

September 26, 2012

VIA EMAIL AND U.S. MAILWRITER'S DIRECT LINE
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090525-0101Planning and Zoning Commission
City of Albany
1000 San Pablo Avenue
Albany, CA 94706Re: Application of St. Mary's College High School For Conditional Use
Permit: PA 06-053

Dear Commissioners:

My firm represents St. Mary's College High School ("SMCHS") in connection with its application for issuance of a Conditional Use Permit ("CUP") that is currently on the Albany Planning Commission's (the "Commission") agenda for hearing on September 26, 2012. This letter is provided in response to the letter to you from Marci A. Hamilton on behalf of the Peralta Park Neighborhood Association ("PPNA") dated September 19, 2012 opposing the approval of the CUP application (the "Hamilton Letter").

Although SMCHS' application addresses uses involving renovation or construction of several campus buildings, Ms. Hamilton's letter focuses primarily on the proposed construction of a chapel for the SMCHS community. In her letter to you, Ms. Hamilton raises three issues. First, she argues that potential traffic problems have not been adequately studied or addressed and that the Staff Report gave improper deference to SMCHS on the grounds that it is a religious institution. [Hamilton Letter at 2]. Second, Ms. Hamilton argues that CEQA issues were "apparently not taken seriously by the Staff" and that the actions of Staff raise First Amendment issues. [*Id.*] Third, Ms. Hamilton complains that the proposed CUP places no conditions on the construction or operation of the chapel. [*Id.*]

None of these contentions have merit. SMCHS therefore respectfully requests that the Commission approve the CUP application.

1. The Proposed Use of the Chapel

As a preliminary matter, the proposed use of the chapel bears repeating. As stated in the Staff's September 12, 2012 Report to the Commission, the planned use of the chapel will be limited in nature. Staff properly described the proposed use as follows:

If constructed, the school has indicated that they have no plans for regular use of the Chapel on Sundays or other times outside of school hours. In

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addition, the chapel will not be a parish church. The School has also indicated that it does not intend to lease the space to members of the general public for religious or other purposes. The Chapel is intended for use by the school as a place for worship, religious services, quiet prayer and meditation, religious instruction and a place for the Blessed Sacrament. The interior is expected to include an Altar, Sacristy, parlor, vestibule, toilets, and storage space. Religious events currently held in the gymnasium would be held in the new Chapel. On occasion the Chapel might be used for religious events involving members of the extended school community, such as memorial gatherings for alumni.

[September 12, 2012 Memo from Anne Hersch to the Commission re: PA 06-053 St. Mary's College High School Conditional Use Permit (CUP) & Design Review (DR))(the "September 12, 2012 Memo") at 5.]

While the September 12, 2012 Memo notes that the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), [42 U.S.C. §§2000cc (2006)] applies to the proposed chapel construction, contrary to Ms. Hamilton's claims, neither SMCHS nor Staff used the provisions of RLUIPA as a shield against all examination of the proposed project or the imposition of certain conditions. On the contrary, the September 12, 2012 Memo states:

[S]taff has inquired about anticipated uses and frequency of events at the proposed Chapel. However, the City has refrained from inquiring about specific religious activities and imposing any conditions that could potentially be construed as a substantial burden on religious exercise.

[September 12, 2012 Memo at 5.] Therefore, Staff appropriately inquired regarding the use of the chapel. Contrary to Ms. Hamilton's assertions, the only deference based on SMCHS's status as a religious institution was that Staff did not inquire as to what particular religious activities would occur in the chapel and properly did not impose conditions on what religious activities could occur at the chapel. Therefore, Ms. Hamilton's assertion that Staff improperly gave deference to SMCHS based on its religious status is nothing more than the creation of a "straw man" to support the assertion of a misleading argument intended to confuse the record and divert the Commission from approval of the CUP.

2. The Proposed CUP Adequately Addresses Traffic Issues

As for Ms. Hamilton's recitation of alleged deficiencies, even a cursory review of the September 12, 2012 Memo demonstrates that her complaints have no basis in fact. Ms. Hamilton's first argument, that the Staff Report and "mediating" conditions regarding traffic are inadequate, is wholly without merit. The resolution recommended by Staff includes extensive traffic mitigation measures. [Proposed Planning & Zoning Commission Resolution 2012-03 ("Draft Resolution")]

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(attached to the September 26, 2012 Memo from Anne Hersch to the Commission).] Specifically, Exhibit A to the Draft Resolution outlines the Conditions of Approval. Section D of Exhibit A is entitled “Traffic Management Plan” and includes extensive requirements for traffic mitigation. Those requirements include, but are not limited to, the following: (1) the designation by SMCHS of a transportation coordinator; (2) retention of traffic monitors; (3) approval of the Transportation Demand Management Program after review by the City’s Traffic & Safety Commission; (4) the preparation of a Traffic & Parking Handbook which shall be reviewed by the City and disseminated to SMCHS staff, parents, students and contractors; (5) submission of an annual report to the Planning and Zoning Commission; and (6) the appointment of an Events Coordinator responsible for enacting procedures to mitigate traffic and parking problems during special events. [Draft Resolution, Exhibit A at 19-20.]

