From: Steven Silvia
To: Board of Supervisors, (BOS); Safai, Ahsha (BOS); Walton, Shamann (BOS); Ronen, Hillary; MandelmanStaff, [BOS]; MelgarStaff (BOS); RivamonteMesa, Abigail (BOS); Haney, Matt (BOS); Preston, Dean (BOS); Mar, Gordon (BOS); Peskin, Aaron (BOS); Stefani, Catherine (BOS); ChanStaff (BOS)
Cc: Breed, Mayor London (MYR); Cityattorney; STACY, KATE (CAT); Hills, Rich (CPC); Grob, Carly (CPC); Delumo, Jenny (CPC); Mahogany, Honey (BOS)
Subject: 450-474 O'Farrell Street/532 Jones Street Project Appeal.
Date: Friday, September 3, 2021 2:25:57 PM
Attachments: September 2021 FCCS Letter.pdf

Dear Members of the Board of Supervisors:

Please see the enclosed letter and exhibits, sent on behalf of Robin N. Pick, Esq.

Steven Silvia

Paralegal

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September 3, 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: Appeal of the 450-474 O'Farrell Street/532 Jones Street Project Approval

Dear Members of the Board of Supervisors:

As I previously wrote to you on August 25, 2021, 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. We now write in response to the August 30, 2021 letter of Appellant, Pacific Bay Inn, Inc. ("PBI").

PBI's letter in fact further supports the Church's position that a denial of the Appeal pending before the Board of Supervisors ("Board") would violate the Church's federal civil rights under 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. In its letter, PBI highlights that this Appeal is an improper CEQA challenge to the Project's Environmental Impact Report ("EIR"). As stated in the Holland & Knight letter of August 25, 2021 ("H&K Letter"):

> **The Appeal Raises Issues Evaluated in the EIR and Untimely CEQA challenges**
>
> The potential impacts raised in the Appeal Letter were adequately reviewed in the Environmental Impact Report ("EIR") and, where appropriate, addressed with specific mitigation measures. This Appeal identifies no new or different environmental impacts tha[n] those evaluated in the EIR. . . .

> The Pacific Bay Inn did not challenge or appeal the EIR evaluation or the mitigation measures incorporated into the Final EIR. The Notice of Determination ("NOD") for the project approval was published on December 18, 2018 and any challenge under the California Environmental Quality Act ("CEQA") to the EIR and those mitigation measures had to have been filed within 30 days of the NOD. . . .
>
> No appeal and no CEQA challenge was filed to the prior approval or the EIR from 2018. Finally, the City ultimately prepared two Addendums to the EIR and concluded that no further environmental review was required for the current proposal.

In its recent letter, Appellant's arguments center on CEQA, the EIR and its addendum. As detailed in the H&K letter, this is an improper basis on which to grant the Appeal. As stated in our August 25, 2021 letter, "[w]here 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 S*aints Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin,* 396 F.3d 895, 900 (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."). If the Appeal were to be granted by the Board on the basis argued by PBI, such an "arbitrary, capricious, or unlawful" action would violate RLUIPA's substantial burden provision.

Moreover, in arguing that there is no substantial burden on the Church's religious exercise, Appellant's letter demonstrates a critical lack of understanding of this important civil rights law. RLUIPA's plain text states that "[t]he term 'religious exercise' includes *any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A) (emphasis added). Further, it is important to note that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc–5(7)(B). Moreover, RLUIPA explicitly states that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc–3(g).

Appellant's claim that RLUIPA "do[es] not extend so far" to protect a Church seeking to construct housing as part of its religious mission thus misapprehends the scope of RLUIPA and disregards applicable case law and the statutory definitions and rule of construction. For example, in *World Outreach Conf. Ctr. v. City of Chicago*, 591 F.3d 531, 535-538 (7th Cir. 2009), the Court found a substantial burden where the plaintiff, a Christian sect, was prevented from renting 168 apartments as Single Room Occupancy units. "As a result of the City's actions, World Outreach was impeded in its religious mission of providing living facilities to homeless and other needy people." *Id*. at 538. As described in my prior letter, religious exercise is not limited to Sunday worship service.

Additionally, Appellant's assertion that RLUIPA does not apply because the Project Sponsor is a for-profit corporation, likewise, is contradicted by controlling Supreme Court precedent. *See Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 719 (2014) (holding that a federal regulation's restriction on the activities of a for-profit closely held corporation must

comply with the Religious Freedom Restoration Act of 1993). In any case, it is the *Church's* religious exercise that would be impeded by such a decision, not its development partner.

This office has successfully represented scores of religious institutions in RLUIPA actions across the United States. The burdens on the Church's religious exercise outlined in our letter of August 25, 2021 are the type that courts routinely find to violate RLUIPA. *See Int'l Church of Foursquare Gospel*, 673 F.3d 1059, 1067 (9th Cir. 2011) (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).

Appellants' latest submission only reinforces the fact that granting this Appeal would present a very serious RLUIPA substantial burden violation.

Very truly yours,

Robin Pick

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