BOARD OF APPEALS, CITY & COUNTY OF SAN FRANCISCO

Appeal of
ABENET TEKIE,)
Appellant(s))
)
vs.)
)
ZONING ADMINISTRATOR,)
Respondent

Appeal No. **23-013**

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT on March 28, 2023, the above named appellant(s) filed an appeal with the Board of Appeals of the City and County of San Francisco from the decision or order of the above named department(s), commission, or officer.

The substance or effect of the decision or order appealed from is the ISSUANCE on March 27, 2023, of a Letter of Determination (Applicability of State Law, Board of Supervisors' actions, Planning Department policies, and the Planning Code to the Subject Property) at 1435 26th Avenue.

RECORD NO. 2023-000425ZAD

FOR HEARING ON May 17, 2023

Address of Appellant(s):	Address of Other Parties:
Abenet Tekie, Appellant(s) c/o Isaac Tolila, Agent for Appellant(s) 3739 Balboa Street, Suite 243 San Francisco, Ca 94121	N/A

Date Filed: March 28, 2023

CITY & COUNTY OF SAN FRANCISCO
BOARD OF APPEALS

PRELIMINARY STATEMENT FOR APPEAL NO. 23-013

I / We, **Abenet Tekie**, hereby appeal the following departmental action: **ISSUANCE** of **Letter of Determination No. 2023-000425ZAD** by the **Zoning Administrator** which was issued or became effective on: **March 27, 2023**, for the property located at: **1435 26th Avenue**.

BRIEFING SCHEDULE:

The Appellant may, but is not required to, submit a one page (double-spaced) supplementary statement with this Preliminary Statement of Appeal. No exhibits or other submissions are allowed at this time.

Appellant's Brief is due on or before: 4:30 p.m. on **April 27, 2023**, **(no later than three Thursdays prior to the hearing date)**. The brief may be up to 12 pages in length with unlimited exhibits. It shall be double-spaced with a minimum 12-point font. An electronic copy shall be emailed to: boardofappeals@sfgov.org, julie.rosenberg@sfgov.org, corey.teague@sfgov.org and tina.tam@sfgov.org.

Respondent's and Other Parties' Briefs are due on or before: 4:30 p.m. on **May 11, 2023**, **(no later than one Thursday prior to hearing date)**. The brief may be up to 12 pages in length with unlimited exhibits. It shall be doubled-spaced with a minimum 12-point font. An electronic copy shall be emailed to: boardofappeals@sfgov.org, julie.rosenberg@sfgov.org and isaacgroups@gmail.com.

Hard copies of the briefs do NOT need to be submitted to the Board Office or to the other parties.

Hearing Date: **Wednesday, May 17, 2023, 5:00 p.m., Room 416 San Francisco City Hall, 1 Dr. Carlton B. Goodlett Place.** The parties may also attend remotely via Zoom. Information for access to the hearing will be provided before the hearing date.

All parties to this appeal must adhere to the briefing schedule above, however if the hearing date is changed, the briefing schedule MAY also be changed. Written notice will be provided of any changes to the briefing schedule.

In order to have their documents sent to the Board members prior to hearing, **members of the public** should email all documents of support/opposition no later than one Thursday prior to hearing date by 4:30 p.m. to boardofappeals@sfgov.org. Please note that names and contact information included in submittals from members of the public will become part of the public record. Submittals from members of the public may be made anonymously.

Please note that in addition to the parties' briefs, any materials that the Board receives relevant to this appeal, including letters of support/opposition from members of the public, are distributed to Board members prior to hearing. All such materials are available for inspection on the Board's website at www.sfgov.org/boa. You may also request a hard copy of the hearing materials that are provided to Board members at a cost of 10 cents per page, per S.F. Admin. Code Ch. 67.28.

The reasons for this appeal are as follows:

The Zoning Administrator erred or abused his discretion in certain portions of the Determination.

Appellant

Abenet Tekie filed this appeal by email.

San Francisco Planning

49 South Van Ness Avenue, Suite 1400
San Francisco, CA 94103
628.652.7600
www.sfplanning.org

LETTER OF DETERMINATION

March 27, 2023

Abenet Tekie
New Horizons Trust
3739 Balboa St,Suite 243
San Francisco CA 94121

Also via email: isaacgroups@gmail.com

Record No.:	**2023-000425ZAD**
Site Address:	**1435 26th Avenue**
Assessor's Block/Lot:	1827/004
Zoning District:	RH-1, Residential-House, One-Family
Height/Bulk District:	40-X

Dear Abenet Tekie:

This letter is in response to your request for a Letter of Determination regarding the property at 1435 26th Avenue, Application No. 2022-000361PRJ, and the application of State law and the Planning Code. Your extraordinarily lengthy request consists of 68 pages containing 133 discrete questions (many including sub-questions), background information, and an appendix. This determination addresses your questions related to State law, Board of Supervisors' actions, and Planning Department policies generally, and then addresses the few Planning Code questions separately.

State Law and Planning Department Policies

Per Planning Code Section 307(a), the Zoning Administrator has the authority and responsibility to "respond to all written requests for determinations regarding the classification of uses and the interpretation and applicability of the provisions of" the Planning Code. Planning Department policies that are not governed by the Planning Code are established and/or administered by either the Planning Commission or the Planning Director. Regarding the potential impact of the referenced State laws on the Planning Department's review of Application No. 2022-000361PRJ, the Zoning Administrator does not have the authority or responsibility to interpret State law. Please see the various Planning Director Bulletins for more information on how the City currently interprets and implements some or all of the referenced State laws, which may be found at www.sfplanning.org. Any

dispute or final interpretation of State law would be adjudicated through the applicable local appeal options for a permit or other entitlement, or ultimately through the courts.

Planning Code Questions

Your questions numbered 8, 9, and 10 generally relate to the Planning Code. Please see the determinations below, with come caveats for portions of questions that are not entirely related to the Planning Code.

8. You ask is there any Planning Code regulation that would impact the ability to have up to 12 bedrooms configured to be suitable for multigenerational family cohabitation?

   There is no Planning Code regulation applicable to the subject property that would specifically limit the number of bedrooms in a Dwelling Unit at the subject property. However, there are other areas of the City where the number of bedrooms may trigger additional review and approvals, such as the Oceanview Large Residence Special Use District.

   It's also important to note that a Dwelling Unit may only be used for a single family, and the definition of both terms are provided below, per Planning Code Section 102. If a residential use is for a group of occupants that are not a family, then that is considered Group Housing, which is also defined below per Section 102. Please also note that the density of Group Housing is based on the number of bedrooms, and the maximum Group Housing density in the RH Zoning District is called out and described in Planning Code Sections 209.1 and 208. However, Group Housing is not currently permitted in the RH-1 Zoning District.

   > *Dwelling Unity* . A Residential Use defined as a room or suite of two or more rooms that is designed for, or is occupied by, one family doing its own cooking therein and having only one kitchen. A housekeeping room as defined in the Housing Code shall be a Dwelling Unit for purposes of this Code. For the purposes of this Code, a Live/Work Unit, as defined in this Section, shall not be considered a Dwelling Unit.
   >
   > *Family*. A single and separate living unit, consisting of either one person, or two or more persons related by blood, marriage or adoption or by legal guardianship pursuant to court order, plus necessary domestic servants and not more than three roomers or boarders; a group of not more than five persons unrelated by blood, marriage or adoption, or such legal guardianship unless the group has the attributes of a family in that it (a) has control over its membership and composition; (b) purchases its food and prepares and consumes its meals collectively; and (c) determines its own rules or organization and utilization of the residential space it occupies. A group occupying group housing or a hotel, motel, or any other building or portion thereof other than a Dwelling, shall not be deemed to be a family.
   >
   > *Group Housing*. A Residential Use that provides lodging or both meals and lodging, without individual or limited cooking facilities or kitchens, by prearrangement for 30 days or more at a time and intended as Long-Term Housing, in a space not defined by this Code as a Dwelling Unit. Except for Group Housing that also qualifies as Student Housing as defined in this Section 102, 100% Affordable Housing as defined in Planning Code Section 315, or housing operated by an organization with tax-exempt status under 26 United States Code Section 501(c)(3) providing access to the unit in furtherance of it primary

mission to provide housing, the residential square footage devoted to Group Housing shall include both common and private space in the following amounts: for every gross square foot of private space (including bedrooms and individual bathrooms), 0.5 gross square feet of common space shall be provided, with at least 15% of the common space devoted to communal kitchens with a minimum of one kitchen for every 15 Group Housing units. Group Housing shall include, but not necessarily be limited to, a Residential Hotel, boardinghouse, guesthouse, rooming house, lodging house, residence club, commune, fraternity or sorority house, monastery, nunnery, convent, or ashram. It shall also include group housing affiliated with and operated by a medical or educational institution, when not located on the same lot as such institution, which shall meet the applicable provisions of Section 304.5 of this Code concerning institutional master plans.

