th Street reported 61 vacancies, a 36% vacancy rate. However, all 61 reported vacancies were in the SRO's 81 residential units, a

[3] *San Francisco Homeless County and Survey: 2022 Comprehensive Report*, Applied Survey Research, *available at*: https://hsh.sfgov.org/wp-content/uploads/2022/08/2022-PIT-Count-Report-San-Francisco-Updated-8.19.22.pdf.

75% vacancy rate for the residential SRO units. If this SRO were required to rent all 87 tourist units on a long-term basis as residential units and these units suffered from the same vacancy rate, the raw total number of vacant units would skyrocket from 61 vacant units to 126 vacant units. There would simply be no way that this SRO could continue to operate at a 75% vacancy rate, and would ultimately lead to the business ceasing to operate – and *all* existing tenants would be displaced. The FND again fails to adequately analyze the evidence in the record, and the FND's conclusion that the Amendments will not have an impact on vacancy rates, or result in urban decay and blight, is clearly erroneous.

Even the FND's flawed analysis demonstrates that vacancy rates have been steadily increasing, and the Amendments will only exacerbate this problem. Increased vacancy rates will inevitably lead to deferred maintenance, closures, increased homelessness, urban decay, and blight. The PND acknowledges the Amendments may potentially have social and economic impacts, but states that only potential physical impacts resulting from economic activities must be analyzed under CEQA. Beyond the fact that caselaw is clear that urban blight and decay *are* physical impacts that must be analyzed under CEQA, the Planning Department explicitly acknowledged in response to the PND appeal that a reasonably foreseeable impact of the potential loss of low-income units (and resulting increase in homelessness) would be for the City to "*construct* homeless shelters, supportive housing and navigation centers." Construction of replacement housing units is *unquestionably* a physical impact, but one which the FND fails to analyze. The fact that the FND explicitly acknowledges that these issues were specifically *not* analyzed confirms that the FND is inadequate.

C. *Land Use and Planning*

The Amendments are likely to have land use and planning impacts. In May 2022, Ordinance No. 050-22 went into effect, which, in part, modified the definition of group housing under the Planning Code to change the minimum length of stay from 7 days to 30 days. On July 7, 2022, the Zoning Administrator issued a letter of determination (record no. 2022-003800ZAD), confirming that this change did *not* apply to legally established existing group housing uses, because the length of occupancy is part of the definition of group housing and is

"*fundamental* to the use itself." Therefore, the Zoning Administrator determined that this fundamental change would only apply to *new* group housing units, and that existing group housing units could continue to operate as a nonconforming use.

Just like Ordinance No. 050-22, the Amendments here fundamentally change the entire category of land use by increasing minimum stay requirements. This change will completely and permanently disrupt the existing SRO use, and is entirely inconsistent with the intent of the existing SRO policies that were designed to protect existing businesses. The fundamental land use policy shift will have a significant impact on the preservation of SROs city-wide, and the FND should have evaluated these environmental impacts.

2. Failure to Disclose Relevant Information

CEQA states that "it is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented" may constitute a prejudicial abuse of discretion "regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (Pub. Res. Code § 21005) Any document relied upon by an agency in the preparation of an environmental document is part of the public record for that project. (*Id.* § 21167.6.)

The Appellant submitted an Immediate Disclosure Sunshine Ordinance and Public Records Act request to the Planning Department for the information cited and relied upon in the FND on December 1, 2022. Despite the fact that the information cited in the FND should have already been part of the public record, the Planning Department failed to respond to Appellant's request until January 26, 2023, *the morning of the Planning Commission hearing regarding the Appellant's PND appeal.* The response included nearly 1,000 pages of documents, including years of AUUR Survey data that the Department heavily relied upon in the FND. Multiple Commissioners raised concerns regarding the failure to disclose this relevant information and that it may have impacted the Appellant's ability to adequately prepare for the hearing. The City attorney erroneously told the Commissioners that the Appellant likely already had access to this information due to the prior litigation. This is undoubtedly false, as the vast majority of the AUUR Survey data was not even in existence at the time of the prior litigation.

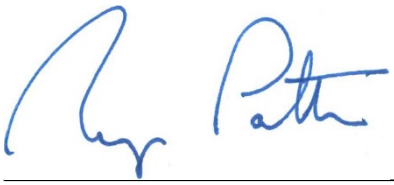
The FND's analyses and conclusions rely almost exclusively on the AUUR Survey data. The failure to disclose this information during the public comment period, and withholding this information until the morning, of the PND hearing not only violated the Public Records Act's disclosure requirement but prevented any meaningful review by the public and the Commissioners prior to adoption of the FND. This failure to disclose relevant information was a prejudicial abuse of discretion and failed to conform to the requirements of CEQA.

3. Conclusion

The FND violates CEQA because there is substantial evidence to support a fair argument that the Amendments will have a significant effect on the environment, and the failure to disclose relevant information constitutes a prejudicial abuse of discretion. The Planning Commission's approval therefore does not conform to the requirements of CEQA, and this Board should reverse the approval and remand the negative declaration to the Planning Department for additional review.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC



Ryan J. Patterson

EXHIBIT A

FILED
San Francisco County Superior Court
SEP 24 2019
CLERK OF THE COURT
BY: _____ Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

SAN FRANCISCO SRO HOTEL COALITION, an unincorporated association, HOTEL DES ARTS, LLC, a Delaware limited liability company, and BRENT HAAS,

Plaintiffs and Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a public agency, acting by and through the BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO; DEPARTMENT OF BUILDING INSPECTION OF THE CITY AND COUNTY OF SAN FRANCISCO; EDWIN LEE, in his official capacity as Mayor of the City and County of San Francisco,

Defendants and Respondents.

Case No. CPF-17-515656

CEQA

ORDER RE. PETITION FOR WRIT OF MANDAMUS

Date Action Filed:	May 8, 2017
Trial Date:	May 3, 2019
Hearing Judge:	Cynthia Ming-mei Lee
Time:	9:30 a.m.
Place:	Department 503

INTRODUCTION

This matter was heard on May 3, 2019 at 9:30 a.m. in Department 503 of the San Francisco County Superior Court, the Honorable Cynthia Ming-mei Lee presiding. Bryan Wenter and Arthur Coon of the law firm Miller Starr Regalia, and Andrew Zacks of the law firm Zacks Friedman & Patterson P.C. appeared for plaintiffs and petitioners San Francisco SRO Hotel Coalition, Hotel Des Arts, LLC, and Brent Haas (collectively, "Petitioners"). Deputy City Attorneys Andrea Ruiz-Esquide, Kristen Jensen, and James Emery appeared on behalf of defendants and respondents, the City and County of San Francisco, the Board of Supervisors, the Department of Building Inspection, and the Mayor (collectively, "San Francisco").

In their First Amended Petition and Complaint ("FAP"), Petitioners assert causes of action under the California Environmental Quality Act ("CEQA"), codified under Public Resources Code sections 21000 *et seq.*), the federal and state constitutions, and the California Public Records Act ("PRA"). The Court heard argument on the CEQA claim and the PRA claim only. The federal and state constitutional claims remain pending.

