

**RESPONSE TO COMMENTS
FINDING OF NO SIGNIFICANT IMPACTS AND NOTICE OF INTENT TO REQUEST
RELEASE OF FUNDS
ENVIRONMENTAL ASSESSMENT FOR HUD FUNDED PROPOSALS
BOOKER T. WASHINGTON COMMUNITY SERVICE CENTER REDEVELOPMENT
PROJECT
800 PRESIDIO AVENUE
SAN FRANCISCO MAYOR'S OFFICE OF HOUSING
May 31, 2012**

A. INTRODUCTION	4
1. Purpose of the Comments and Responses Document	4
2. Duties and Responsibilities of Responsible Entity and Certifying Officer	4
3. Transitional Aged Youth	4
4. Environmental Review Process	5
5. Document Organization	8
6. Project Description	9
7. Distribution	9
B LIST OF COMMENTERS	10
1. Comments on the Finding of No Significant Impact/Notice of Intent to Request Release of Funds Related to Environmental Assessment	10
2. Comments Incorporated By Reference and Directed to the CEQA EIR or to the CEQA challenge	10
C. SUMMARY OF COMMENTS AND RESPONSES	11
1. CONSIDERATION OF IMPACTS	11
2. CONTROVERSY	12
3. CULTURAL RESOURCES	13
Comments – Cultural Resources and Finding of No Significant Impact (FONSI)	13
Comments – Cultural Resources – Treatment under NEPA and CEQA distinguished	15
Comments – Cultural Resources, Correctness of Information sent to SHPO and ACHP	18
Comments – Cultural Resources – Relocation of structure	18
4. DISSEMINATION AND/OR PUBLICATION OF THE FINDINGS OF NO SIGNIFICANT IMPACT	19
Comments – Duty to request comments	19
Comments – Public Comments Incorporated by Reference	1920
5. FINDING OF NO SIGNIFICANT IMPACT	20
FONSI – General	20
FONSI – Sufficiency	21

6. PROJECT DESCRIPTION..... 26

7. LAND DEVELOPMENT – CONFORMANCE WITH COMPREHENSIVE PLANS AND ZONING..... 27

8. LIMITATIONS ON ACTIVITIES PENDING CLEARANCE..... 28

 Comments – Pre-approval..... 28

 Comments - Timeliness 30

 Comment - Alternatives..... 31

9. TRANSPORTATION - PARKING AND TRAFFIC 32

D. COMMENTS INCORPORATED BY REFERENCE AND DIRECTED TO THE CEQA EIR
 33

E. GENERAL RESPONSE TO CEQA LITIGATION DOCUMENTS 33

A. INTRODUCTION

1. Purpose of the Comments and Responses Document

This document contains public comments received on the two separate *Combined Finding of No Significant Impact and Notice of Intent to Request Release of Funds* published, posted and mailed by the Mayor's Office of Housing (MOH) and the responses to those comments for the Booker T. Washington Community Service Center (BTW) Redevelopment Project. This document serves as evidence of MOH's consideration of the comments received and of MOH's responses to those comments. It will be distributed prior to MOH's certification of the EA and before the submission of the Request for Release of Funds (RROF).

2. Duties and Responsibilities of Responsible Entity and Certifying Officer

Responsible entities assume the responsibility for environmental review, decision-making, and action that would otherwise apply to the United States Department of Housing and Urban Development (HUD) under the National Environmental Policy Act (NEPA) and other provisions of law that further the purposes of NEPA, as specified in 24 Code of Federal Regulations §58.5. Responsible entities that receive assistance directly from HUD assume these responsibilities by execution of a grant agreement with HUD and/or a legally binding document such as the certification contained on HUD Form 7015.15, certifying to the assumption of environmental responsibilities. As the recipient of HUD assistance the City and County of San Francisco is the responsible entity for all programs identified at 24 CFR §58.1.

24 CFR §58.2 identifies as the Certifying Officer the official who is authorized to execute the Request for Release of Funds and Certification and has the legal capacity to carry out the responsibilities of a certifying officer per 24 CFR §58.13. The terms of the certification are set forth at 24 CFR §58.71. A responsible entity's certifying officer is the "responsible Federal official" as that term is used in section 102 of NEPA and in statutory provisions cited in 24 CFR §58.1(b). The Certifying Officer is responsible for all the requirements of section 102 of NEPA and the related provisions in 40 CFR parts 1500 through 1508, and 24 CFR part 58, including the related Federal authorities listed in Sec. 58.5.

On June 27, 2011, Mayor Edwin Lee authorized Mr. Olson Lee, Acting Director of the San Francisco Mayor's Office of Housing to act as Certifying Officer for the City and County of San Francisco. Mr. Lee is authorized to and consents to assume the status of a Federal official under the National Environmental Policy Act of 1969 and each provision of law designated in the lists of NEPA related authorities at 24 CFR §§58.5 and 6 insofar as the provisions of these laws apply to HUD responsibilities for environmental review, decision-making and action that have been assumed by the City and County of San Francisco.

3. Transitional Aged Youth

Transition Age Youth (TAY) are young adults, age 18 – 24, who are transitioning from public systems (like foster care) or are at risk of not making a successful transition to adulthood. The City of San Francisco has made new housing for TAY a top priority.

In 2006, Mayor Gavin Newsom established the Mayor's Task Force on Transition Age Youth, which developed a set of policy recommendations to improve outcomes for the City's most vulnerable youth. Stable, affordable housing emerged as a critical need due to the high number of homeless youth in San Francisco. An estimated 1,600 youth at any given time are homeless in San Francisco and there is less than 350 existing units set aside for TAY. TAY SF was established as an oversight body to implement the Task Force recommendations.

The Mayor's Office of Housing convened the "TAY Housing Work Group" to create a plan to meet the housing goals established by the Task Force. The goal of the TAY Housing Plan is to create 400 additional units by 2015, with various housing models. The Plan identifies priority populations that have been significantly underserved, including youth with severe mental illness, parenting youth, and youth exiting the criminal justice system.

The workgroup concluded that there is no "best model" of housing for youth, but a wide range of models is needed for different populations, such as, for example, Low Threshold, Mixed Population, Single Site, and Shared Housing. A key to success for homeless and at-risk youth is the availability of supportive services. The San Francisco Departments of Public Health and Human Services Agency are committed to providing services funding for these new units.

Another critical resource for project feasibility is some type of operating subsidy, since rents affordable to homeless and at-risk youth typically will not cover the operating expenses. Possible sources in San Francisco include THP Plus, McKinney Shelter Plus Care, administered through the Local Homeless Coordinating Board, and if no other subsidies are available, project sponsors may request support from the Local Operating Subsidy Program (LOSP) Supportive housing for TAY is critical to San Francisco's efforts to improve the outcomes of disconnected youth and prevent future homelessness.

MOH issued its first TAY Notice of Funding Availability (NOFA) in 2009, and received six applications for funding under the TAY NOFA. Of these six, three were forwarded to the Loan Committee for approval. They were: Edward II Hotel, Booker T. Washington, and Aarti Residence. These 3 developments will create 88 TAY supportive housing units.

4. Environmental Review Process

BTW and AF Evans, the original development partner, submitted an application in response to the TAY NOFA on Oct. 29, 2009. Because of a pending bankruptcy, AF Evans withdrew from the project and was replaced by John Steward Company with Equity Community Building acting as the developer on behalf of BTW.

The Loan Committee reviewed the application of BTW for initial predevelopment activities (including architecture & engineering, survey, geotech studies, legal, environmental review and project administration) on July 16, 2010 and recommended approval of \$788,484. According to HUD regulations at 24 CFR Part 58, these activities are either exempt or categorically excluded. Exempt activities do not have to comply with the requirements of 24 CFR Part 58. Categorically excluded activities have been determined by HUD to not alter any conditions that would require a review or compliance determination with the authorities cited in 24 CFR §58.5. See response Comments on Limitations on Activities Pending Clearance.

In anticipation of the submission of the application BTW contracted with Tetra Tech, Inc. to conduct an Environmental Assessment for their proposed project in June 2010.

Additionally, BTW has applied for and received several Community Development Block Grants (CDBG) for soft costs related to the proposed build out of the Housing project. These grants were cleared under 24 CFR §58.34(a)(1), (3) and (8) on April 13, 2010 (\$15,000), August 9, 2010 (\$150,000) , and April 28, 2011 (\$75,000). Soft costs include but are not limited to planning, environmental studies, architectural and engineering services. Costs cleared under 24 CFR §58.34 are exempt from environmental review and may be disbursed and expended upon documentation of the exempt nature of the activity by the Responsible entity.