9. The following questions relate to legislated height districts and the additional height controls of Planning Code Sections 260 and 261:

    a. You ask who in the City has the authority and responsibility to respond to written requests for determinations regarding the interpretation and applicability of the provisions of the General Plan?

    The Planning Code does not designate a specific person or body to make such determinations upon request. However, individual actions (project approvals, denials, legislation, etc.) must be found consistent with the General Plan per various provisions in the Planning Code. The entity charged with rendering such a determination varies based on the nature of the action.

    b. You ask what constitutes the City's "Master Plan" prior to the 1996 Charter amendment, as referenced in Planning Code Section 340. Where or how would someone obtain a copy of that Master Plan?

    This question is not a request to interpret the Planning Code. However, copies of such historical documents may be found through the San Francisco Public Library, the Clerk of the Board of Supervisors, and/or other sources.

    c. You ask if Planning Code Section 252 a "legacy" of the Master Plan referenced in Section 340?

    As above, this question is not a request to interpret the Planning Code. Nonetheless, in response to your question, Planning Code Section 252 has existed in its current form since at least 1972.

    d. You ask if the City's General Plan contains the prior master-plan-created specific height and bulk districts, such as 40-X (e.g., via SEC. 252 plus SEC. 340, per the above)?

    While the Urban Design Element provides guidance on building heights, the General Plan does not establish or impose specific Height or Bulk Districts. Height districts are established and mapped through the Planning Code and Zoning Maps, which are established and amended by the Board of Supervisors by ordinance.

    e. You ask if the subject property is in a 40-X Height and Bulk District, noting that Planning Code Section 261(b)(1) provides a more restrictive 35-foot height limit, and subsequently ask if the 35-foot height limit is an objective control that could be grounds for disapproving a permit for a building up

to 40 feet in height?

The subject property is within a 40-X Height and Bulk District. Additional height controls, such as the 35-foot limit in question, provide additional height regulations. A permit that does not meet an applicable height control and does not obtain any relief under the Planning Code and/or State law for which it may be eligible may be disapproved.

f. You ask whether, when the Charter was amended in 1996 and updated the General Plan if it made consistency findings with the "inherited" Master Plan, specifically with respect to Height and Bulk Districts?

This question does not seek an interpretation of the Planning Code. You may wish to research this question through the Department of Elections, the Clerk of the Board of Supervisors, and/or the San Francisco Public Library.

10. You ask if the City has a specific plan as defined in Gov. Code §65450-65451?

The City has a General Plan that is comprised of multiple elements (e.g., Housing, Transportation, Urban Design, etc.) and multiple Area Plans (e.g., Downtown, Mission, Western Shoreline, etc.). These Area Plans meet many, if not all the components of a Specific Plan as defined in California Government Code Section 65450-65451. Rendering a determination of consistency between any Area Plan with the legal definition of a Specific Plan is not within the authority of the Zoning Administrator.

Please note that a Letter of Determination is a determination regarding the classification of uses and interpretation and applicability of the provisions of the Planning Code. This Letter of Determination is not a permit to commence any work or change occupancy. Permits from appropriate Departments must be secured before work is started or occupancy is changed.

APPEAL: An appeal may be filed with the Board of Appeals within 15 days of the date of this letter if you believe this determination represents an error in interpretation of the Planning Code or abuse in discretion by the Zoning Administrator. Please contact the Board of Appeals in person at 49 South Van Ness Ave, Suite 1475, call (628) 652-1150, or visit www.sfgov.org/bdappeal.

Sincerely,

Corey A. Teague, AICP
Zoning Administrator

cc: Neighborhood Groups
Kate Conner, Planning Department

BRIEF SUBMITTED BY THE APPELLANT(S)

New Horizons Trust
3739 Balboa St.
STE 243
San Francisco, CA 94121
Tel: (415)
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SAN FRANCISCO BOARD OF APPEALS

New Horizons Trust, a California Trust Appellant, vs. SAN FRANCISCO ZA, Respondent.	Appeal No.: 23-013 APPELLANT'S BRIEF LOD No.: 2023-000425ZAD Hearing Date: May 17, 2023, at 5:00 p.m.,

Date: April 26, 2023

I. INTRODUCTION

A question in this case is whether San Francisco City Planning Code vests any power or authority for the Director of Planning (DoP), as needed for any particular Planning Department purpose, to have the ZA perform LODs to satisfy state law permitting due process requirements, or to change, interpret, reinterpret, or amend/wave any planning code regulations, or otherwise promulgate any order that is binding upon any City Planning staff (such as the ZA) to faithfully execute, and if not the to refund all LOD and Appeal fees wrongfully incurred by Appellant. Another question in this case is whether the Board of Appeals (BoA) erred in its denial decision of Appellant's LOD #1, to reverse its denial decision, or void all cited LODs where the ZA previously violated the BoA's decision in LOD #1. In particular, questions contested in this case, are as follows:

1. Does the Director of Planning (DoP) have the unilateral authority to make the ZA responsible and obligated to answering any state law related City Planning permitting/process questions in an LOD?

    a) Did the Zoning Administrator (**ZA) err and/or abuse his authority in claiming to <u>not</u> have the authority and responsibility to interpret** and make determinations concerning applicability of certain planning codes/provisions guiding what projects City Planning may deny and/or restricted under Planning Director Bulletins (**PDB), State housing laws, and** the planning code?

2. Does the Director of Planning have the unilateral authority to wave section 311 neighborhood notification and the corresponding discretionary review (DR) process for any Planning Department permits processed under any state law mandated ministerial permitting (e.g., SB-35/SB-330)?

3. Did the City Attorney give the ZA (in re 2022-007996ZAD) and the board of appeals (BoA, at the hearing for APPEAL FILE NO. 22-094) false legal guidance stating that city code

precludes the ZA from performing LOD any state law related City Planning permitting/process questions?

4. Did the BoA conduct a hearing (on Feb. 8th, 2023 re APPEAL FILE NO. 22-094) that lacked good faith, if not outright bad faith, in its hearing and judging of Appellant's presented case, resulting in a lack of proper due process of law and thereby a wrongful decision?

5. Are any prior LOD's concerning questions of state law impact to city planning matters invalid and void?

   a) Is the City Attorney conflicted and incredulous for advising the ZA that he is not authorized by city code or policy to perform LOD upon any state law(s)/PDBs related to city permitting/process matters, despite the ZA having done so multiple times before in the cited LODs, and by not voiding those LOD's as a ZA abuse of discretion?

6. Is planning director bulletin (PDB) number 5 invalid and void because the Director of Planning exceeded and abused his Authority in attempting to unilaterally wave the city code section 311 requirement of neighborhood notification and DR process?

   a) Is the Planning Departments SB-35/SB-330 application program/process invalid under city codes because it relies upon an invalid PDB No. 5?

   b) Especially as it concerns Appellant's SB-35/SB-330 application, is the Planning Departments SB-35/SB-330 application program/process invalid under city codes because it mandates a local dispute resolution process which is invalid under both city and state law?

7. If PDB No. 5 is valid and then how is it possible or reasonable that the DoP has the legitimate power to wave/alter critical city code requirements such as section 311 and DR process, but does not have the power to require city interpretation of §307(a) include requiring the ZA to perform LOD upon any state law(s) or PDBs impact on application of city code(s) or permitting/process?

8. Is Appellant due a full refund of its fees wrongfully paid to the city for the DoP specifying an invalid/wrongful ZA LOD local dispute resolution process, concerning LODs: 2022-007996ZAD (LOD #1) and 2023-000425ZAD (LOD #2), and Appeals: No.: 23-013 (Appeal #1) and 22-094 (Appeal #2)?

The answer to these questions is each "yes." The LOD determinations at issue must be revoked, Appeal #1 reversed, and the board is accordingly compelled to decide these issues under its de novo standard because the ZA erred and/or abused his discretion in determining otherwise, which results to restrict the creation of housing, in violation of City and State law.

II. SUMMARY

The Director of Planning (DoP), Richard Hillis, and Kate Conner have officially stated that under the DoP's authority, the ZA is authorized, obligated and required to answer Applicant's LOD questions concerning complaints/issues/disputes concerning SFCP's improper/invalid Streamlined "Ministerial and as-of-right" Permitting Process and project denial, to include the pertinent Planning Director Bulletins and State laws for applications/evaluations/approvals/denials thereof, which in particular are in dispute by Applicant for the subject project. The BoA in Appeal # 1 clearly failed to provided Appellant a proper fair, due process of law and thereby rendered a wrongful decision, in apparent out-right bad faith. Thus, the BoA should reverse its denial decision in Appeal # 1, and fairly rehear the case; or, at least it should void the cited LODs concerning State housing laws, as some evidence supporting good faith, unbiased, and consistent, legal process by the BoA concerning Appellant.

III. FACTUAL BACKGROUND

On Feb. 23 and March 14, 2022 Elizabeth Watty, (See **EXHIBIT A**) in denying Appellant's SB-35 application eligibility by email, instructed that Applicant may only challenge that determination by way of one of the following two formal processes:

1. Submit a Building Permit Application that we will disapprove, and you can appeal to the Board of Appeals; or,
2. Request a Letter of Determination from the Zoning Administrator, which you can also appeal to the Board of Appeals.

