SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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ORDER

NEIGHBORS FOR FAIR PLANNING, AN UNINCORPORATED VS. CITY AND COUNTY OF SAN FRANCISCO, A CHARTERED et al

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SUPERIOR COURT OF STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

NEIGHBORS FOR FAIR PLANNING, an unincorporated association, Petitioner, vs. CITY AND COUNTY OF SAN FRANCISCO, et al., Respondents.	Case No. CPF-11-511499 **ORDER** **AND** **STATEMENT OF DECISION**
BOOKER T. WASHINGTON COMMUNITY SERVICE CENTER, a California not-for-profit corporation, Real Party in Interest.	

A hearing in the above captioned case was held on March 12, 2012 at 1:30 p.m. in Department 503 of the San Francisco Superior Court, the Honorable Teri L. Jackson presiding. Stephen Williams appeared on behalf of Petitioners Neighbors for Fair Planning ("Petitioners"); Susan Cleveland-Knowles appeared for Respondent the City and County of San Francisco ("City"); and Anne Morrison-Epperly and Alice Suet Yee Barkley appeared for Real Parties in Interest Booker T. Washington Community Services Center ("BTW" or "Real Party").

After considering the evidence, arguments, and applicable law, the Petition for Writ of Mandate is **DENIED**.

INTRODUCTION

In this action, Petitioners challenge the City's various approvals related to BTW's project to demolish its existing community center and replace it with a 50-unit affordable housing mixed-use project including a new state-of-the-art community center ("Project"). Petitioners, who are neighbors of the Project located at 800 Presidio, seek to set aside certification of the Final Environmental Impact Report ("FEIR") for failure to comply with the requirements of the California Environmental Quality Act, Public Resources Code Sections 21000 ("CEQA"), and the CEQA Guidelines, California Code of Regulations Title 14, Chapter 3 Sections 15000 through 15387; to invalidate the conditional use authorization ("CU") for the Project; and to set aside the Presidio-Sutter Special Use District ("Presidio-Sutter SUD"), an amendment to the Planning Code.

This Court finds that Petitioners' claims that actions taken by City prior to the certification of the EIR, including but not limited to the approval of a pre-development loan by the Mayor's Office of Housing, do not constitute "pre-approval" under CEQA. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. Additionally, the Court finds that the FEIR prepared and certified by the City is adequate, accurate and objective, and complies with the requirements of CEQA. CEQA Pub. Resources Code §§ 21000, et. al. Specifically, the Court finds that the EIR for the Project included adequate information describing the relevant environmental baseline, and that the corrections to typographical and printing errors in the Draft EIR did not deprive Petitioners of a fair hearing or result in an abuse of discretion. The Court further finds that that the EIR considered an adequate range of alternatives to the Project and did not commit to the Project or foreclose consideration of alternatives as a result of any "pre-approval" of the Project. The Court further finds that the City properly supported the Project approvals with findings as required under CEQA, including a Statement of

Overriding Considerations, that all findings of the EIR are supported by substantial evidence in the administrative record, and that the conditional use authorization for the Project is consistent with the Planning Code and the City's General Plan. Finally, the Court finds that the City's adoption of the Presidio-Sutter Special Use District complied with applicable law.

FINDING OF FACT

BTW was founded in 1919 to serve the African American community in San Francisco just after the First World War. The current BTW is located at 800 Presidio Avenue, San Francisco, where it has been located since 1952. Its current programming includes job training, after school and teen programs, recreation, emergency food, counseling on housing and health care, and senior clubs, among other programs. Due to segregation, BTW provided services exclusively to the African-American community when it first opened, but it currently serves a diverse ethnic population including a clientele that is 50% African-American, 30% Asian, 10% Latino and 10% others. Every client of BTW qualifies as being in the low- to very low-income group and many are from immigrant families.

The Project site ("Site") is 22,360 square feet (or over ½ acre), and is located in San Francisco's Western Addition neighborhood at the southeast corner of Presidio Avenue and Sutter Street. The Site is currently improved with a 13,745 gross square foot community service building that includes a gymnasium and program space. The existing building is a historic resource for purposes of environmental review. This designation is based exclusively on the building's affiliation with BTW as the oldest community services center serving the African American community in San Francisco. The existing community center has been determined to be an unsound structure that has major structural and foundation deficiencies.

BTW proposes to demolish its existing community and construct a five-story, approximately 55 foot tall, mixed-use building on the Site. The Project consists of two parts: (1) demolition of the community center and replacement with an expanded facility, and (2) development of a housing

component. The new community center will: include a new space to support BTW's expanded community programs that target at at-risk youth; provide sufficient space to expand the after school and teen program from 100 to 150; and include a new 7,506 square-foot gymnasium, and a child care center for 24 pre-school children. The housing component will provide 48 affordable housing units, of which 24 units are affordable to low income households and 24 units are for low to very-low income transitional aged youth. Two of the units will be reserved for building managers.

In 2006, the Mayor convened the Transitional Youth Task Force to address the needs of Transition Age Youth ("TAY") in San Francisco. The Task Force published a report in 2006 and charged City Departments with developing detailed work plans for several relevant areas, including housing. The Mayor's Office of Housing ("MOH") – whose mission includes providing financing for the development, rehabilitation, and purchase of affordable housing in San Francisco – facilitated a planning process focused on TAY housing. As a result, in August of 2009, MOH issued a Notice of Funding Availability ("NOFA") for $2 million to support TAY projects. MOH received 6 proposals for TAY housing projects, including the BTW proposal.