40 CFR §1501.3(a) directs agencies to prepare an environmental assessment (Sec. 1508.9) when necessary under the procedures adopted by an individual agency to supplement Council on Environmental Quality (CEQ) regulations. The Mayor's Office of Housing, as the responsible entity for programs subject to 24 CFR Part 58, prepared an EA for the Booker T. Washington Community Service Center Redevelopment Project (BTW Project) using the HUD recommended format. The EA was prepared in accordance with HUD guidelines and in compliance with the standards articulated in 24 CFR §§58.40(a) through (f) as well as CEQ Regulations.

24 CFR §58.40 requires the responsible entity to ensure the following elements are considered when preparing the EA:

- (a) Determine existing conditions and describe the character, features and resources of the project area and its surroundings; identify the trends that are likely to continue in the absence of the project.
- (b) Identify all potential environmental impacts, whether beneficial or adverse, and the conditions that would change as a result of the project.
- (c) Identify, analyze and evaluate all impacts to determine the significance of their effects on the human environment and whether the project will require further compliance under related laws and authorities cited in §58.5 and §58.6.
- (d) Examine and recommend feasible ways in which the project or external factors relating to the project could be modified in order to eliminate or minimize adverse environmental impacts.
- (e) Examine alternatives to the project itself, if appropriate, including the alternative of no action.
- (f) Complete all environmental review requirements necessary for the project's compliance with applicable authorities cited in §§58.5 and 58.6.

After preparing the EA in accordance with the Section 40 and CEQ standards, the MOH, in accordance with 24 CFR §58.43(g), made a finding that the project was not an action that would result in a significant impact on the quality of the human environment and proceeded as required by Part 58 to dissemination of the finding as required by 24 CFR §58.43. As permitted

by 24 CFR §58.43, the Mayor's Office of Housing disseminated the Finding of No Significant Impact (FONSI) at the same time it disseminated the Notice of Intent to Request Release of Funds as required by 24 CFR §58.70. The combined notice was published by the Mayor's Office of Housing on August 14, 2011 in the San Francisco Examiner; it was also posted in the window on the western façade of the existing facility at 800 Presidio Avenue and mailed on August 12, 2011 to more than the 400 addresses of residences and businesses in the neighborhood.

The comment period for the FONSI and Notice of Intent to Request Release of Funds (NOIRROF) ended on September 14, 2011. The Director of the Mayor's Office of Housing as Certifying Officer held the public comment period open for 32 days, two days in excess of number of days required by 24 CFR§58.46. This was to ensure that the intent expressed in 24 CFR §58.46, *Time delays for exceptional circumstances*, was met. §58.46(a) requires the Responsible Entity make the FONSI available for public comment for 30 days before the recipient files a Request for Release of Funds (RROF) when there is considerable interest or controversy concerning the project.

During the 32 day comment period, the Mayor's Office of Housing received written comments from the Law Offices of Stephen Williams by email on September 14, 2011 at 4:01 pm. In addition to his comments on the FONSI/NOIRROF, Mr. Williams' email included comments submitted to the San Francisco Planning Department on August 10, 2010 on the Draft Environmental Impact Report (EIR) prepared by the Planning Department for the project under the California Environmental Quality Act (CEQA). Mr. William also included in his email the Verified Petition for a Writ of Mandamus and the Notice of Appeal filed in the action *Neighbors for Fair Planning v. City and County of San Francisco, et al.* (San Francisco Superior Court Case No. 11 511499) for a Writ of Administrative Mandamus under (CEQA). The Comments on the EIR, the Notice of Appeal and the Petition for a Writ of Mandamus were incorporated by reference by Mr. Williams into his comments on the FONSI/NOIRROF. The Mayor's Office of Housing also received a written comment from Michael Sesich on August 17, 2011 by mail.

The FONSI of August 14, 2011 failed to inform the public that the combined notice was intended to meet two separate procedural requirements and to advise the public to specify in their comments which "notice" their comments addressed, as required by the operative regulation at 24 CFR §58.43(b). A second error in the August FONSI, stated that both the City and HUD had determined that the project would not have a significant impact on the environment, whereas in fact, this determination was made by the City and not by HUD.

Because of the errors in the August FONSI, the Mayor's Office of Housing disseminated the FONSI a second time on November 1, 2011 at the same time it disseminated the NOIRROF as required by 24 CFR §58.70. The combined notice was published by the Mayor's Office of Housing on November 1, 2011 in the San Francisco Examiner; it was also posted on the wall on the northern façade of the existing facility at 800 Presidio Avenue and mailed on November 1, 2011 to more than the 400 addresses of residences and businesses in the neighborhood.

The revised FONSI was held open for comment until December 1, 2011 a period of 31 days. The Mayor's Office of Housing received written comments from Joyce Lively on November 30, 2011 by email and from Brent Lewellen on November 18 by mail. Additionally, HUD forwarded the objection letter filed with their office prematurely by Roger Miles and which is included here as a comment.

The project has not been changed as a result of the consideration of the comments received for the two FONSI/NOIRROF. Nor has the Environmental Assessment document been changed as a result of the consideration of the comments.

5. Document Organization

Following this introduction, Section B contains a list of all persons and organizations who submitted written comments on the Combined FONSI/NOIRROFs. The comments received are reproduced in Appendix One.

Section C summarizes the comments received on the EA and provides our responses.

Comments on the Draft EIR, which were incorporated by reference by Mr. Williams are addressed in Section D. As the Planning Department has previously responded to those comments, we have attached their Comment and Response document prepared by that Department and hereby incorporate them by reference into this Comment and Response document in so far as they relate to the Environmental Assessment for which a FONSI/NOIRROF was issued by this office. An Environmental Assessment prepared under 24 Part 58 is to be executed in compliance with the standards identified by HUD and the Council on Environmental Quality as well as those of the National Environmental Policy Act and not in accordance with the multitude of laws of the various states, including those of California. Insofar as an EIR executed under the California Environmental Quality Act is consistent with the Federal Standards those elements commented upon in the EIR and incorporated by reference will be considered as relevant. Additionally, insofar as Part 58 directs compliance with local and state laws, those requirements are addressed in the EA and when commented upon are addressed herein.

Mr. Williams as counsel for Neighbors For Fair Planning also incorporated by reference the various pleadings in their action contesting the EIR including the Verified Petition for Writ of Mandamus, Writ of Administrative Mandamus Under the CEQA, Superior Court Case Number 11-511499 (*Neighbors for Fair Planning v. CCSF*), and the Notice of Appeal of Certification of Final EIR. Due to the pending litigation, a written response to these pleadings will not be made here and is being addressed in the pending litigation. These pleadings are reproduced in Section E.

The San Francisco Superior Court, Hon. Teri L. Jackson presiding, held a hearing on the Petition for Writ of Mandate on March 12, 2012. On April 9, 2012, the Court issued an Order and Statement of Decision denying the Petition for Writ of Mandate and upholding the City's environmental review process under CEQA and a corresponding challenge that the Project did not comply with the City's General Plan. The Order and Statement of decision are attached. Petitioners Neighbors for Fair Planning are challenging the Statement of Decision. On Friday, May 25, the Court denied Petitioners' objections to the Statement of Decision.

Some comments were directed towards the merits of the proposed project. No responses are provided to these comments, unless they concern the adequacy or accuracy of the EA.

As is discussed in subsequent sections of this volume, this Comments and Responses document does not provide significant new information and a reevaluation of the FONSI/NOI is not

required per 24 CFR §58.47, Re-evaluation of environmental assessments and other environmental findings.

6. Project Description

The proposed project will include the demolition of the existing Booker T. Washington Community Center and the construction of a community center encompassing 20,726 square feet and 50 units of housing encompassing 32,021 square feet. The new community center will include 13,220 square feet of program space and a 7,506-square-foot gymnasium. The community center component would be 43.5 feet high. The new housing will be comprised of 50 units totaling 32,021 square-feet, which includes a basement-level garage for 21 vehicles and a child care center. The residential component would be 55 feet high. Twenty-four of the housing units will be for TAY, with the balance of the units for individuals earning up to 60 percent of the area medium income (AMI) and two manager's units. The project site is on the corner of Presidio Avenue and Sutter Street, on the block bounded by Presidio Avenue to the west, Sutter Street to the north, Lyon Street to the east, and Post Street to the south. The site comprises a single parcel at 800 Presidio Avenue (Block 1073 Lot 013).

7. Distribution

This Comments and Responses document will be distributed to the United States Department of Housing and Urban Development (HUD), the San Francisco Planning Department, and agencies and persons who commented directly on the Combined Notice. This document is also posted on the Mayor's Office of Housing Website at <http://sf-moh.org/index.aspx?page=155> and is available for copying and reading at the reception desk of the Mayor's Office of Housing at 1 South Van Ness Avenue, 5th Floor, San Francisco, CA 94103 from 9:30 am to 4:30 pm Monday through Friday beginning June 4, 2012.

