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October 18, 2011

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**RE: Further Responses to Proposed Amendments to Articles 10 & 11 Submitted by
Supervisor Scott Wiener (October 3, October 13, and October 17, 2011 Memos)**

Dear President Chase and Members of the Commission:

On behalf of San Francisco Architectural Heritage (Heritage), thank you for the opportunity to further comment on additional amendments to Articles 10 and 11 put forward by Supervisor Scott Wiener. These responses augment—and should be read in conjunction with—Heritage’s previous comment letter submitted on October 3, 2011, attached. We appreciate that some of the more objectionable amendments originally proposed by Supervisor Wiener have been abandoned or moderated in response to comments from the Planning Department, Historic Preservation Commission (HPC), and members of the public. In concept, Heritage also supports the proposal to add a narrowly drawn economic hardship provision to Article 10. However, we continue to oppose revisions that are contrary to best practices and/or would single out historic preservation initiatives for disparate treatment compared to other neighborhood planning and zoning changes.

**I. HERITAGE RESPONSE TO OCTOBER 3, 2011 MEMO RE: “ECONOMIC HARDSHIP
OPT-OUT” PROVISION**

Supervisor Wiener has proposed an “economic hardship opt-out” provision aimed at protecting low income property owners in historic districts. According to his October 3, 2011 memo, the proposed opt-out provision would target “property owners who want to make changes to their buildings but who do not have the economic means to do so in compliance with historic preservation standards or to pay Certificates of Appropriateness.”¹ In his October 13, 2011 memo, Supervisor Wiener clarified that his “intention is to include Affordable Housing projects, regardless of income level, and

¹ Memo from Supervisor Scott Wiener to the Historic Preservation Commission, October 3, 2011.

mixed-use and commercial properties as part of this Exemption/Opt-Out.”² We agree with Supervisor Wiener that any economic hardship provision should be “drafted as a narrow exemption that avoids abuse.”³

As a threshold matter, federal regulations already explicitly require that the *Secretary of the Interior’s Standards for Rehabilitation* be applied in a reasonable manner, taking into account economic and technical feasibility.⁴ As recognized by the California Office of Historic Preservation, it is both common and considered best practice to include economic hardship provisions in local historic preservation ordinances:

To ensure compliance with federal and state constitutional requirements, the ordinance should include a procedure allowing a property owner to make the case that, in some situations, enforcement of the ordinance will cause unusual and extreme economic hardship.⁵

Municipalities throughout the country have adopted a range of economic hardship provisions in local historic preservation ordinances. Most economic hardship provisions reflect the constitutional takings standard by requiring those seeking an exemption to demonstrate that they will be denied “all reasonable beneficial use of, or return on, the property.”⁶ Some provisions specifically target low income residents, enabling qualifying applicants to be exempted from preservation requirements that would result in immediate and extreme financial hardship.⁷

HERITAGE POSITION: In concept, Heritage supports Supervisor Wiener’s proposal for a “narrow” economic hardship exemption aimed at protecting low income property owners to avoid gentrification of historic districts. However, as demonstrated by the numerous

² Memo from Supervisor Scott Wiener to the Historic Preservation Commission, Amendments to Articles 10 and 11 of the Planning Code, October 13, 2011. It should be emphasized that nearly all of San Francisco’s affordable housing projects receive federal funding and are therefore subject to review by the California Office of Historic Preservation to ensure full compliance with the *Secretary of the Interior’s Standards for Rehabilitation*. Consequently, the City has very limited jurisdiction to relax or exempt these projects from federal preservation standards.

³ Memo from Supervisor Scott Wiener to the Historic Preservation Commission, October 3, 2011.

⁴ 36 C.F.R. § 67.7(b).

⁵ California Office of Historic Preservation, “Drafting Effective Historic Preservation Ordinances,” California Office of Historic Preservation Technical Assistance Series, p.70. See www.parks.ca.gov/pages/1072/files/tab14hpordinances.pdf.