At a public meeting on July 16, 2010, the Citywide Affordable Housing Loan Committee considered and granted BTW's request for a predevelopment loan in the amount of $788,484 ("Predevelopment Loan"). On October 29, 2010, the City and BTW entered into an agreement committing the City to provide predevelopment funding to the Project subject to certain terms and conditions, including that the loan of predevelopment funds did not constitute an approval or commit the City to approving the Project, and that any activity beyond the predevelopment phase be subject to environmental review under CEQA (the "Predevelopment Loan Agreement"). MOH reimbursed invoices submitted by BTW for funds expended in accordance with the terms of the Predevelopment Loan Agreement.

Petitioners make much of BTW leasing the gymnasium at the current site to the Drew School and other organizations that do not have a gymnasium to generate income for the BTW programs. However, any financial agreement between BTW and the Drew School is legally irrelevant to this action except to the extent that such agreements establish that BTW receives funding from multiple sources.

On March 8, 2008, the City's Planning Department ("Department") determined that an Environmental Impact Report ("EIR") was required for the Project. On June 23, 2010, the Department published the Draft Environmental Impact Report ("DEIR") and circulated it for public comment in accordance with CEQA. On August 5, 2010, the City's Planning Commission ("Commission") held a public hearing on the DEIR. Members of the public submitted comments on a variety of issues, including the size and scope of the proposed project. Commissioners made comments on, among other matters, the Preservation Alternative and a need for more detail in certain sections including aesthetics and visual. On April 14, 2011, the Department published the "Comments and Responses" document ("C&R"), responding to every comment submitted. The FEIR consists of the DEIR and the C&R.

The City held numerous public hearings, and BTW held numerous community meetings, to discuss the Project. The Record demonstrates both community support for and opposition to the Project. Some neighbors objected to, among other things, the size, scale and density of the Project and expressed concerns relating to visual impacts, traffic, dwelling unit density, and lack of on-site parking for the residents. Supporters presented arguments that the Project is a beneficial re-use of a currently under-utilized lot, will continue the valuable work of BTW in an improved way, and will provide needed affordable housing – especially housing for Transition Aged Youth – for the community and the City.

On April 28, 2011, the Commission held a public hearing and, in Motion No. 18340, certified the FEIR by a unanimous vote, granted BTW's CU application, and authorized the demolition of the

existing building and the construction of the Project pursuant to Planning Code sections 303 and 304. The Commission found that the FEIR was adequate, accurate, objective, reflected the independent judgment of the Commission, and was in compliance with the requirements of the CEQA. Petitioners appealed the certification of the FEIR to the Board of Supervisors ("Board") on May 15, 2011. On May 28, 2011, Petitioners appealed the CU authorization granted by Commission to the Board.

On June 21, 2011, after a consolidated hearing of the appeal of the FEIR certification, the CU appeal and the Presidio-Sutter Street SUD, the Board unanimously denied the appeal of the FEIR certification and approved the CU. On July 7, 2011, the City issued a Notice of Determination under CEQA. On August 4, 2011, Petitioners filed the Petition commencing this action.

Although Petitioner urges this Court to find that BTW is a "*de facto* City Agency" based on loans and grants of funds made to BTW at various times, the record reflects otherwise. Specifically, Petitioner asks the Court to find that BTW is "mired in debt" and, therefore, must rely on City funding to fulfill its mission. As Petitioner concedes, however, BTW borrowed $450,000 from the Low Income Housing Fund (not a City agency) in 2002, repaid that loan by negotiating a loan from a private financial institution in 2003, and entered into a mutually beneficial arrangement with the neighboring Drew School in 2007 that paid off the debt to the private financial institution. Petitioner further concedes that this last agreement resulted in a financial "clean slate" for BTW. This Court declines Petitioner's invitation to speculate that the financial condition of BTW would make it impossible for BTW to repay the Predevelopment Loan. In fact the evidence that is in the record demonstrates that BTW has successfully paid back loans in the past.

DISCUSSION

I. STANDARD OF REVIEW

In reviewing agency actions under CEQA, Section 21168.5 provides that a court's inquiry "shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is

established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. Thus, the reviewing court "'does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document.'" *Id.* A court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable." *Id.* Furthermore, a court's "limited function is consistent with the principle that '[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.'" *Id.* (internal citations omitted). Finally, a court may not substitute "[its] judgment for that of the people and their local representatives. [A court] can and must, however, scrupulously enforce all legislatively mandated CEQA requirements." *Id.*

In a CEQA proceeding, the burden of showing that the EIR is inadequate is on the party challenging the EIR to show that the City's findings were not supported by substantial evidence in the record. CEQA, Pub. Resources Code § 21168; *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 749. The CEQA Guidelines state that substantial evidence "means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CEQA Guidelines § 15384(a).

To meet this burden, a petitioner bears the burden of citing to evidence in the record that supports its position. *See SP Star Enterprises, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 459, 469 ("the agency's findings are presumed to be supported by the administrative record and the appellant challenging them has the burden to show they are not."). Petitioners must "lay out the

evidence favorable to the other side and show why it is lacking." *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 541. It is not sufficient to simply show that there is conflicting evidence in the record. *Id.* Indeed, the court's job is "not to weigh conflicting evidence and determine who has the better argument"; rather, it need only determine whether there is substantial evidence supporting the City's decision. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435; *State Water Resources Control Bd. Cases,* 136 Cal.App.4th at 749-750.

