



May 5, 2017

Hon. London Breed
San Francisco Board of Supervisors
City Hall Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: 2675 Folsom Street
File No. 161146 (CEQA Appeal)
Hearing Date: May 9, 2017

Dear President Breed and Supervisors,

On May 9, 2017, the Board of Supervisors will finally hear the appeal of the Community Plan Exemption (CPE) prepared under the California Environmental Quality Act (CEQA) for the proposed development at 2675 Folsom Street (Project). By the time the appeal is heard, it will have been **200 days** since the appeal was filed, a delay that not only is not supported by the City's Administrative Code, but is indicative of everything that is wrong with CEQA and a clear example of CEQA abuse.

Our firm represents Axis Development Group (Axis), the Project sponsor. For the past few months, we have been submitting studies, documents and evidence into the administrative record for the Project (Administrative Record) to clearly establish, without a doubt, that the CEQA appeal is without merit and spurious. **Our office has submitted over 6,000 pages of substantial evidence that supports the preparation of a CPE and refutes the claims made by the Appellants.** Previous letters by our firm explain in detail why Appellants' claims are meritless. Instead of repeating ourselves, this letter simply, and clearly, explains why the Board of Supervisors must uphold the CPE.

- The Board of Supervisors must uphold the CPE because the only issue under consideration is whether the CPE is legally adequate.¹ No other issues are under consideration and can, or should, be considered.
- The Board of Supervisors must uphold the CPE because over the past few months the Board has upheld three other CPEs for projects in the same neighborhood that were challenged on the same grounds being raised by the Appellants. This not only sets a very strong legal precedent, but it means any decision by the Board that finds the CPE legally inadequate will easily be found to be arbitrary and capricious given the facts and substantial evidence in the record.²

¹ Issues outside of CEQA are not under consideration or before the Board of Supervisors. This includes the Latino Cultural District, which substantial evidence in the record indicates is not a CEQA resource.

² On April 25, 2017, the Board of Supervisors upheld the CEQA analysis prepared for 953 Treat Avenue, and on April 18, 2017, the Board of Supervisors upheld the CEQA analysis prepared for 1515 South Van Ness Avenue. Both projects are in the Latino Cultural District and the Mission District Area Plan of the Eastern Neighborhoods. Both appeals were based on similar, if not identical claims to those raised here. The Board of Supervisors has made clear, by

- The Board of Supervisors must uphold the CPE because the Board cannot make the findings necessary to support a motion to reverse the CPE.

For all these reasons, and based on the entirety of the Administrative Record, which includes the Board of Supervisor's decisions on other similarly situated projects, we urge you to uphold the CEQA analysis prepared for the Project and affirm the CPE determination.

I. The Latino Cultural District is Not a CEQA Resource

As has been discussed thoroughly in the Administrative Record for this Project, and in the administrative records for three (3) other CEQA appeals³, the **Latino Cultural District is an intangible cultural heritage asset that is not eligible for listing on a state, local or federal registry of historic properties and therefore does meet the definition of an "historic resource" under CEQA Guidelines Section 15064.5(a).**

Appellant's claim that the Latino Cultural District is a CEQA resource is not supported by the law and is both contrary to, and inconsistent, with the Board of Supervisors' (Board) own adopted policy and established precedent on its status. For example, at the hearing for the 1296 Shotwell Street CEQA appeal (Board File No. 170024), members of the Board of Supervisors stated, on the record, that the Latino Cultural District is not an historic resource under CEQA.⁴ The same conclusion and findings were reached by the Board in the CEQA appeals for 1515 South Van Ness Avenue and 953 Treat Avenue. In all those cases, members of the Board acknowledged the importance of the Latino Cultural District, but the Board of Supervisors unequivocally found that **the Latino Cultural District is not a CEQA historic resource.** There is nothing different or unique about this Project that would change the historic nature of the Latino Cultural District or support any other decision by the Board of Supervisors than what was reached in the 1296 Shotwell Street CEQA appeal, the 1515 South Van Ness Avenue CEQA Appeal or the 953 Treat Avenue CEQA Appeal.

Moreover, the historic resource evaluation prepared for the Project site found, without a doubt, that the building was not a historic resource and is not listed as part of a cultural asset theme to be protected. A supplemental assessment of the Project site's relationship to the railroad was also prepared and submitted into the Administrative Record, again, clearly establishing **there are no historic resources of any kind on site.**

A community mural is located on the Folsom Street façade. This community mural was painted by students of Cesar Chavez Elementary School in 2011-2012 to commemorate the mission and achievements of the Jamestown Community Center. This community mural is a beautiful piece of art, but it does not meet the definition of a historic or cultural resource under CEQA. It was painted less than ten (10) years ago and while it reflects the mission and achievements of the

the records in those cases, that the issues being raised by the Appellants are not CEQA issues and do not render the CEQA analysis prepared legally inadequate.