B LIST OF COMMENTERS

1. Comments on the Finding of No Significant Impact/Notice of Intent to Request Release of Funds Related to Environmental Assessment

Person/Agency and Signatory	Date	Via
Michael Sesich	08/17/2011	Mail
Stephen M. Williams	09/14/2011	Attachment to Email
Roger Miles – to HUD	10/23/2011	Forwarded
Brent Lewellen	11/18/2011	Mail
Joyce Lively	11/30/2011	Email

2. Comments Incorporated By Reference and Directed to the CEQA EIR or to the CEQA challenge

Person/Agency and Signatory	Document Type	Date	Via
Stephen Williams for Neighbors For Fair Planning	Verified Petition for Writ of Mandamus, Writ of Administrative Mandamus Under the California Environmental Quality Act	Sept. 14, 2011	Attachment to Email
Stephen Williams for Neighbors For Fair Planning	Notice of Appeal of Certification of Final EIR	Sept. 14, 2011	Attachment to Email
Stephen Williams for Neighbors For Fair Planning	800 Presidio Draft EIR Comments	Sept. 14, 2011	Attachment to Email

C. SUMMARY OF COMMENTS AND RESPONSES

1. CONSIDERATION OF IMPACTS

Comments

"We feel the City wants these housing units and is pushing ahead with the project without considering the impact the changes in the structure and its use will have on the immediate neighbors." Michael Sesich, Letter, August 17, 2011

Response

The EA adequately discussed the impacts on the environment from the activities related to the development and future use of the project.

In accordance with 24 CFR 58.40, MOH:

- Identified all potential environmental impacts, whether beneficial or adverse, and the conditions that would change as a result of the project;
- Identified, analyzed and evaluated all impacts to determine the significance of their effects on the human environment and whether the project would require further compliance under the related laws and authorities cited in Sections 58.5 and 58.6;
- Examined and recommended feasible ways in which the project or external factors relating to the project could be modified in order to eliminate or minimize adverse environmental impacts;
- Examined alternatives to the project, where appropriate, including the alternative of no action.

Potential project impacts relative to the intensification of land uses, the proposed building's relative size as compared to the surrounding structures, and other characteristics of the proposed project are fully discussed under 49 separate topics in the EA as required by 24 CFR Part 58 and other HUD standards. Mitigation measures were identified to reduce potential impacts to historical architectural and archeological resources; measures were identified to reduce any potential impacts related to soil suitability, and mitigation measures were identified for the potential impacts of construction on vegetation and wildlife.

A determination was made for each statute, executive order and regulation identified in the statutory checklist and cited in 24 CFR §§58.5 and .6. Appropriate source documentation was provided for each authority. Consistency and compliance documentation was provided and mitigation measures were identified, where appropriate, for:

- Historic Preservation [36 CFR 800],
- Floodplain Management [24 CFR 55, Executive Order 11988],
- Wetlands Protection [Executive Order 11990],
- Coastal Zone Management Act [Sections 307(c),(d)],
- Sole Source Aquifers [40 CFR 149],

- Endangered Species Act [50 CFR 402],
- Wild And Scenic, Rivers Act [Sections 7 (B), (C)],
- Air Quality [Clean Air Act, Sections 176 (C) and (D), and 40 CFR 6, 51, 93],
- Farmland Protection Policy Act [7 CFR 658],
- Environmental Justice [Executive Order 12898],

Additionally, determination of compliance with HUD Environmental Standards was made for authorities relating to

- Noise Abatement and Control [24 CFR 51 B],
- Toxic/Hazardous/Radioactive Materials, Contamination, Chemicals or Gases [24 CFR 58.5(i)(2)],
- Siting of HUD-Assisted Projects near Hazardous Operations [24 CFR 51 C],
- Airport Clear Zones and Accident Potential Zones [24 CFR 51 D],

An evaluation of the significance of the effects of the proposal on the character, features and resources of the project area was made in the EA Checklist (EAC). As noted in the EA, Existing Conditions and Trends and Environmental Assessment sections, the project site is located in a mixed use area that includes residential, public, commercial and retail uses. These evaluations are supported by relevant base data and verifiable source documentation. An impact code was assigned to each element of the EAC in accordance with Environmental Review Guide HUD CPD 782, 24 CFR 58.40; Ref. 40 CFR 1508.8 &1508.

2. CONTROVERSY

Comments

"As the Mayor's Office of Housing (sic) (MOH) is aware, there is litigation pending to which MOH is a party. The litigation sets forth in detail specific (sic) objections which the surrounding community (sic) has to the environmental review afforded the Booker T. Washington Community Center demolition and redevelopment project at 800 Presidio Avenue, (Project) as well as the conditional use authorization (sic) and special use district "spot zoning" granted for the Project." Stephen Williams, Letter, September 14, 2011.

"Litigation is pending regarding the conditional use authorization and special use district spot zoning." Stephen Williams, Letter, September 14, 2011

"Please note that this development project currently has a lawsuit filed against it, so there cannot be any release of funds". Joyce E. Lively, Letter, December 2, 2011

Response

The Mayor's Office of Housing is performing an environmental review on a proposal for funding. The Environmental Review is not complete until an Authority to Use Grant Funds (AUGF) is issued by HUD. HUD issues an AUGF which follows the submission of a Request for Release of Funds and Environmental Certification (RROF/EC) by the responsible entity to HUD. The RROF/EC certifies to HUD that responsible entity has completed its Part 58 review of the project. Specifically, the responsible entity has assumed responsibility for and complied with and will

continue to comply with, the National Environmental Policy Act of 1969, as amended, and the environmental procedures, permit requirements and statutory obligations of the laws cited in 24 CFR 58.5; and also agrees to comply with the authorities in 24 CFR 58.6 and applicable State and local laws, has issued a FONSI; has published and/or disseminated notices; will inform the recipient of funds of all required mitigating conditions and that the Certifying Officer assumes NEPA responsibilities and accepts jurisdiction of the federal courts. MOH has not yet submitted a RROF/EC to HUD and will not do so until after this response to comments is made available to the public. Neither Council on Environmental Quality (CEQ) nor HUD regulations require a responsible entity to delay the submission of a RROF/EC for an Environmental Review until a challenge under state law has been heard.

In response to the perceived controversy regarding the proposal and in accordance with 24 CFR §58.46 (Time delays for exceptions circumstances), MOH has held each comment period open in excess of 30 days.

3. CULTURAL RESOURCES

Comments – Cultural Resources and Finding of No Significant Impact (FONSI)

"The Notice of Intent to Request Release of Funds is incorrect regarding no significant impact from the proposed project, particularly regarding demolition of a building found to be eligible for both the California Register of Historic Resources and the National Register of Historic Places." Stephen Williams, Letter, September 14, 2011.

Response

The EA concluded that, with mitigations, the proposed undertaking, including the proposed demolition would not have a significant impact on the environment, as adverse effects to historic resources would be mitigated. This impact finding was made based on environmental analysis conducted in accordance with the HUD NEPA regulations, 24 Code of Federal Regulations (CFR) Part 58. This finding that the project would not have a adverse effect on cultural resources under federal law was made in accordance with federal standards, and the analysis followed the required procedures identified in both the applicable programmatic agreements and the Advisory Council on Historic Preservation's (ACHP) regulations, 36 CFR Part 800.

NEPA and the National Historic Preservation Act (NHPS) allow certified local government agencies to enter into programmatic agreements with federal agencies and the state historic preservation officer (SHPO) to address the potential effects on historic resources that may result from a particular program or series of undertakings. A programmatic agreement is a contract that records the terms and conditions agreed upon to resolve the potential adverse effects of a Federal agency program, complex undertaking or other situations where historic resources may be adversely affected in accordance with federal environmental requirements. (See 36 CFR §§800.14(b) and 800.16(t).) Agreement upon the terms of a programmatic agreement is evidence of an agency's compliance with the National Historic Preservation Act.

The ACHP's regulations allow agency officials (here MOH Certifying Officer) to negotiate a programmatic agreement to govern the implementation of a particular program or the

resolution of adverse effects from certain complex project situations or multiple undertakings. (36 CFR 800.14(b).) These programmatic agreements may be used when nonfederal parties are delegated major decision making responsibilities as is the case here, where HUD has delegated the major decision making responsibilities in regards to HOME and CDBG funded activities to MOH.

Federal courts have affirmed the validity of Findings of No Significant Impact issued by a Certifying Officer based upon Programmatic Agreements entered into in accordance with 36 CFR 800. In *Knowles v. United States Coast Guard*, 44 ERC (BNA) 2070, the Court held that the Coast Guard complied with NEPA and the NHPA when it negotiated with the Advisory Council on Historic Preservation prior to issuance of the FONSI; and the coast guard complied with NEPA's notice requirement where it published notice of the availability of the EA and invited comments concerning the EA. In *Lesser v. City of Cape May*, 110 F. Supp. 2d 303 (D.N.J. 2000), the court held that a federal agency may negotiate programmatic agreements "to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." These programmatic agreements are used in lieu of case-by-case individual Section 106 review process. In *Advocates for Transportation Alternatives, Inc. v. U.S. Army Corps of Engineers*, 453 F. Supp. 2d 289, 313 (D. Mass. 2006), the court held that adequate consultation was evidenced by a programmatic agreement requiring various mitigation measures that were incorporated as required conditions into the Corps permit.