A court's determination of the appropriate timing of CEQA review is "predominantly a legal question, which ... [a reviewing court] answer[s] independently from the agency whose decision is under review." *Save Tara,* 45 Cal.4th, at 131. As the First District Court of Appeal observed, "[t]here is some flex in the joints. Our Supreme Court has emphasized 'the practical over the formal' in deciding the timing of CEQA review." *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1259 (citing *Save Tara, supra*, 45 Cal.4th at p. 135).

When reviewing the city's approval of the conditional use, the Court applies the following standard:

> When the subject under review is a decision of a local or county administrative agency which by law is required to give a hearing, the power of the court is strictly limited. It may not exercise its independent judgment or allow a trial de novo, on the issues formerly before the agency. Nor may it control a discretion lawfully entrusted to that body. Its review is limited to a determination whether the agency abused its discretion or acted in an arbitrary or capricious manner, or that the agency action is not supported by substantial evidence other than that adduced below, nor may it weigh that evidence.

Upton v. Gray (1969) 269 Cal.App.2d 352, 359 (citations omitted). Accordingly, "[t]he power of the court is confined to whether there was substantial evidence before the commission to support its findings." *Damiani v. Albert* (1957) 48 Cal.2d 15, 17.

II. CITY DID NOT PREAPPROVE THE PROJECT IN VIOLATION OF CEQA

Petitioners argue that, under the holding of *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, the City impermissibly "pre-approved" the Project prior to certification of the EIR. This Court disagrees.

MOH approved a Predevelopment Loan Agreement to cover the costs of environmental review, architectural drawings, and other predevelopment expenses for an affordable housing project prior to completing the EIR. This Court finds that this Predevelopment Loan Agreement is not a pre-approval of the Project by the City in violation of CEQA since: (1) the pre-development loan agreement expressly stated the intent of the parties that the contract did not constitute a project approval and contained the appropriate "CEQA compliance" language; and (2) the surrounding circumstances did not commit the City to approve of the Project.

In *Save Tara*, the petitioners argued that, "once a private project had been described in sufficient detail, any public-private agreement related to the project would require CEQA review." *Save Tara, supra*, 45 Cal.4th at 137. The Supreme Court expressly rejected this test. According to the Supreme Court, such a bright-line rule

> would be inconsistent with the CEQA Guidelines' definition of approval as involving a 'commit[ment]' by the agency. Agencies sometimes provide preliminary assistance to persons proposing a development in order that the proposal may be further explored, developed or evaluated. Not all such efforts require prior CEQA review. Moreover, privately conducted projects often need some form of government consent or assistance to get off the ground, sometimes long before they come up for formal approval. Approval, within the meaning of sections 21100 and 21151, cannot be equated with the agency's mere interest in, or inclination to support, a project, no matter how well defined. 'If having high esteem for a project before preparing an environmental impact report (EIR) nullifies the process, few public projects would withstand judicial scrutiny, since it is inevitable that the agency proposing a project will be favorably disposed toward it.'

Save Tara, 45 Cal.4th at 136-137 (citations omitted). Instead, "[u]nder *Save Tara*, the critical question is 'whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA

would otherwise require to be considered, including the alternative of not going forward with the project.'" *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, 1170, (hereinafter "*Cedar Fair*") (quoting *Save Tara, supra*, 45 Cal.4th at 139.) The court in *Save Tara* expressly found that "[a] CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review." *Save Tara, supra*, 45 Cal.4th at 132.

A. The Predevelopment Loan Agreement Did Not Commit The City to the Project.

Here, the Pre-development Loan Agreement on its face demonstrates that the parties did not intend to enter into a binding agreement regarding the Project. The Agreement contains unambiguous language demonstrating the intent of the parties that the contract did not constitute a project approval. Instead the Loan Agreement provided preliminary assistance to BTW so it could develop and evaluate the proposed project. Thus, here, as in *Cedar Fair*, the Court need only look to the four corners of the Agreement to establish that there was no commitment to the Project. *Cedar Fair,* 194 Cal.App. at 1172.

Petitioners argue, in part, that MOH's financial support of the Project constituted impermissible approval of the Project prior to certification of the EIR. But the only City approval in this case was MOH's approval of a Predevelopment Loan. As recognized by the Supreme Court, a public agency may need to "provide preliminary assistance to persons proposing a development in order that the proposal may be further explored, developed or evaluated. Not all such efforts require prior CEQA review." *Save Tara, supra*, 45 Cal.4th at 136-37 (citing, e.g., CEQA Guidelines § 15262) (conduct of feasibility or planning studies does not require CEQA review).

Here, total estimated costs for completing the project were approximately $20 million, and the City awarded a loan of $788,484 – or approximately 4% of the total project costs – to BTW specifically earmarked for "Predevelopment Activities" related to the proposed development of an affordable housing project at the community center site. The Loan Agreement authorized a maximum expenditure of $550,000 prior to the completion of CEQA review. The Agreement defines Predevelopment Activities as:

> architectural and engineering design, survey and appraisal preparation, preparation of environmental studies, CEQA and NEPA review, legal expenses, loan fees, cost estimates, and associated administration.

Thus, the loan funds are restricted to planning and feasibility studies that are exempt from environmental review under CEQA. CEQA, Pub. Resources Code §§ 21102, 21150, CEQA Guidelines § 15262. Moreover, these activities will not result in any physical change in the environment and the City made no commitment to further financing the project until environmental review is complete, unless the City approves the project.

B. The Predevelopment Loan Agreement Is Not An Approval Of The Project.

The Predevelopment Loan Agreement makes clear that the City did not pre-approve the Project:

> By entering into this Agreement, MOH and Borrower intend to preserve the possibility of developing the Project as affordable housing by lending funds to Borrower for the Predevelopment Activities. The City does not, however, commit to or otherwise endorse the Project by entering into this Agreement. The Project remains subject to review by City agencies and City discretion to disapprove or modify the Project.