However, regarding option 2, in both LOD #1 and #2, the ZA took the opposite position, affirmed by the BoA in Appeal #1; that is, the ZA in both LODs **claims to not have the authority and responsibility to interpret** and make determinations concerning applicability of certain planning codes/provisions guiding what projects City Planning may deny and/or restricted under Planning Director Bulletins **(PDB), State housing laws, and** the planning code. In a phone call with the ZA concerning LOD #2, the ZA effectively Appellant that DoP does not know what he's talking about and does not have any power or any vested authority whatsoever to change, reinterpret, or amend/wave any planning code regulations, or otherwise promulgate any order, making the ZA responsible and obligated to answering any state law related questions in an LOD.

The ZA further stated that the City attorney confirmed to him that the ZA is not obligated by the planning director to do any LOD on anything state law related and that city code prohibits the ZA from doing such. This would imply that the current DoP has exceeded his authority and abused his discretion in forcing Appellant to go down the ZA LOD City process as a local legal remedy to the SB-35/SB-330 permit processing/denial dispute. Regarding the other option (No. 1), the DoP specified is not allowed under state law, that is to require the filing of a building permit to make a determination of SB35/330 eligibility. So, Appellant assumed that at least the ZA LOD legal remedy option was legal; however, Appellant was later astonished to discover that this ZA path is also deemed illegal under city law because the DoP lacks the authority over the ZA. This has resulted in a completely invalid and obstructive local process by City planning which has now cost Appellant needless waste of over 1 year, thousands of dollars in city fees, and hundreds of hours of wasted effort.

Appellant spoke with DoP Hillis asking for a good faith proper resolution of this serious city

process legitimacy impasse between him and the ZA, yet he could not cite to me any city code which gives him (and thus his predecessor) the authority to require the ZA to render LOD on Appellant's state law city application. Because, DoP Hillis cannot/does not provide this then we have to assume:

1. no city code derived authorization/power exists for the Director of Planning (DoP) to make the ZA responsible and obligated to answering any state law related City Planning permitting/process questions in an LOD;
2. the DoP both exceeded and abused Authority;
3. an inference of bad faith behavior/intent by DoP and/or his top staff involved, at least by not vetting Planning Department's SB-35/SB-330 application program/process and local dispute resolution mechanisms with the city attorney; and,
4. the Planning Department's SB-35/SB-330 application program/process is invalid under city codes at least because it relies upon an invalid local dispute resolution mechanism.

Given that the DoP both exceeded and abused his Authority requiring Appellant go through an invalid local dispute resolution mechanism, resulting in a completely invalid and obstructive local process by City planning which has now cost Appellant needless waste of over 1 year, thousands of dollars in city fees, and hundreds of hours of wasted effort.

However, as set forth in LOD #1, the ZA **has demonstrated** in prior LODs that he in fact does have the authority and responsibility to interpret and make determinations concerning PDBs and how State laws impact what is allowable under the planning code. Based on the foregoing, the BoA's ruling willfully ignored these plain facts resulting in the wrongful and erroneous ruling affirming the ZA's LOD 1 position, which has now created conflict with the DoP and implementation of and valid dispute resolution paths for SB-35/SB-330 programs.

Scope of ZA Authority and Responsibility in re PDB and State Law Determinations

As in LOD #1, LOD #2 wrongfully claims ZA has no Authority and Responsibility to make any

PDB or State Law Determinations, yet again provides no analysis or evidence supporting this assertion. Appellant previously set forth many exemplary LODs that clearly establish that the ZA, in conjunction with support from expert SF staff and attorneys, is very comfortable, capable, and competent to issue LOD rulings on city code compliance with any specifically questioned State Laws.

Moreover, the ZA has in fact demonstrated this, for example, in LOD Record No.: 2019-019981ZAD, the ZA made an analysis and determination of whether Planning Director Bulletin No. 6 was legally valid/consistent with the HAA and CA Government Code § 65915(o)(2)) concerning lot coverage base density calculations, where you made an official determination saying that "Based on the information and analysis above, it is my determination that Ordinance No. 116-17 was reviewed by the Planning Department and City Attorney's Office to ensure it met all applicable state laws, and was adopted by the Board of Supervisors. As such, the provisions of that ordinance represent the City's lawful implementation of the State Density Bonus Law...As such, as applied to a particular project, it would not represent a reduction of density in violation of the Housing Accountability Act, but is rather a reasonable calculation of the maximum permitted density."

In other words, LOD No. 2019-019981ZAD did not simply rely on the City's determination that the adopted legislation was compliant with the relevant State law. As such, that request and determination was not significantly different than the request made in LOD No. 2022-007996ZAD, which the ZA wrongfully decided to not answer in similar manner. The request made in LOD No. 2019-019981ZAD asked the ZA to set forth the legal basis and interpretation of Government Code § 65915(o)(2) as it applies to the city's reduction of their state-law permitted building rights vs the planning code regulations, as implemented via planning director's bulletin. where the ZA personally made the HAA determination (not present in PDB No. 6) that "As such, as applied to a particular project, it would not represent a reduction of density in violation of the Housing Accountability Act, but is rather a reasonable calculation of ...." That is very similar to asking the ZA in this LOD to set forth the legal basis and law interpretation that would permit the city to deny a project that complies with all review standards/regulations set forth by SB-330, SB-35 and

the HAA. Nowhere in that LOD did the ZA dodge answering city permit state-law implementation questions with blocking answers like "please note that the Zoning Administrator does not have the authority or responsibility to interpret State law.", as the ZA did for LOD No. 2022-007996ZAD. For the subject project, I ask for at least the same level of "full explanation of the legal and policy basis for" the city's interpretation of the state housing law in question. See where the ZA summarized their LOD request and hence sets forth the minimum scope of the ZA's authority and responsibility does include such interpreting of State housing laws and City Planning Director Bulletins, which includes questions such as in those in this LOD:

> "you request "a full explanation of the legal and policy basis for using the lower lot coverage threshold to calculate the base density for state density bonus developments," and "a specific justification for why Government Code § 65915(o)(2) would not mandate that the city assume the 100 percent lot coverage scenario as a base density calculation.""

Moreover, DoP Hillis has ordered the ZA to render LOD on the State-law and PDB matters/issues raised in any SB-35/SB-330 application denial, such as Appellant's, and Appellant relied upon the belief that the ZA is obligated to follow the DoP orders.

Based on the foregoing, Appellant hereby appeals this LOD determination.

IV. ARGUMENTS

The DoP has the power to require the ZA to render LOD on State-law matters and PDBs.

Facts that evidence that the DoP has the power to require the ZA to render LOD on State-law matters and PDBs, include the following:

1. The ZA is a member of the Planning Department staff (as stated in most all City Planning Commissioner meetings), so the ZA is under the authority of the DoP to follow his orders, such as making the ZA responsible and obligated to answering any state law related City Planning permitting/process questions in an LOD;

2. DoP authority is also evidenced by the fact that city code requires 311 notifications & DR process on all building permit applications; however, PDB 5, by Director of Planning executive order, unilaterally waives enforcement of that city planning code on SB 35 application projects. Hence, DoP has the power to effectively amend, reinterpret, and/or waive any provision of city planning code or process as the DoP deems necessary to comply with state laws and/or proper city planning application/building permit processing;

3. Had the BOS interpreted city codes/laws as not empowering to effectively amend, reinterpret, and/or waive any provision of city planning code or process as the DoP sees fit/deems necessary then the BOS would have challenged PDB 5, PDB 7, etc.;

4. DoP Hillis has ordered the ZA to render LOD on the State-law and PDB matters/issues raised in any SB-35/SB-330 application denial, such as Appellant's, and the ZA is obligated to follow the DoP orders.

Hence, ZA erred and abused discretion to ignore the direct order by DoP to empower and require the ZA to render LOD on all State-law matters and PDBs at issue in Appellant's SB-35/SB-330s application denial, irrespective of any erroneous interpretation otherwise of §307(a) by the city attorney as dittoed by the BoA in Appeal #1.