In 2007, the City entered into a programmatic agreement to address the potential adverse effects to historic or cultural resources that could result from MOH's implementation of certain federal programs. (*Programmatic Agreement by and among the City and County of San Francisco, the California State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Historic Properties Affected by Use of Revenue from the Department of Housing and Urban Development Part 58 Programs* (2007 PA).) The 2007 PA sets forth certain procedures for consultation and mitigation when proposed projects, such as the one here, may adversely affect historic or cultural resources.

For this project, when consulted by MOH under the terms of the 2007 PA, the Advisory Council on Historic Preservation (ACHP) advised MOH that—in accordance with *Appendix A, Criteria for Council Involvement in Reviewing Individual Section 106 Cases*, of its regulations—"Protection of Historic Properties" did not apply to this undertaking. (36 CFR Part 800.) As stated in ACHP's letter dated March 29, 2011, "we do not believe that our participation in the consultation to resolve adverse effects is needed". Subsequently ACHP confirmed the completion of the Section 106 consultation process upon receipt of the signed MOA from the MOH in September of 2011.

Here, the effects resulting from the proposed demolition of the historic building, which was determined to be eligible for listing on the National Register solely on the basis of association with local events and not for any significant architectural features, were adequately addressed through the City's compliance with the requirements of the 2007 PA. Because the ACHP determined its involvement was not necessary to mitigate this proposed project's effects to cultural resources, the City entered into a project-specific programmatic agreement with the SHPO on July 6, 2011 (BTW PA). The BTW PA sets out detailed mitigation and resolution measures, including documentation and recordation of the historic building according to the Historic American Buildings Survey (HABS) standards which reduce the proposed undertaking's

adverse effects in accordance with 36 CFR PART 800 - Protection of Historic Properties. Hence, a FONSI is appropriate for this undertaking.

Comments – Cultural Resources – Treatment under NEPA and CEQA distinguished

"In particular I call your attention to the fact that the Notice of Intent to Request Release of Funds circulated to the entire community is incorrect in its assertions that, "The City and County of San Francisco and the Department of Housing & Urban Development, Office of Community Planning and Development have determined that the project will have no significant (sic) impact on the human environment." This announcement (sic) to the community is patently and knowingly false. As MOH is aware, the City and County of San Francisco through its Planning Department undertook an Environmental Impact Report on this same Project and specifically determined that the Project would have significant and unavoidable negative environmental impacts to cultural and historic resources which cannot be mitigated to less than significant. The building was found to be eligible for listing on both the California Register of Historic Resources and the National Register of Historic (sic) Resources. In the final EIR, the City of San Francisco issued a Statement of Overriding Considerations. The Planning Department's findings under the National Historic Preservation Act of 1966 are included in the ERR (sic) and the building was determined to possess (sic) integrity at every level. The inclusion of the false information in the public announcement (sic) of a finding of "no significant impact" is not only false, it undermines the entire process.

As detailed in the previous objections and in the Verified Complaint, at no time did any agency consider relocation of the resource as mandated by the state and national environmental review statutes. This is also a fatal flaw in the analysis relied upon by MOH and HUD because this project includes the demolition of a known historic resource and it must comply with Section 106 of the National Historic Preservation Act of 1966 16 U.S.C. 470f. This law applies to all federally funded, assisted, or licensed undertakings, so it is directly applicable to the Project. The refusal by the regulating agencies, Advisory Council Historic Preservation and the California State Historic Preservation Officer to fully participate does not end MOH's or HUD's responsibility for environmental review of this Project. As the sponsoring federal agency, HUD is still responsible for the compliance of the Project with the statutory scheme. Likewise, MOH, as the sponsoring federal agency's designee, also must fully comply with the mandates of the statutes. This has not been accomplished in this instance."

"The National Historic Preservation Act and its implementing regulations codified at 36 CFR Part 800 require federal agencies with jurisdiction over a federal, federally assisted, or federally licensed undertaking to take into account the effects of the agency's actions on properties included in or eligible for the National Register of Historic Places. Prior to approval of the undertaking, the Act requires the agency to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. The California State Historic Preservation Officer coordinates state participation in the implementation of the National Historic Preservation Act and is a key participant in the Section 106 process. The California State Historic Preservation Officer performs the primary review of federally assisted projects and provides guidance to Federal agencies and their designees in carrying out their responsibilities under Section 106 and its associated regulations. National Environmental Policy Act (NEPA) 42 U.S.C. 4321." Stephen Williams, Letter, September 14, 2011

"Although NEPA is a separate authority from Section 106 and CEQA, and is not satisfied simply by complying with NHPA, it is perfectly reasonable for agencies to coordinate studies done and documents prepared under Section 106 and CEQA with those done under NEPA. The ACHP's regulations provide guidance on how the NEPA and Section 106 processes can be coordinated with State processes such as CEQA and set forth the manner in which a Federal agency can use the NEPA process and documentation to comply with Section 106. These processes were not coordinated in this instance and in fact, were specifically undermined and tainted by the actions of MOH." Stephen Williams, Letter, September 14, 2011

Response

As discussed in Section A.4, the City withdrew the FONSI that stated that the finding of no significant impact of August 14, 2011 was made by both HUD and the City and County. This mistake was corrected in the subsequent FONSI of November 1, 2011. However, this mistake did not affect the substantive analysis which resulted in a FONSI. The analysis that led to the FONSI is based upon Federal laws and regulations and not the California Environmental Quality Act, which is a state law.

As discussed in the response to the comment regarding Cultural Resources and Finding of No Significant Impact above and in the EA, the City has consulted with the SHPO, and the Advisory Council on Historic Preservation and has executed the 2007 PA with SHPO and the ACHP, which establishes the City's Section 106 responsibilities for the administration of undertakings that may have an effect on historic properties. The City is required to comply with the stipulations set forth in the 2007 PA for all undertakings, such as this project, that: (1) are assisted in whole or in part by revenues from the HUD Programs subject to 24 CFR Part 58; and (2) can result in changes in the character or use of any historic properties that are located in an undertaking's Area of Potential Effect (APE). The proposed project has applied for funds subject to Part 58 and thus is subject to the Stipulations of the PA.

Because the proposed Undertaking involves demolition of a resource that has been determined to be eligible for listing in the National Register, the City determined, in consultation with SHPO, that the Undertaking would have a potentially adverse effect on an historic property.

Paragraph E of Stipulation VIII of the 2007 PA requires that, if demolition of a Historic Property is part of an Undertaking subject to the 2007 PA, the City shall forward documentation to the SHPO explaining the need for demolition, summarizing alternatives considered, discussing future plans for the site, setting forth a mitigation plan, and including comments received from the public.

For this project, the City advised the SHPO, per these requirements, about the project and requested the SHPO to enter into a Standard Mitigation Measure (SMM) in accordance with the 2007 PA. (See letter dated January 12, 2011.) Stipulation IX, Resolution of Adverse Effects, of the 2007 PA requires the City to consult with the SHPO to determine if Historic Properties affected by an Undertaking should be treated in accordance with the SMM set forth in Appendix B of the 2007 PA or if the consultation process set forth in 36 CFR §800.6 should be initiated. In response, the SHPO advised the Mayor's Office of Housing that a SMM Agreement would not be appropriate for this Undertaking. (See letter dated February 22, 2011.) Pursuant to the 2007

PA, the SHPO advised MOH to consult with the ACHP in accordance with 36 CFR §800.6 and the 2007 PA's consultation requirements.

On March 7, 2011, the MOH invited the ACHP to participate in the consultation process to resolve the adverse effects of the proposed undertaking. The ACHP declined to participate in the consultation process, determining that the criteria for ACHP involvement in reviewing individual Section 106 cases did not apply to this project. Although the ACHP determined that its participation in the consultation project was not necessary, it advised MOH that the final project-specific agreement developed in consultation with the SHPO would have to be filed with the ACHP upon completion.

On August 4, 2010, the City's Historic Preservation Commission (HPC) held a public hearing to review and provide feedback on the proposed BTW PA and its proposed mitigation measures designed to resolve the adverse effect of the undertaking on historic and cultural resources. The HPC's recommendations were incorporated into the Environmental Review Records of the undertaking and included as mitigation measures in the BTW PA executed with the SHPO and concurred to by the Project Sponsor.