I. CEQA

A. Background

In 1979, the San Francisco Board of Supervisors instituted a moratorium on the conversion of residential hotel units into tourist units in response to a severe shortage of affordable rental housing for elderly, disabled, and low-income persons. (Administrative Record ("AR") 001117, 001320; S.F. Admin. Code ("HCO") §§ 41.3(g).) Subsequently, in 1981, the City enacted the Residential Hotel Unit Conversion and Demolition Ordinance (the "HCO"), Administrative Code Chapter 41, instituting permanent controls to regulate all future residential hotel conversions. (AR 1427-45; HCO § 41.1 *et seq.*) In adopting the HCO, the Board of Supervisors included findings that "the City suffers from a severe shortage of affordable rental housing; that many elderly, disabled and low-income persons reside in residential hotel units; that the number of such units had decreased by more than 6,000 between 1975 and 1979; that loss of such units had created a low-income housing "emergency" in San Francisco, making it in the public interest to regulate and provide remedies for unlawful conversion of residential hotel units; that the City had instituted a moratorium on residential hotel conversion

effective November 21, 1979; and that because tourism is also essential to the City, the public interest also demands that some moderately priced tourist hotel rooms be available, especially during the summer tourist season." (*San Remo Hotel L.P. v. City and Cty. of San Francisco* (2002) 27 Cal.4th 643, 650 [citing the original HCO § 41.3]; see AR 1427-28.)

In the original HCO, a unit's designation as "residential" or "tourist" was determined as of September 23, 1979, by its occupancy status according to definitions contained in the HCO. (AR 1428-49 at §41.4.) The HCO required single room occupancy ("SRO") hotels in San Francisco to report all residential and tourist units in a hotel as of September 23, 1979. (AR 1433 at § 41.6.) Residential units were then placed on a registry, and a hotel owner could convert residential units into tourist units only by obtaining a conversion permit from the Department of Building Inspection ("DBI").[1] (*Id.* at §§ 41.4 [definition of Conversion]; 41.12 [Permit to Convert]; 41.16 [Unlawful Conversion; Remedies; Fines].) To obtain a conversion permit, applicants were required to construct new residential units, rehabilitate old ones, or pay an "in lieu" fee into the City's Residential Hotel Preservation Fund Account. (*Id.* at §41.10.)

The original HCO also allowed seasonal tourist rentals of residential units during the summer if the unit was vacant because a permanent resident voluntarily vacated the unit or was evicted for cause by the hotel operator. (*Id.* at § 41.16.) Further, the HCO required hotel operators to maintain records to demonstrate compliance with the ordinance and to provide these records for inspection by DBI. (*Id.* at §§ 41.6(h)-41.7.)

When the City adopted the original HCO in 1981, it determined there was no possibility the ordinance would have a significant impact on the environment. (AR 1454.) The trial court disagreed and found the requirement of one-for-one replacement of residential units "creates the very real possibility of a significant environmental impact." (*Id.*) While the trial court case was pending on appeal, the City performed an initial study on the original HCO and, on April 15, 1983, issued a preliminary negative declaration concluding that the HCO could not have a significant impact on the

[1] The Department of Building Inspection was formerly termed the Bureau of Building Inspection in the original HCO.

environment. (AR 1530-33; AR 1542.) The City then readopted the HCO and adopted a final Negative Declaration on June 23, 1983. (AR 1657-64.)

The Court of Appeal eventually issued its decision finding that "the City's failure to comply with CEQA was illegal," but "the defect was cured, however, by reenactment of the ordinance following an environment evaluation and issuance of a negative declaration." (*Terminal Plaza Corp. v. City & Cty. of San Francisco* (1986) 177 Cal.App.3d 892, 905, n.6.) Environmental review of subsequent amendments to the HCO likewise determined those amendments, addressed to the administration and enforcement of the HCO, could have no impact on the environment. (See, e.g., AR 1689-1693; AR 1727-29.)

In 1987 and 1988, the City conducted a series of meetings and workshops to discuss the operation of the HCO with City staff, community housing groups, and residential hotel owners and operators. (AR 1705.) City decision makers considered the concerns of hotel operators relating to the prohibition on renting residential units for fewer than 32 days. (AR 1706-09.) Ultimately, the City repealed and readopted the HCO in 1990, making four changes from the old law. (*San Remo Hotel v. City and County of San Francisco* (9th Cir. 1998) 145 F.3d 1095, 1099.) The 1990 amendments: (1) prohibited the summer tourist use of residential rooms; (2) increased the in lieu payment from 40 percent to 80 percent; (3) added the requirement that any hotel that rents rooms to tourists during the summer must rent the rooms at least 50 percent of the time to permanent residents during the winter; and (4) the new law did not provide for relief on the ground of economic hardship. (*Id.*)

In 2014, the City did an analysis of the HCO and found that while private hotel owners are required to file an Annual Unit Usage Report ("AUUR") with DBI, only 179 of 413 private SRO hotels thought to be in operation returned the annual usage report. (AR 3523-27.) The City acknowledged that given the low rate of response to the AUUR, it was difficult to know precisely the total number of residential units available in private and non-profit owned and operated SRO hotels, and the actual vacancy rates for these buildings. (AR 3525.) However, the City determined the following vacancies (*see* Table 2 at AR 3524):

- Of 228 privately owned SROs for which data was obtained, 864 of 7,241 units (11.9 percent) were vacant.

- Of 32 non-profit hotels, 91 of 2,667 units (3.4 percent) were vacant.

The City further found that "a few of the buildings...indicated that they were serving populations other than the low-income, disabled, and elderly individuals whom the units are intended to serve," and that "the hotels may be providing long-term rental housing to students or to young technology sector workers, both of which would be allowed under the provisions of Chapter 41." (AR 3523). It confirmed that "at least three of the hotels are now providing long-term housing for students only, a use which is allowed under Chapter 41, but which does not accomplish the goal of providing rooms for low-income and disabled populations." (AR 3525.)

Further analysis from the City showed the following vacancies in 2015 (*see* Table 3 at AR 5432):

- Of 419 hotels citywide, 1,689 of 16,611 units (10.2 percent) were vacant.
- Of 354 privately owned hotels, 1,488 of 11,473 units (13 percent) were vacant.
- Of 29 non-profit hotels, 84 of 2,028 units (4.1 percent) were vacant.
- Of 36 master-leased hotels by the City, 117 of 3,110 units (3.8 percent) were vacant.

Again, the City acknowledged that "many SROs had disconnected numbers, did not return phone calls, or were unable to provide information, [and] as a result, it was impossible to verify whether they were still in operation, or to include vacancy information for them." (*Id.*)

On December 6, 2016, Supervisor Peskin introduced substitute Ordinance No. 38-17 ("the 2017 Amendments") to update the HCO. (AR 0001; 0098-0122.) On December 16, 2016, the City determined the Ordinance was "not defined as a project under CEQA Guidelines Sections 15378 and 15060(c)(2) because it does not result in a physical change in the environment." (*Id.*)

On February 7, 2017, the Board of Supervisors unanimously adopted the 2017 Amendments. (AR 229.) Mayor Ed Lee signed the 2017 Amendments on February 17, 2017, and the 2017 Amendments became effective on March 19, 2017. (AR 204-230.) As of the proposed amendments, the HCO regulated roughly 18,000 residential units within 500 residential hotels across San Francisco. (AR 175.)

The focus of this action is subsections 41.20(a) and (b) of the amended HCO, which reads as follows:

SEC. 41.20. UNLAWFUL CONVERSION; REMEDIES; FINES.

