BOARD OF APPEALS, CITY & COUNTY OF SAN FRANCISCO

Appeal of
2700 SLOAT HOLDINGS LLC,)
Appellant(s))
)
vs.)
)
ZONING ADMINISTRATOR,)
Respondent

Appeal No. **23-016**

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT on April 5, 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 28, 2023, of the Zoning Administrator's Interpretation of Planning Code Sections 102 and 270 regarding Measurement of Bulk and Plan Dimensions (Unless specified elsewhere in the Planning Code, the maximum Plan Dimensions per specific bulk limits apply within the exterior walls of each individual building or structure, such that a single building may not have multiple vertical elements (i.e. towers, etc.) that collectively exceed the maximum permitted Plan Dimensions. However, separate buildings on the same lot will have separate Plan Dimensions for the purpose of measuring bulk limits).

FOR HEARING ON May 10, 2023

Address of Appellant(s):	Address of Other Parties:
2700 Sloat Holdings LLC, Appellant(s) c/o Melinda Sarjapur, Attorney for Appellant(s) Reuben Junius & Rose LLP One Bush Street, Suite 600 San Francisco, CA 94104	N/A

Date Filed: April 5, 2023

CITY & COUNTY OF SAN FRANCISCO
BOARD OF APPEALS

PRELIMINARY STATEMENT FOR APPEAL NO. 23-016

I / We, **2700 SLOAT HOLDINGS LLC**, hereby appeal the following departmental action: **ISSUANCE** of the Interpretation of Planning Code Sections 102 and 270 by the **Zoning Administrator** which was issued or became effective on: **March 28, 2023**

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 20, 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 tina.tam@sfgov.org

Respondent's and Other Parties' Briefs are due on or before: 4:30 p.m. on **May 4, 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 msarjapur@reubenlaw.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 10, 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:

Not Submitted

Appellant or Agent:

Signature: Via Email

Print Name: Melinda Sarjapur, attorney for appellant

San Francisco Planning

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MEMO TO FILE

March 28, 2023

Subject: Zoning Administrator Interpretations
Staff Contact: Corey Teague, Zoning Administrator – (628) 652-7328
corey.teague@sfgov.org

Background

Pursuant to Planning Code Section 307(a), the Zoning Administrator (ZA) issues rules, regulations, and interpretations they deem necessary to administer and enforce the provisions of the Code. Formal interpretations are listed within the Planning Code, as well as a series of topical bulletins (e.g., neighborhood notice, bicycle parking, affordable housing, etc.).

Interpretations

The attached document details several ZA determinations to amend, repeal, or adopt new Planning Code interpretations.

Appeals

Each individual ZA determination in the attached document is separately appealable to the Board of Appeals within 15 days of issuance. A single appeal may not be filed to encompass two or more separate determinations.

Attachments:

Amendments to Zoning Administrator Interpretations of the Planning Code – Issued March 28, 2023

cc: Tina Tam, Deputy Zoning Administrator
Elizabeth Watty, Director of Current Planning
Odaya Buta, Office of City Attorney
Citywide Neighborhood Groups

Amendments to Zoning Administrator Rules, Regulations, and Interpretations of the Planning Code – March 28, 2023

NOTE: Additions are *single-underline italics Times New Roman*;

Deletions are ~~*strike-through italics*~~ *Times New Roman*.

INTERPRETATIONS BY CODE SECTION

Code Section: 102 and 270

Subject: Measurement of Bulk and Plan Dimensions

Effective Date: 03/23

Interpretation:
Section 270(a) states that the bulk limits of Section 270 are measured by Plan Dimensions, which are defined in Section 102. Section 270(a) also states that bulk limits apply to buildings and structures. Per Sec. 102, the Plan Dimensions used to measure bulk are defined to be "dimensions of a building or structure, at a given level, between the outside surfaces of its exterior walls." Section 102 also defines a Building to be any structure having a roof supported by columns or walls. The Planning Code provides no guidance or methods to allow multiple parts of the same building or structure to rely on separate calculations for Plan Dimensions for bulk limits.

Therefore, unless specified elsewhere in the Planning Code, the maximum Plan Dimensions per specific bulk limits apply within the exterior walls of each individual building or structure, such that a single building may not have multiple vertical elements (i.e., towers, etc.) that collectively exceed the maximum permitted Plan Dimensions. However, separate buildings on the same lot will have separate Plan Dimensions for the purpose of measuring bulk limits.

