



Hammond **LAW**

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October 24, 2010

VIA EMAIL & FACSIMILE DELIVERY

Eugene Flannery
Lydia Ely
San Francisco Mayor's Office of Housing
1 South Van Ness Avenue – 5th Floor
San Francisco, CA 94103

Re: 3155 Scott Street, San Francisco, California
Edward II / Supportive Housing for Homeless Youth II Inn

Dear Ms. Ely & Mr. Flannery:

As you are aware this office represents the Cow Hollow Association regarding the proposed project to convert the Edward II Inn (located at 3155 Scott at Lombard) to transitional-age youth housing (the "Project"). We hereby submit public comment to the Mayor's Office of Housing's ("MOH") October 15, 2010 Notice of Intent to Request Release of Funds ("NOI/RROF") from the Department of Housing and Urban Development ("HUD") pursuant to 24 C.F.R. § 58.70 and the recent Environmental Review Report ("ERR").

1. Notice of Intent To Request Release of Funds Is Premature and Improper

a. Project Not Properly Entitled: SUD Legislation Not Passed

As we have previously indicated in our letter of October 3, 2010 (resubmitted to you on October 22, 2010 via hand delivery and email) MOH's issuance of the October 15, 2010 NOI/RROF is premature as the project is not fully entitled. Specifically, the Project has not obtained any of the necessary amendments to zoning law through the San Francisco Planning Department which would allow the project to move beyond the planning phase. The Environmental Checklist (*Conformance with Comprehensive Plans and Zoning*) set forth in the ERR recognizes the need for implementation of a Special Use District ("SUD") to allow for a variance in the current density zoning law as a necessary prerequisite to the project's completion. Specifically, the Environmental Checklist states as follows:

Residential group housing is a permitted use in the site's NC-3 zoning district. However, density controls would limit the project to 16 units. As part of the project a Special Use District permitting the proposed density is to be placed on

the project site as an overlay to the existing NC-3 zoning. In accordance with the required mitigation measure, the Special Use Overlay would require recommendation for approval by the Planning Commission and adoption by the Board of Supervisors pursuant to Planning Code sections 302 and 306 (Amendments to Planning Code).

However, as MOH is well aware, the proposed Planning Commission hearings on the creation of the SUD and concomitant compliance with California Environmental Quality Act ("CEQA") were taken off the August 12, 2010 hearing calendar and the public comment period for CEQA comments reopened. (Issues related to CEQA compliance are discussed further below.) As of the date of this letter, no hearings have been scheduled on the proposed creation of the SUD. Consequently, the NOI/RROF is premature and inappropriate at this juncture and shall remain premature unless and until the Planning Commission conducts the requisite hearings and the SUD legislation is passed by the San Francisco Board of Supervisors.

Accordingly, we demand that MOH rescind the October 15, 2010 NOI/RROF unless and until the Project has obtained the necessary permits including the approval by the Planning Department and the San Francisco Board of Supervisors. In the alternative, we demand that MOH issue a revised ERR addressing this concern and outlining its position why the issuance of NOI/RROF is legal and appropriate prior to approval by the Planning Department and the San Francisco Board of Supervisors. Such demand is made pursuant to 24 C.F.R. § 58.43 (c) which states that the "responsible entity must consider the comments and make modifications, if appropriate, in response to the comments, before it completes its environmental certification and before the recipient submits its RROF." (Emphasis added.)

b. Project Not Properly Entitled: CEQA Review Not Completed

As noted, the Planning Department has yet to complete its CEQA review on whether the Project may have a significant effect on the environment. As you may not be aware, various community organizations, including my client, have raised significant concerns with the Planning Department regarding its July 20, 2010 decision to issue a Certificate of Exemption on the Project based upon an alleged categorical exemption under CEQA Guidelines and Government Code Section 15061 (b)(3). Specifically, community organizations concerns regarding the Project's impact on public services, transportation, employment, housing, aesthetic and cultural resources, and land use and planning considerations, which we believed mandate the preparation of a full Environmental Impact Report ("EIR") under CEQA. As you are aware, the lead agency (in this case, the San Francisco Department of Planning) has no discretion to avoid preparing an EIR when presented with a "fair argument" that the Project may have a significant effect on the environment. See *No Oil Inc. v. City of Los Angeles* (1974) 13 Cal. 3d. 68.

As a consequence, until the Planning Department completes its CEQA study, the NOI/RROF is premature and inappropriate. Accordingly, we demand that MOH rescind the October 15, 2010 NOI/RROF until Planning Department completes its CEQA study and the

Project has obtained all necessary permits. In the alternative, we demand pursuant to 24 C.F.R. § 58.43 (c) that MOH issue a revised ERR addressing this concern and outlining its position why the issuance of NOI/RROF is legal and appropriate prior to the Planning Department completion of its CEQA study and the issuance of all necessary building permits.

c. Project Not Properly Entitled: ADA Compliance Not Resolved

Again, as noted in prior correspondence, significant controversy exists regarding the Project's lack of compliance with the Americans With Disabilities Act ("ADA"). In response to these concerns, the ERR simply states in O-CHA-9 as follows:

The proposed project as analyzed in the EA included accessibility improvements to ensure compliance with the Americans With Disabilities Act. [...] The Mayor's Office of Disability must review and approve the proposed project before a permit is issued and construction begins.

As a consequence, unless and until the Mayor's Office of Disability completes its ADA review and approves the Project, the NOI/RROF is premature and inappropriate. Accordingly, we demand that MOH rescind the October 15, 2010 NOI/RROF until Mayor's Office of Disability completes its required ADA review and the Project has obtained the necessary permits. In the alternative, we demand pursuant to 24 C.F.R. § 58.43 (c) that MOH issue a revised ERR addressing this concern and outlining its position why the issuance of NOI/RROF is legal and appropriate prior to the Mayor's Office of Disability completion of its ADA review, approval the Project, and the issuance of all necessary building permits.