(a) Unlawful Actions. It shall be unlawful to:

(1) Change the use of, or to eliminate a residential hotel unit or to demolish a residential hotel unit except pursuant to a lawful abatement order, without first obtaining a permit to convert in accordance with the provisions of this Chapter;

(2) Rent any residential unit for *Tourist or Transient Use* ~~*a term of tenancy less than seven days*~~ except as permitted by Section 41.19 of this Chapter;

(3) Offer for rent for ~~*nonresidential use or*~~ *T*~~*t*~~*ourist or Transient* U~~*u*~~se a residential unit except as permitted by this Chapter.

(AR 225 [added text is shown in italics and underlined; deleted text is shown in italics and strikethrough)].) The 2017 Amendments define "Tourist or Transient Use" as "any use of a guest room for less than a 32-day term of tenancy by a party other than a Permanent Resident." (AR 209.)

i. The 2019 Amendment

On May 31, 2019, after the Court heard oral argument, the City passed further legislation amending the HCO to revise the definition of "Tourist or Transient Use" to "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident." Thereafter, on June 12, 2019, the City filed a Motion to Dismiss the First through Fifth Causes of Action in the First Amended Petition as moot. An Amended Motion to Dismiss was filed on June 18, 2019. On June 18, 2019, Petitioners filed a Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint.

The Court heard oral argument on the Motion to Dismiss and Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint on August 9, 2019. The parties stipulated to continue the Motion for Leave to File Second Amended and Supplemental Petition for Writ of Mandate and Complaint to September 27, 2019.[2] The Court denied the City's Motion to Dismiss. As the Court stated in its August 15, 2019 order:

> Plaintiffs' Constitutional and CEQA challenges are not moot because material questions remain for the Court's determination.[3] (*Eye Dog Found. v. State Bd. of Guide Dogs for Blind* (1967) 67 Cal. 2d 536, 541 ["the general rule governing mootness becomes subject to the case

[2] The Court granted Petitioner's ex parte application on September 10, 2019 to advance the hearing to September 25, 2019 in light of the statutory deadline to challenge the 2019 Amendments under Government Code section 65009(c).

[3] San Francisco acknowledges that Plaintiffs' PRA cause of action in its First Amended Petition is not moot. (Motion to Dismiss at 4, n.1.)

recognized qualification that an appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination"]; *Davis v. Superior Court* (1985) 169 Cal. App. 3d 1054, 1057–58 ["the enactment of subsequent legislation does not automatically render a matter moot. The superseding changes may or may not moot the original challenges...This issue may only be determined by addressing the original claims in relation to the latest enactment"].) While the 2019 HCO Amendment dropped the minimum length of SRO unit use from 32 days to 30 days, this change does not moot Plaintiffs' challenge to the 2017 HCO Amendments on grounds that the HCO "redefine[ed] prohibited 'tourist or transient' use and 'unlawful actions' so as to entirely eliminate SRO operators' preexisting year-round right to rent SRO units for minimum terms of at least seven (7) days." (First Amended and Supplemental Verified Petition at ¶ 23.)

Accordingly, the Court will address the 2017 Amendments in relation to the 2019 Amendment in this order.

B. Exhaustion of Administrative Remedies

CEQA requires issue exhaustion: "No action or proceeding may be brought pursuant to [CEQA] unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency ... during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Res. Code § 21177(a).) This exhaustion requirement is jurisdictional. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.)

Under the exhaustion of administrative remedies doctrine, the "exact issue" must be presented to the agency, and neither "bland and general" references to environmental issues, nor "isolated and unelaborated comments" will suffice. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-36.) Petitioner "bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level." (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 910.)

The City argues that neither Petitioners Brent Haas nor Hotel Des Arts raised any CEQA claim during the City's administrative review of the 2017 Amendments. (Opposition ("Opp") at 11.) Petitioners argue that the City did not give proper notice and therefore, the exhaustion doctrine does not apply. (Reply at 24.) The Court finds Petitioners' notice argument unpersuasive. The record reflects that the City noticed multiple public hearings before the Board of Supervisors, providing a description of the proposed changes to the HCO and indicating that one of the issues to be discussed

would be "affirming the Planning Department's determination under the California Environmental Quality Act." (AR 645 [January 23, 2017 Meeting Agenda], 734 [January 31, 2017 Meeting Agenda], 1065 [February 7, 2017 Meeting Agenda].) Further, any argument regarding defective notice is waived since Samantha Felix, manager of Hotel Des Arts, submitted a letter to the Board of Supervisors dated January 27, 2017 and received January 31, 2017, objecting to the minimum 32 night stay under the proposed amendments. (AR 6609-6611; *see Hines v. California Coastal Com.* (2010) 186 Cal. App. 4th 830, 855 [finding that the administrative remedy exhaustion requirement of section 21177, subdivision (a) was triggered where one appellant spoke and appellants and others submitted written arguments at two public hearings].)

Based on the evidence discussed, the Court finds that Petitioner Hotel Des Arts exhausted its administrative remedies and has standing. However, the Court finds that Mr. Haas lacks standing to pursue the CEQA claims in this case. There is no evidence in the record that Mr. Haas participated in the administrative process before the Board of Supervisors when the City enacted the 2017 Amendments.

C. Petitioners' Motion to Augment the Administrative Record and Request for Judicial Notice

The City stipulated to augmentation of the Administrative Record with Exhibits 4 and 12 through 18 to the 9/13/18 Declaration of Arthur F. Coon In Support Of Petitioners' Motion To Augment Administrative Record ("9/13/18 Coon Decl."). The City agreed to allow a redacted version of Exhibit 11, omitting an inadvertently disclosed attorney-client communication from the email chain. Accordingly, the Court orders the record augmented only as to these specific exhibits.

The Court finds that all other exhibits attached to the 9/13/18 Coon Decl. are irrelevant as Petitioners have not shown that the documents were actually considered by the Board in making its decision. Accordingly, the Court denies the balance of the Motion to Augment. The Court denies Petitioners' Request for Judicial Notice on the same grounds.

D. Whether the amended HCO is a CEQA "Project"

CEQA and CEQA Guidelines establish a three-tier process to ensure public agencies inform their decisions with environmental considerations. (*Muzzy Ranch Co. v. Solano County Airport Land*

Use Com'n (2007) 41 Cal.4th 372, 380.) The first tier is jurisdictional—that is, an agency must "conduct a preliminary review to determine whether an activity is subject to CEQA." (*Muzzy Ranch,* 41 Cal.4th at 380; CEQA Guidelines[4] § 15060(c).) If an activity is not a "project," it is not subject to CEQA. (*Id.*) At the second tier, if the agency has determined the proposed action is a CEQA "project," it must determine whether it qualifies for any exemption from CEQA review. (*Id.*) If not, the agency "must conduct an initial study to determine whether the project may have a significant effect on the environment." (*Id.*; CEQA Guidelines § 15063(a).) If there is "no substantial evidence that the project or any of its aspects may cause a significant effect on the environment,...the agency must prepare a "negative declaration" that briefly describes the reasons supporting its determination." (*Id.* at 380-81; CEQA Guidelines § 15063(b)(2).) At the third tier, "if the agency determines substantial evidence exists that an aspect of the project may cause a significant effect on the environment...the agency must ensure that a full environmental impact report is prepared on the proposed project." (*Id.* at 381; CEQA Guidelines § 15063(b)(1).) Accordingly, no environmental review under CEQA occurs if an agency determines an activity is not a project.

