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October 1, 2021

VIA EMAIL

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

Re: *Appeal of the 450-474 O'Farrell Street/532 Jones Street Project Approval*

Dear Supervisor Haney,

The events that took place at the hearing on Tuesday September 28, 2021 strongly support the Fifth Church of Christ, Scientist's ("Church's") position[1] that granting this Appeal would burden the Church's religious exercise in violation of the federal 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.

The central argument in the Appeal filed with the Board of Supervisors ("Board") related to potential structural and construction impacts of the Project on the Pacific Bay Inn Hotel ("PBI"). PBI's argument spanned approximately 50 out of 59 pages of Appellants' Exhibit 1. Before the hearing, PBI reached an agreement with the Project Sponsor, and withdrew as an Appellant.[2] With the withdrawal of the PBI, only two asserted issues remained, namely the

[1] The Church's position was outlined in detail in this Firm's correspondence to the Board dated August 25, 2021 and September 3, 2021.

[2] At the hearing, counsel for PBI stated: "I just wanted to state for the record that Pacific Bay Inn withdrew as an appellant in light of an agreement reached with Forge that was intended to address our concerns."

claims that "The Project Is Not Compatible with the Tenderloin Community" and the so-called "Lack of Community Outreach and Dialogue."[3] (Appeal, pp. 51-52.)

Lacking arguments strong enough to support its Appeal in the wake of PBI's withdrawal, Appellant raised new issues at the hearing that were not part of the Appeal. These new "concerns"—the Project's BMR percentage, which is legally compliant, and the definition of group housing—were suddenly the focus of an appeal in which the goalposts continue to shift. Of great concern, the Board engaged in discussion of the new issues as if they were within the scope of this Appeal. The lack of coherence between the standards for a conditional use approval (which were all met), the bases for the appeal (only two remaining), and the ever-changing rationales being tossed into the ring to kill this project are glaring. Federal courts have widely recognized

> the vulnerability of religious institutions—especially those that are not affiliated with the mainstream Protestant sects or the Roman Catholic Church—to subtle forms of discrimination when, as in the case of the grant or denial of zoning [approvals], a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards."

Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005) (emphasis added); *see also Chabad Lubavitch of Litchfield Cty., Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 193 (2d Cir. 2014) (quoting *Sts. Constantine & Helen Greek*, 396 F.3d at 900). In RLUIPA cases,

> Courts have. . . looked to whether the land use restriction was "imposed on the religious institution arbitrarily, capriciously, or unlawfully." *Westchester Day Sch.*, 504 F.3d at 350. This may occur where, for instance, local regulators disregard objective criteria and instead act adversely to a religious organization based on the objections of a "small but influential" group in the community. *Id.* at 346 (noting that "[m]any of the[ ] grounds" for zoning board's denial of religious institution's building permit application "were conceived after the [board] closed its hearing process, giving the school no opportunity to respond," and that "the stated reasons for denying the application were not supported by evidence," leading the district court to "surmise[ ] that the application was in fact denied because the [board] gave undue deference to the public opposition of the small but influential group of neighbors who were against the school's expansion plans"). It may also occur where local regulators base their decisions on misunderstandings of legal principles. *See Saints Constantine*, 396 F.3d at 899-900 (describing "repeated legal errors" by the city, suggesting that errors were indicative of city either being "deeply confused about the law" or "playing a delaying game," and warning of risks to religion where, as in zoning processes, "a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards").

[3] Neither of these arguments is an appropriate basis on which to grant this Appeal as detailed in this Firm's letters to the Board dated August 25, 2021 and September 3, 2021.

Roman Cath. Bishop of Springfield v. City of Springfield, 724 F.3d 78, 97 (1st Cir. 2013) (emphasis added). In ruling against Sutter County in a RLUIPA case, the Ninth Circuit Court of Appeals similarly held:

> In denying the second CUP application, the Board of Supervisors disregarded, without explanation, the Planning Division's finding that Guru Nanak's acceptance of various mitigation conditions would make the proposed temple have a less-than-significant impact on surrounding land uses. We "cannot view [the denial of the second CUP application] 'in isolation'; [rather, it] 'must be viewed in the context of [Guru Nanak's permit process] history.'"