⁶ “Under takings law, government is not required to compensate owners for bad business decisions. Nor is the government required to guarantee a return on a speculative investment.” “Assessing Economic Hardship Claims Under Historic Preservation Ordinances,” National Trust for Historic Preservation (2009), p.2.

⁷ Nicholas L. Bozen and Dragomir Cosanici, “Economic Hardship, Feasibility and Related Standards in Historic Preservation Law,” Michigan State Historic Preservation Office, p.4.

examples cited below, there are many different options for economic hardship language that serve very different purposes.

In order to benefit low-income property owners, for example, the process should be relatively straightforward and not unduly burdensome to the applicant. Supervisor Wiener’s intention to allow other classes of projects—“regardless of income level”—to qualify for economic hardship implicates a complex array of issues that need to be carefully considered separate from the current set of “clean-up” amendments to Articles 10 and 11. Heritage recommends that the proposed economic hardship provision be developed in an independent process with input from all affected parties. In conjunction with crafting economic hardship language, it will be important for the City to simultaneously pursue policy changes that would broaden access to existing financial incentives, such as Mills Act property tax abatement.

For future discussions regarding appropriate economic hardship language, Heritage believes that any such provision should include the following key components:

- (1) The exemption should be strategically drawn to focus on very-low and low income residents;
- (2) It should require substantial evidence of extreme and immediate economic hardship, especially for larger projects;
- (3) It should confer discretion on the City to impose conditions that minimize harm on historic resources; and
- (4) It should require the applicant to take advantage of all available incentives, including permit fee waivers, Mills Act property tax abatement, and cost-saving alternatives available under the State Historical Building Code.⁸

Each of these provisions is explained in greater detail below, including sample language drawn from economic hardship provisions in other local ordinances.

- (1) Focused on very-low and low income residents:** The economic hardship provision should be strategically drawn to protect very-low and low income residents, such as that provided by the City of Pasadena Zoning Code:

The approval of an Economic Hardship Variance shall be based on findings that:
(a) The owner of the property is qualified as very-low or low income; and
(b) If the Certificate of Appropriateness is for an income-producing property, the property is not in a state caused by demolition by neglect.⁹

⁸ In conjunction with broadening access to preservation incentives, the City will need to allocate resources to the various departments responsible for administering these programs to ensure that they are adequately prepared to encourage and assist the uninitiated permit applicant in making successful and unimpeded use of these incentives.

⁹ City of Pasadena Zoning Code, Article 6, §17.62.090.

The District of Columbia also includes protections specifically targeting low income residents. In the D.C. Code, “unreasonable economic hardship” is defined as:

*That failure to issue a permit would amount to a taking of the owner's property without just compensation or, in the case of a low income owner(s) as determined by the Mayor, failure to issue a permit would place an onerous and excessive financial burden upon such owner(s).*¹⁰

(2) Requires substantial evidence of economic hardship: The provision should authorize the HPC to require documentation or testimony in order to substantiate any claim of economic hardship. Several cities in California, including Davis, Pasadena, Pomona, Santa Clara, Santa Monica, and South Pasadena, among many others, require specific documentation in order to substantiate claims of economic hardship.¹¹ For larger projects, local preservation commissions are typically authorized to require the following types of information, at their discretion, when determining whether an applicant qualifies for an economic hardship exemption: the amount paid for the property; real estate taxes over several years; mortgage balance, appraisals, and available financial resources; an estimated cost of the proposed construction, alteration, or demolition; and/or report(s) from a licensed engineer and/or architect. Oftentimes, the applicant must also demonstrate that they have exhausted all possible options in order to eliminate the hardship, such as less-costly alternatives under the State Historical Building Code, Mills Act property tax abatement, and/or bank financing.¹²

(3) Authorizes the HPC to impose conditions: In an instance of economic hardship, the HPC should be able to impose conditions on a finding of economic hardship in order to minimize adverse impacts on the historic resource. Accordingly, we support the Planning Department’s recommended language requiring the HPC to determine that the scope of work “does not constitute a demolition” and “will not be detrimental to the integrity of the district” before issuing an economic hardship exemption.¹³

The County of Santa Clara includes a provision allowing the County to recommend relevant conditions be placed on the issuance of the related permit.”¹⁴ The City of Santa Monica contains a similar provision, allowing commissioners to impose conditions such as relaxing ordinance provisions that are normally adhered to or modifying the building code:

¹⁰ D.C. Code §6-1105.

