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August 25, 2021

VIA EMAIL

Board of Supervisors
City and County of San Francisco
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: *450-474 O'Farrell Street/532 Jones Street Application*

Dear Members of the Board of Supervisors:

Storzer & Associates, P.C. has been retained by Fifth Church of Christ, Scientist ("Church") to protect its federal civil rights in connection with the Church's proposed development project ("Project") on 450-474 O'Farrell Street and the related appeal ("Appeal") pending before the Board of Supervisors ("Board"). We are writing to inform you that if the Board grants this appeal, the Board and City of San Francisco ("City") would be violating the Church's federal civil rights as protected by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C §§ 2000cc, *et seq.* and the Free Exercise Clause of the United States Constitution, 42 U.S.C. § 1983, and potentially running afoul of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*

Currently, the Church does not have a building that can adequately accommodate its religious exercise and has been seeking to construct a new house of worship since 2013. This Project—which includes a new church building and Christian Science Reading Room that will meet the religious needs of the Church, in addition to 316 group housing units—has faced extreme and unreasonable delays in the land use approval process by the City, which have severely impeded the Church's religious exercise as described below. We urge the Board to reject this Appeal and uphold the Planning Commission's conditional use approval. Failure to do so would potentially expose the City to years of litigation and substantial damages and attorneys' fees.

I. The Substantial Burdens Provision of the Religious Land Use and Institutionalized Persons Act

RLUIPA's Substantial Burdens provision explicitly prohibits municipalities from imposing a substantial burden on the religious exercise of a religious assembly or institution unless that imposition is the least restrictive means of furthering a compelling governmental interest.[1] 42 U.S.C. § 2000cc(a). To protect religious liberty, RLUIPA is "construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of RLUIPA and the Constitution." *Id.* § 2000cc-3(g) (emphasis added). As explained in further detail below, granting this Appeal would impose a substantial burden on the religious exercise of the Church, and no compelling governmental interest exists for doing so. Even if a compelling governmental interest did exist, granting the appeal would not be the least restrictive means of achieving such interest.

A. The Burden on Plaintiff's Religious Exercise

In the Ninth Circuit, a government imposes a substantial burden on religious exercise when it "imposes a significantly great restriction or onus upon [religious] exercise." *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1067 (9th Cir. 2011) (internal citations and quotations omitted) (emphasis added). District courts in the Ninth Circuit have recognized that "having 'a place of worship . . . is at the very core of the free exercise of religion . . . [and that] [c]hurches . . . cannot function without a physical space adequate to their needs and consistent with their theological requirements.'" *Id.* at 1069 (quoting *Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove,* 460 F. Supp. 2d 1165, 1171 (C.D. Cal. 2006)). The Ninth Circuit has repeatedly found a substantial burden on religious exercise in cases where a local government blocked a church from building a house of worship that would meet its religious needs—the exact situation the Church faces with this pending Appeal. *See Int'l Church of Foursquare Gospel*, 673 F.3d at 1067 (finding that the district court erred in finding no substantial burden under RLUIPA when the City blocked church from building a house of worship that would meet its religious needs); *Guru Nanak Sikh Soc. of Yuba City v. Cty. of Sutter,* 456 F.3d 978, 992 (9th Cir. 2006) (holding that the denial of a conditional use permit to build a house of worship substantially burdened organization's religious exercise); *see also Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1227 (C.D. Cal. 2002) (finding that plaintiff established a substantial burden where the City was prevented from building a church that would meet its religious needs). The Ninth Circuit's standard for a Substantial Burdens claim under RLUIPA is clearly met here, as described below.

1. *The Church Is Unable to Fulfill its Religious Mission in Its Current Facilities*.

As detailed in the Church's June 21, 2021 Letter, the Church's present building in the Tenderloin district of San Francisco cannot accommodate the Church's needs and prevents it from

[1] RLUIPA's substantial burden provision applies where "the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses" or where the substantial burden affects, or removal of that substantial burden would affect, interstate commerce. *Id.* § 2000cc(a)(2)(B), (C). Denial of a land use application such as a conditional use permit is the epitome of an "individualized assessment," triggering the application of the substantial burden provision. *See, e.g., Guru Nanak Sikh Soc. of Yuba City v. Cty. of Sutter*, 456 F.3d 978, 987 (9th Cir. 2006).