The provisions of the Loan Agreement demonstrate the intent of the parties to: (1) make no commitment to the Project; (2) keep open all alternatives, including the no project alternative; and (3) assure that no commitment occur prior to completion of CEQA. Furthermore, the loan agreement provided that the City retained sole discretion to decide whether to provide additional financing at a later point. Finally, the loan must be paid back, whether or not the project is approved and, if the SUD

Legislation that is needed for the project is not approved by the Board, the loan must be paid back immediately thereafter.

In support of their argument that the City impermissibly approved the Project by entering into the Loan Agreement, Petitioners asked this Court to speculate as to the financial solvency of BTW and its ability to pay back the loan in the event that the Project is not approved. This Court declines that invitation, and notes that Petitioners pointed to no evidence before this Court to support its claim. In fact, the record demonstrates that BTW is legally obligated to pay back the Predevelopment Loan if the SUD Legislation is not approved. Furthermore, the City has obtained a deed of trust against the Property to secure the loan. Thus, if the Planning Commission and/or Board determined, in their sole discretion, not to approve the CU and SUD Legislation, MOH would be legally entitled to secure repayment of the Predevelopment Loan through the remedies spelled out in the Predevelopment Loan Agreement, including, among other options, foreclosure. Unlike in *Save Tara*, where the conditional Development Agreement provided that the funds only needed to repaid in the event of project approval, here there is simply no evidence in the Record that the City did not have full authority to recover its funds if the Board did not approve the Project. In fact, the terms of the Loan Agreement, Deed of Trust, and Promissory Note explicitly provide for repayment and secure that obligation.

Moreover, Petitioners' unsupported allegations regarding BTW's financial situation are contradicted by the Record. For example, in its extensive Loan Evaluation to the Citywide Affordable Housing Loan Committee, MOH, as a regular lender to nonprofit housing development organizations, evaluated BTW's audited financial statements and concluded that the ratio of current assets to liabilities for year ending 2008 is 1.4:1, "indicating financial stability."

Furthermore, the terms of the Predevelopment Loan Agreement are similar to the provisions of the Term Sheet upheld in *Cedar Fair*. As in that case, the terms of the Predevelopment Loan Agreement do not bind the City to the Project, and the CEQA compliance conditions explicitly

preserve all options, including the no project alternative. Similar to the commitment to continue negotiating in *Cedar Fair*, here the stated purpose of the Predevelopment Loan Agreement is to "preserve the possibility of developing the Project as affordable housing." Therefore, the terms of the Loan Agreement are far from the commitments made by the City of West Hollywood in its "conditional development agreement" that the *Save Tara* court found objectionable. (Compare *Save Tara,* 45 Cal.4th at 122-26 (requiring repayment only in the event of project approval, giving City Manager discretion to determine whether CEQA had been satisfied and authority to waive certain conditions; and requiring project sponsor to begin "irreversible" course of evicting tenants by hiring relocation consultant).

C. Surrounding Circumstances Demonstrate That the City Did Not, As a Practical Matter, Commit Itself To the Project Prior To Completing CEQA.

As the court in *Cedar Fair* found: "an agency does not commit to a project 'simply by being a proponent or advocate of the project.'" *Cedar Fair,* 194 Cal.App.4th at 1173. Thus, even if the Predevelopment Loan Agreement arguably left the door open for the City to commit to the Project (which it did not), the surrounding circumstances do not demonstrate commitment by the City to the Project.

Here, as shown by the record, the City did not pre-approve the Project or preclude the consideration of alternatives – including the no project alternative – until after certification of the EIR. Petitioners point to none of the types of commitment found objectionable under *Save Tara*. Moreover, none of the City's actions rise to the level of tenant relocation or are similarly "irreversible" as was observed by the court in *Save Tara*.

There are no facts here similar to the facts in *Save Tara* that created a sense of "momentum," or would give the public the impression that the City had foreclosed mitigation measures, or alternatives, including the no project alternative. In *Save Tara*, the Mayor, City Manager, and other city personnel made statements that indicated that the City was obligated to pursue the project. *Save Tara*, 45 Cal.4th

at 141-42. Here, however, while City officials had the opportunity to promote the project; however, they declined. To the contrary, Planning Commissioners made detailed comments about issues in the Draft EIR that needed to be addressed, including more detail given to the Preservation Alternative, Visual and Aesthetic Impacts, a request for a modified project with fewer units and lower height, and a request for an additional mitigation measure for the impact on the historic resource.

In addition, the Supervisor for the District where the Project is located wrote to the Commission requesting that it consider a project with fewer units and a lower height. This same Supervisor later introduced revised SUD Legislation with fewer units and a lower maximum height. At a minimum, these actions demonstrate that City decision-makers continued to consider the alternatives analyzed in the EIR.