Guru Nanak Sikh Soc. of Yuba City v. Cty. of Sutter, 456 F.3d 978, 991 (9th Cir. 2006). The tribulations forced upon the Church here are no less burdensome.

Group housing is a permitted use in this zoning district. The fact that the definition of group housing is now being debated in the context of this Appeal highlights the absence of appropriate legal standards. The Ninth Circuit found a violation of RLUIPA where a county "inconsistently applied" policies and disregarded relevant findings of the Planning Department. *Guru Nanak Sikh Soc'y v. County of Sutter,* 456 F.3d 978, 989-91 (9th Cir. 2006). *See also Westchester Day Sch. v. Vill. of Mamaroneck* ("*WDS*"), 504 F.3d 338, 353 (2d Cir. 2007) (affirming the district court where "[t]he court stated the application was denied because of undue deference to the opposition of a small group of neighbors). As the one remaining Appellant representing a "small but influential group" continues to shift tactics to block this Project, the City should not act unlawfully by acquiescing to their demands.

It is important to note that there is simply no interest that could satisfy the exacting "compelling governmental interest" standard that the City would need to satisfy under RLUIPA. "A compelling state interest involves some substantial threat to public safety, peace[,] or order, and includes only interest of the highest order, and the gravest abuses." *WR Prop. LLC v. Twp. of Jackson*, No. CV173226MASDEA, 2021 WL 1790642, at *12 (D.N.J. May 5, 2021) (quoting *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 138 F. Supp. 3d 352, 418 (S.D.N.Y. 2015), *aff'd sub nom. Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona, NY*, 945 F.3d 83 (2d Cir. 2019)). No such interest exists here. The only remaining arguments in the Appeal are "lack of community outreach" and "incompatibility with the neighborhood," which are not "compelling" for purposes of a strict scrutiny analysis. "'Community character' [is] normally not [a] compelling interest[]." *Congregation Rabbinical Coll. of Tartikov*, 138 F. Supp. 3d at 418.

Particularly problematic was the fact that the Appellant believed that it could testify itself about what constitutes the Church's religious exercise. After the Church Board President, Ela Strong, testified about the burdens imposed on the Church's religious exercise by the current structure and inability to as yet build a replacement facility, Appellant Pratibha Tekkey stated the following on rebuttal: "First and foremost, the Church is still allowed, I mean they can still practice in the existing space. They are basically talking about the outside. . . . so they can still practice at the existing church if they want to." This is wholly inappropriate.

> Congress defined 'religious exercise' capaciously to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.' Thus, RLUIPA bars inquiry into whether a particular belief or practice is central to [an individual's] religion. Furthermore, the Supreme Court has repeatedly warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.

Nance v. Miser, 700 F. App'x 629, 631 (9th Cir. 2017) (internal quotations and citations omitted); *see also Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."). Any inquiry into or opining on the validity of the Church's stated religious exercise violates RLUIPA and the First Amendment.

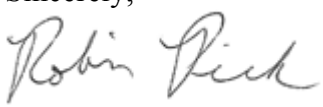
Finally, at the hearing, a statement was made that if the Project was to revert back to the original plan, the Church would not be impacted. This is false. As described by the Project Sponsor, the previous developer could not obtain financing for the Project after the years of delays and changed market conditions. If the Project Sponsor is forced to revert back to the original plan, the lack of financing would prevent the Church's structure from being rebuilt. *See WDS*, 504 F.3d at 346 (affirming the district court's finding of a substantial burden under RLUIPA where denial of the application would result in a long delay and substantially increase construction costs). Conditions of approval that themselves burden religious exercise would violate RLUIPA:

> We recognize that in some circumstances denial of the precise proposal submitted may be found to be a "substantial burden," notwithstanding a board's protestations of willingness to consider revisions—for example, where the board's stated willingness is disingenuous, or cure of the problems noted by the board would impose so great an economic burden as to make amendment unworkable, or where the change demanded would itself constitute a burden on religious exercise.

Westchester Day Sch. v. Vill. of Mamaroneck, 386 F.3d 183, 188 (2d Cir. 2004) (emphasis added).

Against the backdrop of robust federal statutory and constitutional protections of the Church's right to engage in its religious exercise, and in light of the circumstances surrounding the Appeal and the Project's approval, there is no legally permissible basis on which to grant this Appeal.

Sincerely,



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