engaging in religious activity in accordance with its religious mission. *See generally Int'l Church of Foursquare Gospel*, 673 F.3d at 1067-70.[2] The Church's religious mission requires it to provide a welcoming, healing refuge to individuals seeking solace, which is impossible to do in the current structure. The Church's dark, oversized concrete building on a blighted street-front and alleyway that regularly attracts drug use and violence in front of the church entrances, preventing the Church from offering a peaceful, welcoming environment and limiting access of church members to the building. Tent encampments lining the front and side entrances of the building also block access to the Church for members. Access to the Bible verse sign in front of the Church is also regularly blocked, preventing the Church from changing the sign, which is a part of the Church's religious exercise. Garbage, human excrement and urine, used hypodermic needles, and graffiti must be cleaned up by the Church daily, sometimes several times a day.[3] Some members are afraid to go to Church. The Church contacts City agencies such as police non-emergency, 311/the Homeless Outreach Team, and 911(in cases of individuals in distress), on a regular basis to request services for individuals in need outside of the Church, and is frequently ignored. The Church has also placed numerous 911 calls when faced with violence or threats of violence, and in significant instances has received no response. *See* Letter to Captain Chris Canning, Exhibit A. The Church was forced to install chain-link fencing across the street façade and access doors to prevent use of the front steps as a shooting gallery, encampment site, urinal, etc., further restricting access to the church building. This resulted in a significant reduction in membership.

The Project would replace the current structure with a new church building, the design of which will be welcoming, light-filled, and human-scaled to reflect the Church's spiritual mission of creating an atmosphere of light, warmth and healing. The 316 new housing units and retail space included in the proposed development would activate the block, providing much needed animation and a flow of people in the area, eliminating conditions which foster open drug use and violence, remove barriers to access for the Church's members, and allow for an atmosphere of healing, which is central to the Church's mission.

2. *The Absence of a Christian Science Reading Room.*

Of great religious significance to the Church, the current structure cannot accommodate a Christian Science Reading Room, which is mandated by the Church's Bylaws and is an essential component of the Church's religious exercise.[4] The Church cannot fulfill its religious mission

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[2] As another Court of Appeals wrote, RLUIPA's Substantial Burdens provision is violated when "use of the property would serve an unmet religious need, the restriction on religious use is absolute rather than conditional, and the organization must acquire a different property as a result." *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore Cty.*, Maryland, 915 F.3d 256, 261 (4th Cir. 2019) ("*JCIAM"*), *as amended* (Feb. 25, 2019); *see also Thai Meditation Ass'n of Alabama, Inc. v. City of Mobile, Alabama*, 980 F.3d 821, 831-832 (11th Cir. 2020) (considering, *inter alia*, "whether the plaintiffs have demonstrated a genuine need for [a] new. . . space—for instance, . . . to facilitate additional services or programming").

[3] The Church's own caretaker has been assaulted while cleaning the area in front of the church on multiple occasions. Recently, he has been threatened with a knife, gun, metal pipe, and pit bull (on separate occasions), and has been subjected to racial slurs. A church member's car was recently attacked while she was in it. Individuals regularly splice the power cord in front of the church, and this recently caused a fire in front of the church.

[4] A Reading Room, which is open to the public daily throughout the week, is a neighborhood sanctuary where any individual can find hope, comfort, and healing. For a Christian Science church, a Reading Room provides spiritual food to the community and offers healing and restoration.

without a Reading Room. The proposed church building will have a Christian Science Reading Room, which will serve as a daily active presence in the neighborhood and allow the Church to fulfill this critical component of its religious mission.

3. *The Church's Mission to Provide Healing to the Community.*

Another critical aspect of the Church's religious mission is to provide healing to the community in which it is located through meaningful service, as the Church considers its central mission to be healing in the broadest sense. One way that the Church seeks to serve the local community is by providing desperately needed housing in the Tenderloin that low-income and working families can afford. The construction of 316 units of affordable and workforce housing, which would enable working-class families and individuals to live in the city where they work, will further the Church's religious mission of serving the local community and helping the Tenderloin realize its potential of being a safe, stable neighborhood where families can thrive. *See Harbor Missionary Church Corp. v. City of San Buenaventura,* 642 F. App'x 726, 729 (9th Cir. 2016) (finding a substantial burden where "the City's denial of the conditional use permit prevents the Church from conducting its homeless ministry, an integral part of its religion.").

The church's inability to provide a welcoming, healing refuge in accordance with its religious mission due to the conditions described above, the barriers to access to the Church for members, the absence of a Christian Science Reading Room, and the Church's inability to provide housing to the local community in accordance with its mission, each taken separately, would impose a substantial burden on the Church's religious exercise. Taken together, there is no question that these factors "impose[ ] a significantly great restriction or onus upon [religious] exercise" of the Church in violation of RLUIPA. *Int'l Church of Foursquare Gospel*, 673 F.3d at 1067.