¹¹ A corollary already exists in San Francisco for demolition review under Article 11 at Section 1110.

¹² Nicholas L. Bozen and Dragomir Cosanici, “Economic Hardship, Feasibility and Related Standards in Historic Preservation Law,” Michigan State Historic Preservation Office, p.4.

¹³ Memo from Planning Department to Historic Preservation Commission, “Planning Code Amendments: Articles 10 &11,” October 19, 2011 hearing date, at p.3.

¹⁴ County of Santa Clara Municipal Code, Division C-17, Article III-Landmark Alteration Permit, www.sccgov.org/scc_ordinance/TOC094.HTM.

Upon a finding by the Commission that without approval of the proposed work, all reasonable use of or return from a designated landmark or property within a historic district will be denied a property owner, then the application shall be delayed for a period not to exceed one hundred twenty days. During this period of delay, the Commission shall investigate plans and make recommendations to the City Council to allow for a reasonable use of, or return from, the property, or to otherwise preserve the subject property. Such plans and recommendations may include, but are not limited to, provisions for relocating the structure, a relaxation of the provisions of the ordinance, a reduction in real property taxes, financial assistance, building code modifications and/or changes in zoning regulations.¹⁵

(4) Requires the applicant to first explore economic and regulatory incentives: The proposed economic hardship exemption should be predicated on the use of all applicable economic and regulatory incentives, including the State Historical Building Code, Mills Act property tax abatement, and/or waiver of permit fees. For example, the City of Pomona requires that available economic incentives be explored prior to determining whether an economic hardship is present:

*All means involving City sponsored incentives such as tax abatements, financial assistance, building code modifications, amendments to the zoning ordinance, loans, grants, and reimbursements have been explored to relieve possible Economic Hardship.*¹⁶

The City of Glendale’s ordinance includes a similar prerequisite, stating that the “Council shall consider the value of property tax incentives allowed by the historic preservation ordinance and other benefits as may be available for historic preservation or stabilization in determining if economic hardship” exists.¹⁷ To this end, Heritage supports the Planning Department’s recommendation to cross-reference the Planning Code’s existing fee waiver provisions in Section 1005(f) of the Planning Code.¹⁸

We also urge Supervisor Wiener, the HPC and the Planning Department to take meaningful steps to broaden access to the Mills Act among low income property owners. The Mills Act is state legislation that authorizes local jurisdictions to enter into individual contracts with historic property owners to enable them to qualify for a significant reduction in property taxes. Owners typically save 50 percent or more in

¹⁵ City of Santa Monica Municipal Code, Article 9, Chapter 9.36 (emphasis added), http://qcode.us/codes/santamonica/view.php?topic=9-9_36-9_36_160&frames=on.

¹⁶ City of Pomona Municipal Code, §5809-13, <http://library.municode.com/index.aspx?clientID=13712&stateID=5&statename=California>.

¹⁷ City of Glendale Municipal Code, Chapter 15, §15.20.055, www.ci.glendale.ca.us/gmc/15.20.asp.

¹⁸ Memo from Planning Department to Historic Preservation Commission, “Planning Code Amendments: Articles 10 &11,” October 19, 2011 hearing date, at p.3.

taxes for agreeing to maintain and improve their property over a 10-year period. The enabling legislation allows the local jurisdiction to tailor its Mills Act program to target certain types of property owners (for example, single family homes under \$500,000), waive applicant fees for low-income residents, limit the number of contracts entered into each year, and/or place a cap on annual tax revenue losses.