A "project" is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (1) An activity directly undertaken by any public agency..." (Pub. Res. Code § 21065(a); *see also* CEQA Guidelines § 15378(a)(1) [A "project" is "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: (1) An activity directly undertaken by any public agency including but not limited to . . . enactment and amendment of zoning ordinances . . ."]; see also *Muzzy Ranch, supra,* 41 Cal.4th at 381 ["whether an activity constitutes a project subject to CEQA is a categorical question respecting whether the activity is of a general kind with which CEQA is concerned, without regard to whether the activity will actually have environmental impact"].) CEQA "shall apply to discretionary projects proposed to be carried out or

[4] References to CEQA Guidelines refers to Cal. Code Regs., tit. 14, Ch. 3 §§15000-15387.

approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances . . . ." (Pub. Res. Code § 21080(a).)

The parties dispute: 1) whether the amended HCO is categorically a "project" because it is an ordinance akin to a zoning ordinance; and 2) whether the amended HCO is an activity that may cause a reasonably foreseeable indirect physical change in the environment. The Court addresses these issues in turn.

i. Zoning Ordinance

Petitioners assert the amended HCO is "categorically a project within CEQA's purview" because: 1) the 2017 Amendments are "akin" to a zoning ordinance; and 2) zoning ordinances are categorically CEQA "projects" under § 21080(a), which specifically lists "the enactment and amendment of zoning ordinances" as among the discretionary projects subject to CEQA, citing *Rominger v. County of Colusa* (2014) 229 Cal.App.4th at 690, 702. (Petitioners' Opening Brief ["Opening Brief"] at 9-10, 25.) As to whether zoning ordinances are categorically CEQA "projects," the California Supreme Court recently disapproved of *Rominger* in *Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal. 5th 1171, holding "the various activities listed in section 21080 must satisfy the requirements of section 21065 before they are found to be a project for purposes of CEQA." Thus, CEQA applies "only to activities that qualify as projects — in other words, to specific examples of the listed activities that have the potential to cause, directly or indirectly, a physical change in the environment." (*Id.* at 328, emphasis in original.)

Regardless, the Court finds that the 2017 Amendments are not "akin" to a zoning ordinance. As the court found in *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 902 regarding the original HCO:

> Zoning laws typically regulate such facets of land use as location, height, bulk, setback lines, number of stories and size of buildings, and the use to which property may be put in designated areas (Gov. Code, § 65860 et seq.; *Taschner v. City Council* (1973) 31 Cal.App.3d 48, 59 [107 Cal.Rptr. 214].)....The ordinance, however, does not regulate land use in the same manner as zoning laws. The nature of buildings or uses permitted in specified districts are not touched upon by the ordinance; nor does it seek to control the dimensions, size, placement or distribution of structures within the City. The ordinance is of general application, and merely

regulates existing uses. The regulations governing issuance of conversion permits require purely ministerial acts; the replacement provisions do not call for land use decisions.

In other words, the land is already zoned for commercial use and remains unchanged. The HCO merely regulates how owners operate commercial use buildings once they've been built.

The cases cited by Petitioner involve ordinances that regulate initial uses of the land rather than existing uses and are therefore distinguishable. (*see e.g.*, *Morehart v. County of Santa Barbara* (1994) Cal.4th 725, 750 [purpose of the challenged ordinance was "to regulate the minimum size of a lot on which a residence may be built"]; *People v. Optimal Global Healing, Inc.* (2015) 241 Cal.App.4th Supp. 1, 7-8 [involving ordinance that makes it a misdemeanor to own, establish, operate, use, or permit the establishment or operation of a medical marijuana business]; *DeVita v. Cty. of Napa* (1995) 9 Cal. 4th 763, 773 [involving amendment to general plan that guided future local land use].)

ii. Reasonably Foreseeable Indirect Physical Change in the Environment

The next issue is whether the amended HCO is an activity that may cause a reasonably foreseeable indirect physical change in the environment. Identifying a physical change involves "comparing *existing* physical conditions with the physical conditions that are predicted to exist at a later point in time, after the proposed activity has been implemented. The difference between these two sets of physical conditions is the relevant physical change." (*Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal. App.4th 273, 289 (disapproved on other grounds in *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279) (emphasis in original, citation & footnote omitted).) Under CEQA Guidelines, "an indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." (§ 1504(d)(3).)

A comparison of the HCO before and after the 2017 Amendments indicates that prior to 2017, section 41.20(a) made it unlawful to "rent any residential unit for a term of tenancy less than seven days except as permitted by Section 41.19 of this Chapter" and "offer for rent for nonresidential use or

tourist use a residential unit except as permitted by this Chapter." (AR 225.) Hence, a hotel owner could rent a residential unit for as few as seven days as long as it was for residential use. A hotel owner could not rent a residential unit for tourist use unless certain conditions applied. Following the 2017 Amendments, section 41.20(a) makes it unlawful "to rent any residential unit for Tourist or Transient Use except as permitted by Section 41.19 of this Chapter" and "offer for rent for Tourist or Transient Use a residential unit except as permitted by this Chapter." (*Id.*)

Under the 2017 Amendments, "Tourist or Transient Use" was defined as "any use of a guest room for less than a 32-day term of tenancy by a party other a Permanent Resident.[5]" (AR 209.) As such, a guest who occupied a residential unit of an initial term of 32 continuous days became subject to the provisions of San Francisco's rent ordinance. (S. F. Admin. Code § 37.2(r) [definition of a rental unit].) In effect, the 2017 Amendments no longer permitted rentals to non-permanent residents for short term tenancies lasting from seven days to thirty-one days. Under the recent 2019 Amendment, "Tourist or Transient Use" is defined as "any use of a guest room for less than a 30-day term of tenancy by a party other than a Permanent Resident." (HCO § 41.20(a).) The significance of the minimum 30-day rule is that guests who stay the minimum 30-day tenancy cannot be evicted unless an unlawful detainer proceeding is brought. (see Civil Code § 1940.1)

The Court finds that tenant displacement is a reasonably foreseeable impact of the amended HCO. The HCO's purpose is to provide and preserve affordable housing for elderly, disabled, and low-income persons; its premise in extensively regulating the terms of occupancy for SRO units is that they are a limited resource and critical housing stock that must remain available to serve a vulnerable and economically-disadvantaged target population. (HCO § 41.3.) While the 2019 Amendment reduced the 32-day minimum tenancy to 30 days, it still restricts hotel owners from renting rooms to guests for tenancies as short as seven days, as was previously allowed prior to the 2017 Amendments.

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[5] Permanent Resident is defined as "A person who occupies a guest room for at least 32 consecutive days." (HCO § 41.4.)

A change in regulation that increases the minimum term of occupancy for the finite number of available SRO units from weekly hotel rentals to monthly apartment rentals foreseeably restricts the availability of the limited stock of these units to the target population, with the reasonably foreseeable effect of displacing that population elsewhere.

The Court rejects the City's argument that the HCO will not result in displacement of short-term tenants because it does not require private SRO hotel owners to charge first and last months' rent and security deposits. While the 2017 Amendments does not require a specific payment structure, it is reasonably foreseeable that hotel owners could begin requiring security and monthly deposits if forced to rent for longer minimum rental terms that eliminate weekly rentals. It is also reasonably foreseeable that renters who are unable to afford monthly deposits would be displaced as a result. (*San Remo Hotel,* 27 Cal.4th at 674 ["residential hotel units serve many who cannot afford security and rent deposits for an apartment"].) Such reasonably foreseeable actions by hotel owners resulting in displacement is sufficient for purposes of the first tier of CEQA analysis. (Pub. Res. Code § 21065(a) ["'Project' means an activity which *may* cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment"] (emphasis added).)