ZA has Authority and Responsibility to Make PDB and State Law Determinations

SFPC §307(a) states in part "The ZA shall respond to all written requests for determinations regarding the classification of uses and the **interpretation and applicability** of the provisions of this Code." **Obviously, the applicability of city codes is subject to interpretation and conflicts resolution with any state laws, as the ZA performed in LOD Nos.: 2021-001320OTH and 2019-019981ZAD**. If the ZA in fact did not have this power, he would have instead responded to dismiss answering those state law LODs the same way the ZA, wrongfully, did in the subject LOD. That is, See **EXHIBIT A** (esp. highlighted text) for an email exchange Appellant had with the ZA that set forth many exemplary LODs that clearly establish that the ZA, in conjunction with support from expert SF staff and city attorneys, has

the Authority and Responsibility to issue LOD rulings on city code compliance with any specifically questioned State Laws & PDBs. As such, the ZA is in fact accustomed to making such LODs based on his/staff's understandings of what/how any given clear state law may, or may not, bring in conflict/question/issue any given city code, and make his decision balancing his interpretations of both city planning/zoning code(s)/PDB's versus controlling/competing/conflicting state law(s). For example, see **EXHIBIT B1** (esp. highlighted text for more factual details) where we see confirmation of that in the ZA's relatively recent **LOD No.: 2021-001320OTH**, concerning making a ZA ruling based on the ZA's detailed analysis, **interpretation, and conflict resolution determination** of State Assembly Bill No. 1561 and CA Gov. Code Section 65914.5 **versus conflicting SF City Planning Code** requiring that all Planning Commission and ZA permit approvals include a performance condition w/in a set (typically 3 years) period of time. The ZA cited AB 1561 requiring "notwithstanding any law, including any inconsistent provision of a local agency's general plan, ordinances, or regulations, the otherwise applicable time for the expiration, effectuation, or utilization of a housing entitlement that is within the scope of the timeframes specified in paragraphs (1) and (2) is extended by 18 month".
See: https://sfplanning.org/sites/default/files/za/2021-001320OTH_LOD_ZA_COVID-19_Extension_of_Approvals.pdf

Likewise, see **EXHIBIT B2** (esp. highlighted text) there we also see regarding **LOD Record No.: 2019-019981ZAD**, the ZA made an analysis and determination of whether Planning Director Bulletin No. 6 was legally valid/consistent with CA Government Code § 65915(o)(2) concerning lot coverage base density calculations, where the ZA made an official determination saying that "…Based on the information and analysis above, it is my determination that **Ordinance No. 116-17** was reviewed by the Planning Department **and City Attorney's Office to ensure it met all applicable state laws**, and was adopted by the Board of Supervisors. As such, **the provisions of that ordinance represent the City's lawful implementation of the State Density Bonus Law...As such, as applied to a particular project, it would not represent a reduction of density in violation of the Housing Accountability Act, but is**

rather a reasonable calculation of the maximum permitted density." By way of further example, see **EXHIBIT B3** (esp. highlighted text) where we see in **LOD Record Number: 2017-008526ZAD**, **the ZA's predecessor (Sanchez) cited CA Court law legal precedents to support the ZA's determination/ruling** that SF's property rights handling was valid under state laws. There we see that **the ZA's legal citations of CA Court law legal precedents on state property rights law. These all have very similar, if not more complex, clear terminology as the state laws cited/questioned in Appellant's LOD questions, which the ZA wrongfully refused to answer on false pretense**. Moreover, **city planning has informed Appellant that the ZA, with full support from expert SF staff and city attorneys, is in fact authorized and required to answer LOD questions concerning** all issues and bases for project permit denial, to include the **pertinent PDBs and State housing laws.**

Moreover, in LOD 2019-019981ZAD (EXHIBIT B2) the ZA stated that PDB's "authority is derived directly from the Planning Code, and may be applied to any project individually", thus the ZA made an admission that the ZA has Authority and Responsibility to interpret and make determinations concerning if and how **PDB and State housing laws** impact what projects City Planning may deny and/or restrict under the planning code & PDB policies **because PDB's are simply extensions of the planning code made by Planning Director executive order, instead of (BOS) legislative amendment. Moreover,** See Error! Reference source not found. (esp. highlighted text) for an email exchange Appellant had with the ZA concerning requested clarifications to his subject LOD, esp. where he says **"3. The LOD regarding Director Bulletin No. 6 (2019-019981ZAD) is nuanced, but it does not ultimately make a determination of state law compliance."; however, that is factually not true at least because** the ZA made an official statement/determination saying that " …the Bulletin **is consistent with** both **State** and local **law**,…:" **As such, in view of all the foregoing, the ZA clearly erred and abused his discretion in not answering** LOD questions related to **PDB and/or State housing laws,** under the obviously false pretense of lacking the authority and responsibility to do so, and Appellant believes/requests that the board must accordingly **decide all the pertinent LOD questions/issues under its de novo**

standard.

If the BoA denies this appeal, then Appellant requests a full refund of all ~$2804 fees paid for LOD # 1 ($790) & LOD #2 ($790 + 3% CC=$814), and APPEAL # 1 ($600) & APPEAL #2 ($600), **g**iven that the Planning Department's SB-35/SB-330 application program/process sets forth an invalid local dispute resolution mechanism and that the DoP both exceeded and abused his Authority in requiring Appellant go through an invalid local dispute resolution mechanism, **resulting in a completely invalid and obstructive local process by City planning which has now cost Appellant needless waste of over 1 year, thousands of dollars in city fees, and hundreds of hours of wasted effort**.

Board of Appeals Acting in Biased, Bad Faith against Appellant

At the hearing on Feb. 8th, 2023 re APPEAL FILE NO. 22-094 the BoA demonstrated clear lack of good faith due process of law in its hearing and judging of Appellant's presented case, resulting in a lack of proper due process of law and thereby a wrongful decision, in apparent out-right bad faith, as evidenced by at least the following facts:

1. Commissioner Alex Lemberg engaged in a heated, hostile attack upon Appellant's representative at the hearing, attempting to prejudice the record with a series of questions focused on irrelevant matters such as why no address was indicated in the LOD, saying that was nefarious, and prejudicial in his opinion. This demonstrated both Commissioner Lemberg's lack of knowledge about LODs, and his default hostility and bias against Appellant, presumable as being "the evil speculator/developer";

2. No one on the board questioned or addressed any of Appellant's submitted evidence and counterpoints;

3. The board acted in willful blindness by automatically following the city attorney's advice without any thought of their own to fairly, with due process, address and resolve conflicts raised by Appellant at the hearing; e.g., the city attorney said "the ZA answered everything he was authorized to"; however, Appellant pointed out that that is not true because the ZA failed to

answer certain questions concerning city code interpretation, such as "**Historically (pre-'96), City Code and the Master Plan (e.g.,** 40X of §252 & **were conflated**. Post '96, they were **merged** by §340 into a "**General** Plan". Hence, ZA **must** answer status of 40X Master Plan zoning."; and,

4. Similarly, the board acted in willful blindness by automatically following the city attorney's advice without due process to address and resolve the conflicting LOD precedents cited by Appellant at the hearing that evidenced that the ZA was in fact authorized to **answer** LOD questions related to **PDB and/or State housing laws** (namely LOD Nos.: 2021-001320OTH, 2019-019981ZAD, and 2017-008526ZAD). This fact also draws an inference of the city attorney acting in bad faith as well, possibly trying to protect the city's "sacred cows" that Appellant's LODs see to overturn.

Hence, the BoA in Appeal # 1 clearly failed to provided Appellant proper fair, due process of law and thereby rendered a wrongful decision, in apparent out-right bad faith. Thus, **the BoA should reverse its denial decision in Appeal # 1, and fairly rehear the case; or, at least it should void the cited LODs concerning State housing laws, as some evidence supporting good faith, unbiased, and consistent, legal process by the BoA concerning Appellant.**

V. CONCLUSION

Aspects of the LOD are inconsistent with the Planning Code and must be overturned and/or modified to achieve the above/below. The LOD is improper and based on pure conjecture and flawed reasoning, rather than on the plain reading of the laws. Appellant is entitled to either an order overturning both LODs & Appeal #1, and a favorable de novo ruling/rehearing on the LOD/Appeal questions at issue, or a full refund of all ~$2804 fees paid for LODs # 1 & #2, and APPEALs # 1 & #2 per above.

Respectfully submitted,

Abenet Tekie
Trustee, New Horizons Trust

EXHIBIT A

On Mon, Mar 14, 2022 at 9:19 AM Watty, Elizabeth (CPC) <elizabeth.watty@sfgov.org> wrote:
Hi Ari,
As stated previously, please either file a Building Permit so that we can disapprove it (and you can argue these points to the Board of Appeals), or file a Zoning Administrator Letter of Determination, where the Zoning Administrator will formally put in writing our position on this matter (and you may similarly appeal that determination to the Board of Appeals).

This will be the last email that our Department will respond to on this matter until one of the above are completed on your end.

Best,
Liz

Elizabeth Watty, LEED AP, Director
Current Planning Division
San Francisco Planning
49 South Van Ness Avenue, Suite 1400, San Francisco, CA 94103
Direct: 628.652.7362 | www.sfplanning.org
San Francisco Property Information Map

….

On Wed, Feb 23, 2022 at 6:47 PM Watty, Elizabeth (CPC) <elizabeth.watty@sfgov.org> wrote:
Hi Ari,
We will have to agree to disagree on this issue. You are more than welcome to challenge this determination through one of the two formal processes outlined below:

3. Submit a Building Permit Application that we will disapprove, and you can appeal to the Board of Appeals; or,
4. Request a Letter of Determination from the Zoning Administrator, which you can also appeal to the Board of Appeals.