The BTW PA identifies the mitigation measures necessary to reduce the impacts of the adverse effects of demolishing the BTW building. The PA also includes mitigation measures to address the adverse effects of the project on any potential archaeological properties and the historic architectural property. These mitigation measures include, but are not limited to, preparation of a HABS Level outline, HABS level documentation including photographs of the exterior and significant interior elements, deposition of HABS documentation in repositories, an archaeological testing program, and procedures for dispute resolution. To reduce the adverse effects, the project sponsor will implement the stipulations identified in the BTW PA, as stated under the Conditions for Approval section of the EA. With implementation of these mitigation measures, the SHPO and the City agreed that the project would take into account the effect of the undertaking on archeological and historical architectural resources.

On September 9, 2011, the ACHP acknowledged receipt of the BTW PA for the mitigation of the adverse effects of the undertaking on a historic resource. Accordingly, the ACHP advised the MOH that the requirements of the NHPA and the ACHP's regulations had been met. Because the adverse effect of the undertaking have been resolved for both historical and archeological resources through compliance with the terms of the 2007 PA and the BTW PA, as well as the requirements of federal law, there is no significant impact and thus no Environmental Impact Statement is required.

There is no requirement that the analysis performed under NEPA, the NHPA, or their implementing regulations be entirely consistent with the analysis performed under local environmental laws such as CEQA. As discussed, under federal law, documentation and recordation prior to demolition can be sufficient to mitigate an effect to a historic or cultural resource to a less than significant level, as is the case here, whereas CEQA applies a different standard. NEPA and CEQA are subject to different administrative and regulatory schemes, as well as different interpretive case law. There is no requirement that environmental reviews conducted under these two schemes reach the same conclusions. Thus, the mere fact that the NEPA analysis concluded a FONSI was appropriate, whereas the CEQA analysis concluded that

the impact to historic resources was significant and unavoidable, does not support a conclusion that either review was inadequate.

Comments – Cultural Resources, Correctness of Information sent to SHPO and ACHP

"Further, because the draft EIR had not been corrected and expanded at that point in time, much of the information provided to the State and Federal agencies was incorrect, misleading and intended to favor the approval of the project "as-is."" Stephen Williams, Letter, September 14, 2011

Response

It is assumed that Mr. Williams is referring to the correspondence with the ACHP and the SHPO in this statement. Correspondence with the SHPO and the ACHP regarding the undertaking was neither incorrect nor misleading, nor was it intended to favor approval of the project.

The January 12, 2011 letter to the SHPO was written in compliance with MOH's 2007 PA with the SHPO and ACHP. These letters contain information regarding MOH's role, the historic status of the structure, the need for demolition, constraints on affordable housing in San Francisco, and a description of the proposed project, a discussion of alternatives and proposed mitigations.

Specifically, the letters describe the volume of residential units as 32,996 square feet, the number of parking spaces as 21, the volume of garage space as 6,717 square feet, office space at 2,854 square feet and 8,450 square feet of open space.

The EA, to which the correspondence is directed, describe the total volume of the project as 68,206 square feet, community center and common space volume at 20, 726 square feet and 32, 021 square feet of residential space. The descriptions among the letters and the EA are consistent, hence the information provided to the SHPO and ACHP was correct and not misleading.

While information from the DEIR may have been the original source of project information provided to the SHPO and the ACHP, the information was assessed for consistency with the proposal and the federal Environmental Review Record (ERR) as it was planned at the time of the correspondence.

The information provided to the SHPO and ACHP concerned the status of the building as a historic resource, the need for demolition of the resource, the description of the proposed project, the various alternatives considered in the decision making process, the comments received from the public up to the time the correspondence to the SHPO and ACHP was sent, future plans for the site, and proposed mitigation measures. This comment does not specify what information may have been incorrect, misleading, or intended to favor approval of the project, and thus can not be responded to in greater detail.

Comments – Cultural Resources – Relocation of structure

"None of the alternatives considered include the mandatory relocation alternative for such historic resources." Stephen Williams, Letter, September 14, 2011

The consultation efforts conducted under the 2007 PA did not identify relocation of the resource as a viable alternative to the proposed Undertaking nor is relocation identified as a mandatory requirement under Section 106 of the NHPA. Likewise, federal regulations, specifically 36 CFR Part 800, do not identify relocation as a required alternative under NEPA or the NHPA. Relocation is not a mandatory alternative and is itself often considered to be an adverse effect. It should be borne in mind that mitigation should be proportionate with the level of significance of the resource. In this instance, because the historical significance of the building is vested in the services provided to the community over the years, recordation is legally sufficient to serve as a legitimate archival purpose.

4. DISSEMINATION AND/OR PUBLICATION OF THE FINDINGS OF NO SIGNIFICANT IMPACT

Comments – Duty to request comments

"It is unfair and burdensome for the City to continue to call for comments when the City has the communities' comments and is well aware of the continuing objections." Stephen Williams, Letter, September 14, 2011.

"We are all neighbors, yet from the very beginning we were denied notification if our property line fell beyond 300 feet from the project site, and were excluded from ANY input on the project itself" Roger D. Miles, Letter, October 23, 2011.

Response

Responsible Entities are required to request comments under various sections of 24 CFR Part 58; including §§58.43, 58.45, and 58.46.

24 CFR §58.46 requires a responsible entity to make a FONSI available for public comment for 30 days before submitting a Request for Release of Funds (RROF) when there is a considerable interest or controversy concerning a project. In light of the criticism of the project from some members of the community and the Petition for Writ of Mandamus filed under the California Environment Quality Act, the City and County of San Francisco made the Notice of Intent to Request a Release of Funds and Finding of No Significant Impact (NOIRROF/FONSI) available for public comment for 32 days. Noticing of the proposal included publication in a local newspaper on August 14, 2011, mailing the NOIRROF/FONSI to more than 425 persons and organizations and posting the NOI/RROF in a prominent place on the western façade, along Presidio Avenue, of the proposed project site. The comment period was held open from August 14, 2011 to September 14, 2011.

Subsequent to the publication of the FONSI in August, the Mayor's Office of Housing withdrew its Request for Release of Funds to HUD and republished the FONSI on November 1, 2011. The Comment period for the second FONSI was held open until December 1, 2011. As of January 4, 2012, a Request for Release of Funds has not been submitted to HUD.

Comments – Public Comments Incorporated by Reference

"The neighborhood residents and the surrounding community have been submitting formal written comments and objections to this Project since 2007. We hereby incorporate by reference all previously submitted comments to all City agencies along with those of all neighbors and others who have objected to this monstrous and out-of-place Project." Stephen Williams, Letter, September 14, 2011

Response

The MOH published, mailed and posted a Combined FONSI and NOIRROF on August 14 and November 1. We have considered the comments received in response to those documents as is evidenced by this document. Comments incorporated by reference are addressed in the section for comments incorporated by reference.

5. FINDING OF NO SIGNIFICANT IMPACT

FONSI – General

Comments

"The planning commission (sic) conclusion "that the project will have no significant impact on the human environment" was reached after all the neighbors residing around BTW spoke to the negative impacts the current design would have on our community." Michael Sesich, Letter, August 17, 2011

"In this instance, the Notice of Intent to Request Release of Funds promulgated to the community at large was used to broadcast more false and misleading information regarding this Project. The City and County of San Francisco, through its environmental review process, found that the proposed project would have significant and irreversible effects on the environment" Stephen Williams, Letter, September 14, 2011

"...and was tainted by false and misleading information from MOH regarding the impacts of the Project and consideration of viable alternatives." Stephen Williams, Letter, September 14, 2011

Response

The Part 58 Environmental Review, conducted in accordance with federal laws, regulations, HUD information bulletins and agreements entered into per those authorities, resulted in a finding of no significant impact. While the EIR drafted in accordance with local standards identified a significant impact resulting from the demolition of a historic resource, the standard under the federal scheme warrants a FONSI as the effect has been resolved to the satisfaction of the SHPO and the ACHP in accordance with the BTW PA, the 2007 PA, the NHPA and the ACHP regulations. Additionally, mitigation measures have been identified to reduce any potential impacts related to the suitability of the soil at the site and for the protection of vegetation and wildlife. No other effect upon the environment caused by the project rose to a level requiring mitigation.

The Finding of No Significant Impact (FONSI) was made by the Certifying Officer after an analysis of the project was conducted in accordance with HUD standards articulated in 24 CFR

Part 58. These regulatory standards incorporate the CEQ regulations and are consistent with the purposes of NEPA. Additionally, the HUD standards mandate that local standards and determinations be used in assessing impacts where appropriate and where not inconsistent with Federal law. The Planning Commission did not participate in the development of the EA, and hence did not conclude that the project will have no significant impact on the human environment

Public Meetings were held as part of the environmental review for the proposed project under the CEQA. To the extent that the comments were relevant to an analysis under the analysis required by 24 CFR Part 58 they were considered in the analyses made during the EA.

As part of the CEQA review process, comments were received by various commissions and departments of the City and County of San Francisco regarding historic resources, traffic congestion, parking, the height and bulk of the proposed project, the design of the building, vegetation and open space and a perceived lack of public outreach as part of the CEQA process. Comments regarding these matters were heard by the San Francisco Planning Commission, the San Francisco Board of Supervisors and incorporated into a revised Environmental Impact Report prepared by the San Francisco Planning Department which is cited as a source document for the EA.