The Court of Appeal's opinion[6] reversing this Court's denial of Petitioners' motion for a preliminary injunction based on their constitutional due process and takings claims is also instructive in this regard. In its unpublished October 15, 2018 opinion, the court held that the pre-amendment version of HCO "precluded rentals of less than seven days, regardless of a showing of the renter's purpose, and it is the seven-day period which demarcates residential from tourist rentals." (10/15/18

[6] The Court of Appeal's relevant findings and holdings are considered the law of the case and govern the disposition of subsequent issues in this litigation. (*Santa Clarita Org. for Planning the Env't v. Cty. of Los Angeles* (2007) 157 Cal. App. 4th 149, 156 [holding "where an appellate court states in its opinion a principle or rule of law necessary to its decision, that principle or rule becomes the law of the case"].) After reversal of the order denying the preliminary injunction and upon remand, this Court re-set Petitioners' preliminary injunction motion for hearing to balance the parties' relative hardships. Upon the parties' stipulation, this Court entered an injunction on against operation or enforcement of the HCO's minimum rental term by anyone and for any purpose pending resolution of this litigation or further order of this Court. (11/30/18 Injunction Order.)

Opinion at 8.) The court further held "the 2017 Amendments effected a substantial change by making the minimum term 32 days unless the person was already a permanent resident." (*Id.*) Noting that the 2017 HCO Amendments do not provide for compensation or a reasonable amortization period, the court held, "they do, on their face, require owners of SROs to forego more classically styled hotel rentals in favor of more traditional tenancies. This changes the fundamental nature of their business, by making them landlords rather than hotel operators." (*Id.* at 10.) As such, even a 30-day minimum term, which, as discussed, would make the hotel owner subject to landlord-tenant laws under state law, could foreseeably cause SRO hoteliers forced to become apartment landlords to begin requiring the security and rent deposits customary to that fundamentally changed business model. This is assuming they wish to rent their SRO units at all.

To the extent Petitioners argue that this displacement also leads to increased homelessness and urban blight, the Court acknowledges *San Remo*, which found that "while a single room without a private bath and kitchen may not be an ideal form of housing, [SRO] units accommodate many whose only other options might be sleeping in public spaces or in a City shelter." (27 Cal.4th at 674.) However, the Court finds that Petitioners fail to provide evidence in the record that links tenant displacement due to the amended HCO with homelessness and/or urban blight. (*see e.g.*, AR 3534 [internal e-mail between HSA/DSS employees discussing "public health risk" and "individual human suffering that results from homelessness" in the context of a building a mandatory shelter]; 3539 [HSH-HAS draft policy document noting homelessness as the City's "#1 problem" and "public health crisis" that "poses risks to the general public due to the presence of excrement, used needles, vermin, etc. that are often byproducts of persons living on the streets or in our parks," and proposing that the City "provide a nightly shelter bed to ALL individuals who are living on the streets or in our parks a night; 1375-1389 [San Francisco Leasing Strategies Report Draft discussing generally strategies for encouraging landlords to rent to individuals who are, were, or are at risk of being homeless].) The

Court also rejects Petitioners' further assertion that resort to record evidence is unnecessary to resolve the threshold issue raised here as a categorical matter. (*Muzzy Ranch.*, 41 Cal.4th at 382 [holding "whether an activity is a project is an issue of law that can be decided on undisputed data in the record on appeal"].)

Regardless, the Court need not reach this issue, since a finding of tenant displacement is within the purview of CEQA. In *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 451, the project at issue included demolition of housing units in a redevelopment plan. The court held that CEQA "is made relevant here by the Ellis Act's explicit exceptions for a public entity's power to regulate, among other things, "planning," "subdivision map approvals," the "demolition and redevelopment of residential property," *and the mitigation of adverse impacts on persons displaced by reason of the withdrawal of rental accommodations*. Such items are the common focus and byproducts of the CEQA process, as they were in the case here." (emphasis added.)

The record further reflects that short-term renter displacement as a result of change in the minimum term of tenancy was foreseen and documented by the City. (AR 1706 [1988 Report on Residential Hotels Policy and Legislative Issues noting, "The 32 day rental requirement often works against the rental of vacant residential hotel units as operators have to refuse occupancy to weekly tenants, even though some residential units may have been vacant for long periods"] see also AR 1341, 1345 [City memo suggesting section 41.20 be revised to a 32 day minimum rental, also suggesting that "low income, elderly, and disabled persons should be allowed to pay in seven (7) day increments so they, as the target population to be served, have access to this housing"].) The City also foresaw, in connection with its consideration of prior HCO amendments, that hoteliers not wanting to risk permanently committing to undesirable tenants not vetted through weekly rentals, might hold SRO units off the rental market. (AR 1707 [1988 City Planning report: "Weekly rentals are used by

operators to screen potential trouble making tenants. Without this option, operators are leaving units vacant rather than risk renting to potentially troublesome tenants on a monthly basis."].)

In summary, it is reasonably foreseeable that the 2017 HCO Amendments may lead to indirect physical changes in the environment in the form of tenant displacement, and tenant displacement is the general sort of activity with which CEQA is concerned. Accordingly, the Court finds that the amended HCO is "project" and the City failed to proceed in the manner required by law in summarily dispensing with CEQA review. The Court therefore grants the CEQA writ petition and orders the issuance of a writ of mandate setting aside the City's adoption of the 2017 HCO Amendments pending its compliance with CEQA.

II. The Public Records Act Requests

A. Background

Petitioners filed their verified FAP on August 23, 2017, adding the Sixth Cause of Action for PRA violations and seeking a writ of mandate under Code of Civil Procedure Section 1085. They thus "bear the burden of pleading and proving the facts on which the claim for relief is based." (*Cal. Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1153 (internal citations omitted).)

Petitioners allege and argue that they were required to sue the City to obtain relevant public records which they had requested and to which they are entitled under the PRA because the City had: (1) refused to search for relevant and responsive records in all City departments possessing them; (2) intentionally narrowly interpreted the scope of Petitioners' facially broad requests; (3) improperly stopped producing responsive documents for over two months before Petitioners filed their FAP alleging the PRA claim; and (4) ultimately and belatedly provided a large number of previously withheld responsive documents (many of which became part of the certified Administrative Record on the CEQA claim) after the PRA claim was filed. (Coon PRA decl. at ¶¶ 18-25, 36-37.) Petitioners

also allege the City improperly failed to produce required affidavits from certain City officials and employees verifying that adequate searches for responsive public records on their personal electronic devices were made (*Id.* at ¶¶ 5, 8, 13, 17, 37.) On this issue, the Court directed the City to provide executed declarations from the specified individuals at the May 3, 2019 hearing. Thereafter, on May 24, 2019, the City produced the declarations except for the custodian of records for the Department of Building Inspection who supervised the collection of documents including materials from Rosemary Bosque (now retired). The City indicated that the custodian was away from the office until May 29, 2019, but that they would the would forward her declaration after her return.