Petitioners offer three undated flyers from the BTW community center, a single e-mail by a non-City employee, two e-mail strings from MOH staff, and meeting notes from the Planning Department as evidence of the City's pre-approval. This "evidence" does not rise to the level of pre-approval as articulated in *Save Tara.* As an initial matter, CEQA does not constrain the actions of private parties prior to CEQA review, only the actions of public entities. The three flyers pointed to by Petitioners all appear to be printed by BTW and show no indication of cooperation with the City. The flyer "Partnership for a Vibrant Community" is a 1-page flyer published by BTW. It invites feedback on the project from the community. The second flyer is an invitation to a kick-off celebration and again contains no mention of any City support or pre-approval. The third flyer, again printed by BTW, includes a picture of District Supervisor Michela Alioto-Pier among other people. This flyer quotes her as saying that the community center is "an established and vital fixture in District 2," whose work she pledges to continue to support. While this quote from one of 11 District Supervisors indicates a favorable impression of BTW, it in no way indicates any commitment by the City to a specific project. Furthermore, the single erroneously sent e-mail, from a person who states that she is *not a City*

employee, provides no evidence that "city workers, using City resources, City e-mail and City funds, openly advocated and lobbied for the Project" or created "an aura of approval and support from the City" as argued by Petitioner.

Petitioners also point to two e-mails from MOH staff and a few randomly selected hand-written notes to argue that MOH is the "de facto" project sponsor here and exercised "complete control" over the Project. But the record is clear that MOH is neither the lead agency nor the project sponsor. While early drafts of the EIR incorrectly listed MOH as a sponsor, that mistake was corrected in the C&R document. BTW is the project sponsor. Petitioners provide no evidence that would suggest that MOH did anything more than conduct due diligence on an affordable housing project, or, more importantly, that suggests project approval was a foregone conclusion.

Finally, Petitioners point to Planning Department meeting notes from 2006 about the Project. Those notes – that indicate a discussion of a taller 65 foot project – clearly do not indicate pre-approval. Rather, they indicate that Planning Staff and the Director were opposed to the proposed height of the project and, as the record demonstrates, the project did ultimately change. The note that the District Supervisor was willing to introduce SUD legislation is also not "pre-approval." It is common practice for a member of the Board or a City Department to introduce a legislative proposal, which then triggers the CEQA review process to begin.

This Court finds that the surrounding circumstances here do not amount to the statements from the City Manager, Mayor, and other high-level city officials in *Save Tara* that the court found objectionable.

III. THE EIR IS ADEQUATE, ACCURATE AND COMPLETE

The administrative record reveals a thorough environmental review process for this Project that began prior to March 8, 2008, and was completed when the C&R document was published on April 14, 2011. The EIR adequately analyzes the environmental impacts of the Project on land use,

aesthetics, population and housing, cultural resources, transportation, noise, air quality, greenhouse gases, wind and shadow, recreation, utilities, public services and biological resources. This Court finds that the public review process conducted by the City resulted in the certification of a FEIR for the Project that complies with all applicable provisions of CEQA, both procedurally and substantively.

A. The FEIR Correctly Describes the Setting and Baseline For the Environmental Impact Analysis.

Petitioners argue that the FEIR incorrectly described the baseline conditions in the vicinity of the Project, including the predominant size of buildings in the area depictions of the height of certain buildings on a map. However, the administrative record reveals that the FEIR adequately described the buildings in the vicinity of the Project.

An EIR must contain a description of existing conditions in the vicinity of the project, usually measured from the time the notice of preparation for the project is published. CEQA Guidelines §15125(a). The baseline description needs to be "no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives." CEQA Guidelines §15125(a); see also *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 953-954.

Except for a single erroneous graphic that was corrected before the Board acted, this Court finds that the Petitioners' arguments regarding setting and baseline are nothing more than Petitioners' disagreement with the conclusions in the FEIR. Here, the City's conclusions are supported by substantial evidence. Petitioners' mere disagreement with that conclusion and assertion that another conclusion could have been reached is not grounds for invalidating the FEIR. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable").

Substantial evidence in the record supports the City's conclusions that the Project would not have a significant impact on land use and aesthetic impacts. The original DEIR contains discussion as well as photographs of the project vicinity's existing character including under the Project Description;

the presentation of land use; the aesthetic setting; and in the evaluation of potential land use and aesthetic impacts. The analysis includes photomontages of the neighborhood setting with the Project in place. The C&R contained additional figures that illustrated the overall physical character of the surrounding area, which included photographs as well as an illustration of the bulk pattern along Presidio Avenue including the proposed building height to street width ratios. The FEIR also provides the required information regarding the height, massing, lot coverage, and architectural styles of surrounding buildings as well as street widths for purposes of evaluating the Proposed Project's potential to cause adverse physical land use or aesthetic impact.

The FEIR also disclosed that the Project would be taller than the adjacent buildings along Presidio Avenue and Sutter Street. The FEIR states: "[T]he project would be taller than other residential and non-residential buildings in the general project area, which includes a mix of uses and building types ranging from one- and two-story houses to four- and eight-story commercial and hospital buildings, respectively." As the FEIR appropriately concludes, "while the new building would be of greater height and bulk than the residential uses immediately surrounding the project site, the project would be generally compatible with the surrounding neighborhood's exiting low- to mid-rise character, particularly when viewed within a larger (i.e., neighborhood) context." The FEIR further notes "the proposed project would not have a demonstrable negative impact on the neighborhood character or compatibility."

The FEIR clearly depicted the existing physical setting and the baseline of the Project vicinity and the potential impact of the 55' high project to the decision makers and the public in sufficient detail to permit an evaluation of the environmental effects of the Project. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th, 713. As a result, Petitioner's baseline argument is without merit.

B. The FEIR Considered a Reasonable Range of Alternatives.

Petitioners claim that the FEIR should have analyzed two additional alternatives: Alternative Site and Resource Relocation. But the administrative record demonstrates that the FEIR analyzed a reasonable range of alternatives as required by CEQA. CEQA does not require that the FEIR to analyze an off-site alternative if the project sponsor does not have control over another location for a community center in the project vicinity. Nor must the FEIR analyze a "Relocation Alternative" when that alternative would not lessen significant environmental impacts identified in the FEIR.