³ The three appeals are 1296 Shotwell Street (Board File No. 170024), 1515 South Van Ness Avenue (Board File No. 161002) and 953 Treat Avenue (Board File No. 170134). The Board file for each of these appeals, including the transcripts, have been added into the Administrative Record.

⁴ While 1296 Shotwell Street (Board File No. 170024) relied on CEQA's "In-Fill Exemption", the Board of Supervisors publicly noted on the record that the Latino Cultural District is not a historic resource under CEQA. A copy of that transcript and audio file, as well as the Board packet for that appeal, has been provided under separate cover and was previously added to the Administrative Record.

Jamestown Community Center, the Jamestown Community Center was never located or offered community services in the building or on the Project Site. It also, unfortunately, has been the subject of significant graffiti as shown in the attached photographs. The mural is a wonderful addition of art to the neighborhood, but it does not qualify as a CEQA resource and is therefore not relevant to the question of whether the CPE prepared for the Project is legally adequate.

The law is clear, the record is clear and the Board of Supervisors' position on this issue is well established: The Latino Cultural District is not a historic resource under CEQA. Therefore, no further CEQA analysis is needed to study the Project's potential impact on the Latino Cultural District or on any other cultural issue.

II. Recent Precedent Requires that the CPE be Upheld

In the last two years, the Board of Supervisors has considered, and rejected, CEQA appeals on at least five (5) projects in the Eastern Neighborhood Plan Area that, like the Project, relied on the Eastern Neighborhood Programmatic EIR (EN PEIR) through the preparation of a CPE or other CEQA exemption.⁵ Three of those appeals were **for projects near the Project site and within the Latino Cultural District.**⁶ In all instances, the Board of Supervisors **rejected the appeals, upholding the underlying CEQA analysis finding that the EN PEIR is not flawed.**

The following is a summary of those CEQA appeals and the Board of Supervisors' decisions.

- **340 Bryant Street**

On April 7, 2015, the Board of Supervisors heard the appeal of a CPE for a 45,000-square foot commercial project located at 340 Bryant Street (Board File No. 150171). The CPE for the project relied on the EN PEIR. The appellants alleged that the project's transportation impacts were not adequately studied, **but the Board of Supervisors rejected the appeal and affirmed the CPE, finding that the CPE properly relied on the EN PEIR.**

- **2000-2070 Bryant Street**

On September 13, 2016, the Board of Supervisors heard the appeal of a 194-unit market rate project with 136 affordable housing units on an adjacent parcel at 2000-2070 Bryant Street (Board File No. 160774). The appellants alleged that the EN EIR was outdated and could not be relied upon, but **the Board of Supervisors unanimously rejected those claims, finding that the CPE properly relied on the EN PEIR.**

- **1296 Shotwell Street**

On February 14, 2017, the Board of Supervisors heard the appeal of a 94-unit senior affordable housing project located at 1296 Shotwell Street (Board File No.

⁵ In fact, our review of City records indicates that the Board of Supervisor has rejected every appeal of a CPE determination in the Eastern Neighborhoods over the last two years.

⁶ On April 25, 2017, the Board of Supervisors rejected the CEQA appeal of a project at 953 Treat Avenue (Board File No. 170134), located a mere fifty (50) feet from the Project site. On April 18, 2017, the Board of Supervisors rejected the CEQA appeal of a project at 1515 S. Van Ness (Board File No. 161002), located just four (4) blocks from the Project site.

170025). The appellants alleged that the EN EIR was outdated and flawed, and could not be relied upon, and that the 1296 Shotwell Street project was inconsistent with the Latino Cultural District and required further review under CEQA. **The Board of Supervisors rejected the appeal, finding that the Latino Cultural District was not a historic resource under CEQA and that the EN PEIR was not flawed.**

- **1515 South Van Ness Avenue**

On April 18, 2017, the Board of Supervisors heard the appeal of a CPE for a 157-unit mixed use development located at 1515 South Van Ness Avenue (Board File No. 161002). The appellants and appellants' counsel raised almost identical issues as they have for this Project and **the Board of Supervisors unanimously rejected the appeal, upholding the CPE as legally valid.** 1515 South Van Ness is four (4) blocks from the Project and within the Latino Cultural District.⁷