As to document production, Petitioners acknowledge the City has produced all responsive documents. However, they assert they have prevailed on their PRA claim under the catalyst theory. Under the catalyst theory, "the question whether the plaintiff prevailed, in the absence of a final judgment in his or her favor, is really a question of causation—the litigation must have resulted in the release of records that would not otherwise have been released." (*Sukumar v. City of San Diego* (2017) 14 Cal. App. 5th 451, 464.) In determining whether a PRA lawsuit caused an agency to release requested public records, "it is necessary to examine the parties' communications, the timing of the public record productions, and the nature of the records produced." (*Id.* at 454.) Petitioners must show "more than a mere temporal connection between the filing of litigation to compel production of records under the PRA and the production of those records." (*Id.* at 464.) As the court in *Belth v. Garamendi* (1991) 232 Cal.App.3d 896, 901-902 similarly held:

> A party is considered the prevailing party if his lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior or if the litigation substantially contributed to or was demonstrably influential in setting in motion the process which eventually achieved the desired result. The appropriate benchmarks in determining which party prevailed are (a) the situation immediately prior to the commencement of suit, and (b) the situation today, and the role, if any, played by the litigation in effecting any changes between the two.

(internal citations omitted.) Based on the evidence in the record, the Court finds the City acted reasonably in responding to Petitioners' PRA requests, and Petitioners' PRA cause of action was not "the motivating factor" for the City's document production.

B. Evidence in the Record

On February 7, 2017, the Board of Supervisors enacted the 2017 Amendments. On the same day, counsel for Petitioners sent a letter to the Board commenting on the pending legislation, and requesting "relevant documents to include records that comprise, constitute or relate to:"

- The person, persons, organizations, or entities that suggested the Proposed Amendments or that in any way initiated the Proposed Amendments or caused the Proposed Amendments to be initiated.
- The rationale or justification for the Proposed Amendments.
- CEQA review or studies for any aspect of the Proposed Amendments or potential environmental effect of the Proposed Amendments, including but not limited to displacement of tenants.
- The City's record retention policies

(Dec. of Arthur Coon in Supp. of Writ ["Coon Decl."] at Ex. 1.) In response to this request, the custodian of records for the Board of Supervisors provided documents in installments between February 7 and March 6, 2017. (*Id.* at Ex. 2.)

Petitioners' Counsel sent a second document request on March 24, 2017. (*Id.*, at Ex. 3.) This time, the request was addressed to both the Board of Supervisors and the Department of Building Inspection, and requested documents relating to:

- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any member of the Board of Supervisors, Planning Commission, Building Inspection Commission, and Single Room Occupancy Task Force.
- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any member of the Land Use and Transportation Committee, Rules Committee, and Budget and Finance Committee.
- Any communication pertaining to the HCO prepared, owned, used, retained, created, received or exchanged by any City representative [including ten specifically named City employees and departments].
- Any record pertaining to any potential environmental effect (including but not limited to displacement of SRO tenants) of the HCO prepared, owned, used, retained, created, received, or exchanged by the City of any of the individuals or entities referenced in this Public Records Act request.

(*Id.* at Ex. 3.) The request also stated "Please note, we are only seeking records prepared, owner, used, retained, created, received, or exchanged by the City since January 1, 2016. In the case of Supervisor Peskin, however, we are seeking records dating from December 8, 2015." (*Id.*)

In response, the custodian of records from DBI contacted counsel asking for clarification regarding the scope of the request and, on April 4, 2017, provided a first production to the requestor, followed by a second and final production on June 6, 2017. (*Id.* at Exs. 4 and 5.) The custodian indicated on June 6, 2017 that parts of the record had been redacted where they were "legally required to do so to protect the privacy interests of individuals" under California Constitution, Article I, section 1 and California Government Code sections 6254(k) and 6254(c), and that attorney-client privileged records had been withheld. (*Id.* at Ex. 5.) The custodian further stated "We have finished conducting our search and found no other documents responsive to your request. Therefore, we consider your request closed." (*Id.*)

On July 12, 2017, counsel for Petitioners submitted a third records request to the records managers for the Board of Supervisors and Department of Building Inspections, asserting that the City's productions to date were inadequate, and objected to duplications and the redactions by DBI. (*Id.* at Ex. 6.) The request exponentially increased the chronological scope by requesting documents over a 36-year period, cast a wider net to non-specified City agencies, and added categories of requested information including homelessness. It was somewhat ambiguous in terminology and lacked distinct parameters. Among the new requests, Petitioners sought the following:

- All writings that address or relate to displacement of persons from SRO hotels since the adoption of the HCO in 1981
- All documents reflecting laws, programs, procedures, policies, and efforts developed by the City to assist tenants or potential tenants who are displaced from housing options
- All documents prepared, owned, used, retained, created, received, or exchanged by the City, and/or any of its departments, agents, consultants, volunteers, or employee between January 1, 2008 and [2017] that survey, study, analyze, catalogue, count, estimate, quantify, or reflect (a) The number of homeless persons within the City and/or (b) the environmental impacts caused by homeless persons living or sleeping in public

places not meant for human habitation in the City (e.g., urination or defecation, waste, tent encampment, discarded hypodermic needles, panhandling, loitering, crime, etc."

- Added the Tenderloin Housing Clinic and Randy Shaw to the list of city agencies referenced in the second PRA request.

(*Id.* at Ex. 6.) Petitioners' counsel explained the July PRA request was "made to facilitate our preparation of the administrative record in [this action], and we believe such documents should be included in the administrative record." (*Id.*) The third request was only served on the records manager for the Board and custodian of records for DBI. (*Id.*) No other City agencies, commissions, or individuals were served. The request caused the records manager for the Board of Supervisors to contact Petitioner to affirm that the Board of Supervisors did not have any additional records responsive to the new request and suggested Petitioner contact the Department of Building Inspections directly for other documents. (*Id.* at Ex. 9).

On August 2, 2017, the Custodian of Records for the Department of Building Inspections responded to Petitioners, acknowledging its production of responsive documents related to Petitioners' March 24, 2017 request, and stated "it seems you now have three new requests for DBI." (*Id.* at Ex. 10). The custodian requested clarifications on the "new" requests as follows: (1) for the new request for additional documents relating to the HCO, "provide the keywords/topics of interest along with the timeframe;" (2) provide a definition of "displacement of persons," in addition to identifying the subject matter of interest in light of the burden of responding, to allow narrowing the search and getting Petitioner the documents sought; (3) noted the request for all HCO documents since its adoption in 1981 and expressed a desire to work with Petitioner to identify the particular HCO sub-topic and narrow the time frame if possible; and (4) directed contact with the Department of Homelessness and Supportive Housing or SF Human Services Agency for the information sought. (*Id.*)

Petitioners responded in a letter on August 4, 2017, in which they rejected the requests for definition of "displacement," clarified the scope of the request to "records that address or relate to displacement of persons, whether low income, elderly, disabled, or otherwise from SRO hotels since the adoption of the HCO in 1981, and (sic) regardless of the reason for the displacement," and reiterated that "records" included "electronic records in all forms wherever located, including

privately-owned computers, tablets, phones and electronic devices, including privately-owned and maintained accounts or servers," citing *City of San Jose v. Superior Court (Smith)* (2017) 2 Cal.5th 608. (*Id.* at Ex. 11.) Petitioners noted that thus far, no documents had been produced regarding "the environmental impacts caused by homeless persons in the City" and rejected the City's implied response of lack of documents regarding the number of homeless persons within the City, citing two of City's websites containing data. Petitioners further requested affidavits with sufficient facts to show whether the requested records were personal or public. (*Id.*)

On August 7, 2017, the records manager for the Board of Supervisors responded that all relevant documents had been provided, referred Petitioner to the Legislative Research Center for other legislative files and indicated that follow up inquires for records should be made to DBI. (*Id.* at Ex. 12.) For litigation matters, Petitioners were told to contact Deputy City Attorney Robb Kapla. (*Id.*)

On August 8, Petitioners responded to the Records and Project Manager for the Board of Supervisors and Custodian for the Department of building Inspections, excoriating both individuals for the responses to the three Public Records Acts requests and reminding them of the obligation to provide the documents or an affidavit from all relevant individuals to show whether any information withheld is public or private. (*Id.* at 13.)