Code Section: 134(f)

Subject: Corner Lots as Through Lots

Effective Date: 03/23

Interpretation:
This section states the following: "Where a lot is a Corner Lot, or is a through lot having both its front and its rear lot line along Streets, Alleys, or a Street and an Alley, and where an adjoining lot contains a residential or other lawful structure that fronts at the opposite end of the lot, the subject through lot

may also have two buildings according to such established pattern, each fronting at one end of the lot, provided that all the other requirements of this Code are met." While this provision applies to Corner Lots, a typical Corner Lot does not have its rear lot line along a street. Therefore, only a Corner Lot that that has frontage on three separate Streets and/or Alleys may qualify for the provisions of this section (see Block 0145 Lot 037 and Block 4058 Lot 009 as examples).

Subject: Expansion of Legalized Dwelling Units Over Permitted Density

Effective Date: 03/23

Interpretation:
Section 181(c)(2) states that dwelling units that are nonconforming due to density may not be enlarged, altered, or reconstructed beyond the building envelope as it existed on January 1, 2013. Section 207.3 allows the legalization of dwelling units that meet certain criteria. Section 207.3(e)(2) states that one such dwelling unit on a lot is allowed to exceed the permitted density authorized for that zoning district provided that a residential use is principally permitted in that zoning district and that expansion of the additional dwelling unit within the building envelope shall be permitted as part of the legalization process. However, "building envelope" is not defined for this purpose.

The following 1996 interpretation of Section 311 exempts certain "Fill-ins" from notice:

> *"Fill-ins": The filling in of the open area under a cantilevered room or room built on columns is exempt only if the height of the open area under the room does not exceed one story or 12 feet. The exemption does not apply to space immediately under a deck nor to space under a room known to be illegal.*

Therefore, dwelling units nonconforming as to density per Section 181(c) and dwelling units legalized per Section 207.3 may expand pursuant to the 1996 interpretation for "Fill-ins" and still be considered to be within the existing building envelope.

Code Section: 260(b)(1)

Subject: Height Exemptions

Effective Date: 03/23

Interpretation:
This section allows the Zoning Administrator to grant a height exemption for an elevator penthouse for a building with a height limit of more than 65 feet when it's found that that such an exemption is required to meet state or federal laws or regulations. The building at 655 Montgomery Street extends higher than its height limit and presented a case where an existing Building Maintenance Unit (BMU) needed to be replaced, but state regulations required a larger BMU to safely service the building.

Therefore, it was determined that the Zoning Administrator height exemption of Section 260(b)(1) shall be expanded to also include BMUs.

Code Section: 303.1

Effective Date: 07/09 *(Moved and Revised 03/23)*

Interpretation:
~~*SEC. 703.3. FORMULA RETAIL USES and 303(i) CONDITIONAL USES (FORMULA RETAIL).*~~ *This section* ~~*These sections*~~ of the Code define*s* formula retail uses as a type of retail activity "along with eleven or more other retail sales establishments located in the United States" that maintains two or more characteristics listed in this section. A question *was* ~~*has been*~~ raised whether it is the eleventh or the twelfth establishment *that* ~~*which*~~ triggers the formula retail requirement for approval of a Conditional Use Authorization. It *was* ~~*has been*~~ determined that a Conditional Use Authorization is required for the twelfth establishment.

INTERPRETATIONS – ALPHABETICAL

~~**Subject: Formula Retail**~~
~~**Effective Date:** 09/07~~
~~**Interpretation:**~~
~~*This paragraph requires Conditional Use authorization for all new formula retail uses (as defined by Section 703.3(c)) in any Neighborhood Commercial District. The Zoning Administrator has determined that a change from one formula retail use to another requires a new Conditional Use authorization in Neighborhood Commercial Districts, whether or not a Conditional Use authorization would otherwise be required by the particular change in use in question. This Conditional Use authorization requirement also applies in changes from one Formula Retail operator to another within the same Article 7 use category.*~~
~~*However, from time to time, corporations that operate formula retail outlets are purchased in whole or in part by other corporations, often resulting in a name change and necessity for new signage or minor exterior alterations, which require a valid signage or building permit approved by the Planning Department for a number of outlets. A situation arose where a number of outlets of an existing supermarket chain that met the definition of formula retail under the Planning Code were purchased by another supermarket chain that also met the definition of formula retail. The new corporate owner would continue what was considered by the Zoning Administrator to be essentially the same type of operation, with the only major change being the store name. The store size was to remain the same, and the merchandise offering, aside from store brands, would be very similar, providing essentially the same retail service as offered previously. It is hereby determined that the requirement for a new Conditional Use authorization in such cases shall not apply to a change in a formula retailer that meets both of the following criteria:*~~
~~*- the formula use operation remains the same in terms of its size, function and general merchandise offering as determined by the Zoning Administrator, and*~~
~~*- the change in the formula retail use operator is the result of multiple existing operations being purchased by another formula retail operator.*~~