Whereas San Francisco has only a handful of Mills Acts contracts in place (mostly commercial and high-end residential properties), Los Angeles and San Diego have several hundred each spanning a wide range of property types and demographics. Accordingly, we urge Supervisor Wiener and the HPC to champion legislation in conjunction with any economic hardship provision that would enable the city's low income residents to readily access property tax savings under the city's Mills Act program.

II. HERITAGE RESPONSE TO OCTOBER 13, 2011 MEMO RE: "AMENDMENTS TO ARTICLES 10 AND 11 OF THE PLANNING CODE"

A. ARTICLE 10

1. SECTION 1002. POWERS AND DUTIES OF THE PLANNING DEPARTMENT AND THE HISTORIC PRESERVATION COMMISSION

In lieu of requiring majority owner support for initiation of a historic resource survey, Supervisor Wiener is now proposing that community engagement policies and procedures be set forth in administrative bulletins (instead of the Preservation Element).

HERITAGE POSITION: Heritage supports the development of Department-wide policies and procedures to ensure community participation in the historic survey process as well as other community planning efforts. Although the Planning Department already follows a range of community engagement strategies, we understand that the proposed administrative bulletins are intended to list the full menu of outreach tools all in one place, for broad application to historic resource surveys and other neighborhood planning initiatives.

2. SECTION 1004.4. DESIGNATION BY BOARD OF SUPERVISORS

In lieu of requiring majority owner support or a super-majority of the Board of Supervisors to designate a historic district, Supervisor Wiener is now proposing that an "informational vote from a majority of property owners prior to a simple majority vote of the Board of Supervisors." The Department would be required to obtain the vote of a majority of property owners before designation can be brought to the Board for a vote.

HERITAGE POSITION: Although Heritage appreciates that Supervisor Wiener has moderated his stance by merely requiring an "informational vote," we remain concerned that the proposed amendment would impose a unique and costly burden on historic district designation. Indeed, no other zoning changes in San Francisco are subject to this requirement. As noted by the Planning Department, the proposed amendment raises other

policy and procedural issues regarding how the vote would be conducted, where the funding would come from, the exclusion from participation of the local resident renter community, how the Department would treat non-responses, and the legitimacy of community-sponsored petitions in gauging support.

Heritage agrees with the Department's recommendation that this topic warrants further discussion by a broad range of interest groups, including the preservation and development communities, and neighborhood groups representing owners and renters alike.¹⁹ Policies and procedures for measuring community support (or opposition) should be developed separate from the current set of proposed amendments to Articles 10 and 11, as part of a comprehensive package defining the nomination, initiation and designation process for historic districts.

3. SECTION 1006.3. SCHEDULING AND NOTICE OF HEARING

This proposed amendment is addressed in Heritage's previous position paper submitted to the HPC on October 3, 2011.

4. SECTION 1006.7. STANDARDS FOR REVIEW OF APPLICATIONS

The October 13, 2011 memo from Supervisor Wiener clarifies the process he envisions for development of "San Francisco Standards" to require adoption by the HPC. Rather than create a second level of review, the stated purpose of the "San Francisco Standards" is to "inform and improve review of historic projects under CEQA." Pending completion of the "San Francisco Standards," Supervisor Wiener would eliminate mandatory compliance with the *Secretary of the Interior's Standards* for projects involving contributors to historic districts.

HERITAGE POSITION: Heritage feels that the proposal to develop an alternative to the *Secretary of the Interior's Standards* "for specific application in San Francisco" is simply unnecessary. The *Secretary's Standards* already provide detailed guidance on urban design issues and the HPC has traditionally applied these standards quite flexibly. However, we acknowledge that other cities have successfully developed design guidelines that interpret—and are equivalent to—the *Secretary's Standards*. The City of Los Angeles, for example, requires design guidelines to be developed in conjunction with any new historic district designation. Given the diversity of development patterns, density, architectural styles, and neighborhood character across San Francisco, Heritage favors district-by-district design guidelines over uniform citywide standards.