At this time we cannot allocate any additional staff time to this email exchange.

Best,
Liz

Elizabeth Watty, LEED AP, Director
Current Planning
San Francisco Planning
49 South Van Ness Avenue, Suite 1400, San Francisco, CA 94103
Direct: 628.652.7362| www.sfplanning.org
San Francisco Property Information Map

EXHIBIT B1

LOD No.: 2021-001320OTH, concerning making a ZA ruling based on the ZA's analysis and interpretation of State Assembly Bill No. 1561 and CA Gov. Code Section 65914.5

Letter of Determination

March 16, 2021

Record No.: **2021-001320OTH**
Subject: **Extensions of Planning Commission and Zoning Administrator Approvals During the COVID-19 Emergency**

To All Interested Parties:

This letter addresses certain approvals by the Planning Commission and Zoning Administrator that include required performance periods that overlap with San Francisco's response to the COVID-19 emergency. It is intended to provide clarity, especially for projects with performance periods that have expired during this emergency period. Additional letters may be warranted and issued in the future should delays continue due to the COVID-19 emergency.

COVID-19 BACKGROUND

On February 25, 2020 Mayor London Breed ("Mayor") declared a state of emergency ("Emergency Order") in San Francisco due to COVID-19.

On March 4, 2020 Governor Gavin Newsom ("Governor") issued a proclamation of a state of emergency throughout California due to COVID-19.

On March 13, 2020 the Mayor issued a supplement to the Emergency Order. In part, this supplement ordered the following:

> *(2) Deadlines set by local law requiring City policy bodies, including the Board of Supervisors and City boards and commissions, to take action within a certain time period are suspended during the emergency and for 14 days following termination of the local emergency, if such policy bodies are unable to meet and comply with such deadlines due to the emergency;*

On March 16, 2020 the Mayor issued the Third Supplement to the Emergency Order. In

part, the Third Supplement ordered the following:

> *(5) From March 18, 2020 through April 7, 2020, City policy and advisory bodies shall not hold public meetings, unless the Board of Supervisors, acting by written motion, or the Mayor or the Mayor's designee directs otherwise, based on a determination that a policy body has an urgent need to take action to ensure the public health, safety, or essential government operations. This order applies to all City commissions, boards, and advisory bodies other than the Board of Supervisors and its committees.*

On March 16, 2020 the San Francisco Health Officer issued *Order of the Health Officer No. C-19-07* ("Shelter-In- Place Order"), which took effect on March 17, 2020 and required many businesses and government offices to close or operate at limited capacities. Five other Bay Area counties also issued Shelter-In-Place orders on the same day. This order had numerous impacts on the ability to conduct normal operations towards advancing development approvals, including:

1. The Shelter-In-Place order advised all residents to limit trips outside the home to only those that are essential;

2. All City offices, including the Planning Department and the Department of Building Inspection (DBI) were required to work remotely, if possible, with the exception of certain employees serving essential functions;

3. The City began to place employees in Disaster Service Worker (DSW) assignments to aid the City's response to the emergency;

4. All school systems in the Bay Area were open for remote learning only; and

5. All child care businesses in the Bay Area were open on a limited basis for essential workers only.

On March 19, 2020 the Governor issued an executive order and the State Health Officer issued an order requiring all 40 million individuals in California to stay home except as needed for essential functions.

On March 31, 2020 the San Francisco Health Officer updated the Shelter-in-Place order to close most commercial and residential construction projects. There were limited exceptions for projects immediately necessary to maintain essential infrastructure, healthcare operations, affordable housing projects, and mixed-use projects with 10% on-site affordable housing, shelters and temporary housing, and essential public works projects. These restrictions were largely relaxed on May 3, 2020.

While numerous supplements to the Mayor's Emergency Order and the Health Officer's Shelter-In-Place order were issued since March 16, 2020, those orders and similar state orders are still in effect today. The nature of the emergency over this time period caused many businesses to remain closed or conduct limited or periodic operations. City Departments have remained primarily closed to the public and City employees continue to primarily work remotely. This has limited the public's ability to submit permit applications for review and receive prompt permit review and issuance services, impeding project sponsors' ability to satisfy applicable performance conditions.

Additionally, Bay Area citizens have been required to limit their activities and movement, accommodate remote schooling and a lack of child care, care for vulnerable and ill family members, and take other actions necessary to respond to the emergency. These limitations and obligations created additional challenges and delays in project sponsors' ability to satisfy applicable performance conditions.

EXTENSIONS TO DEVELOPMENT PROJECT APPROVALS

Most, if not all recent Planning Commission and Zoning Administrator approvals (e.g. Conditional Use Authorizations, Variances, etc.) include a performance condition that a certain action must be taken (e.g. site or building permit issued or tentative map approved) within a period of time (typically 3 years) or the approval will expire or require an extension of time from the authorizing body.

These approvals may also include a condition permitting the Zoning Administrator to grant an extension to the required performance period if the project is delayed by a public agency, appeal, or litigation. Approvals from the Historic Preservation Commission typically have not included this option for the Zoning Administrator extension. While the language for this extension condition may slightly vary, the following represents the typical language:

> *Extension. All time limits in the preceding three paragraphs may be extended at the discretion of the Zoning Administrator where implementation of the project is delayed by a public agency, an appeal or a legal challenge and only by the length of time for which such public agency, appeal or challenge has caused delay.*

On September 28, 2020 Assembly Bill No. 1561 took effect. Among other provisions, this bill granted an 18-month extension for certain housing developments that are subject to a performance period condition. The specific provisions of this law are in Section 65914.5 of the California Government Code, which includes the following:

> *(b) Except as provided in subdivision (c), notwithstanding any law, including any inconsistent provision of a local agency's general plan, ordinances, or regulations, the otherwise applicable time for the expiration, effectuation, or utilization of a housing entitlement that is within the scope of the timeframes specified in paragraphs (1) and (2) is extended by 18 months. For the purposes of this section, housing entitlements that are extended are entitlements where both of the following apply:*
>
> *(1) It was issued prior to and was in effect on March 4, 2020; and*
>
> *(2) It will expire prior to December 31, 2021.*
>
> *The otherwise applicable time for the utilization of a housing entitlement provided by this section includes any requirement to request the issuance of a building permit within a specified period of time.*
>
> *(c) If the state or a local agency extends, on or after March 4, 2020, but before the effective date of the act adding this section, the otherwise applicable time for the expiration, effectuation, or utilization of a housing entitlement for not less than 18 months and pursuant to the same conditions provided in subdivision (b), that housing entitlement shall not be extended for an additional 18 months by operation of subdivision (b).*

DETERMINATION

Based on the above, it is my determination that the specific actions taken by State and local governments in response to the COVID-19 emergency have created numerous delays to the implementation of development projects in San Francisco. As such, the required performance period of any applicable approval that 1) includes a version of the condition cited above allowing the Zoning Administrator to grant an extension, and 2) falls within the timeframe of March 17, 2020 to March 16, 2021, is hereby extended by the number of days of overlap.

For example, if a project's required performance period is July 17, 2017 to July 17, 2020, this determination extends that performance period for a period of 4 months (the period of overlap), and the remaining 4 months of the performance period will begin on March 17, 2021. If a project was approved on or after March 17, 2020, then this determination extends that performance period for the number of days equal to the number of days from the date of the approval to March 16, 2021. The date of "approval" for purposes of this Determination means the date that a Motion or letter was issued by a Commission or the Zoning Administrator, respectively.

Please note that the typical condition of approval relating to extensions only permits the Zoning Administrator to grant such extension for the length of time for which such public agency has caused delay. As such, the extension granted in this letter only addresses the period of time up to the date of this letter's issuance. However, the Zoning Administrator may issue additional letters in the future to accommodate a further extension of performance periods extensions on the same basis if the delay persists.

Finally, please note that any extension granted by this letter shall not be additive to any extension granted to a qualifying housing development pursuant to California Government Code Section 65914.5. Instead, any overlap between these extensions shall run concurrently. For example, if a qualifying project is eligible for both an extension granted by this letter for a period of 1 year, and an extension granted by California Government Code Section 65914.5 for a period of 18 months, the 18-month extension shall supersede and represent the total time period of extension.

APPEAL: An appeal may be filed with the Board of Appeals within 15 days of the date of this letter if you believe this determination represents an error in interpretation of the Planning Code or abuse in discretion by the Zoning Administrator. Please contact the Board of Appeals in person at 49 South Van Ness Ave, Suite 1475, call (628) 652-1150, or visit www.sfgov.org/bdappeal.

Corey A. Teague, AICP
Zoning Administrator

EXHIBIT B2

LOD Record No.: 2019-019981ZAD, the ZA made an analysis and determination of whether Planning Director Bulletin No. 6 was legally valid/consistent with CA Government Code § 65915(o)(2) concerning lot coverage base density calculations, where the ZA made an official determination.

