



# SAN FRANCISCO PLANNING DEPARTMENT

**MEMO**

## Appeal of Final Environmental Impact Report 450-474 O'Farrell Street/532 Jones Street Project

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**DATE:** November 5, 2018  
**TO:** Angela Calvillo, Clerk of the Board of Supervisors  
**FROM:** Lisa M. Gibson, Environmental Review Officer – (415) 575-9032  
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**RE:** Board File No. 180993, Planning Department Case No. 2013-1535ENV  
Appeal of the Final Environmental Impact Report for the 450-474 O'Farrell  
Street/532 Jones Street Project  
**HEARING DATE:** November 13, 2018  
**ATTACHMENTS:** Final EIR (on compact disc)

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**PROJECT SPONSOR:** Fifth Church of Christ, Scientist  
450 O'Farrell Partners, LLC  
39 Forrest Street, Suite 201  
Mill Valley, CA 94941  
Attn: Stephanie Hill  
**APPELLANTS:** Sarah M. K. Hoffman on behalf of 540 Jones Street Hotel LLC  
Mike Buhler, San Francisco Heritage

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### INTRODUCTION

This memorandum is a response to two letters of appeal submitted to the Board of Supervisors (Board) regarding the Planning Commission's (Commission) certification of a Final Environmental Impact Report (Final EIR) under the California Environmental Quality Act (CEQA) for the 450-474 O'Farrell Street/532 Jones Street Project (Project). The Final EIR (provided on a compact disc to the Board on November 5, 2018) was certified by the Commission on September 13, 2018.

The first appeal to the Board was filed by Sarah M. K. Hoffman on behalf of 540 Jones Street Hotel LLC on October 15, 2018. The second appeal to the Board was filed by Mike Buhler, the President and CEO of San Francisco Heritage (Heritage), on behalf of Heritage, on October 15, 2018. Both appeal letters are part of Board File No. 180993 and can be accessed online at <https://sfgov.legistar.com/LegislationDetail.aspx?ID=3709237&GUID=27AB7ED5-7CFA-4DFC-B8D8-7ED526C12ECF&Options=ID|Text|&Search=180993>.

The decision before the Board is whether to uphold the Commission's decision to certify the Final EIR and deny the appeals, or to reverse the Commission's decision to certify the Final EIR and return the Project to the Department for staff to conduct additional environmental review.

Appellant 540 Jones Street Hotel LLC submitted a supplemental letter on November 2, 2018. The Planning Department will respond to it under a separate response memo.

## **PROJECT DESCRIPTION**

The project site is located at 450 O'Farrell Street, 474 O'Farrell Street, and 532 Jones Street, San Francisco, California. The block is bounded by Geary Street to the north, O'Farrell Street to the south, Taylor Street to the east, and Jones Street to the west, with Shannon Street bisecting the block from O'Farrell Street to Geary Street. The project site, located within San Francisco's Downtown/Civic Center neighborhood, is 22,106 square feet in size and consists of three rectangular parcels (Assessor's block/lot 0317/007, 0317/009, and 0317/011) that would be merged to form a single lot. It is currently located in the RC-4 (Residential-Commercial, High Density) Zoning District and the 80-T-130-T Height and Bulk District.

The project site is currently occupied by the three-story, 26,904-square-foot (sf) Fifth Church of Christ, Scientist building and a 1,400-sf parking lot with four parking spaces at 450 O'Farrell Street; a one-story, 4,415-sf vacant retail building at 474 O'Farrell Street; and a one-story, 1,012-sf restaurant and residential building with five units at 532 Jones Street.

The Project would involve the demolition of the existing church building (450 O'Farrell Street), the vacant retail building along O'Farrell Street (474 O'Farrell Street), and the restaurant and residential building along Jones Street (532 Jones Street). The project would replace the existing church building at 450 O'Farrell Street with a new building.<sup>1</sup>

The new building would be a 13-story, 130-foot-tall (excluding a 20-foot-tall elevator penthouse) mixed-use building with up to 176 dwelling units, including 28 below-market-rate units, restaurant/retail space on a portion of the ground floor, and a replacement church (proposed religious institution) on the ground floor and two upper levels facing O'Farrell Street. The Project would construct a total of 228,764 square feet of new development in one building, including up to 184,168 square feet for residential use, 4,577 square feet for restaurant and/or retail use, 9,555 square feet for religious institution use to replace the existing church, 8,359 square feet of open space on two levels, and 22,105 square feet of below-grade parking (including 46 vehicle spaces, 125 Class 1 bicycle, and 16 Class 2 bicycle spaces).

The following discussion provides a brief overview of the Project's procedural background and a succinct list of the EIR's significant and unavoidable impacts and accompanying mitigation measures.

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<sup>1</sup> The project as proposed and analyzed in the EIR included the retention of the existing façade of the Fifth Church of Christ, Scientist building. However, the project, as approved by the Commission (Motions No. 20280 and 20281), no longer includes the retention of the façade.

## PROCEDURAL BACKGROUND

**Table 1: CEQA Procedural Background**, identifies the dates of the major CEQA milestones for the Project's environmental review.