On August 15, 2017, the records manager for the Board again stated there were no additional responsive records and advised Petitioners to "contact DBI if you have follow up inquiries that address or pertain to any of records that they may have, or contact the respective City Department(s) if you are extending your search to all City Departments, and lateraled all follow-up to Deputy City Attorney Robb Kapla. (*Id.* at Ex. 14). The City Attorney's office had not been served with any of the three records requests. There is no evidence that the City Attorney was actively involved with responses to the multiple requests. Rather, the evidence indicates that each agency responded individually to requests within their purview.

Petitioners responded with an email to the custodians of records for the Board of Supervisors, DBI, and Deputy City Attorney Kapla on August 16, stating "we are still being told to figure out ourselves which other city departments might have responsive documents and to make separate requests to those departments (each of our requests has always been intended to include all City

departments)," and further, "if the City Attorney is responsible for coordinating with all City departments, we obviously request for that to occur." (*Id.* at Ex. 15.) This e-mail stated what was already apparent—a lack of notice to individual City agencies despite Petitioners' requests for documents encompassing over 160 City departments, commissions, task forces, and numerous named individuals. Rather, the three records requests had only been served on the Board of Supervisors and DBI, the only two agencies named in the requests. Petitioners inexplicably assumed one of the two agencies would somehow be responsible for the coordination of records collection for all the other independent City agencies, each with a unique custodian of records.

As of mid-August 2017, the City had produced a total of 2,500 pages of responsive documents and efforts continued to fulfill the requests in a "rolling production" process. Subsequently, on August 23, 2017, Petitioners filed their "First Amended and Supplemental Verified Petition for Writ of Mandate; Complaint for Declaratory and Injunctive Relief For Takings, Denial of Due Process, and Denial of Equal Protection," which added a Sixth Cause of Action seeking a writ of mandamus for violations of the California Public Records Act – Government Code sections 6258 and 6259, and Code of Civil Procedure section 1085. (FAP at 20.)

On August 28, Petitioners wrote to the two City Attorneys assigned to the CEQA litigation referencing the history of requests to the custodians of the Board of Supervisors and DBI. (*Id.* at Ex. 17.) Petitioners disclaimed that the requests were limited to the Board of Supervisors or DBI, and asserted that their requests had "always included and been intended to include all City departments," which "should be broadly construed to include any council, board, commission, department, committee, official, officer, council member, commissioner, employee, agent, or representative of the City." (*Id.*) In a separate letter also on August 28, Petitioners further wrote to the City with regard to the delay in certification of the administrative record. (*Id.* at Ex. 16.)

On September 6, 2017, the Deputy City Attorney Ruiz-Esquide wrote to Petitioner indicating readiness to certify the administrative record, explaining previous hesitancy to do so because of the "broad and evolving document requests to city agencies, explicitly stating that Petitioners seek additional documents for inclusion in the administrative record." (*Id.* at Ex. 18.) Two days later, on September 8, 2017, DCA Ruiz-Esquide responded to the records issues and stated "as you know, the

documents you requested are voluminous. Different City departments are diligently searching their records. We will be producing them to you on a rolling basis, as we receive them from the different departments," and enclosed a disc with records from the Human Services Agency and Department of Homelessness and Supportive Housing. (*Id.* at Ex. 19). In another letter three days later, on September 11, 2017, Petitioners denied knowing or having any reason to know the records were voluminous, given the response by the Board and DBI. (*Id.* at Ex. 20.) This was despite Petitioners' insistence that the request was intended to include all city departments and city agencies, and to be broadly construed.

At the Case Management Conference on September 29, 2017, the parties brought the Public Records Act production issues to the Court's attention. (See parties' Case Management Conf. Statements, filed Aug. 30, 2017). Of concern to the parties was the increased scope of the request, volume of documents and dispute about what was properly part of the Administrative Record. A central question emerged regarding whether all documents generated by City employees or agencies properly part of the Administrative Record, even if the decision-makers (Board of Supervisors) did not consider the documents in the CEQA decision.

At the September 29, 2017 Case Management Conference, and at subsequent conferences on November 17, 2017 and January 11, 2018, the Court supervised further negotiations between the parties. City department searches for the documents with the terminology in the requests identified "truckloads" of material of questionable relevance. The Court and the parties discussed appropriate ways for the Petitioners to fine-tune the search through more specific search terms and how to narrow the search to the relevant City departments. In addition, the Court imposed production deadlines for the City and reviewed the progress of production by each City department selected. The City conducted a review for privilege and redaction of personal identifying information.

At the November 17, 2017 conference, the Court directed the City to collect and produce documents "to be located through the use of search terms as discussed" and refine search terms including "environmental impact of homelessness" and "environmental impact caused by homelessness." (Petitioners' CMC Statement, filed Dec. 27, 2017.) Other search terms were discussed at length. The search term "homeless" produced documents from the Department of Public

Health which were not relevant to the issues, while a broad search involving documents from the Mayor's Office of Housing and Community Development yielded individual applications for housing which would require redaction of personal identifying information. Petitioners requested more specific terms be utilized, (eg. urination, defecation, human waste, tent encampment, needles) to reflect the environmental impacts of homelessness.

As for document production, the City Attorney represented that documents aggregated by their office were being processed and redacted as needed. Production of documents from the Department of Public Works, Department of Public Health, Planning Department, Planning Commission, Budget/Legislative Analyst Office, Single Room Occupancy Task Force among others were in progress. Other agencies, such as the Department of Human Services completed production. The search with some terms ("environmental impact of homelessness") continued for all city departmental files. By the end of December, almost 4,000 additional documents were produced.

At the January 11, 2018 conference, Petitioners' counsel "further narrowed" their requests. (See Petitioners' CMC Statement, filed March 27, 2018.) An additional 9,600 pages from various city departments had been produced. The City represented that all documents that had been produced using the new search parameters were being processed.

On February 14, 2018, San Francisco completed its production in response to Petitioners' revised and narrowed Public Records Act Requests. San Francisco's rolling production totaled nearly 40,000 pages from twelve City agencies, commissions or departments. (See Petitioners' CMC Statement, filed March 27, 2018; Coon Decl., Exs. 27, 33.) Throughout this process, it became apparent that the ambiguous and overbroad terminology of the third request produced too many documents, some of which Petitioners acknowledged were not relevant to the litigation.

Petitioners argue that the filing of the lawsuit resulted in production of documents withheld. The evidence indicates that with the filing of the PRA claim, the City Attorney's Office became the point-persons to direct the search, aggregate response, assert privilege where appropriate, and coordinate and communicate with the appropriate city agencies, since many agencies performed duties unrelated to the issues in this litigation. However, Petitioners have not shown that there is "more than a mere temporal connection between the filing of litigation to compel production of records under the

PRA and the production of those records" or that the litigation was "the motivating factor for the production of documents." (*Sukumar*, 14 Cal.App.5th at 464; *Belth*, 232 Cal.App.3d at 901-902.) Petitioners ignore the crucial fact that service of each request upon the Board of Supervisors and DBI only resulted in responses by each department. The communication between Petitioner and the City was limited to the custodians of each of these two departments, who had no control or ability to produce documents from other departments. The response by the two city departments served with the records request and by only those departments should have signified to Petitioners that their assumption that one of those departments would act as the "aggregator" for the other city agencies was faulty.