B. Additional Factors Courts Consider in Determining "Substantial Burden."

1. *Arbitrariness in Decision-making.*

Another factor courts consider in evaluating a substantial burden claim under RLUIPA is "whether the City's decision-making process concerning the plaintiffs' applications reflects any arbitrariness of the sort that might evince animus or otherwise suggests that the plaintiffs have been, are being, or will be (to use a technical term of art) jerked around." *Thai Meditation Ass'n*, 980 F.3d at 831-832. "Where the arbitrary, capricious, or unlawful nature of a defendant's challenged action suggests that a religious institution received less than even-handed treatment, the application of RLUIPA's substantial burden provision usefully 'backstops the explicit prohibition of religious discrimination in the later section of the Act.'" *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 351-52 (2d Cir. 2007) ("*WDS*") (quoting *Saints Constantine and Helen Greek Orthodox Church v. City of New Berlin,* 396 F.3d 895, 900 (7th Cir. 2005)) (finding that "the arbitrary and unlawful nature of the ZBA denial of [the plaintiff's] application supports [the plaintiff's] claim that it has sustained a substantial burden."). Each issue detailed below would evidence "arbitrariness" on the part of the Board if the Appeal were to be granted.

As outlined in the August 25, 2021 letter from Holland & Knight LLP ("H&K Letter"), this Appeal does not challenge any of the items voted upon by the Planning Commission on June

24, 2021, but instead inappropriately targets earlier approvals for which the time to appeal has expired. As stated in the H&K Letter:

> The action before the Planning Commission was limited to proposed modification of conditions in the Conditional Use Approval. The substance of the Planning Commission action concerned modification of four (4) conditions from the original approval and addition of a condition of approval addressing the standards for group housing cooking facilities. The conditions that were modified concerned Parking for Affordable Units (#24), Car Share (#25), Bicycle Parking (#26), and the Inclusionary Affordable Housing Program (#32). . . .
>
> None of the reasons stated as the basis for the appeal concern the items modified by the Planning Commission action. ***The appeal is based on objections to alleged construction impacts and the authorization for group housing at this site. Nothing however in the action of the Planning Commission affects the previously approved site plan and associated construction impacts, and group housing is a permitted use in this zoning district, requiring no Planning Commission approval.*** Given the reasons stated for the appeal, the real target of the appeal is the prior site plan approval and earlier Planning Code amendments that designated group housing as a permitted use. The time for appealing those decisions has passed. The only appropriate decision on this unsupported appeal of the modification of the Conditional Use approval is to deny the appeal.

See Exhibit B (emphasis added).

2. *Appellants' Meritless Arguments.*

Accepting Appellants' arguments—which fail to address the items actually decided by the Planning Commission—would also demonstrate arbitrariness in decision-making, as each of these three arguments is wholly without merit, as described below. An appeal granted on the basis of any of these arguments would, again, reflect arbitrariness of the sort that would support a RLUIPA substantial burden claim.

i. Construction Impacts Argument

Appellants' argument that the environmental analysis does not sufficiently address potential structural and construction impacts on the adjacent property is not an appropriate basis for this appeal. As stated above, this issue was not before the Planning Commission for the Conditional Use Approval, and the time to appeal the environmental analysis has expired. Moreover, there is no requirement that these impacts be addressed at this stage of the process. Structural and construction impacts to adjacent neighbors must and will be addressed and resolved before a building permit is issued. It is common practice for a project sponsor and adjacent landowner to enter into an agreement that addresses potential impacts on the neighboring property. In this case, the Project Sponsor (Forge Development Partners) has engaged in discussions with the Pacific Bay Inn Hotel for this purpose, and will continue to do so. This Appeal cannot lawfully be granted on this basis.

ii. Compatibility with the Neighborhood Argument

Appellants' argument that the revised Project will be "out-of-place" and "undesirable," and that "there is a great need for family housing" mischaracterizes both the Project and the community need. While clearly subjective, "undesirable" is simply not an accurate descriptor for a project that has received significant community support.[5]