In regards to the adverse effect of the project on historic resources, comments regarding the demolition of the historic resource were considered by the San Francisco Planning Department, the Historic Preservation Commission, the Certifying Officer of the City and County of San Francisco, the Historic Preservation Officer of the State of California and the Advisory Council on Historic Preservation in accordance with 36 CFR §800.6 and the 2007 PA signed January 19, 2007. The mitigation agreement entered into, which resolves the effect of the project on historic resources, takes into account the comments and wishes of the public regarding the resource.

The Summary of Comments and Responses received in response to the EIR are attached as an appendix to the revised EA.

In response to the two NOI/FONSIs the Certifying Officer received the comments which are attached hereto as appendices and addressed within this response section to the EA.

HUD promulgated regulations that establish procedures for implementing NEPA and the CEQ regulations, 24 C.F.R. Part 58. HUD's procedures do not require a grant recipient to conduct public hearings during preparation of an EA. HUD only requires a grant recipient to consider holding a public hearing when an EIS is required. 24 C.F.R. § 58.59. HUD does require, however, that FONSIs be made available for public review for 30 days when "there is a considerable interest or controversy concerning the project." 24 C.F.R. § 58.46(a) As noted previously, the period of public review of the FONSIs exceeded HUD's 30 day requirement.

FONSI – Sufficiency

Comments

"NEPA also sets a standard for those Projects which "normally require" the preparation of an environmental review document. NEPA states: Sec. 1501.4 Whether to prepare an environmental impact statement. In determining whether to prepare an environmental impact statement the Federal agency shall: (a) Determine under its procedures supplementing these regulations (described in Sec. 1507.3) whether the proposal is one which: 1. Normally requires an environmental impact statement, or 2. Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion). Given the impacts, public outcry and the proposed demolition of an acknowledged historic and cultural resource, which is eligible for the NRHP, this Project falls squarely in the category of those Projects which "normally require" an EIS within the meaning of NEPA under numerous categories including the following:

- There are unique characteristics in the geographic area of the project such as historic or cultural resources, that would be affected by the project;*
- There is any controversy over the degree of environmental effects of the project;*
- The project presents unique or unknown environmental risks;*
- The project sets a precedent for future actions that are likely to have significant environmental impacts;*
- The action is related to other actions which, taken together, could have significant cumulative impacts;*
- The project adversely affects any sites, structures, etc., listed in or eligible for listing in the National Register of Historic Places;*
- The project would have a disproportionate and adverse impact on minority or low-income populations.*

These criteria for what "normally require" an EIS make clear that one is required in this instance." Stephen Williams, Letter, September 14, 2011

Response

The CEQ has promulgated regulations outlining when an EIS is required. An EIS is required whenever a proposal for major federal action would significantly affect the human environment. To determine whether an action significantly affects the human environment CEQ regulations (40 CFR §1508.27) direct the responsible entity to divide the inquiry into significance into an analysis of context and intensity. Context refers to the unique circumstances and setting of a proposed action that should be considered when assessing the significance of the impacts. Intensity involves the severity of an environmental impact. The characteristics listed above by the commenter are paraphrases of the some of the elements identified by CEQ at 40 CFR §1508.27(b) for assessing intensity. The exact elements to be considered under §1508.27(b) are as follows:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

- (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
- (8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
- (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
- (10) Whether the action threatens a violation of federal, state, or local law or requirements imposed for the protection of the environment.

In evaluating the project in light of these factors MOH determined that the severity or the intensity of the project did not reach a level that would require a finding of significance when analyzed in conjunction with the context of the project.

The unique characteristics of the geographic area were not significantly affected by the project. As noted in the EA, Existing Conditions and Trends and Environmental Assessment sections, the project site is located in a mixed use area that includes residential, public, commercial and retail uses. As a mixed use project, it would fit into the surrounding area. The site itself is eligible for listing on the National Register of Historic Places and there is a possibility as identified by the Northwest Information Center of disturbing prehistoric archeological resources as a result of project activity. To mitigate the effect of project activities on these resources, MOH consulted with the ACHP and the SHPO and entered into a Programmatic Agreement for the resolution of these effects. These measures are discussed previously in this Response in Section C.3 (Cultural Resources).

The courts have defined the "controversy" necessary to raise the level of environmental review for a project to an EIS as meaning more than opposition to the project. The Fourth Circuit has pointed out that the term "controversial" is not synonymous with "opposition." *See North Carolina v. Fed. Aviation Admin.*, 957 F.2d 1125, 1134 (4th Cir. 1992) (adding that "otherwise, opposition, and not the reasoned analysis set forth in an environmental assessment, would determine whether an environmental impact statement would have to be prepared."). In *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir., 2001) the Ninth Circuit's has held that a controversy must be a *bona fide* controversy as to the environmental effects of the project not merely opposition.

An agency must prepare an environmental impact statement (EIS) whenever a federal action is "controversial," that is, when ... there is a substantial dispute about the size, nature, or effect of the major federal action. A substantial dispute exists when evidence, raised prior to the preparation of an EIS or Finding of No Significant Impact, casts serious doubt upon the reasonableness of an agency's conclusions.

MOH found that the project is not highly controversial. Here there is no bona fide controversy as to the environmental effects of the project. The effects to cultural resources, soils, and vegetation and wildlife are not disputed. Furthermore, mitigation measures have been identified for these effects. In regards to the demolition of the BTW Center itself, MOH's conclusions were based upon a review of documents prepared by the San Francisco Planning Department and used in the Section 106 review of the project. Included among these documents is the State of California Department of Parks and Recreation Primary Record (DPR 523A and B) prepared for the site as part of the Section 106 review process. This record established the basis for the eligibility of the property for listing in the National Register to which the SHPO concurred.

The BTW PA between the MOH and the SHPO incorporated the mitigation measures identified by the Historic Preservation Commission as necessary to address the adverse effect of the Undertaking. These measures were approved by the SHPO. It cannot be disputed that MOH's conclusions were reasonable in light of the public scrutiny provided by the Historic Preservation Commission and the consultations with the SHPO and ACHP.

In regards to 40 CFR 1508.27(b)(8), the degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources, the project's adverse effect on historic resources eligible for listing in the National Register of Historic Places were taken into account and resolved by the BTW PA. This is discussed above as well as in the response in Cultural Resources.

The remaining elements of §1508.27 that the commenter lists are not implicated by the project at a level that mandates the preparation of an EIS. The project does not present unique or unknown environmental risks; nor does it set a precedent for future actions that are likely to have significant environmental impacts. The project does not have significant cumulative impacts nor does it have a disproportionate and adverse impact on minority or low-income populations. In fact this project has a beneficial impact in that it allows BTW to expand services to its client base, low income people, and expand housing and services to transitional age youth. These conclusions are supported by the analysis contained in the EA.

In assessing the reasonableness of an agency decision not to prepare an EIS courts also look to level of agreement among local, state and federal officials, private parties and local environmentalists on the content of the EA. *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982). Here, the State Historic Preservation Officer, the San Francisco Planning Department, the Mayor's Office of Housing, the Historic Preservation Commission and the Advisory Council on Historic Preservation agree that the mitigation measures adopted in the MOA take into account and resolve the impacts.

Courts also look to consistency of the project with local policies on land use to determine whether a finding of no significant impact is reasonable..

“We have specifically recognized such compliance is a factor pointing toward the validity of a conclusion and that there is no significant impact on the environment. Where a federal project conforms to existing land use patterns, zoning, or local plans, such conformity is evidence supporting a finding of no significant impact.” *Preservation Coalition, Inc. v. Pierce*, 667 F.2d at 861.

Here, the project has been determined to be in conformity with comprehensive plans, zoning, and land use policies. Hence, there is evidence supporting the finding of no significant impact.

Finally, courts have permitted the effect of mitigation measures to be considered in determining whether preparation of an Environmental Impact Statement is necessary. *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. 1982); *City and County of San Francisco*, 615 F.2d at 501. As previously discussed, the Project's mitigation measures include execution of a programmatic agreement between the MOH and SHPO, mitigation measures to reduce any impact related to soil suitability, and measures to protect vegetation and wildlife. With these mitigation measures, the adverse environmental impacts are resolved or eliminated and the FONSI was appropriately made.

As supported by the findings of the EA, the HUD-specific conditions requiring preparation of an Environmental Impact Statement, as enumerated under 24 CFR §58.37(a) and (b), do not apply to the proposed project.

Sec. 58.37 Environmental impact statement determinations.