REISSUED Letter of Determination

September 22, 2020

Sonja Trauss
Yes In My Back Yard
1260 Mission Street

San Francisco, CA 94103

Record No.:	**2019-019981ZAD**
Site Address:	N/A
Subject:	Planning Director Bulletin No. 6
Staff Contact:	Kate Conner, 415-575-6914 or kate.conner@sfgov.org

Dear Sonja Trauss:

This letter is a re-issuance of the letter issued on August 12, 2020. You requested to have that letter sent by email because you were not regularly staffing your office due to COVID-19. However, the letter issued on August 12 was sent only by standard mailed, and not emailed as requested. This re-issuance will ensure that you receive the letter upon issuance. This reissued letter is otherwise unchanged from the originally issued letter.

This letter is in response to your request for a Letter of Determination regarding Planning Director Bulletin No. 6 ("Bulletin"). More specifically, you request "a full explanation of the legal and policy basis for using the lower lot coverage threshold to calculate the base density for state density bonus developments," and "a specific justification for why Government Code § 65915(o)(2) would not mandate that the city assume the 100 percent lot coverage scenario as a base density calculation."

BACKGROUND

Ordinance No. 116-17 ("Ordinance") was adopted by the Board of Supervisors and became effective on July 13, 2017. The Ordinance included various amendments to the Planning Code, including the creation of multiple local programs to implement the State Density Bonus Program. One such local program was the Individually Requested State Density Bonus Program (Planning Code Section 206.6), which provided a review and approval process for any project seeking a density bonus that is consistent with State Law, Government Code Section 65915 et seq., but is not consistent with the pre-vetted menu of concessions, incentives or waivers, or other requirements established in other local programs.

The Bulletin was first issued in December 2018 to provide clear and consistent implementation guidance for projects using the Individually Requested State Density Bonus Program. The development of the Bulletin included significant coordination with the City Attorney's Office to help ensure it was consistent with the Planning Code and State law.

Ordinance No. 296-18 was adopted by the Board of Supervisors and became effective on January 12, 2019. This ordinance amended the Planning Code to implement the Central SoMa Plan, and it included the provisions and controls of Section 249.78 for the Central SoMa Special Use District (SUD). Planning Code Section 249.78(d) establishes "Urban Design and Density Controls" for the SUD. Section 249.78(d)(6) states:

> *Lot Coverage. For residential uses, the rear yard requirements of Section 134 of this Code shall not apply. Lot coverage is limited to 80 percent at all residential levels, except that on levels in which all residential units face onto a public right-of-way, 100 percent lot coverage may occur. The unbuilt portion of the lot shall be open to the sky except for those obstructions permitted in yards pursuant to Section 136(c) of this Code. Where there is a pattern of mid-block open space for adjacent buildings, the unbuilt area of the new project shall be designed to adjoin that mid-block open space.*

Planning Director Bulletin No. 6 was revised in July 2019. One of the updated provisions stated the following:

> *Certain zoning districts do not have a rear yard setback requirement under Section 134. Instead, these districts are controlled by lot coverage provisions. Projects in Central SOMA (Section 249.78(d)(6)) and the Downtown Residential District (DTR – Section 825(b)(2)) must calculate base density assuming 80% coverage on all residential levels. The base density study may not assume full lot coverage.*

PLANNING CODE ANALYSIS

The density bonus provided by the State Density Bonus Program within State law is derived from the "maximum allowable residential density" permitted on a project site. It has long been common practice for zoning districts in the United States to regulate residential density through specific unit limits or lot area ratios. For example, the maximum permitted density in the RM-2 Zoning District

in San Francisco is 3 dwelling units, or one dwelling unit per 600 square feet of lot area. A 10,000 square foot lot zoned RM-2 would have a clear maximum density of 17 dwelling units.

While San Francisco regulates residential density in this traditional way for many zoning districts, it also has many districts where no such discrete density limit or lot area ratio applies. Neither State law nor related case law provide any guidance as to how maximum allowable residential density should be calculated when no discrete limit or lot area ratio is provided. However, the Planning Code does provide guidance on how maximum density should be calculated in density-decontrolled areas. For example, Planning Code Section 207.6(a), which regulates dwelling unit mix in certain zoning districts, states the following:

Purpose. In order to foster flexible and creative infill development while maintaining the character of the district, dwelling unit density is not controlled by lot area in RTO, NCT, and Eastern Neighborhoods Mixed Use Districts but rather by the physical constraints of this Code (such as height, bulk, setbacks, open space, and dwelling unit exposure).

Additionally, the land use tables for Neighborhood Commercial Districts that do not regulate residential density through specific unit limits or lot area ratios (i.e. SoMa NCT [Planning Code Section 753], Mission Street NCT [Planning Code section 754], etc.) provide the following language regarding residential density:

No density limit by lot area. Density restricted by physical envelope controls of height, bulk, setbacks, open space, exposure and other applicable controls of this and other Codes, as well as by applicable design guidelines, applicable elements and area plans of the General Plan, and design review by the Planning Department.

San Francisco voters approved Proposition E in 2019 to amend the Planning Code to create the 100% Affordable Housing and Educator Housing Streamlining Program, which took effect on December 20, 2019. This program also includes a provision for considering density without setting a discrete limit or lot area ratio. Planning Code Section 206.9(d) states:

DensityvNotwithstanding any other provisions of this Code, density of an 100% Affordable Housing Project or Educator Housing Project shall not be limited by lot area or zoning district maximums but rather by the applicable requirements and limitations set forth elsewhere in this Code, including consistency with the Affordable Housing Bonus Program Design Guidelines, referenced in Section 315.1, as determined by the Planning Department.

When developing the local programs to implement the State Density Bonus Law, the City was required to develop a methodology for determining the maximum allowable residential density (aka "Base Density") for projects where density was not prescribed or calculated through a lot area ratio. The methodology adopted by the Board of Supervisors for this purpose is consistent with the other Planning Code examples described above, and expressed through the definition of "Maximum Allowable Gross Residential Density" in Planning Code Section 206.2, which states:

Maximum Allowable Gross Residential Density means the maximum number of dwelling units per square foot of lot area in zoning districts that have such a measurement, or, in zoning districts without such a density measurement, the maximum number of dwelling units that could be developed on a property while also meeting all other applicable Planning Code requirements and design guidelines.

While it is possible to calculate the maximum amount of floor area (i.e. building envelope) that may be permitted on a specific property in these density de-controlled areas, it is not possible to easily determine how many dwelling units could be included within a permitted building envelope. This is due to the highly variable nature of interior development design and its relationship with various Planning Code requirements like useable open space, exposure, and dwelling unit mix. Such a determination would also depend on applicable Building Code and Fire Code provisions. Finally, attempting to make such a determination would require developers to provide, and Planning staff to review, a full set of detailed architectural drawings.

PLANNING DIRECTOR BULLETIN NO. 6

While Planning Director Bulletin No. 6 was issued by the Planning Director, and is under their purview to issue and revise, a brief synopsis is provided here for clarity. The Bulletin provides detailed guidance on a number of issues that are key to understanding and implementing the State Density Bonus Programs. In relation to this request, it clarifies that a project site's Gross Floor Area for residential uses, as defined in Planning Code Section 102, is used

as a proxy for the maximum allowable gross residential density. As such, a project site's maximum allowable gross residential density in such a case is expressed as a square footage instead of a discrete number of dwelling units. The Department determined this to be the simplest methodology to understand and implement, and the most accurate proxy for the maximum number of units permitted.

The Bulletin also takes a balanced approach to how certain discretionary provisions of the Planning Code apply to the calculation of a project's maximum allowable gross residential density (i.e. Base Density). For example, wind and shadow requirements are not considered when calculating Base Density. In addition, sub-grade floor levels are not included in a project's Base Density. The Bulletin does not permit projects' Base Density to use the Planning Code provisions stating a project in the Central SoMa SUD and the Downtown Residential District (i.e. Rincon Hill) may have up to 100% lot coverage when all residential units face onto a public right-of-way. Those provisions were intended for more unique lot and development circumstances, and not for large, typical, generally unconstrained development sites. Implementing these provisions clearly and consistently is key to ensure the efficient processing of density bonus projects and that the Individually Requested State Density Bonus Program is consistent with State Law.

In response to your specific request, the 100% lot coverage provision for the Central SoMa SUD was not intended to be used by large, unconstrained development sites like 598 Bryant Street, 300 5th Street, and 650 Harrison Street. Those and similar project sites in the Central SoMa SUD are generally large, flat, and unconstrained by topography or similar irregularities. For a variety of reasons, any realistic residential development scenario for such sites would not include only units fronting a public right-of-way. These reasons range from the inability to do so and meet other Planning Code requirements (i.e. useable

open space), to resulting in highly unrealistic internal layouts consisting of extremely large units and/or an inordinate amount of amenity space. For example, such internal layouts would likely create infeasible on-site affordable housing scenarios due to Planning Code requirements for the equivalency of units (Sec. 415.6(f)(1)). As such, it is highly likely that the Planning Department would require such project sites to meet the 80% lot coverage provision in order for the project to comply with the Planning Code and/or to ensure the design of the project met all applicable design guidelines.