~~*The new operator shall comply with all conditions of approval previously imposed on the existing operator, including but not limited to signage programs and hours of operation; and shall conduct the operation generally in the same manner and offer essentially the same services and/or type of merchandise; or seek and be granted a new Conditional Use authorization.*~~

~~*Subject: Formula Retail Thresholds*~~
~~*Effective Date: 07/09*~~
~~*Interpretation:*~~
~~*SEC. 703.3. FORMULA RETAIL USES and 303(i) CONDITIONAL USES (FORMULA RETAIL). These sections of the Code define formula retail uses as a type of retail activity "along with eleven or more other retail sales establishments located in the United States" that maintains two or more characteristics listed in this section. A question has been raised whether it is the eleventh or the twelfth establishment which triggers the formula retail requirement for approval of a Conditional Use Authorization. It has been determined that a Conditional Use Authorization is required for the twelfth establishment.*~~

BRIEF SUBMITTED BY THE APPELLANT(S)

Appellant's Brief for Appeal No. 23-016

https://reubenlaw.egnyte.com/fl/HIzUpwEmux

BRIEF(S) SUBMITTED BY RESPONDENT DEPARTMENT(S)

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BOARD OF APPEALS BRIEF

HEARING DATE: May 17, 2023

May 11, 2023

Appeal No.:	23-016
Project Address:	N/A
Subject:	Interpretation of Bulk Controls (Planning Code Sections 102 and 270)
Staff Contact:	Corey Teague, Zoning Administrator – (628) 652-7328 corey.teague@sfgov.org

Introduction

The Zoning Administrator (ZA) issued a batch of interpretations on March 28, 2023, that included an interpretation of Sections 102 and 270 related to the application of bulk controls for buildings, which is included as an exhibit to the Appellant's brief. Because it was issued only as a technical interpretation, and not as part of a Letter of Determination, there was no contextual information provided in association with the interpretation. This brief serves as a supplement to the bulk interpretation to provide rationale for the interpretation and responses to the issues raised in the appeal.

Rationale

Each property in San Francisco has a designated height and bulk district. The height district represents the maximum height of any building permitted on a lot, and the bulk district indicates at what height the massing of a building must be reduced to various dimensions, which are outlined in Table 270 (see Exhibit A). The bulk rules in the Planning Code are derived from the policies in the Urban Design Element of the General Plan, which sets the policy framework for the Planning Code. The bulk rules in the Code originate out of

concerns about the overall appearance of buildings against the sky ("a disconcerting dominance of the skyline and neighborhood"), in the "blocking of near or distant views," and in the general maintenance of adequate light and air. The Urban Design Element clearly states that the essence of bulk rules are "the amount of wall surface that is visible" and "the degree to which the structure extends above its surroundings."

The essential purpose of the bulk rules, therefore, is to limit the contiguous volume of buildings above a certain height. The conjoining of multiple "buildings" above the designated height in a way that creates a contiguous, unseparated facade such that the totality exceeds the maximum bulk dimensions above the prevailing height completely undermines the very purpose of the bulk rules as articulated in the General Plan.

Planning Code Section 270 states that the "limits upon the bulk of buildings and structures shall be as stated in this Section and in Sections 271 and 272. The terms Diagonal Dimension, Height, Length, and Plan Dimensions shall be as defined in this Code. In each height and bulk district, the maximum plan dimensions shall be as specified in the following table, at all horizontal cross-sections above the height indicated." For example, within the A bulk district, above a height of 40 feet a building's mass is limited to a maximum length of 110 feet and a maximum diagonal dimension of 125 feet.