CEQA Guidelines Section 15126.6(a) provides that an EIR must describe a reasonable range of alternatives to the project that would reduce or eliminate significant impacts of the project. The "range of alternatives" is governed by the "rule of reason," which requires that the EIR set forth "only those alternatives necessary to permit informed public participation and an informed and reasoned choice by the decision-making body." CEQA Guidelines § 15126.6(f). Furthermore, "[t]here is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason." CEQA Guidelines § 15126.6(a) (citing *Citizens of Goleta Valley, supra*, 52 Cal.3d at p. 553; *Laurel Heights, supra*, 47 Cal.3d 376, 376).

The alternatives discussed in the EIR shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project. CEQA Guidelines § 15126.6(f). Of those alternatives, the EIR needs to examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project. *Id.*

In *Residents Ad Hoc Stadium Committee v. Board of Trustees* (1979) 89 Cal.App.3d 274, 288, the court acknowledged that the consideration of four alternatives in the EIR was sufficient. The court also noted that "[t]he statute does not demand what is not realistically possible given the limitation of time, energy, and funds. 'Crystal ball' inquiry is not required. An agency need not devote itself to an extended discussion of the environmental impact of alternatives remote from reality." *Id.* at 286.

Moreover, "[a]bsolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned. It is only required that the officials and agencies make an objective, good-faith effort to comply." *Id.* at 287. Therefore, Petitioners' claims that analysis of an alternative site and a relocation of resources alternative are required has no basis in fact or in law. The FEIR in this case properly described a reasonable range of alternatives to the Project that would reduce or eliminate significant impacts of the Project.

Here, the EIR analyzed four alternatives including the No Project Alternative, the Code Compliant Alternative, the Preservation Alternative and the Adaptive Reuse Alternative. This Court finds that the City analyzed a reasonable range of alternatives as required by CEQA.

1. The City Was Not Required to Consider an Off-Site Alterative That Is Speculative and Financially Infeasible.

CEQA does not require the agency to consider an off-site alternative where the project sponsor has no control or ownership over other potential sites, principally because "consideration of an off-site alternative would be too remote or speculative." CEQA Guidelines §15126.6(f)(3). Among the factors that may be taken into account when addressing the feasibility of alternatives are: site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries (projects with a regionally significant impact should consider the regional context), and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site (or the site is already owned by the proponent). CEQA Guidelines § 15126.6(f)(1). Not one of these factors establishes a fixed limit on the scope of reasonable alternatives. *Citizens of Goleta,* 52 Cal.3d at 553; see *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1753, fn. 1.

Furthermore, "[a]n EIR need not consider an alternative whose effect cannot be reasonably ascertained and whose implementation is remote and speculative." CEQA Guidelines § 15126.6(f)(3);

see also *Residents Ad Hoc Stadium Committee,* 89 Cal. App.3d at 285-86. As the record reflects, BTW is a single asset entity and does not have site control on another parcel of land and has no financial resources to purchase another site to serve the targeted community. As a result, the City was not required to consider an off-site alternative.

2. A Relocation Alternative Would Not Lessen the Significant Impact Identified in the FEIR.

Petitioners argue that the FEIR failed to include a "resource relocation" alternative. However, resource relocation is a not a mandatory alternative project under CEQA. Rather, "[i]f the lead agency concludes that no feasible alternative locations exist, it must disclose the reasons for this conclusion, and should include the reasons in the EIR." CEQA Guidelines § 15126.6(f)(2)(B).

The existing community center building is a historic resource for purposes of environmental review based solely on the building's affiliation with BTW as the oldest community services center serving the African American community in San Francisco. The new BTW facility will continue its historic function of service to the African American community, as well as others now benefitting from the expanded mission of BTW. Petitioners' contention that moving BTW to a site not owned by BTW, and preserving just the building but not the mission, is illogical from a historic preservation perspective.

Moreover, Petitioners' argument that the "resource relocation" alternative is mandatory is without basis in fact or in law. *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587. Petitioners cite *Uphold Our Heritage* for the proposition that alternative sites should have been considered; however, that case is distinguishable from the situation at hand for at least three reasons.

First, the historic building in *Uphold Our Heritage* had no historic significance outside of the actual building itself. The owner of that building did not add historic value or significance to the structure. Here, while the existing building has been determined to be an historic resource for purposes

of environmental review, such designation is tied only to the building's affiliation with BTW due to its status in the community.

Second, in *Uphold Our Heritage*, the question was whether the historical building could be rehabilitated due to its dilapidated condition as opposed to being torn down and rebuilt. *Id.* at 589-99. There, the court determined that a proper economic assessment between the two alternatives had not been performed. *Id.* Here, the question is not whether the structure is too dilapidated to inhabit. Instead, the question is whether the structure, in its current state, can accommodate the expanded services to be provided by BTW.

Finally, the case at hand impacts the entire community's utilization of services, whereas in *Uphold Our Heritage*, only private ownership was at issue.

IV. THE CITY PROPERLY MADE A STATEMENT OF OVERRIDING CONSIDERATIONS THAT IS SUPPORTED BY THE RECORD.

While Petitioners appear to have abandoned this argument in their Reply Brief and at oral argument, this Court finds that the City's Statement of Overriding Considerations is supported by the record.