- a. An EIS is required when the project is determined to have a potentially significant impact on the human environment.
- b. An EIS is required under any of the following circumstances, except as provided in paragraph (c) of this section:
 1. The project would provide a site or sites for, or result in the construction of, hospitals or nursing homes containing a total of 2,500 or more beds.
 2. The project would remove, demolish, convert or substantially rehabilitate 2,500 or more existing housing units (but not including rehabilitation projects categorically excluded under Sec. 58.35), or would result in the construction or installation of 2,500 or more housing units, or would provide sites for 2,500 or more housing units.
 3. The project would provide enough additional water and sewer capacity to support 2,500 or more additional housing units. The project does not have to be specifically intended for residential use nor does it have to be totally new construction. If the project is designed to provide upgraded service to existing development as well as to serve new development, only that portion of the increased capacity

Neither of the conditions specified under Section 58.37(a) or (b) requiring the preparation of an EIS has been met in this instance and the preparation of an EA was appropriate. 40 CFR §1501.3 (When to prepare an environmental assessment.) sets standards for when it is appropriate to prepare an EA.

- (a) Agencies shall prepare an environmental assessment (Sec. 1508.9) when necessary under the procedures adopted by individual agencies to supplement these regulations as described in Sec. 1507.3. An assessment is not necessary if the agency has decided to prepare an environmental impact statement.
- (b) Agencies may prepare an environmental assessment on any action at any time in order to assist agency planning and decision-making.

The HUD guidelines and the methodology followed by MOH are consistent with the CEQ Regulations on when to prepare an EA. The threshold for preparing an EIS as set by CEQ and HUD have not been met for this project and the EA was the appropriate level of review.

6. PROJECT DESCRIPTION

Comments

"The most basic information, including the Project's immediate surrounding environment and the block on which this project is to be built was completely incorrect in the Draft EIR and in the Final EIR. Accordingly, the description of the environmental setting and the "baseline" for all environmental investigation and analysis was also incorrect. Stephen Williams, Letter, September 14, 2011

"The Final EIR incorrectly identifies twenty-five buildings on the block and across the street from the project's block as much larger than those buildings are. This blunder of monumental proportions, incorrectly identifying the size of most of the immediate surrounding buildings (all described as much larger of course) was falsely explained as a "printing error" right before the final hearing at the Board of Supervisors and "corrected" in the response from the Planning Department submitted to the Board. However, it is impossible to correct a false impression about the size and scale of this block and neighborhood, which had been incorrectly described to the Planning Commission and all other reviewing agencies for years Stephen Williams, Letter, September 14, 2011

"It is unthinkable that HUD would now go forward and commit such tremendous resources without giving this Project proper environmental review, especially given the record of shoddy and error-ridden review at the City level. As with much of what has been published for this Project, the most recent notice to the public is not accurate and the Project was found by the City to have significant and irreversible negative environmental impacts." Stephen Williams, Letter, September 14, 2011

Response

The information contained in the EA including the descriptions of the proposal, the surrounding area, and existing conditions and trends is correct and was verified independently of the EIR during the preparation of the EA. Sources for the data and information used for drafting the Environmental Assessment are listed in the Source Document List following the narrative portion of the EA. The data in the EA is correct and was prepared using source data that was confirmed on October 17, 2011.

The source documents for the discussion of land use and zoning include the DEIR and the Comments and Responses document. At the hearing in front of the Board of Supervisors on the appeal of the certification of the EIR, staff did agree with commenters that there had been a printing error in one graphic. Specifically, that Figure 12 in the EIR contained a printing error and as a result did not depict all two-story buildings in the project vicinity. Rather, Figure 12's legend combined 2- and 3- story buildings. But, as staff pointed out to the Board of Supervisors, the Draft EIR contains extensive discussion as well as photographs of the Project vicinity's existing character in numerous other discussions, including under the Draft EIR's Project Description; the presentation of land use; the aesthetic setting; and in the evaluation of potential land use and aesthetic impacts. The Draft EIR analysis includes photomontages of the neighborhood setting with the Project in place. In addition, another source document, the Comments and Responses to the EIR, contained additional figures that illustrated the overall physical character of the surrounding area, which included photographs as well as an illustration of the bulk pattern along Presidio Avenue including the proposed building height to street width ratios. The EIR also provides extensive information regarding the height, massing, lot coverage, and architectural styles of surrounding buildings, as well as street widths for purposes of evaluating the Proposed Project's potential to cause adverse physical land use or aesthetic impacts.

The EIR and the EA fully disclosed the relevant facts and made it clear that the Project would be taller than the adjacent buildings along Presidio Avenue and Sutter Street. Thus, one possible error in one graphic of a source document did not lead to an error in the analysis in the EA.

7. LAND DEVELOPMENT – CONFORMANCE WITH COMPREHENSIVE PLANS AND ZONING

Comment

"This overuse of the site will definitely have a negative impact of (sic) the neighborhood. The planning commissioners (sic) have made up their minds before they even held the community hearing. The violations of neighborhood zoning restrictions being allowed to construct this project demands an Environmental Impact Statement." Michael Sesich, Letter, August 17, 2011

"Not only is the new community center and gymnasium to be bigger than the existing structure, but the (sic) plan to add 50 units of housing in a large tower that exceeds currently zoned height limits. How can that not impact the "human environment?" Brent Lewellen, Letter, November 18, 2011

Response

As discussed in the EA under the Checklist categories of "Conformance with Comprehensive Plans and Zoning" and "Compatibility and Urban Impact," while the project would be higher in density and scale than some of the existing low-density housing in the surrounding area, it would not alter the character or disrupt the existing communities because of its near proximity to mixed-use, residential, and moderate scale commercial districts. Changes in land use would be consistent with goals of the Housing and Community Facilities Elements in the 2004 San

Francisco General Plan, to reduce homelessness, and reduce the risk of homelessness by taking affirmative steps to aggressively pursue strategies to prevent homelessness, granting density bonuses, addressing contributory factors, and the Better Neighborhoods Program related to increased housing, particularly affordable housing, neighborhood services within walking distance, and improved quality of streets as civic and open space areas. As discussed in the EA, the proposed project is consistent with the Special Use District and Conditional Use Permits approved by the San Francisco Board of Supervisors on June 21, 2011 and which are attached as appendices to the EA. In the EA Checklist "Conformance with Comprehensive Plans and Zoning" the project was evaluated to be consistent with local zoning laws and hence an Impact Code of 1 was assigned to this element. Impact Code 1 indicates that no impact of the project is anticipated for this element, hence a FONSI is appropriate and an EIS is not indicated for this project. Community Centers are a permitted use in the subject district as identified in the ordinance establishing the Presidio-Sutter Special Use District (Ordinance No. 137-01).

The height of the proposed structure is consistent with the San Francisco Planning Code §102.12. Height (Of a Building or Structure).

8. LIMITATIONS ON ACTIVITIES PENDING CLEARANCE

Comments – Pre-approval

"The proposal to now sink ten million dollars into the project before the litigation is completed is completely objectionable on numerous grounds. It once again shows the Project was completely "pre-approved" from the beginning. The circumstances demonstrate that the agencies (MOH and now HUD) have already fully committed to the project, and therefore, the environmental review was a mere hurdle to be overcome. Numerous courts have held this is improper and violates CEQA. The CEQA Guidelines define agency approval as occurring upon the agency's "earliest commitment" to a project (this is a quote from the CEQA Guidelines, Cal. Code Regs., tit. 14, §15352(b))." Stephen Williams, Letter, September 14, 2011

"As it has from the beginning, MOH has skewed and undermined the environmental review process by "cheerleading" and advocating for the demolition of a historic resource and construction of an oversized and out-of-place "monster building" in a historic residential neighborhood. MOH's letter to the California Historic Preservation Officer, dated January 12, 2011, was written some four months before the recirculation of the EIR. Once again, MOH played the part of advocate for the project overriding historic preservation concerns and all other environmental concerns and undermining CEQA and NEPA by attempting to force the project to fruition before the initial environmental review and considerations were given an opportunity to provide untainted and unbiased environmental impact information to the public and to the responsible agencies." Stephen Williams, Letter, September 14, 2011

"Why did the Mayor's Office of Housing pay invoices from the for-profit developer and current staff salary and benefits back in July and August 2010, nearly a full year BEFORE the final Environmental Impact Report was certified?" Roger D. Miles, Letter, October 23, 2011

"The Mayor's Office of Housing (MOH) approved and funded this project even before the EIR was prepared or issued." Joyce E. Lively, Letter, December 2, 2011.

Response

The Environmental Assessment was completed when all environmental analysis was finalized, including that related to Section 106 of the National Historic Preservation Act. Public comment was invited at the appropriate time in the NEPA process, in accordance with 24 CFR §58.43 and §58.45.

The City has not committed federal funds to the project as of this time. The MOH's activities in regards to the project were those of a Responsible Entity and Certifying Officer properly executing its legal responsibilities under 24 CFR Part 58. These activities do not equal advocacy. The PA requires the City to advise the SHPO of certain relevant facts when the demolition of a historic resource is being considered. These requirements are listed in Stipulation VII.E.1 of the PA. By complying with the PA, the City is not "cheerleading" nor advocating for a project, it is merely complying with its legal obligations when considering a proposal for funding.