Implicit in Appellants' argument that this Project does not provide "family housing" is a concept of family that does not reflect the reality of family demographics in the Tenderloin. A concept of family that assumes a two-parent household simply fails to account for the large percentage of single-parent families that desperately need housing in the City. The American Community Survey 5-Year Estimates for 2015-2019 compiled by the Bureau of Labor Statistics places the Tenderloin's average household size at 1.63. All of the group housing units in the Project can accommodate such families who, without the income of a second parent, in large measure would not be able to afford a larger unit in San Francisco. Additionally, the plans for this Project contain amenities that would be desirable for families with children such as after-school and educational programming. Blocking this project would actually have the opposite result of what Appellants argue, making housing unavailable to the many families, especially those with one income, who seek to live in the City where they work.[6]

Further, Appellants' argument that there are "serious concerns about developing [this Project] in one of the densest neighborhoods in the City" ignores the reality of the block on which the Project will be situated and, again, disregards the plight of the Church to build a suitable house of worship. As detailed above, the block on which this Project will be constructed is blighted, and, as a result, is a site for illegal and unsafe conditions, which regularly block the entrance of the church and pedestrian use of the sidewalk which, consequently, limit access to the Church of its members. This block needs animation, foot traffic, and density. Any effort to limit density on the block would directly harm the Church and impose a substantial burden on its religious exercise, as the new church building would not be feasible with the allowed density.

Appellants' argument about compatibility with the Tenderloin community is wholly without merit.

iii. Community Outreach Argument

Appellants' "lack of community outreach and dialogue" argument has no basis in law or fact. First, community outreach is not part of the standard for Conditional Use Approval under Section 303(c) of the San Francisco Planning Code. Second, the Project Sponsor engaged in extensive outreach efforts, as documented in Exhibit C. Between November of 2020 and late July of 2021, the Project team held 48 stakeholder meetings, three canvassing events, and four community-wide meetings, as well as placing over 300 calls and emails to stakeholders. The Project received 74 letters of support and 124 signatures in support of the project.

In response to the input from the community and Planning Commission, the Project Sponsor also made significant revisions to the Project plans, including:

[5] The Project received 74 letters and 124 signatures in support of the Project.

[6] The Fair Housing Act makes it unlawful to make housing unavailable on the basis of familial status. 42 U.S.C. § 3604(a).

- Increasing larger-unit count;
- Adding two additional community kitchens and large dinner party spaces for residents to satisfy stated concerns;
- Adding improvements to amenity spaces and greenspace courtyards;
- Adding balconies;
- Increasing bicycle storage beyond code requirements;
- Assessing the feasibility of converting ground level retail space into group housing units.

Appellants' argument about a lack of community outreach is entirely without merit.

3. *Housing Accountability Act.*

As detailed in the H&K letter, the Housing Accountability Act and the five-hearing limit under SB330 apply to this Project, and apply to this Appeal. Eight hearings have already been held, exceeding the five-hearing maximum. As stated in the H&K letter, "given the severity of the housing crisis and legislative and judicial trends, it is quite possible that courts will find that appeal hearings beyond five hearings are improper." Exhibit B. Granting this appeal after what would be a ninth hearing on Project would, again, suggest "unlawful" conduct by the City and Board in violation of RLUIPA's substantial burden provision. *WDS*, 504 F.3d at 351-52.

4. *Other Projects Receiving Differential Treatment.*

The fact that other group housing projects in the Tenderloin have been approved without the significant obstacles and delays faced by the church underscores that the Church has "received less than even-handed treatment." *WDS*, 504 F.3d at 351-52.

A group housing project on 468 Turk Street was under consideration by the Planning Commission at the same time as this Project and was approved after only one continuance, and without onerous conditions such as the ones placed on the Church.[7] Moreover, the Turk Street project contains units that are an average of 220 square feet, which are far smaller than the units in the Church's Project. Also notable is the fact that the Turk Street project did not include a church.

Other group housing projects approved in the Tenderloin include 361 Turk Street and 145 Leavenworth Street, which did not include churches.

In light of these group housing approvals, the Board cannot grant this Appeal without the appearance of "less than even-handed treatment" of the Church. *WDS*, 504 F.3d at 351-52.

5. *Delay, Uncertainty and Expense.*

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[7] As a condition of approval, the Church was required to increase the number of larger group housing units where feasible, after already doing so on two occasions; provide balconies to maximum projection on all sides except O'Farrell Street; continue working with Staff to increase the number of bicycle parking spaces, up to 200; analyze the feasibility of converting the ground-floor retail space to group housing units; and analyze the feasibility of converting the basement to additional group housing units.

