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June 18, 2020

To the Honorable President Yee and Members of the San Francisco Board of Supervisors

RE: APPEAL OF PLANNING COMMISSION CERTIFICATION OF FINAL
SUBSEQUENT ENVIRONMENTAL IMPACT REPORT FOR BALBOA
RESERVOIR PROJECT. (Case No. 2018-007883ENV)

I am an attorney representing Madeline Mueller, Alvin Ja, and Wynd Kaufmyn (hereinafter, "Appellants"). On behalf of the Appellants, and pursuant to San Francisco Administrative Code Section 31.16, I hereby appeal the Planning Commission's certification of the Final Subsequent Environmental Impact Report ("FSEIR") for the Balboa Reservoir Project ("Project") and its adoption of findings supporting that certification on May 28, 2020. All of the Appellants participated in the administrative process for the preparation and approval of the FSEIR, and all submitted both oral and written comments on the Draft SEIR during the public review period. Due to the unusual present circumstances, this appeal is being submitted both electronically via email and in "hard copy" via the U.S. Mail. A check for the \$640 appeal fee is being submitted with the hard copy of the appeal.

The reasons for the appeal are substantive and procedural violations of the California Environmental Quality Act in the preparation and certification of the Final EIR, inadequate findings adopted by the Planning Commission in support of that certification, and an inadequate statement of overriding considerations. Details of the bases for this appeal are laid out below and in the attached exhibits, which exhibits are incorporated into this appeal by this reference. I expect to submit further explanation and amplification on these points in subsequent submittals to the Board prior to the hearing on this appeal.

A. Substantive Violations of the California Environmental Quality Act ("CEQA")

CEQA contains numerous provisions about what is required to be contained in an EIR. The FSEIR for this project violated a number of these provisions, making its certification improper and a violation of CEQA.

1. The Description of the Project area and existing conditions is incomplete and inaccurate. While the EIR makes passing mention of the surrounding major uses in the Project, notably the Ocean Campus of City College of San Francisco ("CCSF"), Archbishop Riordan High School, and Lick Wilmerding High School, it does not provide adequate information on the extent and nature of those uses, both present and

reasonably foreseeable, and the way they would be affected by the proposed Project. Further, while the EIR does mention that CCSF is planning to expand its Ocean Campus, and that the expansion includes the addition of new buildings, including a Performing Arts Education Building (Diego Rivera Theater) and a STEAM (science, technology, engineering, arts, and mathematics) Building, it does not mention that these buildings, which have now been funded by a bond measure passed by San Francisco voters in March 2020, would occupy a good portion of the parking lot just to the east of the Project site, which the EIR relies upon to accommodate most of the student parking needs for CCSF. The tentative construction schedule for those buildings would overlap with construction of the Project, resulting in unanalyzed potentially significant cumulative construction impacts (see attached Exhibit A – CCSF Phasing Plan). Nor does it consider that the expansion of the CCSF Ocean Campus will increase the student enrollment at that campus, and can therefore be expected to further increase the need for space to accommodate parking for its entirely commuter San Francisco student population.

2. The project description is inaccurate and inconsistent. “An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.” (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) The Project is described as including 1,100 residential housing units, half of which (550) would be market rate and half of which would be divided between units permanently affordable to low or moderate-income tenants. However, the description of the project actually states that “up to 50 percent” of the units would be designated as affordable units. (See, Notice of Preparation at p. 14.; DSEIR at p. 6-59.) Nowhere in the EIR does it disclose exactly what percentage of the project *will* be affordable units. In fact, the DEIR makes clear that it has not yet been determined, but would depend on future “market surveys, funding source restrictions and other stakeholder input on the affordable housing plan.” (DSEIR at p. 2-13.) Not only does this not comply with the requirements that the project description be stable, accurate, and finite, but it also implicates the Project’s impact analysis. It is well known that lower income households are more likely to use public transit for a higher percentage of their household trips than are upper income households of the type who would occupy market rate, or even moderate-income, units. Consequently, leaving the final percentage of affordable units, as well as their level of affordability, unspecified makes the analysis of vehicle miles traveled for the Project indeterminate and hence inaccurate. That, in turn, also affects the Project’s other impacts, including air quality, pedestrian and bicyclist safety, and transit delay impacts.
3. Failure to identify and mitigate significant impacts, including: 1) cumulative construction impacts (noise, air quality, transit delay, pedestrian and bicyclist safety) from construction of the Project and adjoining CCSF construction projects. 2) transportation (VMT) and air quality impacts due to cumulative parking shortage and resulting “cruising” by students and other searching for available on-street parking spaces.¹ 3) land use impacts, including not disclosing that the proposed project is

¹ This impact was grossly underestimated, as the number of marking spaces available for CCSF students and faculty were grossly overestimated by not considering the increased parking demand

fundamentally inconsistent with priority policies adopted by the voters of San Francisco in Proposition M, specifically: Policy #2 – That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods, and Policy #7 – That our parks and open space and their access to sunlight and vistas be protected from development. Both of these policies were adopted to protect the environment. 4) Noise impacts on the adjoining CCSF Multi-Use Building, which houses childcare classes, as well as on other childcare facilities and schools in the vicinity of the Project site. The children in these childcare facilities and schools are sensitive receptors who will be especially harmed by construction and operational noise impacts. This impact was neither identified, nor was mitigation of the impact considered. In addition, the FSEIR erroneously identified the time of least noise sensitivity as between 9 AM and 4 PM. Yet this is the time when classes are being held at CCSF, and childcare facilities are in operation, including time for naps for very young children. These are NOT times on minimum sensitivity.