The term "Plan Dimensions" is defined in Planning Code Section 102 and incapsulates the definition of "Length" and "Diagonal Dimension" as they are used for measuring bulk:

> "*Plan Dimensions*. *The linear horizontal dimensions of a building or structure, at a given level, between the outside surfaces of its exterior walls. The "length" of a building or structure is the greatest plan dimension parallel to an exterior wall or walls and is equivalent to the horizontal dimension of the corresponding elevation of the building or structure at that level. The "diagonal dimension" of a building or structure is the plan dimension between the two most separated points on the exterior walls.*"

It's clear that all the language in the Code references the bulk control applying to a single building. A single building's mass is limited to the dimensions in the relevant bulk district. As stated, the bulk controls apply with the exterior walls of a building or structure, and within that single building or structure, the controls represent the maximum building mass permitted.

Using the "A" bulk district again as an example, it is logical that having one building with two adjacent towers above 40 feet in height that are each built to the maximum plan dimensions means the end result is twice the overall building mass above 40 feet than what was intended. There is simply no reference to multiple towers or parts of the same building being able to each have completely separate bulk measurements.

Key Points

The Appellants raise three main points as to why they believe the bulk interpretation is incorrect. A response to each point is provided below.

1. The Interpretation Creates a New Bulk Limitation, Unsupported by the Language and Intent of Existing Code. This issue is addressed in the preceding paragraphs, which explain how the interpretation is based heavily on the plain language of the Planning Code. There is no "appeal to ignorance" logical fallacy because the context of the interpretation is in relation to a maximum building control. When a regulation sets a maximum, there is no need to find additional language to support the fact that the maximum may not be exceeded. Additionally, regulations often include caveats, waivers, and other exceptions that represent the only intended circumstances in which such maximums are intended to be exceeded. In this case, the Code provides a clear maximum dimension for buildings above a certain height and a clear method for how to take that single measurement.

   The Appellant raises the fact that there are specific bulk districts that reference and provide tower spacing controls in a manner that supports multiple towers and/or portions of buildings above their

bulk height, and that is correct. It is important to note that the interpretation specifically references Planning Code subsection 270(a), which provides the standard bulk controls. The interpretation also states that "unless specified elsewhere in the Planning Code [emphasis added], the maximum Plan Dimensions per specific bulk limits apply within the exterior walls of each individual building or structure, such that a single building may not have multiple vertical elements (i.e., towers, etc.) that collectively exceed the maximum permitted Plan Dimensions."

There are indeed certain bulk districts and Special Use Districts (SUDs) that provide very specific and detailed bulk and/or mass reduction provisions, as well as tower separation requirements (e.g., S, S-2, Central SoMa, etc.). In fact, numerous bulk districts listed in Table 270 do not list any specific limits but instead refer to other Code sections entirely for the more detailed controls. Importantly, those tower separation requirements are absolutely necessary to ensure that there is adequate spacing of towers above certain heights to maintain the intent and spirit of the bulk controls. The fact that the standard bulk controls listed in Code Section 270(a) and Table 270 do not include tower separation requirements, but other more detailed bulk controls do, signal that the standard bulk controls were not intended for a multiple tower context.

Finally, it's also important to note that the bulk controls apply to individual buildings, and not to individual development lots. Therefore, if a development project proposes two or more buildings on a single development lot, then each building would be subject to their own separate bulk controls.

2. The Interpretation Disregards Precedent Application of Planning Bulk Code. It is not uncommon that past projects may be found that do not comply with an issued interpretation. In fact, interpretations are often needed precisely because there has been inconsistent implementation over time. Such is the case

for the bulk interpretation. As the Appellant states in their brief, the projects they list is not exhaustive, and no comprehensive historical analysis has been conducted related to this interpretation. However, it is important to note that almost every example project listed by Appellant falls within a bulk district and/or SUD that provides specific controls for a multiple tower context. One example project received a bulk exception from the Planning Commission, and another project's second building portion is only slightly above its bulk limit.

3. The Interpretation Violates State Law. It is important to note that any dispute regarding the City's or ZA's compliance with State law would ultimately be adjudicated in the courts, and the ZA does not interpret State law. However, it may be helpful for the Board to have additional context related to the Appellant's claim.