The extensive discussion of and planning for traffic issues in the September 12, 2012 Memo and the Draft Resolution demonstrates that, contrary to Ms. Hamilton’s assertions, Staff carefully considered the traffic implications of the CUP and included provisions for addressing traffic issues. Moreover, Ms. Hamilton has failed to specify what conditions are claimed to be inadequate. Instead, the mere specter of traffic problems has been raised as a reason for denying the CUP. Furthermore, Ms. Hamilton’s assertion that Staff showed favoritism to SMCHS on religious grounds is simply not supported by the facts. On the contrary, Staff recommended traffic mitigation conditions without apparent regard for the use of the property, and there is no evidence that the CUP would or should have more stringent conditions if SMCHS was not a religious institution. Therefore, Ms. Hamilton’s contention that Staff Report and Mediating Conditions is inadequate or shows favoritism has no basis in fact. Additionally, SMCHS has met with Berkeley City Councilmember Laurie Capitelli and has identified several measures it is prepared to take to reduce trips on Albina Avenue, subject to approval by the City of Berkeley.

3. CEQA Issues Have Been Adequately Addressed

Like the argument relating to traffic issues, Ms. Hamilton’s letter is completely devoid of any facts which indicate that Staff did not take CEQA concerns seriously. [Hamilton Letter at 2]. As discussed in the September 12, 2012 Memo, the City entered into a new contract with an environmental consultant in October 2011 to examine the environmental effects of the project. That report has resulted in the proposed issuance of a Mitigated Negative Declaration (“MND”) which provides that certain conditions be imposed on the project as part of the CUP. Although Ms. Hamilton complains that CEQA concerns were “not taken seriously” by Staff, the MND provisions were, in fact, incorporated into the proposed CUP. Therefore, Ms. Hamilton’s assertions have no basis in reality.

Furthermore, Ms. Hamilton, once again, argues without basis that the First Amendment is somehow implicated in the Staff’s CEQA consideration. Again, Ms. Hamilton fails to show how SMCHS’s status as a religious institution played any role in the Staff’s CEQA analysis or that the Staff treated SMCHS in a deferential manner regarding CEQA issues based on its status as a

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religious institution. Simply put, there are no facts demonstrating that Staff deferred to SMCHS with respect to CEQA because SMCHS is a religious institution. Therefore, Ms Hamilton's argument that Staff's recommendations violate the First Amendment by showing favoritism based on religion is wholly without merit.

4. The Proposed CUP Includes Appropriate Restrictions on the Construction and Use of the Chapel

Ms. Hamilton's assertion that Staff imposed no conditions on the construction and operation of the chapel is, quite simply, false. The proposed CUP includes extensive requirements relating to construction and design and requires the project to go through additional design review before chapel construction is started. [Draft Resolution, Exhibit A at 17-19, 22-24.] In addition, the CUP governs hours of operation, requires SMCHS to comply with noise ordinances, and includes traffic and parking mitigation measures. [Draft Resolution at 14-17, 19-21, 23-24.]

Although Ms. Hamilton uses the false claim that no conditions were placed on the chapel as an excuse to launch a discussion of the limits of RLUIPA, there are no facts that demonstrate that SMCHS' application was granted deference by Staff with respect to the construction of the chapel because of RLUIPA. On the contrary, the conditions of the CUP are applicable to the entire project – which includes proposed projects that, unlike the chapel, are not to be used exclusively for religious purposes. There is no special carve-out which imposes fewer restrictions on the use of the chapel than on the rest of the project. In short, Ms. Hamilton's discussion of the application of RLUIPA puts the cart before the horse in that there is nothing that would indicate that RLUIPA or the fact that the chapel would be used for religious purposes affected the conditions imposed.

Similarly, Ms. Hamilton's discussion of First Amendment issues has no basis. Again, Ms. Hamilton states that there are no conditions on the chapel, when in fact, the CUP imposes conditions on the entire project, including the chapel. Therefore, there is no indication of any favoritism on the basis of religion and the First Amendment is not implicated. On the contrary, if the Commission were to deny SMCHS' application to build the chapel, as Ms. Hamilton seems to propose, then the Commission could run afoul of Constitutional rights to free exercise of religion and the provisions of RLUIPA.

5. The Additional Use Restrictions Proposed by PPNA Would Substantially Burden Religious Practice and Violate RLUIPA

Although RLUIPA has not been cited by the City as a basis for easing restrictions on the chapel, RLUIPA is likely to be involved in this matter if additional restrictions are imposed. For example, PPNA has proposed that conditions be imposed that would violate RLUIPA in that they would substantially burden SMCHS's exercise of religion. Specifically, PPNA proposes as follows:

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Chapel. The chapel shall be considered an accessory building to the School, and it shall be sized to accommodate a maximum of sixty people, whether seated or standing or in combination. Worship services or academic events may be held there only for current students and their family and for faculty/employees and only during the regular school day (7:00 a.m. - 4:00 p.m. Monday through Friday), and in no case may they be held on weekends or during the Summer break. In the chapel, the School shall not hold or allow any such events or assemblies that are generally open to the public, nor shall any other non-school events be held in the chapel at any time.