TABLE 1: CEQA PROCEDURAL BACKGROUND	
CEQA Milestone	Date
Notice of Preparation (NOP) of an EIR and Initial Study Published	February 22, 2017
<i>NOP/Initial Study Public Review Period</i>	February 22, 2017 to March 24, 2017 (30 days)
<i>Public Scoping Meeting</i>	N/A
Draft EIR Published	October 25, 2017
<i>Draft EIR Public Review Period</i>	October 25, 2017 to December 11, 2017 (47 days)
<i>Public Hearing on Draft EIR</i>	November 30, 2017
Responses to Comments Published	June 13, 2018
Certification of the Final EIR	September 13, 2018

## Significant and Unavoidable Project Impacts and Mitigation Measures

**Table 2. Significant and Unavoidable Impacts and Mitigation Measures**, provides an abbreviated list of the single significant and unavoidable impact of the Project and accompanying mitigation measures identified in the EIR. All other impacts would be either less than significant or can be reduced to less-than-significant levels with implementation of mitigation measures identified in the EIR.

TABLE 2. SIGNIFICANT AND UNAVOIDABLE IMPACTS AND MITIGATION MEASURES	
Significant and Unavoidable Impacts	Mitigation Measures
<b>Historic Architectural Resources</b>	
Impact CR-1: The proposed demolition of the existing Fifth Church of Christ, Scientist building at 450 O'Farrell Street would result in a substantial adverse change to the significance of an individual historic architectural resource.	M-R-1a: Documentation M-R-1b: Interpretation M-R-1c: Salvage

## CEQA Findings and Statement of Overriding Considerations

As required in Public Resources Code Section 21081 and CEQA Guidelines Sections 15091 and 15093, if the Final EIR identifies significant effects for a proposed project, but the effects are not avoided or reduced to less-than-significant levels (i.e., significant and unavoidable impacts), a decision-maker that approves the project must make findings, and find that "specific economic, legal, social, technological or other considerations . . . make infeasible the mitigation measures or alternatives identified in the final EIR." (CEQA Guidelines Section 15091.) Further, the decision-maker "shall state in writing the specific reasons to support the action" despite the environmental impacts, stating, in particular, that any such unavoidable

significant effects are acceptable due to overriding economic, legal, technological, social, or other policy considerations. (CEQA Guidelines Section 15093.) This is known as a statement of overriding considerations. In making these findings, the decision-maker must balance the benefits of the proposed project against its unavoidable environmental effects.

The Commission was the initial decision-maker, under CEQA, that was required to adopt CEQA findings, including a statement of overriding considerations, when it first approved the Project. On September 13, 2018, following certification of the Final EIR, the Commission approved the Project and adopted CEQA findings and a statement of overriding considerations as part of its approval action (Planning Commission Motions No. 20280 and 20281).

The Commission approved a Conditional Use Authorization for a Planned Unit Development with modifications to the following Planning Code Sections: 1) rear yard (Section 134(g)), 2) dwelling unit exposure (Section 140); 3) off-street loading (Section 152), and 4) permitted obstructions (Section 136(c)). The Commission also granted a Conditional Use Authorization for: demolition of five existing dwelling units (Section 317); height taller than 50 feet with street frontage greater than 50 feet (Section 253); height greater than 80 feet in North of Market Residential Special Use District No. 1 (Section 249.5/263.7); bulk exceedance (Section 270/271); and for establishment of new religious institution use at the site (Section 303).

The Commission's approval of the Conditional Use Authorization has also been appealed by Heritage (Board File No. 180997).

## **CEQA, THE CEQA GUIDELINES AND CHAPTER 31**

The Final EIR has been prepared in accordance with CEQA, the CEQA Guidelines, and local CEQA procedures under Chapter 31 of the San Francisco Administrative Code (Administrative Code). The purpose of the Final EIR is to disclose any potential impacts on the physical environment resulting from implementation of the Project and provide an opportunity for public review and comment before decision-makers decide to approve or deny the Project. The EIR is an informational document intended to inform public agency decision-makers and the public of the significant environmental effects of a project proposal, identify possible ways to minimize the significant effects, and describe feasible alternatives to the project to reduce or eliminate those significant effects. Certification of an environmental document does not constitute a project approval of any kind.

## **STANDARDS OF ADEQUACY FOR CERTIFICATION OF AN EIR**

On September 13, 2018, the Commission reviewed and considered the Final EIR at a duly noticed public hearing. The Commission found that the Final EIR reflected the independent judgment and analysis of the City and County of San Francisco. The Commission found that the Final EIR was adequate, accurate and objective, and that the Responses to Comments (RTC) document contained no significant revisions to the Draft EIR. The Commission certified the Final EIR in compliance with the requirements of CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code.

Under Administrative Code Section 31.16(c)(3), the grounds for appeal of an EIR

shall be limited to whether the EIR complies with CEQA, including whether it is adequate, accurate and objective, sufficient as an informational document, correct in its conclusions, and reflects the independent judgment and analysis of the City and whether the Planning Commission certification findings are correct.

The standards for adequacy of an EIR are set forth in CEQA Guidelines Section 15151, which provides:

An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.

Administrative Code Section 31.16(b)(6) provides that in reviewing a CEQA decision on appeal, the Board "shall conduct its own independent review of whether the CEQA decision adequately complies with the requirements of CEQA. The Board shall consider anew all facts, evidence and issues related to the adequacy, accuracy and objectiveness of the CEQA decision, including, but not limited to, the sufficiency of the CEQA decision and the correctness of its conclusions."

## **PLANNING DEPARTMENT RESPONSES**

Two appeal letters were timely filed concerning the certification of the EIR for the Project. The concerns raised in each appeal letter are addressed below.