Equally important to the approval process for new projects perceived to be inhibited by preservation procedures, San Francisco's 1995 Certified Local Government agreement—like all other California CLG agreements—states "the Participant [City and County of San Francisco] shall obtain the prior approval of the SHPO for any amendments to said

¹⁹ Memo from Planning Department to Historic Preservation Commission, "Planning Code Amendments: Articles 10 & 11," October 19, 2011 hearing date, at p.4.

ordinances.” As noted by the California Office of Historic Preservation, “The reason for this, of course, is to ensure that proposed changes are in conformance with the Certified Local Government program; if they do not, decertification could result.”²⁰ Accordingly, the proposed “San Francisco Standards,” or individual historic district design guidelines, would be subject to review and approval by the SHPO.

Finally, we strongly oppose the new proposal to exempt contributors to historic districts from compliance with the *Secretary’s Standards* pending development of “San Francisco Standards.” This interim exemption would imperil historic resources by creating different levels of project review depending on the type of designation, even though individual landmarks and contributors are accorded the same level of protection under CEQA. Moreover, the proposed exemption might create an incentive for some owners to seek demolition pending completion of the “San Francisco Standards” and potentially slow completion of the standards themselves.

5. SECTION 1014. APPLICABILITY

As clarified in his October 17, 2011 memo to the HPC, Supervisor Wiener is proposing to create a “uniform standard” for all historic districts and private landmarks “establishing that only exterior character-defining features, or interior character defining architectural features that are or historically have been visible or accessible from the public right of way or public space can be protected by a designating ordinance.”²¹

HERITAGE POSITION: Heritage strongly opposes a blanket exemption of all private or non-visible spaces from designation. If a property owner wishes to protect a significant private space—whether it be a wood-paneled executive board room, mural, rear courtyard, or façade obscured by a wall or landscaping—he or she should be able to do so. As an alternative, Heritage suggests that language be added to Article 10 requiring any future designating ordinance to explicitly call out any private or non-visible features to be protected prior to full review of the ordinance by the HPC, Planning Commission, or Board of Supervisors. Those features that are not listed in subsequent nominations (but not in those that have already been adopted) would be presumed to not be character-defining.

²⁰ Email from Lucinda Woodward, Supervisor, Local Government Unit, California Office of Historic Preservation, to Tim Frye and Charles Chase, October 3, 2011.

²¹ Memo from Supervisor Scott Wiener to the Historic Preservation Commission, Amendments to Articles 10 and 11 of the Planning Code, October 17, 2011.

B. ARTICLE 11

1. SECTION 1107. PROCEDURES FOR DESIGNATION OF ADDITIONAL CONSERVATION DISTRICTS OR BOUNDARY CHANGE OF CONSERVATION DISTRICTS

HERITAGE POSITION: See comments regarding Section 1004.3 above.

2. SECTIONS 1111(b), 1111.6, 1111.7(a) and (b)

HERITAGE POSITION: Heritage does not oppose Supervisor Wiener's proposal to provide notice to owners of properties for which TDR has not been transferred to receive notice of proposed changes in the demolition review process in Article 11.

On behalf of San Francisco Architectural Heritage, thank you for the opportunity to further comment on Supervisor Wiener's proposed amendments to Articles 10 and 11. Please do not hesitate to contact me at mbuhler@sfheritage.org or (415) 441-3000x15 should you have any questions or need additional information. At the time of the October 19th HPC hearing, I will also be available by email or by phone at (510) 282-1290.

Sincerely,



Mike Buhler
Executive Director

Attachment:

Letter from San Francisco Architectural Heritage to Historic Preservation Commission re Amendments to Articles 10 & 11 (Supervisor Scott Wiener), October 3, 2011

cc: Historic Preservation Commission

Supervisor Scott Wiener

Gillian Gillett, Legislative Aide, Supervisor Scott Wiener

John Rahaim, Director, San Francisco Planning Department

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Anthony Veerkamp, Director of Programs, National Trust for Historic Preservation