(See Hamilton letter at 4, n. 2)

A chapel that holds only 60 people would mean that less than ten percent (10%) of SMCHS students could attend events in the chapel at any given time and the chapel would not accommodate any staff or instructors within that number. The current plan would allow the use of the chapel by students of an entire grade level with accompanying staff. Furthermore, the proposed conditions would be *more* restrictive than the conditions that are imposed on non-religious uses at the property.

Ms. Hamilton also wrongly asserts that the chapel is an accessory use and subordinate to the school use on the site. The chapel is not a use akin to a detached garage or a garden shed adjacent to a residence. As is amply stated in the application and documents submitted by SMCHS in the application for the CUP, the chapel is an integral element in the religious mission of the school. The religious mission is embodied throughout the campus and in each of its classrooms and buildings. The role of the chapel in the religious life of the school, its students, parents and faculty, is to provide a focal point for religious worship for the SMCHS community. In this case, although SMCHS is a school, it cannot be reasonably disputed that the exercise of religion is at the core of SMCHS' mission. SMCHS defines its mission, in part, as follows:

As a Christ-centered community striving to live the mission of Saint John Baptist de La Salle, Saint Mary's College High School is a Catholic school where diversity and inclusion are essential and quality education is our active ministry.

Although SMCHS has not cited RLUIPA as a basis for arguing that conditions cannot be imposed on the use of its property (and indeed conditions have been and will be imposed), if the Commission denies the CUP or adopts restrictions that substantially burden SMCHS' religious practices, RLUIPA will become a basis for challenging those restrictions. In this case, the conditions proposed by PPNA, including those involving the chapel, will impose a substantial burden on SMCHS. Indeed, the Ninth Circuit Court of Appeals has recognized that an adequate place of worship is at the core of free practice of religion. In *Int'l Church of the Foursquare Gospel*

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v. City of San Leandro, 634 F.3d 1037 (9th Cir. 2011), the Ninth Circuit cited with approval to district court cases that recognized the importance of an adequate physical space. The Court stated:

[A] place of worship . . . is at the very core of the free exercise of religion . . . [and that] [c]hurches and synagogues cannot function without a physical space adequate to their needs and consistent with their theological requirements. The right to build, buy, or rent such a space is an indispensable adjunct of the core First Amendment right to assemble for religious purposes.

[*Id* at 1047 quoting *Vietnamese Buddhism Study Temple in Am. v. City of Garden Grove*, 460 F.Supp.2d 1165, 1171 (C.D. Cal. 2006) (quoting 146 Cong. Rec. S7774-01, Exhibit 1 (daily ed. July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy on RLUIPA of 2000)).] Moreover, the burden need not be insurmountable to meet the standards articulated by the Ninth Circuit in connection with RLUIPA. On the contrary, the Ninth Circuit cited with approval to a Tenth Circuit case which held just the opposite:

In fact, our sister circuit has held “that a burden need not be found insuperable to be held substantial.” *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 349 (2d Cir. 2007) (citation omitted). And when the religious institution “has no ready alternatives, or where the alternatives require substantial ‘delay, uncertainty, and expense,’ a complete denial of the [religious institution’s] application might be indicative of a substantial burden.” *Id.* (citation omitted).

[*Int’l. Church of the Foursquare Gospel*, 634 F.3d at 1046.]

If the Commission were to deny the CUP or impose the restrictions proposed by PPNA, SMCHS’s core mission of providing a religious education would be substantially burdened. Accordingly, SMCHS respectfully requests that the Commission approve the proposed CUP.

Lastly, Ms. Hamilton’s assertion that SMCHS has refused to meet with its neighbors is also false. To the contrary, SMCHS has made repeated efforts to meet with community members to discuss their concerns and remains willing to do so. For example, Ms. Vivian Kahn of Kahn/Mortimer Associates, who is assisting SMCHS in its planning efforts, worked diligently to arrange a meeting through communicating with the neighbors’ representative, Joe Light, ultimately offering to arrange a meeting for July 25, 2012 or July 26, 2012, and received no response. This effort is in fact memorialized in the July 23, 2012 email Ms. Kahn sent to Mr. Light cited by Ms. Hamilton. (Hamilton Letter at 5).

Most recently SMCHS has met with City Staff and PPNA’s consultant to discuss scheduling a meeting to discuss Councilmember Capitelli’s proposal and other proposals with the neighbors.



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SMCHS understands that there may be upcoming changes in the composition of the Planning Commission and the City Council but would prefer that the City not act on the CUP on September 26, 2012, and postpone its action for one or two meetings to permit SMCHS to have a dialogue with the neighbors.

Thank you for your consideration of this letter.

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By: 

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