There has been no pre-commitment of funds by MOH for the Undertaking. Federal funds were granted for allowable costs under 24 CFR §58.34 & §58.35. Awards of such costs do not amount to pre-commitment, preapproval or advocacy of a proposed project. A project is not officially approved and funds cannot be expended on the project until the AUGF is issued by HUD.

24 CFR §58.22, Limitations on Activities Pending Clearance

- a. Neither a recipient nor any participant in the development process, including public or private nonprofit or for-profit entities, or any of their contractors, may commit HUD assistance under a program listed in Sec. 58.1(b) on an activity or project until HUD or the state has approved the recipient's RROF and the related certification from the responsible entity. In addition, until the RROF and the related certification have been approved, neither a recipient nor any participant in the development process may commit non-HUD funds on or undertake an activity or project under a program listed in Sec. 58.1(b) if the activity or project would have an adverse environmental impact or limit the choice of reasonable alternatives.
- b. If a project or activity is exempt under Sec. 58.34, or is categorically excluded (except in extraordinary circumstances) under Sec. 58.35(b), no RROF is required and the recipient may undertake the activity immediately after the responsible entity has documented its determination as required in Sec. 58.34(b) and Sec. 58.35(d), but the recipient must comply with applicable requirements under Sec. 58.6.

BTW was awarded funding for architectural and engineering services for the proposed project as well as predevelopment activities. The funding for architectural and engineering activities are exempt from the requirements of Part 58.

24 CFR §Sec. 58.34 Exempt activities.

- a. Except for the applicable requirements of Sec. 58.6, the responsible entity does not have to comply with the requirements of this part or undertake any environmental review, consultation or other action under NEPA and the other provisions of law or authorities cited in Sec. 58.5 for the activities exempt by this section or projects consisting solely of the following exempt activities:
 1. Environmental and other studies, resource identification and the development of plans and strategies;

Predevelopment funding is categorically excluded per 24 CFR 58.35(b).

- b. Categorical exclusions not subject to Sec. 58.5. The Department has determined that the following categorically excluded activities would not alter any conditions that would require a review or compliance determination under the Federal laws and authorities cited in Sec. 58.5. When the following kinds of activities are undertaken, the responsible entity does not have to publish a NOI/RROF or execute a certification and the recipient does not have to submit a RROF to HUD (or the State) except in the circumstances described in paragraph (c) of this section. Following the award of the assistance, no further approval from HUD or the State will be needed with respect to environmental requirements, except where paragraph (c) of this section applies.

Comments - Timeliness

"Further, the record shows that the NEPA process was not begun early in the project approval phase, as mandated by the statutory scheme, but was instead left to the very end of the project." Stephen Williams, Letter, September 14, 2011

"Sec. 1501.2 Apply NEPA early in the process. Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Each agency shall: (a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment," as specified by Sec. 1507.2. (b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents. (c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act. (d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that: 1. Policies or designated staff are available to advise potential applicants of studies or other information foreseeably (sic) required for later Federal action. 2. The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable. 3. The Federal agency commences its NEPA process at the earliest possible time." Stephen Williams, Letter, September 14, 2011

Response

The Mayor's Office of Housing directed the project sponsor to initiate an EA at the time the application for funding was submitted to the Loan Committee on July 2010. This was the appropriate time at which to begin the Environmental Review process under NEPA as the federal action to be reviewed is the approval of funding subject to Part 58. Until such time as a request for such funding is made, an environmental review is not appropriate. 40 CFR 1502.5(b) identifies the time the application is received as the appropriate time to begin an environmental review.

§1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§1500.2(c), 1501.2, and 1502.2). For instance:

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received.

BTW contracted with Tetra Tech, Inc. to conduct an Environmental Assessment for their proposed project in June 2010, shortly before the application was presented.

The EA as written meets the requirements of both CEQ and HUD regulations and the processes and procedures used in preparing the ERR are consistent with CEQ and HUD guidelines and regulations regarding timeliness.

Comment - Alternatives

"In violation of the environmental statutes, the project has continued to evolve and change over the past four years, MOH was funding the Project (since July 2010) and completely foreclosed any reasonable alternatives which may have been brought to light through a fair and untainted environmental process. MOH has now poured more than \$1,000,000.00 in "seed money" into this project even paying past invoices of the for profit developers (AF Evans) and did so before the CEQA process was allowed to be completed. Monies were also paid to the current developer and a litany of consultants that are directly related to physical impacts at the site. The comments made on the DEIR and on the FEIR are attached and incorporated herein."
Stephen Williams, Letter, September 14, 2011

"Alternative locations for the Low-income Housing and Housing for Emancipated Foster-Care Youth were never investigated." Roger D. Miles, Letter, October 23, 2011

Response

The project description in the EA is accurate, (see above Comments – Cultural Resources, Correctness of Information sent to SHPO and ACHP). In accordance with HUD regulations, alternatives to the proposed project were addressed in the Alternatives to the Proposed Action section of the EA. In addition to the minimum requirement for a No Action Alternative, four other alternatives were identified. No non-exempt federal funds have been committed to the project as of this time and comments incorporated by reference will be discussed in the section for such comments.

In the EA, a range of reasonable alternatives were considered and the proposed action was determined to best meet the needs of the proposed project and the community and which would best achieve the requirements of the controlling legal authorities such as the National Environmental Policy Act, the National Historic Preservation Act, the Home Investment Partnership Program (HOME) under Title II of the Cranston-Gonzales National Affordable Housing Act of 1990 as amended and Title I of the Housing and Community Development Act of 1974 the and other environmental laws and policies

9. TRANSPORTATION - PARKING AND TRAFFIC

Comments

"Parking and traffic is another area that seems to be of little concern to the planning commission (sic). There is not enough street parking to accommodate the current use of the BTW center." Michael Sesich, Letter, August 17, 2011

"Please note that parking is to be built into the proposed housing portion of the project. None of this parking will be for the residents who will live there 24 hours a day – supposedly to encourage them to ride MUNI. Instead, the parking will be available only to the employees of the privately owned community center who spend 40 hours a week there. These employees could ride MUNI as well as any of the residents." Joyce E. Lively, Letter, December 2, 2011.

These 50 units of housing do not come with a single parking space. In a dense neighborhood full of Victorians with few garages, how can this not impact the "human environment"? Brent Lewellen, Letter, November 18, 2011.

Response

A transportation study completed for the project in 2010 was conducted in accordance with San Francisco Planning Department standards and found that the project's impacts on transportation and circulation would not be significant. Specifically with regards to the possibility of motorists double parking in the project area and the resulting potential for congestion the City and County evaluated the significance of the effects of the project on these factors and determined that while the effect was potentially significant it did not rise to a level requiring mitigation. The project also proposes the conversion of two on-street general use parking spaces on Presidio Avenue (closest to the corner of Sutter Street) to a time-limited loading zone. The traffic evaluation is based upon the transportation study prepared for the San Francisco Planning Department by Environmental Science Associates. (Transportation Study, Final Report, 800 Presidio Avenue, Booker T. Washington Community Center, Residential/Community Center Project, May 4, 2010.). This study is attached to the EA as an

appendix. The Study was prepared in accordance with the standard analytical approach and methodologies contained in the San Francisco Planning Department's Transportation Guidelines.

D. COMMENTS INCORPORATED BY REFERENCE AND DIRECTED TO THE CEQA EIR

It is not the purpose of the Environmental Review Record as certified by the Responsible Entity for NEPA to address the adequacy of either the Draft or Final EIR prepared under CEQA unless it has been incorporated by reference. The CEQA documents prepared for the BTW Project were not incorporated by reference. However, as Mr. Williams has incorporated by reference the comments made to the EIR, we have attached the Comments And Response Section Of the FEIR prepared by the San Francisco Planning Department to this Response to Comments Document as those responses directly address the comments incorporated by reference by Mr. Williams.

E. GENERAL RESPONSE TO CEQA LITIGATION DOCUMENTS

The petition for a Writ of Mandamus filed by the Neighbors for Fair Planning City alleges violations of the California Environmental Quality Act, California Public Resources Code §§21000 *et seq.* (CEQA). However, it does not allege any violations of the National Environmental Policy Act (NEPA), the CEQ, or 24 CFR Part 58. Nor does the Petition address the adequacy of the EA prepared in accordance with NEPA and other federal authorities. In light of this, discussion of the numerous allegations in the complaint is beyond the scope of this Comment and Response document. Due to the pending litigation, a written response to these pleadings will not be made here and is being addressed in the pending litigation. The San Francisco Superior Court's Order and Statement of Decision Denying the Petition for Writ of Mandate addresses the majority of issues raised in the Petition and is attached as an appendix for informational purposes.