2. Funding Improperly Committed Prior To Issuance Of NOI/RRF & HUD Approval

24 C.F.R. § 58.22 provides in pertinent part as follows:

Neither a recipient nor any participant in the development process, including public or private nonprofit or for-profit entities, or any of their contractors, may commit HUD assistance under a program listed in 58.1(b) on an activity or project until HUD or the state has approved the recipient's RROF and the related certification from the responsible entity. In addition, until the RROF and the related certification have been approved, neither a recipient nor any participant in the development process may commit non-HUD funds on or undertake an activity or project under a program listed in [24 C.F.R. §] 58.1(b) if the activity or project would have an adverse environmental impact or limit the choice of reasonable alternatives. (Emphasis added.)

The Project qualifies as a "program listed in [24 C.F.R. §] 58.1(b)" as the Project is to be the recipient of funds allocated and disbursed under the Community Development Block Grant (CDBG) program established under Title I of the Housing and Community Development Act of

1974 and Home Investment Partnership Program (HOME) program established under Title II of the Cranston-Gonzales National Affordable Housing Act of 1990 as amended.

As you are aware, the Notification of Contract Approval filed by the Mayor's Office of Housing Representative, Lydia Ely, reveals that significant funds were earmarked for the Project prior to HUD approval. Specifically, \$1,716,508.00 was committed, approved and reported to the San Francisco Ethics Commission for investment into the Project on or about July 22, 2010—nearly three months before submission of the NOI/RROR and ERR for HUD approval. This advance commitment of funding violated 24 C.F.R. § 58.22 for the simple reason that it eliminated any choice of reasonable alternatives. By committing funding to the Project in advance of submission of the NOI/RROR and ERR for HUD approval, MOH and the Office of the Mayor have attempted to ensure that the Project is the only viable possibility and to foreclose competition.

This premature commitment of public funding is part of a larger pattern and practice on the part of MOH and the Office of the Mayor to foreclose other reasonable alternatives in favor of this Project. For instance, the initial Notice of Funding Availability ("NOFA") issued by MOH on August 24, 2009 was for an award of \$2,000,000. However, the Evaluation Of Request For Funding issued by MOH on April 16, 2010 recommended a grant of \$4,416,508—an increase of 120% over the initial funding notice amount. No explanation was given in April 16, 2010 Evaluation Of Request For Funding for the increase in available funding other than to state that "Staff recommends an additional \$2,416,509 be committed to the project *due to the unexpected availability of additional funds eligible for use on this project.*" (Emphasis added.) The public deserves a better understanding of why such "additional funds" were made available for use on the project, as well consideration of the fact that other projects may have been bid if the original NOFA disclosed the full amount of funding available. It is likely that if the full amount of funds actually available had been disclosed in the NOFA, a multitude of other projects would have been bid. To make the additional funds available without undergoing the NOFA process undercut the public's confidence in the bidding process, city government, and ultimately, the Office of the Mayor—and may indeed be evidence of an unfair and closed process in violation of the law. My client's request for additional information as the unexplained increase in funding to MOH and the Office of the Mayor went unanswered.

Accordingly, we demand that MOH rescind the October 15, 2010 NOI/RROF pending an investigation into funding irregularities and MOH's potential violation of 24 C.F.R. § 58.22. In the alternative, we demand pursuant to 24 C.F.R. § 58.43 (c) that MOH issue a revised ERR addressing this concern and outlining its position why the issuance of NOI/RROF is legal and appropriate in light of the foregoing funding irregularities and MOH's potential violation of 24 C.F.R. § 58.22.

3. Conclusion: The NOI/RROF Is Premature & The Funding Of The Project Violates The Law

As shown herein, necessary prerequisites to the completion of the Project have not yet been fulfilled and the legal and political viability of the project remains uncertain. Unless and until the project is fully and properly entitled, including without limitation full compliance with all CEQA requirements, the creation of the SUD, approval by the Mayor's Office of Disability of ADA compliance issues, and the issuance of all required permits and approvals, MOH has no authority to request the release of funds or expend any HUD funds on the Project. Indeed, any such request for or distribution of federal funds would involve serious factual misrepresentations and omissions to a federal agency—especially in light of the potential violations of 24 C.F.R. § 58.22 discussed herein. As a consequence, we hereby demand that the October 15, 2010 NOI/RROF be rescinded and all matters raised herein given full and adequate consideration and explication.

Finally, please be advised that submission of this public comment letter does not constitute a waiver of any claims with regard to defects in the required notice process pursuant to 24 C.F.R. § 58.43. My client retains all rights to challenge the NOI/RROF and ERR based upon the foregoing reasons, all matters raised in previous correspondence, as well as defects in the required notice process in a court of competent jurisdiction. Additionally, my client retains all rights to bring an action against MOH and the City of San Francisco for violation of 24 C.F.R. § 58.22.

In light of the continued and significant failures of MOH to properly address concerns raised by my client and other concerned citizens and organizations regarding this Project, we again request that MOH conduct a public meeting to address these concerns and related matters prior the issuance of any RROF. Please contact my office to discuss the particulars of such meeting at your earliest convenience.

Please keep this office promptly informed of your intentions and of any further public notices or information your office may disseminate regarding the project.

Very truly yours,

-/s/-

Steven L. Hammond

Cc: Cow Hollow Association
Golden Gate Valley Association
Marina Merchants Association

Eugene Flannery
Lydia Ely
Mayor's Office of Housing
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Marina Cow Hollow Neighbor and Merchants Group
Marina Community Association
Union Street Merchant Association
S.F. Planning Department
Dept. of Housing and Urban Development