   In 2020, the state legislature adopted Senate Bill 330 (SB 330), later amended in 2022's Senate Bill 8 ("SB 8"), known as "the Housing Crisis Act" which, among other things, prohibits cities and counties from adopting any zoning controls that would "reduce the intensity of land use" below that which was allowed on January 1, 2018. (Gov't Code § 66300(b)(1)(A).) The prohibition includes legislation that would reduce "height, density, floor area ratio, require new or increased open space, lot size, or setback requirements," or "any other action that would individually or cumulatively reduce the site's residential development capacity," frequently called "downzoning." (Id.)

   The ZA's determination here is not a downzoning under the terms of SB 330. Contrary to Appellant's arguments, the interpretation does not change the standards for bulk controls, but merely clarifies the standard bulk controls that have been in place since before January 1, 2018. Indeed, almost none of the examples presented by the Appellants of projects that "could no longer be approved" would be

impacted by the interpretation because they are located in bulk districts and/or SUDs that provide for multi-tower scenarios.

Likewise, the interpretation is not a downzoning because the interpretation does not reduce the residential development capacity of any parcel as compared to the capacity assumed in the recently adopted Housing Element Update. The Housing Crisis Act defines "reducing the intensity of land use" as "reducing the site's residential development capacity," but does not define "capacity." However "capacity" is a term frequently used in the Housing Element context, and should be interpreted similarly in the SB 330 context. Housing Element law requires jurisdictions to have adequate "capacity" to meet their Regional Housing Need Allocation and requires jurisdictions to analyze the potential capacity on a parcel-by-parcel basis. There is no indication that San Francisco's residential capacity for the recently adopted Housing Element Update assumed multi-tower buildings in bulk districts that do not specifically provide for such context. Therefore, as a practical matter the interpretation would not result in a "net loss" of residential capacity as compared to the capacity calculation in the Housing Element Update. Therefore, the interpretation is not be considered a downzoning.

Conclusion

To conclude, the Zoning Administrator did not err or abuse their discretion by making the bulk interpretation in question. The interpretation was based on the clear intent of the bulk controls pursuant to the General Plan, the plain language of the Planning Code, the relationship of the standard bulk controls with those controls found in more specific bulk districts and/or SUDs that plan for a multi-tower context, and a good faith understanding of State law. As with any Planning Code provision that requires interpretation by the Zoning Administrator, future legislation from the Board of Supervisors may be helpful to clarify the intent and technical

details related to the standard bulk controls in the future, and the Department is happy to participate in and contribute to that process.

In light of the information provided in the interpretation and this brief, the Department respectfully requests that the Board of Appeals uphold the Zoning Administrator's determination and deny the appeal.

cc: Melinda Sarjapur (Appellant)
Austin Yang, Deputy City Attorney

Enclosures: Exhibit A – Planning Code Table 270

EXHIBIT A

TABLE 270 BULK LIMITS			
District Symbol on Zoning Map	*Height Above Which Maximum Dimensions Apply (in feet)*	*Maximum Plan Dimensions (in feet)*	
		Length	*Diagonal Dimension*

TABLE 270 BULK LIMITS			
District Symbol on Zoning Map	*Height Above Which Maximum Dimensions Apply (in feet)*	*Maximum Plan Dimensions (in feet)*	
		Length	*Diagonal Dimension*

A	40	110	125
B	50	110	125
C	80	110	125
D	40	110	140
E	65	110	140
F	80	110	140
G	80	170	200
H	100	170	200
I	150	170	200
J	40	250	300
K	60	250	300
L	80	250	300
M	100	250	300
N	40	50	100
R	This table not applicable. But see Section 270(e).		
R-2	This table not applicable. But see Section 270(f).		
V		110	140
V	* At setback height established pursuant to Section 253.2.		
OS	See Section 290.		
S	This table not applicable. But see Section 270(d).		
S-2	This table not applicable. But see Section 270(d).		
T	At setback height established pursuant to Section 132.2, but no higher than 80 feet.	110	125
X	This table not applicable. But see Section 260(a)(3).		
TB	This table not applicable. But see Section 263.18.		
CP	This table not applicable. But see Section 263.24.		
HP	This table not applicable. But see Section 263.25.		
PM	This table not applicable. But see Section 249.64 Parkmerced Special Use District.		
TI	This table not applicable. But see Section 263.26.		
EP	This table not applicable. But see Section 263.27.		
CS	This table not applicable. But see Section 270(h).		