Please note that although the Bulletin is consistent with both State and local law, the Planning Commission initiated an ordinance to amend the Planning Code on July 30, 2020 to address a variety of necessary updates and corrections to the original Ordinance No. 296-18 to implement the Central SoMa Plan. One such proposed amendment would allow 100% lot coverage under Planning Code Section 249.78(d)(6) only if the Planning Commission grants an exception pursuant to Planning Code Section 329. This amendment would clarify and formalize the current intersection between Section 249.78(d)(6) and Section 206.2, as expressed in the Bulletin.

DETERMINATION

Based on the information and analysis above, it is my determination that Ordinance No. 116-17 was reviewed by the Planning Department and City Attorney's Office to ensure it met all applicable state laws, and was adopted by the Board of Supervisors. As such, the provisions of that ordinance represent the City's lawful implementation of the State Density Bonus Law. This includes the definition of Maximum Allowable Gross Residential Density, which includes the consideration of any applicable design guidelines when determining the Base Density for an Individually Request State Density Bonus Project on a density de-controlled property.

While this authority is derived directly from the Planning Code, and may be applied to any project individually, Planning Director Bulletin No. 6 was issued (and periodically amended) to provide clear and consistent implementation guidance to projects seeking to use the Individually Requested State Density Bonus Program. The Department's determination that the requirement that density bonus projects in the Central SoMa SUD must calculate Maximum Allowable Gross Residential Density using 80% lot coverage on all residential levels is an appropriate application of design guidelines pursuant to the definition of Maximum Allowable Gross Residential Density for projects using the Individually Requested State Density Bonus Program.

Because the Planning Code and the Bulletin appropriately calculate a project site's Maximum Allowable Gross Residential Density, the number of units ultimately permitted for a State Density Bonus Program project represents the maximum that could be permitted. As such, as applied to a particular project, it would not represent a reduction of density in violation of the Housing Accountability Act, but is rather a reasonable calculation of the maximum permitted density.

Please note that a Letter of Determination is a determination regarding the classification of uses and interpretation and applicability of the provisions of the Planning Code. This Letter of Determination is not a permit to commence any work or change occupancy. Permits from appropriate Departments must be secured before work is started or occupancy is changed.

Sincerely,

Corey A. Teague, AICP
Zoning Administrator

Enclosure: Planning Director's Bulletin No. 6

cc: Citywide Neighborhood Groups
Kate Conner, Planning Department

EXHIBIT B3

LOD Record Number: 2017-008526ZAD, the ZA's predecessor (Sanchez) cited CA Court law legal precedents to support the ZA's determination/ruling that SF's property rights handling was valid under state

SAN FRANCISCO
PLANNING DEPARTMENT

Letter of Determination

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning

October 2, 2017

Jenny D. Smith
Law Offices of Dek Ketchum
900 Veterans Boulevard, Suite 600
Redwood City, CA 94063

Site Address:	800 Clement Street (aka 289-291 9th Avenue)
	Information:
Assessor's Block/Lot:	1424/017
	415.558.6377
Zoning District:	Inner Clement Neighborhood Commercial District (NCD)
Staff Contact:	Matt Dito, (415) 575-9164, or matthew.dito@sfgov.org
Record Number:	2017-008526ZAD

Dear Ms. Smith:

This letter is in response to your request for a Letter of Determination regarding the property at 800 Clement Street (also known as 289-291 9th Avenue). This parcel is located in the Inner Clement Neighborhood Commercial District (NCD) Zoning District. The request is to clarify the status of conditions and limitations placed on the property as a result of Case No. 85.317EV and Building Permit Application No. 8311396. Specifically, the request has five inquiries regarding Notice of Special Restrictions (NSR) No. D936971 (Exhibit F of your request), which was recorded to document conditions of approval related to the aforementioned applications.

BACKGROUND
On November 8, 1983, Building Permit Application No. 8311936 (Exhibit D of your request) was filed to construct a horizontal addition to the rear of the existing building at 800 Clement Street. The subject addition would contain 14 units of senior housing and would become known as 289-291 9th Avenue. Under then-applicable Planning Code requirements, the proposed units could only be approved as senior housing given the density limitations of the underlying zoning district. The proposal required a Variance from the rear yard and usable open space requirements of the Planning Code. On August 16, 1985, the Planning Department issued an environmental determination (Negative Declaration) under

the California Environmental Quality Act (CEQA) for the subject project. On October 21, 1986, the Zoning Administrator granted the required variances (Case No. 85.317V) as outlined in the associated Variance Decision Letter (Exhibit E of your request). On January 29, 1987, NSR No. D936971 was recorded on the subject property outlining six conditions attached to the Planning Department's approval of the subject building permit application in order to allow the permit to be approved under the Planning Code. On January 30, 1987, the Planning Department approved the building permit subject to the conditions of approval, noting the environmental review determination, the variance decision and NSR No. D936971. On July 29, 1987, the subject building permit was issued, with work completed on February 22, 1989 (as noted on the Certificate of Final Completion for the project).

Of the six conditions outlined in NSR No. D936971, it is noted that Condition No. 5 states:

"That the 14 unit senior citizen housing addition fronting on 9th Avenue shall be specifically designed for and occupied by senior citizens or physically handicapped persons, and shall be limited to such occupancy for the actual lifetime of the building by the requirements of State or Federal programs for housing for senior citizens or physically handicapped persons or otherwise by design features and by legal arrangements approved as to form by the City Attorney and satisfactory to the Department of City Planning, as required by Section 209.1(m) of the City Planning Code"

In your request, you state that the NSR was not recorded by the property owner, but by the leaseholder (Bank of Canton) which holds a 50 year lease on the subject property. Also noted in your request is that East West Bank has assumed the lease established by Bank of Canton.

DETERMINATION
The five inquiries, as well as my determinations for each inquiry, are as follows:

1. *Do the conditions and limitations set forth in the Notice of Special Restrictions apply to the ground, to both the original building at 800-810 Clement Street and the newly constructed improvement known as 289291 9th Avenue, or only to the newly constructed improvement known as 289-291 9th Avenue?*

   As the original building at 800 Clement and the addition at 289-291 9th Avenue are situated on the same lot, with a single parcel number, the NSR applies to both. It should be noted that the NSR contains specific conditions for each individual building and limiting the senior housing restriction to the building at 289-291 9th Avenue.

2. *Are the conditions and limitations set forth in the Notice of Special Restrictions binding on the owner of the real property who neither requested nor consented to the Notice of Special Restrictions?*

   Yes. The conditions stipulated in the NSR reflect those which were contained in the Variance Decision Letter and those which were required for the Planning Department as conditions of approval for approval of Building Permit Application No. 8311396. Like the variance issued permitting construction of the improvement known as *289-291 9th Avenue*, once issued, the building permit and all its conditions of approval runs with the land and binds successor owners. (See *Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855, 858.) Moreover, m[a] landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits afforded by the permit.' [Citation.]" *(City of Berkeley v. 1080 Delaware, LLC* (2015) 234 Cal.App.4th 1144, 1150, as modified (Feb. 26, 2015); see also *Lynch v. California Coastal Commission* (2017) 3 Ca1.5th 470, 478, reh'g denied (Aug. 9, 2017) [in general, permit holders are obliged to accept the burdens of a permit along with its benefits].) The approval of the project and related conditions of approval were not appealed within the

timeframes allowed by law and are final and in full effect.

3. *Will the conditions and limitations set forth in the Notice of Special Restrictions survive termination of the Lease and continue to restrict use of the real property after the Lease expires on February 29, 2032?*

   Yes. See Response No. 3, above. The conditions outlined in the NSR are associated with the project approved and constructed under Building Permit Application No. 8311936. The conditions are not related to the terms of any specific lease. As noted in the Condition No. 5, the condition related to senior housing applies for the actual lifetime of the building.

4. *Will the conditions and limitations set forth in the Notice of Special Restrictions, or any other applicable local law, prevent the owner of the real property from seeking to demolish the new constructed improvement at 289-291 9th Avenue following expiration or termination of the Lease?*

   The conditions and limitations referenced in the NSR do not prevent the demolition of the building at 289-291 9th Avenue. If the property owner wishes to seek authorization for the demolition of the building, Conditional Use Authorization is required pursuant to Planning Code Section 317(c)(1), which states: "Any application for a permit that would result in the Removal of one or more Residential Units or Unauthorized Units is required to obtain Conditional Use authorization. The application for a replacement building or alteration permit shall also be subject to Conditional Use requirements."

5. *Will the Zoning Administrator exercise its authority to release the real property from the conditions and restrictions contained in the Notice of Special Restrictions when the Lease expires and the ground and improvements revert to Mrs. Mohr on March 1, 2032?*

   No. As indicated previously, the conditions and limitations referenced in the NSR are not tied to the terms of any specific lease, or to any particular party to that lease. Rather, they run with the land. The conditions shall be valid for the actual lifetime of the building, as approval of the subject building permit application to develop the parcel was dependent upon the use being restricted to senior housing to comply with the density limits of the Planning Code.