4. Failure to include a reasonable range of feasible alternatives, including specifically alternatives that would reduce significant impacts so as to allow all decision makers and the public to make reasoned choices. The FEIR, with no supporting evidence, asserts that an alternative that would construct a 100% affordable housing project is infeasible. As justification, the City asserts that a 100% affordable project would not meet the project objective of building “a mixed-income community with a high percentage of affordable units to provide housing options at a range of income levels.” However, a 100% affordable project could include both moderate and low-income units. If that was not a sufficient range, some very low-income units could be added. It should be noted that the area surrounding the project already includes significant amounts of moderate upper income households; so removing market rate units would still result in a mixed-income community.

The City also claims that SFPUC ratepayers need to be provided fair market value for the land PUC owns.² However, if the land remains in the hands of the City and County, there has been no change in ownership, so the ratepayers would not have been “short-changed.” Finally, the City claims that a 100% affordable project would be a different project. Of course, that is correct, but noting in CEQA requires that a project alternative be no more than a variant on the proposed project. A 100% affordable city-owned project is still an alternative that should have been given serious consideration. Not only would it have been a smaller project (with at roughly the same amount of affordable housing), and therefore have reduced transit delay, air quality, and construction noise impacts, but because it is well documented that lower income households use transit more, the transit delay impacts due to auto use in the Project would be further reduced. Further, if some of the low and moderate income units were dedicated to faculty at CCSF and other nearby schools and residents who

from implementation of the CCSF Master Plan. (Compare Tables 13 and 14 in the attached traffic analysis (Exhibit B). The SEIR used Table 13 when Table 14 was the proper table.)

² It is highly questionable whether the price at which the property is being offered to the Project developers, \$11 million, represents the fair market value for this 17 acre parcel.

work nearby, those residents would walk to work, totally eliminating their impacts on transit. In short, a 100% affordable project was a feasible alternative with lower impacts that was unjustifiably excluded from consideration.

5. Ignoring the cumulative impacts of the Project, taken together with impacts associated with implementation of the City College of San Francisco Master Plan, and specifically the long-planned Diego Rivera Theater and STEAM Building, located directly adjacent to the Project site, and which will significantly exacerbate air quality, transit delay, and bicyclist safety impacts that have already been identified as significant and unavoidable.

B. Procedural violations of CEQA – failure to recirculate DSEIR based on changed circumstances and new information that will require substantial modifications to the EIR. (CEQA Guidelines § 15088.5; *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal. 4th 1112.)

The circulation of the DSEIR was completed on September 23, 2019. However, the Responses to Comments was not issued until April 29, 2020. During the intervening period, the COVID-19 pandemic began, resulting in a shelter-in-place order that has extended from March 2020 to the present. During that time, public transit availability and usage has dramatically decreased – by over 90%. Concomitantly, there has been a dramatic increase in the use of telecommuting by employees, both in San Francisco, the Bay Area, and throughout California. Further, the hiring of new employees in San Francisco had been reduced practically to zero, and the vacancy rate for rental housing has dramatically increase due to residents leaving the City because they no longer need to or want to continue living here. While one can expect to see some hiring/rehiring once the shelter in place order is lifted, and there will likely be some return to use of public transit, it is likely that many of the changes induced by the pandemic will result in permanent changes to San Francisco’s lifestyle, including less public transit use and far more telecommuting. All of these are facts of general knowledge that the Board of Supervisors, and the San Francisco Planning Department and well aware of.

Nevertheless, the Planning Department released a Response to Comments Document that totally ignored the circumstances of the COVID 19 pandemic and its implications for what makes sense for the use of this site. In essence, the San Francisco Planning Department has attempted to ignore the dramatically altered circumstances surrounding this project. Those circumstances make the analysis presented in the FSEIR essentially irrelevant. A new analysis taking into account these changes circumstances is needed before an informed decision can be made about whether this Project still makes sense.

C. Inadequate Findings to support certification of the FSEIR.

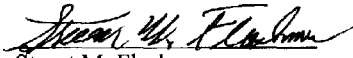
The findings made in support of the certification of the FSEIR, including the CEQA findings, are inadequate in that they do not adequately support the certification of the EIR and they are not supported by substantial evidence in the record. In addition, the Statement of Overriding Considerations approved in support of the EIR’s certification

and the Project's approval is invalid because it understates the Project's significant and unavoidable impacts, thus making any attempt to balance those impacts against the Project's putative benefits invalid. Further, many of the claimed benefits are not supported by substantial evidence in the record and the claim that any one of the claimed benefits would suffice to outweigh the Project's impacts is conclusory and unsupported by any explanation or justification, especially when several of the significant and unavoidable Project impacts would adversely affect human health and safety for inhabitants of the area surrounding the Project, including bicyclists, students, and young children.

Finally, I would like to request, as a matter of procedural fairness, the following when this matter is brought to hearing before the Board of Supervisors: 1) That the time allotted to City staff and the project proponent in opposing the appeal be equal to the amount of time allotted to the appellants to present their appeals; 2) that the appellants be allowed a reasonable amount of time for rebuttal of the arguments presented by staff and the project proponent; and 3) that the appeal be scheduled early enough in the day that members of the public who wish to speak on the appeal have a reasonable time available to make their comments without having the hearing run on until the early morning hours, when those with daytime jobs will have had to leave in order to get up for work the next morning.

We hope that the Board of Supervisors will give this appeal the serious attention and consideration that the many questions surrounding this large and impactful project deserve.

Respectfully Submitted:



Stuart M. Flashman
Attorney for Appellants

Attachments:

Exhibits A & B
Planning Commission Resolutions M-20730, M-20731
Check for appeal fee

CC:

San Francisco Environmental Review Officer
Ms. J. Poling, S.F. Planning Dept.
San Francisco Public Utilities Commission