PUBLIC COMMENT

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SAN FRANCISCO BOARD OF APPEALS

2700 SLOAT HOLDINGS, LLC, Appellant, v. SAN FRANCISCO ZONING ADMINISTRATOR Respondent.	ZA Interpretation Code §§ 102 & 270 Appeal No. 23-016 **BRIEF IN SUPPORT OF APPEAL** Date: May 10, 2023 Time: 5:00 p.m.

I. INTRODUCTION

Our office represents Yes In My Back Yard Law (YIMBY Law), a California nonprofit, and Sonja Trauss in her individual capacity. YIMBY Law's mission is to increase the accessibility and affordability of housing in California by enforcing state housing laws and by advocating for increased access to housing for households of all income levels. This appeal is regarding the San Francisco Zoning Administrator (ZA) interpretation of Planning Code Sections 102 and 270, related to the calculation of the code's bulk limitations. Specifically, the ZA interpreted that bulk limits for projects with multiple towers that are connected by a common base should be calculated from the exterior walls of all towers collectively, rather than calculating the bulk of each tower individually. In other words, the ZA interpretation would count the empty air space between towers as bulk.

The ZA interpretation restricts the ability of a developer to build multiple towers, and as a result reduces the intensity of land use in violation of the Housing Crisis Act (HCA). Moreover, the

fact that the ZA issued an interpretation of the Code's bulk limitation at all confirms that the code's bulk limitations are subjective. The Housing Accountability Act (HAA) prohibits the City from disapproving a housing development project based on subjective code standards; moreover the state Density Bonus Law (DBL) requires the City to calculate "base density" solely on objective code standards. If the City attempts to utilize the ZA's subjective bulk interpretation of the code's subjective bulk requirement to disapprove future housing projects (or reject an applicant's base density study), the City will be in violation of state law. In fact, the ZA's bulk interpretation was issued specifically to reject the "base density" study for the proposed project at 2700 Sloat Boulevard in violation of state law. If the City wishes to impose an objective bulk standard, the City must adopt such standards through the Planning Code amendment process.

The ZA bulk interpretation reduces the intensity of land use in violation of the HCA and reliance on this interpretation will lead to additional state law violations. Our clients therefore respectfully request that the Board disapprove and rescind the subject interpretation.

II. ARGUMENT

1. The ZA Bulk Interpretation Violates the Housing Crisis Act.

In response to the statewide housing emergency, the Legislature enacted the HCA to place significant limitations on the ability of local governments to implement any new development policy, standard, or condition that would "reduce the intensity of land use" on any parcel where residential uses are allowed. The HCA defines "reduce the intensity of land use" as "reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or ***any other action that would individually or cumulatively reduce the site's residential development capacity.***" (Gov. Code § 66300(b)(1)(A).)

The HCA's broad definition of "reduce the intensity of land use" includes *any* reduction or constraint on the space available on a parcel where housing could potentially be built. In other words, the goal of the HCA is to provide *more* flexibility and make *more* room for housing on every parcel, and explicitly prohibits any new standard that would restrict the space where housing could be built. Reducing the intensity of land use is *only* permissible if a city "concurrently changes the

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development standards, policies, and conditions applicable to other parcels within the jurisdiction to ensure that there is no net loss in residential capacity." (Gov. Code § 66300(i)(1).)

Here, the ZA bulk interpretation reduces the intensity of land use by limiting design flexibility and reducing the area of a lot where residential uses could be constructed. For example, if bulk were calculated individually by tower, one tower could occupy the northeast corner of a lot and another tower could occupy the southwest corner of a lot. If bulk were calculated cumulatively, bulk limitations would force a developer to restrict all residential uses to one area of the lot. Due to other code requirements, such as dwelling unit exposure and open space requirements, forcing all residential uses into one tower and one area of a lot limits the number of units that could be constructed. This type of constraint reduces the intensity of land use and is precisely the type of restriction that is prohibited by the HCA. The ZA bulk interpretation was not issued concurrently with other changes to ensure that there is no net loss in residential capacity, and therefore the interpretation violated the HCA.

The HCA states that any new development policy, standard, or condition that does not comply with its provisions "shall be deemed void." (Gov. Code § 66300(b)(2). The ZA bulk interpretation is void per state law, and the Board must therefore disapprove and rescind the interpretation.