Under the current City infrastructure, each city department is responsible to respond to PRA claims, each having a separate custodian of records. The delay in production and response by departments not served with the three requests was not prompted by the litigation nor lack of willingness to comply with the request. Rather, it was that each city department not served with the requests had no knowledge or opportunity to respond. One cannot respond to that which one does not have knowledge of. Petitioners were on notice as to the city infrastructure and their need to serve individual City departments, but did not do so. Unlike respondent in *Belth,* who initially refused plaintiff's request for documents she claimed were confidential, but obtained consent to disclose the documents after plaintiff filed a writ petition, there is little if any evidence that the BOS or DBI refused to provide or withheld requested documents in the first request. (232 Cal.App.3d at 902.) There is evidence that other city departments were never served with any request.

Moreover, the alleged delay in production of documents is not persuasive given that the PRA claim was filed on August 23, and by August 31, contact had been made with the Human Services Agency. (Coon Decl. at Ex. 22.) Delay in production was caused by the ever-widening and increased time frame to include a 36-year period from 1981-2017, and uncertainty over the scope of the request. Petitioner alleges that an August 31, 2017 email from Matt Braun of the Human Services Agency demonstrates frustration of the PRA request. (*Id.*) While the email acknowledges the "first phase of this search" to identify official city documents using a "rather narrow definition of 'documents,'" it then states "you may receive a subsequent request or requests for such documents," and that the plan is

that "the City Attorney will produce documents responsive to this request on a rolling basis" with the intent that the materials be collected before his last day of September 8, reflecting prioritization of the materials to be produced. (*Id.*)

The facts here are distinguishable from *Sukumar*, in which the City "unequivocally claimed it had produced every responsive nonexempt document." (14 Cal.App.5th at 464.) The City's lawyer even told the court in that case that it had produced "everything." (*Id.*) Upon depositions of the city's PMK, however, further documents were discovered. (*Id.*) The holding of the *Sukumar* court relies upon the City's facile representations to the court in the face of failure to perform a complete search. There is no evidence here that the City failed to perform a complete search for responsive documents in compliance with the requests, upon direction from the City Attorney's office. Since having taken over the responses to the three requests, it was incumbent upon the City Attorney to communicate with all City departments to determine which departments had materials relevant to the each of the three requests, using search terms from the requests and as modified from ambiguous and overbroad terms of the third request. As the aggregator of the materials, and coordinator of the document productions across over all city departments, commissions, task forces, councils, boards, employees, representatives and officials, the City Attorney was obligated to conduct privilege review and redactions when necessary (eg. HIPPA, personal identifying information). The evidence indicates the City Attorney's Office commenced coordination and communication with multiple City departments, appropriately reviewing all documents for privileged information and redacting as necessary to protect third party privacy.

The sole change effected by adding the PRA claim to the existing CEQA litigation was to compel the City Attorney to take responsibility and control of the responses to the PRA requests, which was required by its ethical duty of representation. At the time of filing the claim, production of responsive documents had already begun by the departments served with requests.

Accordingly, the Court finds the City acted reasonably in responding to Petitioners' PRA requests. Petitioner has failed to meet the burden of proof for the Sixth Cause of Action.

CONCLUSION

With respect to Petitioners' First Cause of Action for CEQA violations, the Court GRANTS the petition. The Court orders issuance of a writ of mandate setting aside and voiding the City's adoption of the 2017 HCO Amendments, and thereby the 2019 HCO Amendment, ordering the City to comply with CEQA before proceeding with any HCO legislation increasing the 7-day minimum rental period for SRO units. The City shall file a return demonstrating compliance with this court's writ within 60 days of this order. The Court shall retain continuing jurisdiction to enforce and ensure compliance with the writ and CEQA under Public Resources Code § 21168.9(b). (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 479-480.)

With respect to Petitioners' Sixth Cause of Action for PRA violations, the Court DENIES the petition and finds in favor of Respondent.

In light of this Court's Order setting aside the challenged 2017 HCO Amendments on CEQA grounds, Petitioners' Second through Fifth Causes of Action seeking to invalidate the Ordinance on constitutional due process, equal protection and takings grounds are now moot. The Court need not reach and decide those claims, which are hereby ordered dismissed without prejudice.

The Court's preliminary injunction against the City's enforcement of the HCO's minimum rental period is hereby modified to be a permanent injunction pending City's compliance with CEQA, and is modified to allow City's enforcement of the HCO's 7-day minimum rental period, which is the law validly in effect due to the Court's invalidation of the 2017 and 2019 HCO Amendments.

Having disposed of all causes of action framed by the pleadings between all the parties, this Order shall constitute the Court's final Judgment in this action. Any claims for prevailing party attorneys' fees and costs shall be made by timely post-judgment motion(s) and cost bill(s) pursuant to all applicable law.

IT IS SO ORDERED.

Dated: 9/24/19

Hon. Cynthia Ming-mei Lee
JUDGE OF THE SUPERIOR COURT

CPF-17-515656 SAN FRANCISCO SRO HOTEL COALITION, AN ET AL VS. CITY AND COUNTY OF SAN FRANCISCO A PUBLIC AGENCY ET AL (CEQA Case)

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on September 24, 2019 I served the foregoing CEQA - Order RE: Petition for Writ of Mandamus on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: September 24, 2019

By: S. LE

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EXHIBIT C

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FINAL NEGATIVE DECLARATION APPEAL TIMELINESS DETERMINATION

DATE: March 1, 2023
TO: Angela Calvillo, Clerk of the Board of Supervisors
FROM: Devyani Jain, Deputy Environmental Review Officer – (628) 652-7574

RE: **Appeal Timeliness Determination – BOS File 220815, 2022 Hotel Conversion Ordinance Amendments, Definition of Tourist or Transient Use under Hotel Conversion Ordinance; Amortization Period; Planning Department Case No. 2020-005491ENV**

On February 24, 2023, Ryan Patterson of Zacks, Freedman & Patterson, PC, representing Hotel des Arts, LLC (the "Appellant"), filed an appeal with the Office of the Clerk of the Board of Supervisors of the Final Negative Declaration for the proposed project. As explained below, because the Board of Supervisors is the approving decision-making body for this project, the Final Negative Declaration is not appealable to the Board of Supervisors in this case.

Date of Approval Action	30 Days after Approval Action	Appeal Deadline (Must Be Day Clerk of Board's Office Is Open)	Date of Appeal Filing	Timely?
To be determined	Not applicable	Not applicable	Friday, February 24, 2023	Not applicable; not appealable

Approval Action: On January 26, 2023 the Planning Department issued a Final Negative Declaration for the proposed project. Section 31.04(h) of the San Francisco Administrative Code defines Approval Action and Date of Approval Action. In this case, the Approval Action for the project is the Board of Supervisors' adoption of the ordinance amending Chapter 41 of the Administrative Code (BOS File 220815). This Approval Action has not yet occurred.

Appeal Timeliness: Because the Approval Action will be taken by the Board of Supervisors, the Final Negative Declaration is not appealable to the Board of Supervisors, and no timeliness determination is applicable.

Members of the public may comment on the Final Negative Declaration for the proposed ordinance (BOS File 220815). For information concerning the date and time of any associated Board of Supervisors hearing on the proposed ordinance and how to convey comments concerning the proposed ordinance, please contact the Office of the Clerk of the Board at (415) 554-5184.