### **Response 1**

**Appellant 540 Jones Street Hotel's statement that the EIR fails to mitigate potential damage to the 540 Jones Street building is unsubstantiated. The EIR provides adequate mitigation to lessen the potential impacts to the 540 Jones Street building.**

### **CEQA Requirement**

CEQA Guidelines Section 15370 – Mitigation defines mitigation as the following:

"Mitigation" includes:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.

- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

CEQA Guidelines Section 15126.4 – Consideration and Discussion of Mitigation Measures Proposed to Minimize Significant Effects further describes the requirements of mitigation:

(a) Mitigation Measures in General.

- (1) An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy. (A) The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project. This discussion shall identify mitigation measures for each significant environmental effect identified in the EIR.

(B) Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.

(D) If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed.

- (2) Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design.
- (3) Mitigation measures are not required for effects which are not found to be significant.
- (4) Mitigation measures must be consistent with all applicable constitutional requirements, including the following:
  - (A) There must be an essential nexus (i.e. connection) between the mitigation measure and a legitimate governmental interest; and
  - (B) The mitigation measure must be “roughly proportional” to the impacts of the project. Where the mitigation measure is an ad hoc exaction, it must be “roughly proportional” to the impacts of the project.

- (5) If the lead agency determines that a mitigation measure cannot be legally imposed, the measure need not be proposed or analyzed. Instead, the EIR may simply reference that fact and briefly explain the reasons underlying the lead agency's determination.

### Staff Analysis

The Appellant is incorrect in saying the Final EIR, including both the Draft EIR and RTC documents, did not address potential damage that could be caused by construction of the Project. In fact, the Draft EIR, Impact CR-3 identified that the 540 Jones Street building could be susceptible to ground-borne vibration from demolition and construction activities occurring from construction of the 450 O'Farrell Street project site. This ground-borne vibration could cause potential physical damage which could materially impair the identified historic building at 540 Jones Street.

Therefore, the Draft EIR determined that Mitigation Measure CR-3a: Vibration Monitoring and Management Plan and Mitigation Measure CR-3b: Construction Best Practices for Historical Architectural Resources would apply to any components of the Project that would result in ground-disturbing activities. These mitigation measures would require, among other things, the project sponsors to prepare a preconstruction assessment of nearby historic architectural resources within 50-feet of the project site, including 540 Jones Street and to prepare a vibration management and monitoring plan to protect the adjacent resources from damage from vibration or differential settlement caused during construction. This plan would set a performance standard of a maximum vibration level of 0.2 inch per second, or another level determined by a site-specific assessment, and use construction best practices to avoid vibration damage to adjacent and nearby historic buildings based on that performance standard. In addition, monitoring would be required to document and remediate any damage to adjacent and nearby historic buildings caused by construction activities at the project site. If damage occurs, alternative construction techniques would be put into place. These mitigation measures were determined to reduce any potential damage to adjacent structures from construction to a less-than-significant level.

Additionally, as further described in the RTC document (p. RTC-54), Mitigation Measure CR-3a: Vibration Monitoring and Management Plan was further clarified to state the types of alternative techniques that could be employed as part of Mitigation Measure CR-3a. These revisions were incorporated to respond to comments submitted by the Appellant on the Draft EIR. These revisions included adding to Mitigation Measure CR-3a additional criteria defining maximum settlement levels not to be exceeded at each building (including 540 Jones) and actions to be taken if settlement of specific amount occurs: from 3/8-inch to monitor activities; 1/2-inch for construction to be halted; or a level determined by the site-specific assessment made by the structural engineer in coordination with the preservation architect for the project. This settlement criteria shall be included in the requirements of the vibration management and monitoring plan.

The Appellant states that the proposed Mitigation Measures CR-3a and CR-3b are inadequate and lack sufficient detail; however, the Appellant provides no substantiation of how they are lacking detail. The Department is unable to respond to conclusory or speculative statements set forth by the Appellant.

The Appellant also states with no substantiation that reliance on the recommendations of the Geotechnical Report and the San Francisco Building Code would not protect the adjacent properties, including 540 Jones. In fact, the San Francisco Building Code does include requirements to protect adjacent buildings during construction. Additionally, the Department of Building Inspection would review background information, including geotechnical and structural engineering reports, to ensure the suitability of the soils on the project site for development of the Project. The design-level geotechnical investigation would include an analysis of the potential for unstable soil impacts and inclusion of recommendations to address unstable soils. The local building official must incorporate the recommended measures to address such geologic hazards as part of the conditions of the building permit. However, to address the site-specific conditions of the adjacent historic building, the EIR included Mitigation Measure CR-3a and CR-3b to further protect these buildings from vibration and damage during construction of the project.

Mitigation Measure CR-3a, as revised in the RTC, and Mitigation Measure CR-3b comply with the CEQA guidelines section 15126.4 and 15370 requirements for mitigation. The Appellant has not submitted any substantial evidence that the proposed demolition of three historic resources would cause other historic resources to be demolished. The Appellant's conclusory statement that the mitigation is inadequate does provide any evidence or substantial evidence for the record. Therefore, no further response is warranted.