An additional factor that supports the finding of a substantial burden under RLUIPA is the imposition by a municipality of significant "delay, uncertainty, and expense." *Guru Nanak*, 456 F.3d at 991 (quoting *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 901 (7th Cir. 2005)); *see also Int'l Church of Foursquare Gospel*, 673 F.3d at 1068; *Grace Church of N. Cty. v. City of San Diego*, 555 F. Supp. 2d 1126, 1137-39 (S.D. Cal. 2008) (finding that plaintiff had established substantial burden from uncertainty and expense resulting from municipality's zoning regulations); *WDS*, 504 F.3d at 349 (noting that a denial of a religious institution's zoning application which results in substantial "delay, uncertainty, and expense" can be a substantial burden). Even before this appeal was filed, the Church experienced extreme "delay[s], uncertainty and expense" in the processing of its land use application by the City.

The Church first filed its Preliminary Project Assessment ("PPA") in 2013. Due to substantial delays, the Church did not receive conditional use authorization and certification of its Environmental Impact Report ("EIR") until November 13, 2018. After additional delays, the Church received a site permit on May 13, 2020. The significant delays by the City caused the initial developer to withdraw from the Project, substantially harming the Church. In 2020, the new developer, Forge Development Partners, submitted an amendment to the original project replacing the 176 approved dwelling units with 316 group housing units. The revisions to the Project are all within the envelope of the previously approved version of the Project; the modifications impact none of the prior approvals; and the project already received a site permit. The only change requiring approval before the Planning Commission was the change from dwelling units to group housing, and <u>group housing is a permitted use in the RC-4 zoning district.</u> The hearing scheduled for January 7, 2021 to approve the revised Project was continued <u>eight times</u>, in violation of the five hearing maximum under the Housing Crisis Act (HCA) of 2019 (Gov. Code § 65905.5(a)), and finally approved on June 24, 2021, seven years after the Church filed its PPA.

Additionally, delays related to this Appeal further highlight the pattern of delays by the City. As articulated in the H&K Letter:

> The Applicant continues to suffer delays in processing for this Project and as a result significant costs. The City Planning Code clearly requires that the Board of Supervisors or Clerk of the Board set a hearing on an appeal for a date not more than 30 or 40 days after the filing of the appeal. (Planning Code 308.1(c)) The Board must decide the appeal within 30 or 40 days of that hearing, unless the full membership of the Board is not available. (Id.) . . . . ***Despite the mandate in the Planning Code to set the hearing on the appeal to a date not more than 30 or 40 days after the filing of the appeal, the City has proposed to delay the hearing on appeal for more than 70 days.*** In response to the July 21st filing of appeal, Supervisor Matt Haney's Chief of Staff requested that the parties agree to delay the hearing on appeal until October 12, 2021. This request ignores the Planning Code requirements and continues the pattern of delay that already places the City in conflict with state law. This request also reflects the continuing disregard for the impact of delay on Applicant, even while relying on Applicant's continued cooperation and accommodation.
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> . . . . [I]n light of the limited scope of the Planning Commission action and the numerous delays in processing these modifications to the Conditional Use

approval, proposing to set the hearing on the appeal to October represents another unreasonable delay.

Exhibit B.

The continued delays compound the harm to the Church and jeopardize the feasibility of the Project, further supporting a substantial burden on the Church.

C. Absence of Any Compelling Governmental Interest

Under RLUIPA, a government action imposing a substantial burden on religious exercise is invalid unless such actions are the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a). It is the government's burden to prove that it is has a compelling interest and is pursuing it through the least restrictive means possible. *See Guru Nanak*, 456 F.3d at 993 ("the County 'shall bear the burden of persuasion' 42 U.S.C. § 2000cc-2(b), to prove narrowly tailored, compelling interests"). In establishing this standard for RLUIPA, "Congress borrowed its language from First Amendment cases applying perhaps the strictest form of judicial scrutiny." *Yellowbear v. Lambert*, 741 F.3d 48, 59 (10th Cir. 2014) (Gorsuch, J.). *See also City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (compelling interest standard is the "most demanding test known to constitutional law"). In the context of this Appeal, there are simply no governmental interests at stake that could meet this demanding standard.

Based on the foregoing, if the Board were to grant this Appeal, they would be imposing a substantial burden on the Church and such imposition would not be the least restrictive means of achieving a compelling governmental interest, in violation of RLUIPA.