A. The Alternatives Were Properly Rejected as Infeasible.

CEQA prohibits public agencies from approving projects with significant unmitigated environmental effects without first making findings, based upon substantial evidence in the record, that the environmentally superior EIR alternatives are infeasible. Section 15091 of the CEQA Guidelines provides:

> (a) No public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding. The possible findings are . . .
>
> > (3) Specific economic, legal, social, technological, or other considerations, including provisions of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR.

(b) The findings required by subdivision (a) shall be supported by substantial evidence in the record.

Feasible "means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors." CEQA Guidelines § 15364.

The court in *Uphold Our Heritage* further provided that "the question is not whether [the developer] can afford the proposed alternative, but whether the marginal costs of the alternative as compared to the cost of the proposed project are so great that a reasonably prudent property owner would not proceed with the [alternative project]." *Uphold Our Heritage*, 147 Cal.App.4th at 600. Here, the Project will have significant unmitigated impacts to historic resources. Accordingly, prior to approving the Project, both the Commission and the Board issued findings, based on evidence in the record, that the "No Project Alternative" and "Code Compliant Alternative" are infeasible on various grounds, including economic infeasibility.

Petitioners allege that the FEIR fails to make legally sufficient infeasibility findings to support the rejection of certain mitigation measures and alternatives. However, there is substantial evidence to support the findings of infeasibility as the FEIR evaluated a range of project alternatives. The basis for rejecting alternatives as infeasible were discussed in the DEIR, and more extensively in the C&R and in the Statement of Overriding Considerations as discussed below. The FEIR found that the "No Project Alternative" was infeasible because it would not provide a needed housing component and would not allow for expansion of existing program space or add a childcare center. The "Code Compliant Alternative" was also rejected because this alternative would not allow the building massing to be broken into two distinct segments; articulate the massing along Sutter Street to reflect the slope, similar to the Project, the Code Compliant Alternative would also require deviation from the rear yard requirement.

B. The Statement of Overriding Considerations Is Adequate.

Petitioners argue that the FEIR is flawed because City failed to balance the adverse environmental impacts with the alleged benefits of the Project, and the Statement of Overriding Considerations contains no discussion of alternatives to the Project as required under CEQA. Petitioners misunderstand the function of a Statement of Overriding Considerations required by CEQA. Respondents may approve a project with adverse effects on the physical environment provided that Respondents adopt CEQA findings and a Statement of Overriding Considerations. A Statement of Overriding Considerations is required to be adopted only if the decision-makers, in this case the Commission and the Board, decide to approve a project with adverse environmental effects that cannot be mitigated to a less than significant level. Here, the Commission and the Board did just that.

Here, the FEIR for the project identified a significant unavoidable impact to the historic architectural resource, and concluded that demolition of the existing building would have a significant adverse impact on the environment. The record reflects that the decision-makers did what CEQA requires when significant environmental effects cannot be avoided through feasible mitigation measures or feasible alternatives, but where there are other compelling public policy reasons to approve a project despite its environmental effects. CEQA, Pub. Resources Code § 21081(b); CEQA Guidelines § 15093. First, the City issued findings, supported by substantial evidence, that the alternatives are infeasible. After considering the merits of the Project and the Project's environmental effects, the Commission and Board issued a "Statement of Overriding Considerations" which sets out the reasons why the Project, despite its remaining environmental effects, would be approved. As a result, the City complied with CEQA requirements. The Commission's adoption of the Statement of Overriding Considerations supporting approval of the Project is appropriate despite the Project's significant and unavailable impacts to historical resources.

V. THE CITY PROPERLY ISSUED THE CONDITIONAL USE.

While Petitioners appear to have abandoned this argument in their Reply Brief and at oral argument, this Court finds that the CU was properly issued, supported by the record, and consistent with the General Plan. Petitioners claim that the CU was wrongly issued because the Project is not necessary and desirable for the neighborhood, but rather detrimental to Petitioners. In support of this argument, Petitioners suggest that the sole consideration when determining whether to issue a CU is whether the project is "necessary and desirable" for the neighbors within a 300'foot radius of the Project. Petitioners claim that because Respondents' only justification for issuing the CU is that approval was necessary and desirable only for the larger community, the CU was issued in error. This argument lacks merit.

A CU "allows a particular use not permitted under a zoning ordinance if that use promotes the public welfare and does not impair the character of the zoned area." *Wilshire v. Superior Court* (1985) 172 Cal.App.3d 296, 303. Thus, conditional use permits within a zoning pattern "allow uses considered to be desirable to a community but which, by their nature, such as noise, traffic or size, militate against their existence in every location within a zone or in any location without restrictions tailored to fit the special problems which the use presents." *Id.*

A. The Conditional Use Application Meets All the Criteria of Planning Code §303(c) for a Conditional Use Authorization.

Petitioners waived their challenge to the City's issuance of the CU by failing to address Respondent and Real Party's arguments in the Reply brief. In any event, this Court finds that the CU for the Project meets the requirements of Planning Code Section 303(c), and was supported by findings in the administrative record. Additionally, this Court finds that the Project is consistent with the General Plan and that the City's findings of consistency with the General Plan were supported by substantial evidence in the administrative record.

Section 303 of the San Francisco Planning Code governs conditional use applications and sets forth specific criteria that must be met before such an application can be approved. Specifically, Section 303 states: "the proposed use or feature, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable for, and compatible with, the neighborhood or community. . . ." Pl. Code §303(c)(1); *see also* Pl. Code §303(c)(2), (3) (Commission must consider whether proposed use is detrimental to the health, safety, convenience or general welfare of persons in the vicinity, among other things, and find that the Project does not adversely affect the General Plan).