## **Response 2**

**Appellant Heritage's statement that the proposed demolition of Fifth Church of Christ, Scientist building at 450 O'Farrell Street and two other historic resources would result in significant adverse impacts on historic resources merely acknowledges the findings in the EIR and thus raises no issues related to the adequacy of the EIR.**

## **CEQA Requirement**

Chapter 31 of the Code establishes the types of environmental review decisions that may be subject to appeal, as well as the grounds for such an appeal. Chapter 31.16(a) establishes that: (1) certification of a Final EIR by the Commission; (2) adoption of a negative declaration by the first decision-making body; and (3) determination by the Department, or any other authorized City department, that a project is exempt from CEQA are the only environmental review decisions that may be appealed to the Board. Chapter 31.16(c)(3) states that

the grounds for appeal of an EIR shall be limited to whether the EIR complies with CEQA, including whether it is adequate, accurate and objective, sufficient as an informational document, correct in its conclusions, and reflects the independent judgment and analysis of the City and whether the Commission's EIR *certification* findings are correct (emphasis added).

Section 31.16(b)(6) of the Administrative Code requires appellants to provide "facts, evidence and issues" in support of the appeal.



### Staff Analysis

On September 13, 2018, the Commission voted to certify the Project's Final EIR as compliant with CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code. The Final EIR adequately analyzed the Project's impacts on historic resources under CEQA, as discussed below.

The Appellant asserts that the proposed demolition of Fifth Church of Christ, Scientist building at 450 O'Farrell Street and two other contributing historic resources would result in significant adverse impacts on historic resources. This assertion raises no issues regarding the adequacy of the analysis presented in the Final EIR because it simply restates the findings in the EIR.

The EIR found that the existing church building at 450 O'Farrell Street is individually eligible for the California Register of Historic Resources (CRHR) under Criterion 3 (architecture) and that all of the three buildings to be demolished are contributors to the Uptown Tenderloin National Register Historic District (UTNRHD), a historic district listed in the National Register of Historic Places (NRHP). (Draft EIR pp. S-2, 4-13, and 4-32 through 4-34.) The properties at 474 O'Farrell Street and 532 Jones Street were determined to be ineligible for individual listing in the CRHR.<sup>2</sup>

The EIR found that the proposed demolition of the church building, even with the implementation of Mitigation Measures CR-1a: Documentation, CR-1b: Interpretation, and CR-1c: Salvage, would result in significant unavoidable impacts on an individual historic architectural resource (450 O'Farrell Street) because the resource would no longer be able to convey its historical significance. (Draft EIR pp. 4-32 through 4-34.) Noting that the UTNRHD has a total of 407 contributing buildings and 68 non-contributors, the EIR concluded that the UTNRHD is a robust historic district. Based on this, the EIR found that the Project would not have a significant impact on the UTNRHD because the loss of three contributing buildings would not substantially reduce the ratio of contributing to non-contributing buildings and prevent the UTNRHD from conveying its historical significance. (Draft EIR p. 4-34.)

In addition, the EIR adequately analyzed the Project's cumulative effect on historic resources. Specifically, the EIR analyzed impacts on historic resources resulting from the Project and cumulative projects, which include past, present, and reasonably foreseeable future projects in the Project vicinity. The EIR found that the Project's cumulative effect on historic resources would be less than significant with mitigation for a few reasons. (Draft EIR pp. 4-39 and 4-40.)

First, the EIR found that the demolition of three contributing buildings as part of the Project, along with the cumulative projects that would include the demolition of a few other contributing buildings, would not drastically affect the ratio of contributing to non-contributing buildings (6 to 1). Second, the EIR found that the demolition of contributing residential buildings at the Project site and cumulative project sites, which are not concentrated in a geographic area, would not constitute a loss of the predominant residential character of the UTNRHD. Finally, the EIR found that with the implementation of Mitigation Measures CR-3a: Vibration Monitoring and Management Plan and CR-3b: Construction Best Practices for Historic

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<sup>2</sup> San Francisco Planning Department, Preservation Team Review Form concerning the 450-474 O'Farrell Street/532 Jones Street project (Project No. 2013.1535ENV), prepared by Marcelle Boudreaux on September 18, 2017.

Architectural Resources, which would protect adjacent historical resources from damages that could result from vibration during Project construction activities, the cumulative vibration impacts on adjacent historic architectural resources would be less than significant.

Mitigation Measure CR-1a: Documentation requires the project sponsors to undertake Historic American Building Survey (HABS) documentation of the subject property. The documentation must be undertaken by a qualified professional who meets the Secretary of the Interior's Professional Qualification standards. Mitigation Measure CR-1b: Interpretation requires the project sponsors to provide a permanent display of interpretive materials concerning the history and architectural features of the original 450 O'Farrell Street building and its relationship with the UTRHD. Mitigation Measure CR-1c: Salvage requires the project sponsors, by working with a professional who meets the Secretary of Interior's Standards, to develop a salvage report that documents the building's character defining features for conservation and assesses the feasibility of reinstallation at the new church space or in other facilities.

Thus, the Appellant's statement does not raise any issue concerning the adequacy of the EIR.

### **Response 3**

**Appellant Heritage's assertion that the Project would result in reasonably foreseeable cumulative impacts to the UTRHD is unsubstantiated. The EIR fully analyzed the Project's impacts to the UTRHD and found that it would result in a less-than-significant impact to the UTRHD. The EIR is adequate, accurate, objective, and sufficient as an informational document under CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code.**

### **CEQA Requirement**

A project's impact shall not be considered significant in the absence of substantial evidence in the record. (CEQA Guidelines Section 15064.) CEQA defines "substantial evidence" to include "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (CEQA Section 21080(e)(1).) "Substantial evidence" under CEQA "is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment. (CEQA Sections 21080(e)(2) and 21082.2(c).)

CEQA Guidelines Section 15151 provides that

Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts.