II. Free Exercise Clause of the United States Constitution

Like the substantial burden provision of RLUIPA, the First Amendment's Free Exercise Clause also requires strict scrutiny judicial review of burdens on religious exercise. *See Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1222 (C.D. Cal. 2002) (RLUIPA "merely codifies numerous precedents holding that systems of individualized assessments, as opposed to generally applicable laws, are subject to strict scrutiny"); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialea*h, 508 U.S. 520, 546 (1993). Recently, the United States Supreme Court ruled that government regulation affecting religious exercise—regardless of whether a burden is "substantial" or not—is automatically subject to strict scrutiny review if such regulation is not both "neutral" and generally applicable." *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S. Ct. 63, 67 (Nov. 25, 2020) ("Because the challenged restrictions are not 'neutral' and of 'general applicability,' they must satisfy 'strict scrutiny,' and this means that they must be 'narrowly tailored' to serve a 'compelling' state interest." (citation omitted)). Discretionary permitting in the land use context constitutes such "individualized assessments," which involves a "case-by-case evaluation of the proposed activity." *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1225 (11th Cir. 2004); *see also Guru Nanak*, 456 F.3d at 987 (finding an individualized assessment where the County Board of Supervisors reviews the Planning Commission's conditional use decisions). Because the discretionary, individualized assessment of this Appeal is not a "generally applicable" law, it is subject to strict scrutiny review.

For the same reasons that granting this Appeal would violate the substantial burden provision of RLUIPA, granting this Appeal would also violate the Free Exercise Clause.

III. Fair Housing Act.

Granting this Appeal would make the proposed 316 group housing units unavailable in San Francisco, potentially in violation of the Fair Housing Act ("FHA"). Section 3604(a) of the Fair Housing Act ("FHA") makes it unlawful to "make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). The Supreme Court has held that the FHA applies to disparate-impact claims. *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc*., 576 U.S. 519, 539 (2015).

> Given the long history and dire consequences of continuing housing discrimination and segregation, Congress did not stop at prohibiting disparate treatment alone. . . . [A]s the Supreme Court recently reaffirmed, the FHA also encompasses a second distinct claim of discrimination, disparate impact, that forbids actions by private or governmental bodies that create a discriminatory effect upon a protected class or perpetuate housing segregation without any concomitant legitimate reason. *Id.* at 2522. . . .
>
> Today, the policy to provide fair housing nationwide announced in the FHA remains as important as ever. 42 U.S.C. § 3601.

Ave. 6E Invs., LLC v. City of Yuma, Ariz., 818 F.3d 493, 502-03 (9th Cir. 2016). For a disparate impact claim under the FHA, a plaintiff need only establish "'that the defendant's actions had a discriminatory effect.'" *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997) (quoting *Pfaff v. U.S. Dep't of Hous. & Urb. Dev*., 88 F.3d 739, 745 (9th Cir. 1996)). "Demonstration of discriminatory intent is not required under disparate impact theory." *Id.*

Since group housing units, by design, are more affordable than dwelling units in the City, individuals in group housing units are likely to have lower incomes than those who rent elsewhere in San Francisco. It is widely acknowledged that a disproportionately high number of people with lower incomes are people of color, and as a result, blocking this Project will likely have a demonstrable disproportionate impact on people of color. A statistical analysis of the 48 Below Market Rate ("BMR") units in the Project illustrates this point. Dr. Allan Parnell conducted an analysis of income data, comparing the percentages of African American, White and Latino households with incomes eligible for renting the 48 BMR units in the Project. *See* Exhibit D. According to this analysis, "[t]he disparity ratio shows that the percentage of African American households in the income eligibility range is 2.6 times greater than white households at this income level. 15.8% of Latino households have incomes in the eligibility range, a percentage 1.9 times greater than white households in the eligibility range."

Additionally, it is significant to note that the initial project proposed for this property was for 176 units of luxury housing, which was approved in 2018. The 2018 approval was appealed based on historic preservation grounds only, and the appeal was denied by the Board. If this appeal were to be granted, it certainly would not escape notice that a luxury housing project on this property was approved, but a group housing project on the same property was thwarted.

Conclusion

Granting this appeal would violate the substantial burden provision of RLUIPA and the Free Exercise Clause of First Amendment of the Constitution, and would likely run afoul of the Fair Housing Act. If the City and Board were not previously aware of these legal requirements, they are now placed on notice that their actions are subject to them. If the Appeal were granted, it is this Firm's opinion that it is unlikely that the City and Board would succeed in defending a suit against them raising these issues.

Yours truly,
/s/ Robin N. Pick
Robin N. Pick, Esq.

cc: San Francisco Board of Supervisors
Mayor London Breed
San Francisco City Attorney
Abigail Rivamonte Mesa, Chief of Staff to Supervisor Matt Haney