- **953 Treat Avenue**

On April 25, 2017, the Board of Supervisors heard the appeal of Categorical Exemptions⁸ under CEQA for a four (4) unit residential project located at 953 Treat Avenue (File No. 170314). **In approving the Categorical Exemptions, the Board of Supervisors found that the project did not have an impact on any historic resources, including the Latino Cultural District. 953 Treat Avenue is approximately 50-feet from the Project site and also in the Latino Cultural District.**

Nothing about the Project, the facts presented, or the evidence in the Administrative Record distinguish it from the other projects that relied on a CPE and nothing about the Project is unique or peculiar and different from the other appeals considered by the Board of Supervisors. As a result, the Board of Supervisors should act consistent with its prior decisions and reject the appeal, finding that the CPE is legally valid and that the Latino Cultural District is not a historic resource under CEQA. If the Board of Supervisors takes a different position on this Project from all the other projects despite all the substantial evidence to the contrary, the Board would be treating the Project in an inconsistent, arbitrary and discriminatory fashion, supporting a very strong claim that **the decision was arbitrary and contrary to a fair and equal application of the rule of law.** Moreover, it would cast doubt over all projects that previously relied on a CPE in the Eastern Neighborhood Plan Area, and call into question the use of CPEs anywhere in the Eastern Neighborhood Plan Area in the future.

III. The Findings Required to Deny the CPE Cannot Be Made

The Board of Supervisors is required by law to make findings to support any decision it makes on the appeal. Those findings must be made at the time the decision is rendered and cannot be made

⁷ A copy of Motion No. M17-064 approving the CPE for 1515 S. Van Ness Avenue is attached to this letter.

⁸ The Categorical Exemptions were the Class 1 exemption (CEQA Guidelines section 15301) for demolition and removal of individual small structures including up to three single-family residences and the Class 3 exemption (CEQA Guidelines section 15303) for new construction of up to six dwelling units in urbanized areas.

later as a “post hoc rationalization” of the decision.⁹ Here, in this instance, that means that in order to overturn the CPE the Board of Supervisors must determine that the mandatory prerequisites for further CEQA review have been met and findings in support of that determination must be entered into the record before ordering further CEQA review. **Those findings cannot be made here based on the robust Administrative Record, the uncontroverted substantial evidence provided, the Board of Supervisor’s clear precedent, and established case law, which has unequivocally found that “[a]fter an initial EIR is certified, there is a strong presumption against additional environmental review.”**¹⁰

Specifically, to overturn the CPE and find it legally inadequate, the Board of Supervisors would need to find, based on substantial evidence in the record, that *all* of the following have occurred: (1) that the Latino Cultural District is a historic resource under CEQA, (2) that the Project causes a physical impact on the Latino Cultural District, and (3) that the impact could not have been known at the time of the EN PEIR or would require “substantial revision” of the EN PEIR.¹¹

There is no substantial evidence in the record of *any* of the above, much less *all* of the above. Thus, the Board of Supervisors cannot make the required findings and therefore cannot require further CEQA review.

* * * * *

In sum, the claims raised by the Appellants, as detailed in the Planning Department’s response and as evidenced by the substantial evidence in the Administrative Record, are without merit. The Planning Commission’s reliance on the CPE in approving the Project is legally adequate, supported by substantial evidence in the record and should be upheld. The Appellants have not met their burden of proof, the issues they raise are not CEQA issues, and – as made clear by the Board of Supervisors’ prior decisions on similar appeals – the Board of Supervisors cannot make the findings necessary to uphold the appeal and overturn the CPE.

For these reasons as well as the fact that any other decision by the Board of Supervisors would be considered arbitrary and contrary to a fair and equal application of the rule of law given its decision on other similar appeals, we respectfully request that you reject the appeal and uphold the CPE.

Very truly yours,



Alexis M. Pelosi

cc: Dennis Herrera, City Attorney

⁹ *T-Mobile South, LLC v. City of Roswell, Ga.* (U.S. 2015) 135 S.Ct. 808, 816, n. 3; see also *Topanga Assn. for a Scenic Cmty. v. City of Los Angeles*, 11 Cal. 3d 506, 514 (1974).

¹⁰ *San Diego Navy Broadway Complex Coalition v City of San Diego* (2010) 185 Cal.App.4th 924, 934.

¹¹ To overturn the CPE based on any claim raised by the Appellant’s would require making the same three part finding or analysis, as discussed in previous correspondence from our firm.