Chapter 31 of the Code establishes the types of environmental review decisions that may be subject to appeal, as well as the grounds for such an appeal.

the grounds for appeal of an EIR shall be limited to whether the EIR complies with CEQA, including whether it is adequate, accurate and objective, sufficient as an informational document, correct in its conclusions, and reflects the independent judgment and analysis

of the City and whether the Commission's EIR *certification* findings are correct (emphasis added).

Section 31.16(b)(6) of the Administrative Code requires appellants to provide "facts, evidence and issues" in support of the appeal.

### **Staff Analysis**

The Appellant's assertion is speculative. The Appellant has not submitted any substantial evidence that the proposed demolition of three historic resources will cause other historic resources to be demolished. The Appellant's conclusory statement that the Project will "almost certainly" spur future demolition of other historic buildings in the UTRHD does not constitute substantial evidence under CEQA. If in the future other projects that seek demolition of other historic buildings in the UTRHD are proposed, the City will undertake environmental review of those projects at that time.

The EIR analyzed the Project's impacts on the UTRHD and found that it would result in a less-than-significant impact. Noting that the UTRHD has a total of 407 contributing buildings and 68 non-contributors, the EIR concluded that the UTRHD is a robust historic district. Based on this, the EIR found that the loss of three contributing historic resources would not substantially reduce the ratio of contributing to non-contributing buildings. The EIR also found that the Project would not prevent the UTRHD from conveying its historical significance. (Draft EIR p. 4-34.) Further, the EIR also found that the proposed new building would be "compatible with the UTRHD in terms of size and scale, composition, and materials." (Draft EIR p. 4-34.) Additionally, the Project, as approved by the Commission (Motions No. 20280 and 20281), no longer includes the retention of the existing façade. Further, the Commission adopted a condition of approval that requires that the revised façade be compatible with the UTRHD.<sup>3</sup> Finally, the EIR determined the cumulative impacts to the UTRHD would be less-than-significant, as discussed under Response 2.

The Appellant has provided no evidence demonstrating that the analytical approach taken in the EIR is inadequate or any other expert analysis would be required, or that the Project would result in significant effects with respect to the UTRHD that were not previously disclosed in the EIR. The Commission reviewed and considered the information contained in the EIR prior to approving the Project on September 13, 2018, and its decision to approve the Project was proper. Disagreement among experts does not make an EIR adequate under CEQA Guidelines Section 15151.

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<sup>3</sup> Adopted as part of Motion No. 20281: Façade and Colonnade. Prior to issuance of the site permit architectural addendum, the Project Sponsor shall work with the Planning Department to redesign the lower levels of the southeast corner of the Project to eliminate the existing 450 O'Farrell Street façade and colonnade and replace it with a contemporary but compatible design that maintains the project's references to the character-defining features of the surrounding district, including the ground-floor storefront height, tripartite façade composition, organization of the building into vertical masses, punched window openings, and material uses, ensuring the project's compatibility with the Uptown Tenderloin National Register Historic District in terms of size and scale, composition, and materials.

The EIR is adequate, complete, and complies with CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code, and the Appellant has not met his burden to provide evidence to the contrary. Thus, the Board should uphold the Commission's decision to certify the Final EIR.

#### **Response 4**

**Contrary to Appellant Heritage's assertion, the Commission did not err by not adopting any mitigation measure to reduce or avoid significant impacts to the UTNRHD under CEQA because the Final EIR found no significant impacts resulting from the Project to the UTNRHD.**

#### **CEQA Requirement**

CEQA Section 21002.1. provides

- (a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.
- (b) Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.

CEQA Guidelines Section 15126.4(a)(3) provides

Mitigation measures are not required for effects which are not found to be significant.

#### **Staff Analysis**

The lead agency is not required to adopt any mitigation measure for effects which are not found to be significant under CEQA Guidelines Section 15126.4(a)(3). Here, the Commission was not required to adopt any mitigation measure to reduce the Project's impacts on the UTNRHD because the Final EIR found no significant impacts resulting from the Project to the UTNRHD.

As noted under Response 2 above, the EIR adequately analyzed the Project's impacts on the UTNRHD and found that it would result in a less-than-significant impact. Noting that the UTNRHD has a total of 407 contributing buildings and 68 non-contributors, the EIR concluded that the UTNRHD is a robust historic district. Based on this, the EIR found that the Project would not have a significant impact on the UTNRHD because the loss of three buildings would not substantially reduce the ratio of contributing to non-contributing buildings. The EIR also found that the Project would not prevent the UTNRHD from conveying its historical significance. (Draft EIR p. 4-34.) Further, the EIR found that the proposed new building would be "compatible with the UTNRHD in terms of size and scale, composition, and materials." (Draft EIR p. 4-34.) Additionally, the Project, as approved by the Commission (Motions No. 20280 and

20281), no longer includes the retention of the existing façade. Further, the Commission adopted a condition of approval that requires that the revised façade be compatible with the UTNRHD.<sup>4</sup>

As a result, the Commission did not err by not adopting any mitigation measure to reduce or avoid significant impacts to the UTNRHD under CEQA.

### **Response 5**

**The Commission did not violate CEQA by not adopting a mitigation measure that would require the project sponsors to pay mitigation fees as advocated by Appellant Heritage because such mitigation fees are unnecessary and unwarranted, since the EIR did not identify an impact to the UTNRHD that would require any mitigation.**

### **CEQA Requirement**

CEQA Guidelines Section 15126.4(a)(3) provides

Mitigation measures are not required for effects which are not found to be significant.