Here, the record reflects that the Commission made extensive findings setting forth the reasons why the Project meets the criteria set forth in Planning Code §303(c). On appeal, the Board concurred. The adopted findings by the Commission and the Board considered both the neighborhood and the broader community, and made findings that the Project would not be detrimental to the public health, safety and welfare. Additionally, the decision-makers determined that the CU would not adversely affect the General Plan. The Board found that "the proposed new uses and building, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable, and compatible with, the neighborhood or the community." In support of that finding, the Board's Motion states that the "proposed uses will provide for the continuation of a long-standing community service center with an expanded, modern facility serving the low and very low income population." Public testimony in the record also supports this finding.

In addition, the record demonstrates that the Commission found that the "affordable housing component at the density proposed, especially the dwelling units for at-risk emancipated foster care youth, is needed by the City and will diversify the City's housing stock." Again, the written and oral public testimony at the hearings amply supports this finding of necessity.

Also, in support of the Project's necessity and desirability for the neighborhood or community, the Commission found:

> The project's siting, size, massing and scale have been designed to be harmonious with the street face along Presidio Avenue, while transitioning to the finer-scaled residential buildings along Sutter Street. The siting of the five-story residential building at the corner of Presidio Avenue and Sutter Street is consistent with the pattern of larger-scaled, multi-unit buildings found on corner lots in the immediate neighborhood. As is typical in most residential neighborhoods throughout the City, larger corner buildings often serve as structures that define and anchor city blocks. The project location is desirable as it is located where the Western Addition neighborhood transitions into the neighborhoods of Pacific Heights, Presidio Heights, and the Inner Richmond, thus enhancing the diversity of housing types integrated into the City's existing neighborhoods. Therefore, the project's use and location are necessary and desirable for the neighborhood and the City at large.

These findings are supported by the EIR and by public comment. In addition, while Petitioners do not question the City's other findings in support of the CU, the City made extensive findings that the proposed use will not be detrimental to the health, safety, convenience or general welfare, and that the use will comply with the applicable provisions of the Planning Code and will not adversely affect the General Plan.

In San Francisco, the Planning Code requires the Department to notify property owners within a 300-foot radius of the site before a public hearing is conducted on a CU application. But the CU notification requirement and the number of signatures needed to qualify for an appeal of the CU authorization for this Project should not be confused with or elevated to the "legal test" urged on this Court by the Petitioners. The record reflects that the Commission and the Board exercised their discretion, based on the public testimony and written submissions before them, in determining that there is an overwhelming need for the Project. On that basis, the decision-making bodies properly concluded that the Project is necessary and desirable for the Community and the neighborhood. This Court, therefore, rejects Petitioners' position that the CU was issued in error.

A. The Project Is Consistent With the General Plan and the CU Made the Appropriate Findings.

Petitioners urge this Court to conclude that "the Project simply does not comply with the General Plan that mandates new constructions [sic] preserve existing neighborhoods and be 'compatible' with existing development." However, the record before this Court demonstrates that the City fully evaluated the relevant General Plan policies in its consideration of the conditional use permit and Special Use District legislation and found that, on balance, the Project is consistent with the General Plan.

The City may not adopt any legislation unless it is consistent with the City's General Plan and may not approve a conditional use permit unless it is consistent with the Priority Policies of the General Plan. S.F. Plan. Code §101(d), (e). In reviewing a decision, the courts accord great deference to an agency's determination that a land development project is consistent with its own general plan. *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 142). Furthermore, a court must uphold these findings unless it concludes that they were not based on substantial evidence. Under the substantial evidence test, in turn, a court must uphold the public agency's decision unless "no reasonable person" could have reached the same conclusion based on the evidence in the entire record. *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal. App. 4th 656, 677-78.

Since policies in a general plan "reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes." *San Franciscans Upholding the Downtown Plan, supra,* 102 Cal.App.4th at 678 (internal citation omitted). A project need not "be in perfect conformity with each and every general plan policy." *Families Unafraid to Uphold Rural El*

Dorado County v. Board of Supervisors of El Dorado County (1998) 62 Cal. App. 4th 1332, 1336; *see also Sequoyah Hills Homeowners Ass'n. v. City of Oakland* (1993) 23 Cal. App. 4th 704, 719 ("[n]o project could completely satisfy every policy . . . and . . . state law does not impose such a requirement. A general plan must try to accommodate a wide range of competing interests – including those of developers, neighboring property homeowners, . . . environmentalists, and providers and recipients of all types of city-provided services."). Accordingly, where substantial evidence (1) shows that the agency considered the relevant General Plan policies, and (2) supports the agency's decision to place greater weight on some policies and not others, the courts defer to the agency.

Here, the record demonstrates that the City weighed numerous relevant General Plan policies and concluded that the Project is, on balance, consistent with the General Plan, including the Priority Policies.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Mandate is **DENIED**.

Dated: 4/5/12

Teri L. Jackson
Judge of the Superior Court

Superior Court of California
County of San Francisco

Neighbors for Fair Planning, an Unincorporated, Petitioner, vs. City & County of San Francisco, et al., Respondents.	Case Number: CPF-11-511499 **CERTIFICATE OF MAILING** (CCP 1013a (4))

I, Audrey Huie, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On **April 9, 2012** I served the attached **Order and Statement of Decision** by placing a copy thereof in a sealed envelope, addressed as follows:

Stephen M. Williams
Law Offices of Stephen M. Williams
1934 Divisadero Street
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Palo Alto, CA 94306

and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: April 9, 2012

Clerk of the Court

By: Audrey Huie

Audrey Huie, Deputy Clerk