2. The ZA Bulk Interpretation Will Lead to State Law Violations.

The HAA requires a local agency to approve housing development projects that comply with applicable, *objective* general plan, zoning, and subdivision standards and criteria, unless the agency makes written findings that the housing development project would have a specific, adverse impact upon the public health or safety. (Gov. Code § 65589.5(j)(1).) The HAA defines "objective" to mean "involving *no personal or subjective judgment by a public official* and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official." In contrast, a standard is subjective when it can be "treated as one of design choice" and "there is no clear answer to [an] interpretive question." (*Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo ("CaRLA")* (2021) 68 Cal.App.5th 820, 841.)

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The ZA bulk interpretation states that the Planning Code "provides no guidance" regarding how to calculate bulk for projects with multiple towers. The interpretation argues that the ZA was therefore forced to answer an interpretive question for which there was no clear answer, and one which boils down to a design choice. Not only is this factually incorrect, as multiple code sections explicitly allow bulk to be calculated separately for different building elements,[1] but the interpretation explicitly acknowledges that the ZA made a subjective choice that bulk should be calculated collectively rather than by individual tower. The problem, however, is that this personal judgment by the ZA confirms that the code's bulk limitations as currently written are subjective. Objective standards require *no subjective judgment by a public official*, and the code's bulk limitations clearly fail that test.

The ZA bulk interpretation cannot be utilized to transform a subjective code requirement into an objective requirement. Even where an agency interpretation of its own code can be utilized to resolve discrete ambiguities, courts only give deference to "long-standing and consistent" interpretations. (*CaRLA, supra,* 68 Cal.App.5th at 843.) Here, the ZA's bulk interpretation is neither long-standing nor consistent. As the Appellant has demonstrated, the City has approved multiple projects where bulk was not calculated consistent with the ZA's new interpretation, including the 1634 Pine Street project where bulk was calculated by individual tower, and 50 First Street, where bulk was calculated separately for upper and lower towers. Even if a ZA interpretation could be utilized to resolve code ambiguities, a *new* interpretation that is *inconsistent* with prior City precedent holds no legal weight. If the City were to attempt to disapprove a housing development project based on the code's subjective bulk limitation by relying on this ZA interpretation, such a disapproval would run afoul of the HAA.

Similarly, the DBL grants housing development projects that provide a certain percentage of units as affordable a density increase over the "maximum allowable gross residential density." (Gov. Code § 65915(f).) For projects where density is not calculated on a units-per-acre basis, the DBL states that "maximum allowable gross residential density" shall be calculated by estimating the development capacity "based on the *objective development standards* applicable to the project, including, but not

[1] See, for example, Planning Code § 132.1(c) and 270(d) in the "S" and "S-2" bulk districts that expressly allow multiple towers, and Planning Code § 270(e) in the Rincon Hill and South Beach DTR Districts that allow upper and lower portions of towers to be calculated separately.

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limited to, floor area ratio, site coverage, maximum building height and number of stories, building setbacks and stepbacks, public and private open space requirements, minimum percentage or square footage of any nonresidential component, and parking requirements." (*Id. at* § (o)(6)(A).) The DBL further states that a "developer may provide a base density study and the *local agency shall accept it*, provided that it includes all applicable objective development standards."

The ZA bulk interpretation was submitted in connection with the proposed housing development project at 2700 Sloat Boulevard, a project that utilizes the state DBL. The developer provided a base density study that calculated bulk on an individual tower basis. Rather than accept the base density study as required by the DBL, the Planning Department made a subjective judgment to reject the base density study solely due to purported noncompliance with the code's subjective bulk limitation. To reinforce and give weight to the Planning Department's subjective judgment, the ZA issued this interpretation regarding how to calculate bulk for projects with multiple towers. However, as explained above, the fact that the ZA issued this interpretation merely confirms that the code's bulk limitation is, in fact, subjective, and that the Planning Department's rejection of the 2700 Sloat Boulevard base density study was in violation of state law.

Furthermore, the ZA bulk interpretation must be disapproved and rescinded because utilizing this ZA interpretation will inevitably lead to additional state law violations in the future (including if the ZA bulk interpretation is utilized to disapprove the project at 2700 Sloat Boulevard). State law does not prevent the City from enacting new *objective* standards, but such standards must be enacted through the legislative process in compliance with the HCA and other state laws.