CEQA Guidelines Section 15041(a) provides

A lead agency for a project has authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment, consistent with applicable constitutional requirements such as the “nexus” and “rough proportionality” standards established by case law.

CEQA Guidelines Section 15126.4(a)(4) provides

(A) There must be an essential nexus (i.e. connection) between the mitigation measure and a legitimate governmental interest; and

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<sup>4</sup> Adopted as part of Motion No. 20281: Façade and Colonnade. Prior to issuance of the site permit architectural addendum, the Project Sponsor shall work with the Planning Department to redesign the lower levels of the southeast corner of the Project to eliminate the existing 450 O'Farrell Street façade and colonnade and replace it with a contemporary but compatible design that maintains the project's references to the character-defining features of the surrounding district, including the ground-floor storefront height, tripartite façade composition, organization of the building into vertical masses, punched window openings, and material uses, ensuring the project's compatibility with the Uptown Tenderloin National Register Historic District in terms of size and scale, composition, and materials.

- (B) The mitigation measure must be “roughly proportional” to the impacts of the project. Where the mitigation measure is an *ad hoc* exaction, it must be “roughly proportional” to the impacts of the project.

### Staff Analysis

The Appellant’s suggestion to require the project sponsors to pay into the three city-administered mitigation funds, such as the San Francisco Historic Preservation Fund Committee Grants,<sup>5</sup> SF Shines Program,<sup>6</sup> and the Mayor’s Office of Housing and Community Development funds raises no issues related to the adequacy of the EIR. These comments address the merits of the Project.

As noted under Response 3 above, no mitigation measures are required to reduce the Project’s impacts on the UTNRHD because the Final EIR determined the Project’s impact to the UTNRHD would be less-than-significant. Mitigation is required only to address potential significant impacts to the environment, not because the project sponsors may realize net cost savings as part of the project changes.

As the Appellant acknowledges, a mitigation measure must be consistent with constitutional requirements. Under CEQA Guidelines Section 15126.4(a)(4), there must be an essential nexus (i.e., connection) between the mitigation and a legitimate government interest, and the mitigation must be “roughly proportional” to the impacts of the project.

Here, there is no impact to mitigate, and there is thus no nexus to support payment of the fees Appellant suggests. The Appellant has not submitted any evidence that the constitutional nexus and proportionality requirements are met. The Appellant’s bare assertion that a “clear nexus” exists between the Project’s adverse impacts and the imposition of mitigation fees is insufficient to constitute substantial evidence under CEQA.

As the Appellant states, the California Office of Historic Preservation (OHP) noted, in its September 13, 2015 comment letter concerning the Long Beach Civic Center Project, that creative CEQA mitigation has a clear nexus to projects with significant impacts to historical resources.<sup>7</sup> Based on that project, the Appellant

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<sup>5</sup> The Historic Preservation Fund Committee Grants, created pursuant to a settlement agreement related to the old Emporium site on Market Street and administered by the Mayor’s Office of Economic and Workforce Development (OEWD), fund preservation-related work in San Francisco. The grants can be used for education, feasibility studies, consultant services grants, monitoring of the settlement agreement, research and documentation for CEQA evaluations, nominations of properties to state or federal historic registers, architectural surveys sponsored by neighborhood organizations that would further preservation planning in San Francisco, legislative and administrative actions to implement such surveys, and other preservation advocacy oriented purposes in San Francisco.

<sup>6</sup> Under the SF Shines Program, OEWD provides grants, design assistance and project management to improve storefront façades and business interiors. For more information, see <https://oewd.org/sf-shines>.

<sup>7</sup> OHP suggested several mitigation measures including: (1) additional historic surveys in parts of the City that have not been surveyed; (2) development of design guidelines for future reuse of public buildings; and (3) creation of a

argues that the Commission failed to adopt the mitigation fees in violation of CEQA. The Appellant misses the point. As discussed above, the Commission was not required to adopt the mitigation fees because the EIR found no significant impacts resulting from the Project to the UTNRHD. Additionally, despite these suggestions by the OHP, the City of Long Beach determined that there was no nexus between the suggested measures and the impact associated with the proposed project, finding that those additional measures would not mitigate the impact of the City of Long Beach Civic Center Project.

In an attempt to show that an essential nexus exists between the Project's adverse impacts and the imposition of mitigation fees, the Appellant claims that off-site mitigation, known as "creative mitigation," is recognized under the National Environmental Policy Act (NEPA), citing the Code of Federal Regulations (CFR) Section 1508.20(c) and (e).<sup>8</sup> The Appellant is mistaken. The question of whether creative mitigation is recognized under NEPA is irrelevant to the adequacy of the EIR for a few reasons. First and foremost, as discussed above, the Commission was not required to adopt any mitigation measure with respect to the Project's impacts to the UTNRHD because the EIR found less-than-significant impacts to the UNRHD. Second, the Project is subject to CEQA, but not subject to NEPA. NEPA is required for projects seeking federal funding, or that require an approval from a federal agency. The Project does not meet any of these criteria. The Appellant has not explained why the Commission was required to adopt an off-site, "creative mitigation" measure under CEQA just because such mitigation is recognized under NEPA.

Similarly, the Appellant notes that the Federal Advisory Council on Historic Preservation endorses creative mitigation,<sup>9</sup> that similar off-site mitigation is commonly used for California projects affecting wetlands or wildlife habitat, and that California agencies commonly prescribe off-site mitigation to compensate for the loss of prime farmland. None of these points demonstrates that the Project would result in a significant

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Historic Preservation Mitigation Fund. (Civic Center Project Final SEIR pp. 4-3-14 and 4-3-15.) The City of Long Beach Civic Center Project Final SEIR is available online at:

[http://www.lbds.info/planning/environmental\\_planning/environmental\\_reports.asp](http://www.lbds.info/planning/environmental_planning/environmental_reports.asp).