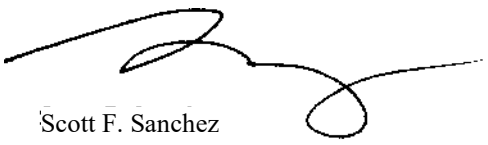
Please note that a Letter of Determination is a determination regarding the classification of uses and interpretation and applicability of the provisions of the Planning Code. This Letter of Determination is not a permit to commence any work or change occupancy. Permits from appropriate Departments must be secured before work is started or occupancy is changed.

APPEAL: If you believe this determination represents an error in interpretation of the Planning Code or abuse in discretion by the Zoning Administrator, an appeal may be filed with the Board of Appeals within 15 days of the date of this letter. For information regarding the appeals process, please contact the Board of Appeals located at 1650 Mission Street, Room 304, San Francisco, or call (415) 575-6880.

Sincerely,

cc: Property Owner
Neighborhood Groups

Amy Chan, San Francisco Mayor's Office of Housing and Community Development Matt Dito, Planner



Scott F. Sanchez
Zoning Administrator

BRIEF(S) SUBMITTED BY RESPONDENT DEPARTMENT(S)

San Francisco Planning

49 South Van Ness Avenue, Suite 1400
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BOARD OF APPEALS BRIEF

HEARING DATE: May 17, 2023

May 11, 2023

Appeal No.:	23-013
Project Address:	1435 26th Avenue
Subject:	Interpretation and Application of State Laws
Staff Contact:	Corey Teague, Zoning Administrator – (628) 652-7328 corey.teague@sfgov.org

Introduction

This brief is intended to provide a concise response to the appeal filed against the Letter of Determination issued to the Appellant on March 27, 2023. The primary purpose of the Appellant's request was to seek a determination regarding the appropriate interpretation and application of State Law by the Planning Department. However, as established in a previous Letter of Determination from December 22, 2022, and upheld by the Board (Appeal No. 22-094), the Zoning Administrator (ZA) does not have the responsibility to interpret State Law, or the authority to direct Planning Department staff to interpret State Law in a particular manner.

Background

The Appellant's request to the ZA consisted of 68 pages and 133 discrete questions, many including sub-questions. Please note that the submitted PDF of the request is security protected in a manner that it cannot be saved as part of this brief. However, anyone may find and review the request letter using the Planning Department's Property Information Map at https://sfplanninggis.org/pim/. The primary question of the request

was whether the ZA has the authority to issue "binding determinations as a legal remedy towards resolving Applicant's complaints/issues/disputes concerning SFCP's improper/invalid Streamlined 'Ministerial and as-of-right' Permitting Process and project denial (e.g., erroneous code interpretations, invalid process, invalid basis for denials, mishandling, etc.) as they concern the Subject Project SB-330/SB-35 application?" (Page 2, Question 1). Specifically, the allegation of improper/invalid interpretation and implementation of State law are in reference to Director Bulletins Nos. 5 and 7 for the implementation of SB-35 and SB-330. Director Bulletins Nos. 5 and 7 may be found on the Planning Department website and through the following links:

- https://sfplanning.org/resource/planning-director-bulletin-no-5-senate-bill-no-35-affordable-housing-streamlined-approval

- https://sfplanning.org/resource/planning-director-bulletin-no-7-housing-crisis-act-2019

The Appellant is correct that Planning staff informed him that his appeal options were to either 1) file a building permit so that it may be denied and then appealed, or 2) request a Letter of Determination from the Zoning Administrator. However, it is important to note that 1) The Department has provided significant time, resources, and responsiveness to the appellant to inform and explain its position, 2) the Appellant's request also included several other questions that were appropriately under the purview of the ZA, and 3) the Zoning Administrator spoke with the Appellant prior to issuing the determination to inform him of the limitations and content of the determination and let him know that, despite the direction from staff, the ZA determination was not the appropriate route to seek the State law determinations he desired. As such, he had the opportunity to withdraw his request, but did not choose that action. Additionally, no building permit has been filed.

The Appellant asked that if the ZA does not have the authority to determine if Director Bulletins No. 5 and 7 were compliant with State Law, then who does. As stated in the determination, any question of compliance with State law is ultimately adjudicated through the courts. Alternatively, he was informed that he

has the option to file a building permit for his proposed project and appeal its denial. Separately, it is the prerogative of the Board of Supervisors to adopt local Code to interpret and implement corresponding State law, which it has done in the past for the State Density Bonus Program and the State Accessory Dwelling Unit (ADU) Program.

The position of the ZA's authority related to interpreting State law is based on Planning Code Section 307(a), which states that the ZA has the authority and responsibility to "respond to all written requests for determinations regarding the classification of uses and the interpretation and applicability of the provisions of this Code" (i.e., the Planning Code). As noted in the letter, the Zoning Administrator does not have the responsibility to interpret State law. Instead, the Planning Director issues bulletins that provide guidance on the City's interpretation of relevant State laws and how they will be implemented by the Planning Department. Additionally, the Zoning Administrator does not have the authority or responsibility to interpret the consistency or compliance of legislative actions with the General Plan. The Planning Commission and Board of Supervisors are responsible for adopting General Plan consistency findings associated with legislative actions. In sum, any dispute of State law or legislative General Plan consistency would be adjudicated through the state court system, and not through the Zoning Administrator and Board of Appeals.

Project History with the Planning Department

Although the ZA determination did not address the specifics of the proposed project at 1435 26th Avenue and its eligibility for certain State laws, it may be helpful to provide the Board some background and context regarding the core issue at hand. Planning staff first communicated with the Appellant on this issue in October 2021. The appellant was interested in using SB-35 for vertical and horizontal additions to a single-family home and construction of an ADU. SB 35 is a State law that provides streamlining to eligible projects. One of the eligibility criteria under SB-35 is that the development must be a multifamily housing development. The

California Department of Housing and Community Development (HCD) published guidance on SB-35 implementation, and defines multifamily as the following:

> *"Multifamily" means a housing development with two or more attached residential units. This includes mixed-use projects as stated in Section 400(a). The definition does not include accessory dwelling units unless the project is for new construction of a single-family home with attached accessory dwelling units. Please note, accessory dwelling units have a separate permitting process pursuant to Government Code section 65852.2. [https://www.hcd.ca.gov/policy-research/docs/sb-35-guidelines-update-final.pdf]*

On February 16, 2022, Planning staff informed the Appellant the proposed scope of work was not eligible for SB-35 based upon the published HCD guidance and that the scope of work included an alteration to a single-family home and construction of an ADU instead of new construction of a single-family home and construction of an ADU. Appellant provided no evidence that would make HCD's guidance inapplicable and provided no basis for Planning staff to reach a different conclusion. Essentially, Appellate disagrees with HCD's guidance, and asks the ZA or the Board of Appeals to overturn HCD's determination. This is not the correct forum for Appellant's contentions.

After advising Appellant that his project did not qualify for SB 35, Planning staff advised the Appellant that SB-9 was an alternative ministerial program, provided eligibility criteria were met, that could be used given the scope of work. SB-9 requires streamlined, ministerial review of certain lot splits and/or duplex projects. The Appellant has indicated that he is not interested in pursuing an SB-9 project. Despite the guidance from HCD, Appellant contends that the Planning Department was not following State law regarding SB-35 implementation. Specifically, Appellant contends that the Department has not followed SB 35's requirements for consultation with Native American tribes. SB-35 projects are subject to notification to California Native American tribes that are traditionally and culturally affiliated with the geographic area of the proposed development site pursuant to

Government Code section 65913.4. Part of the notification package includes submittal of a Preliminary Application pursuant to SB-330 (Preliminary Application), which is separate and distinct from a building permit application. This notification is one of many eligibility criteria for processing the proposed development under SB-35.

The appellant expressed concerns that the Department did not begin the notification to California Native American tribes. The Department reiterated that because the project was not considered a multifamily housing development, it was not eligible for SB-35 and the notification would not be conducted.

On September 20, 2022, Planning staff met with HCD regarding this matter and explained the rationale for not conducting notification to California Native American tribes and the determination that the project was not eligible for SB-35. HCD did not objection and did not further contact the Department regarding this issue.

Conclusion

To conclude, the determination in question met the requirement of Planning Code Section 307(a) to respond to the request, while also staying within the authority and responsibility of the Zoning Administrator. The Appellant also made no claims that the determinations related to the Planning Code were made in error. Therefore, there was no error or abuse of discretion. Considering the information provided in the Letter of Determination and this brief, the Department respectfully requests that the Board of Appeals uphold the Zoning Administrator's determination and deny the appeal.

cc: Abenet Tekie (Appellant)
Ari Isaac (Agent for Appellant)
Kate Conner (Planning Department)

Enclosures: Exhibit A – Letter of Determination