III. CONCLUSION

The ZA bulk interpretation reduces the intensity of land use in violation of the HCA and reliance on this interpretation will lead to future state law violations. Our clients therefore respectfully request that the Board disapprove and rescind the ZA bulk interpretation.

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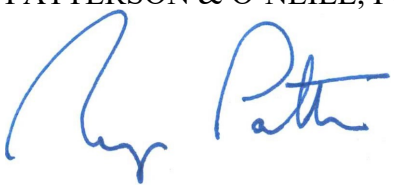
Dated: May 4, 2023

Respectfully submitted,

PATTERSON & O'NEILL, PC



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SAN FRANCISCO BOARD OF APPEALS

2700 SLOAT HOLDINGS, LLC,

Appellant,

v.

SAN FRANCISCO ZONING ADMINISTRATOR

Respondent.

ZA Interpretation Code §§ 102 & 270
Appeal No. 23-016

SUPPLEMENTAL BRIEF IN SUPPORT OF APPEAL (CEQA)

Date: May 17, 2023
Time: 5:00 p.m.

Our office represents Yes In My Back Yard Law (YIMBY Law), a California nonprofit, and Sonja Trauss in her individual capacity. We submit these comments in support of the appeal as a supplement to our May 4, 2023, public comment brief.

THE PLANNING DEPARTMENT MUST COMPLY WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT BEFORE ADOPTING THE ZA INTERPRETATION.

For the sake of argument, assuming that the ZA Interpretation is authorized to amend the Planning Code and that this interpretation complies with state housing laws (which we dispute), the City must comply with the California Environmental Quality Act ("CEQA") before amending the Planning Code via ZA Interpretation. CEQA defines a project as "[a]n activity directly undertaken by any public agency" that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Res. Code § 21065; CEQA Guidelines § 15378.) "Ordinances passed by cities are clearly activities undertaken by a

public agency and thus potential 'projects' under CEQA." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 171, fn. 7.) Similarly, administrative regulations that may have reasonably foreseeable direct or indirect impacts on the environment also meet the definition of "projects" under CEQA. (*Plastic Pipe and Fittings Ass'n v. California Building Standards Com'n* (2004) 124 Cal. App. 4th 1390, 1413 (adoption of California Plumbing Code regulation subject to CEQA); *see also Inyo Citizens for Better Planning v. Board of Supervisors* (2009) 180 Cal.App.4th 1, 10 (CEQA applicable to general plan amendment redefining a term despite assertion that it merely clarified long-standing existing policy).)

The ZA Interpretation clearly meets the definition of a CEQA project. First, the ZA Interpretation acknowledges that it is intended to operate as a "formal amendment" to interpretations that are published directly within the Planning Code. This particular ZA Interpretation diverges from the City's past interpretation and past practice of applying the relevant Code sections. (*See* Appeal Brief's discussion of prior projects subject to the "Bulk Code.") The ZA Interpretation is thus functionally the same as any other zoning ordinance amendment or regulation that courts have previously deemed to be "projects" under CEQA.

Second, the ZA Interpretation will have a direct impact on the environment, as its very purpose is to change the building form of projects that are subject to the Code sections at issue here. It is also reasonably foreseeable that this "project" will have an adverse impact on the environment, as the ZA Interpretation will require more buildings to be constructed to accommodate the same density that would have otherwise been achievable and allowable under the prior interpretation. This will shift the location of future large housing development projects and their accompanying impacts to public services, traffic patterns, utilities, etc. Constructing multiple buildings will also necessitate additional construction vehicles and equipment that will increase noise, adversely impact air quality, and increase greenhouse gas emissions.

Accordingly, the ZA Interpretation is unmistakably a CEQA project that will have a reasonably foreseeable impact on the environment. Therefore, before the ZA Interpretation may be adopted, the City must first comply with CEQA. Given that CEQA review was not properly completed, the ZA Interpretation was not lawfully adopted and must be disapproved and rescinded.

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Dated: May 17, 2023

Respectfully submitted,

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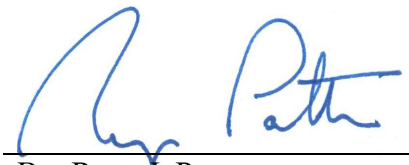

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