<sup>8</sup> CFR Section 1508.20 does not include the term "creative mitigation." Section 1508.20 provides

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

<sup>9</sup> Notice of Adoption of Policy Statement on Historic Preservation and Community Revitalization by the Advisory Council on Historic Preservation, dated November 16, 2016, notes that,

"Creative mitigation" is a concept that allows federal agencies, in consultation with stakeholders, to use non-traditional approaches to compensate for adverse effects that cannot be avoided or offset by using standard mitigation techniques . . . Examples of creative mitigation that have been successful include the development of local historic preservation ordinances; acquisition and relocation of historic properties to alternate sites in a historic district; funding for landscaping and streetscape improvements in a district; and guidance on managing vacant and abandoned properties in the community."

The Notice is available online at: <https://www.federalregister.gov/documents/2016/11/16/2016-27536/notice-of-adoption-of-policy-statement-on-historic-preservation-and-community-revitalization>.

impact that must be mitigated under CEQA. Further, the Appellant has not explained how the off-site mitigation used to reduce impacts to resources that are, by their very essence, more interchangeable (such as air, wetlands, and farmland) can be implemented in the context of historic resources, in which the preservation or replacement of a unique historic resource at an off-site location would not reduce impacts.

In addition to satisfying the nexus requirement, as the Appellant acknowledges, a mitigation measure must also be roughly proportional to the impacts of the project under CEQA Guidelines Section 15126.4(a)(4)(B). Here, the Appellant has not demonstrated that any amount of the mitigation fees would be roughly proportional to the Project's impacts to the UTNRHD, since there are no impacts to the UTNRHD. Thus, the mitigation fees proposed by the Appellant are not required.

## **Response 6**

**Appellant Heritage's characterization of the Commission's action at its September 13, 2018 meeting is not correct. At the meeting, the Commission approved the project that would not retain the existing façade of the church building, but it did not recommend the reallocation of net cost savings that might be realized by the project sponsors to historic preservation projects.**

### CEQA Requirement

Chapter 31 of the Code establishes the types of environmental review decisions that may be subject to appeal, as well as the grounds for such an appeal.

the grounds for appeal of an EIR shall be limited to whether the EIR complies with CEQA, including whether it is adequate, accurate and objective, sufficient as an informational document, correct in its conclusions, and reflects the independent judgment and analysis of the City and whether the Commission's EIR *certification* findings are correct (emphasis added).

Section 31.16(b)(6) of the Administrative Code requires appellants to provide "facts, evidence and issues" in support of the appeal.

### Staff Analysis

At the September 13, 2018 Commission meeting, the Commission approved the Conditional Use Authorization (Motion No. M-20281) for the project (Case No. 2013.1535CUA) that would not retain the existing façade of the church building, but it did not recommend the reallocation net cost savings that might be realized by the project sponsors to historic preservation projects.

During the aforementioned Commission meeting, the Commission discussed the possibility of additional funds as a private agreement between the project sponsors and the Heritage, and it was clarified that such funds would not be imposed a mitigation measure under CEQA or a condition of approval.<sup>10</sup> These

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<sup>10</sup> San Francisco Planning Commission, September 13, 2108 hearing:  
[http://sanfrancisco.granicus.com/MediaPlayer.php?view\\_id=20&clip\\_id=31328](http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=20&clip_id=31328)



comments are about the merits of the project, which is before the Board as part of the Conditional Use Authorization appeal.

The Appellant's statement does not raise any issue related to the adequacy of the EIR.

## **Response 7**

**The Commission did not err by not adopting any mitigation measure that would prevent speculative demolition of historic resources. There is no substantial evidence in the record that the Project will result in speculative demolition of historic resources. Even if substantial evidence is found to exist showing that the Project will result in speculative demolition of historic resources, Appellant Heritage failed to show that such speculative demolition will result in a significant impact that was not analyzed in the EIR.**

## **CEQA Requirement**

Pursuant to CEQA Guidelines Section 15064, an effect shall not be considered significant in the absence of substantial evidence in the record. CEQA defines "substantial evidence" to include "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact" (CEQA Sections 21080(e)(1) and 21082.2(c)). "Substantial evidence" under CEQA "is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment" (CEQA Sections 21080(e)(2) and 21082.2(c)).

CEQA Guidelines Section 15126.4(a)(3) provides

Mitigation measures are not required for effects which are not found to be significant.

## **Staff Analysis**

The Appellant raises no issues regarding the adequacy of the analysis presented in the EIR. The Appellant argues that the Project would result in speculative demolition of historic resources because the financial feasibility studies prepared as part of the CEQA findings and statement of overriding considerations for this project did not show that the project would result in a profit margin. The Appellant makes this assertion by stating that the two financial feasibility studies conclude that the Project would yield only 4.2 to 4.5 percent, falling below what the Appellant states is the typical feasibility range of 5.5 to 6.5 percent to secure financing.<sup>11,12</sup>

This assertion is speculative because the Appellant has not submitted any substantial evidence that the project sponsors would not proceed with the construction of the Project. Further, these comments are about

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<sup>11</sup> EPS, 450 O'Farrell Street Development Feasibility Review and Evaluation, November, 2017

<sup>12</sup> Willdan, 450 O'Farrell Street Development Pro Forma Peer Review and Evaluation, May, 2018

the merits of the Project, which is before the Board as part of the Conditional Use Authorization appeal. In addition, Section 311(e) of the Planning Code prohibits the speculate demolition of a historic or architecturally important building in an R zoning district, such as 450 O'Farrell Street, prior to issuance of a building permit for the replacement structure.<sup>13</sup>

Additionally, the Commission's adoption of the CEQA findings and statement of overriding considerations are separate environmental determinations subject to appeal under Chapter 31, and are part of the project approvals, and not the environmental review process itself. In fact, the Commission adopts the CEQA findings and statement of overriding considerations subsequent to, not together with, the certification of the EIR. CEQA Section 21081 provides that "no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant impacts on the environment" unless the agency makes required findings. As this language makes clear, the CEQA findings are required only if the agency decides to approve the project and only after the EIR has been certified. The Appellant did not appeal the CEQA findings or the statement of overriding considerations.

Further, even if the Project is found to result in speculative demolition of historic resources, the Appellant failed to demonstrate how such speculative demolition would result in a significant impact that was not analyzed in the EIR. The EIR analyzed the impact of demolition of the historic resources, identified feasible mitigation measures, and found the impacts to be significant and unavoidable with mitigation. Beyond that, no mitigation measures are required for the speculative scenario of the site remaining idle after demolition and before construction, since that is not a separate effect.

Thus, the Commission did not err by not adopting any mitigation measure with respect to speculative demolition of historic resources. The EIR fully analyzed the impacts resulting from the proposed demolition of the three contributing historic resources, as discussed above.

## **Response 8**

**The mitigation measure proposed by Appellant Heritage to safeguard against speculative demolition of historic resources is not required because there is no evidence in the record that such speculative demolition would result in a significant impact that was not analyzed in the EIR.**

### **CEQA Requirement**

CEQA Section 21002.1. provides

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<sup>13</sup> Planning Code Section 311(e) states: **Demolition of Dwellings, Approval of Replacement Structure Required.** Unless the building is determined to pose a serious and imminent hazard as defined in the [Building Code](#) an application authorizing demolition in any R District of an historic or architecturally important building or of a dwelling shall not be approved and issued until the City has granted final approval of a building permit for construction of the replacement building. A building permit is finally approved if the Board of Appeals has taken final action for approval on an appeal of the issuance or denial of the permit or if the permit has been issued and the time for filing an appeal with the Board has lapsed with no appeal filed.

- (a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.
- (b) Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.

CEQA Guidelines Section 15126.4(a)(3) provides

Mitigation measures are not required for effects which are not found to be significant.

### **Staff Analysis**

As discussed under Response 7, the Appellant has not provided any evidence that such speculative demolition would result in a significant impact that was not analyzed in the EIR.

To safeguard against speculative demolition of historic resources, Appellant Heritage urges the Board to adopt an additional mitigation measure that would consist of two components. Specifically, it requires the project sponsors (or their successor) to demonstrate, prior to the issuance of demolition permits for the Projects, that: (1) commercially reasonable financial resources are available to complete the new construction project; and (2) commencement of new construction will take place within six months of receipt of all necessary city approvals.

The first component of the mitigation measure would merely delay the project construction until the project sponsors secure commercially reasonable financial resources, helping minimize the period of time during which the project site remains vacant after the existing buildings are demolished. Similarly, the second component of the mitigation measure would help ensure that the period of time during which the project site remains vacant is less than six months. Section 311(e) of the Planning Code already prevents historic resource sites from being prematurely demolished and sitting vacant because a demolition permit may not be issued in an R zoning district until a building permit for the replacement structure has been issued. Neither the Appellant, nor evidence in the record, shows any significant impact resulting from the project site being vacant for a period of time that was not analyzed in the EIR. Thus, the proposed measure is not required under CEQA.

As discussed above, the EIR fully analyzed the impacts resulting from the demolition of three historic resources and found that the proposed demolition of the church building, even with the implementation of Mitigation Measures CR-1a: Documentation, CR-1b: Interpretation, and CR-1c: Salvage, would result in significant unavoidable impacts on an individual historic architectural resource. (Draft EIR pp. 4-32 through 4-34.) Further, the EIR found that the Project would not have a significant impact on the UTRHD. (Draft EIR p. 4-34.)

Thus, the mitigation measure proposed by the Appellant to safeguard against speculative demolition of historic resources is not required under CEQA.

## **CONCLUSION**

Appellants have not raised any new issues related to the Project's physical environmental impacts that were not previously addressed in the Draft EIR and appendices, in the RTC document, or during the Final EIR certification hearing. As discussed above, the analysis and conclusions of the Final EIR are supported by substantial evidence in the record. Moreover, Appellants have not provided substantial evidence in support of their arguments regarding the adequacy and accuracy of the Final EIR. Argument and speculation alone are not substantial evidence under CEQA. Even if Appellants had provided substantial evidence that contradicts the analysis and conclusions of the Final EIR, the agency's adequacy determination remains valid when the EIR is based on substantial evidence in the record. The Final EIR and supporting documents provide such substantial evidence.

For the reasons stated above, the Commission's certification of the Final EIR complies with the requirements of CEQA, the CEQA Guidelines, and Chapter 31 of the Administrative Code. The Department, therefore, recommends that the Board uphold the Commission's decision to certify the Final EIR and deny the appeals.