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What's Holding Up Affordable Housing?

Lawsuit Stalls 2019 Affordable Housing Bond

by Patrick Monette-Shaw

Who knew the \$600 million Affordable Housing Bond passed by voters in November 2019 has been delayed and held hostage to a citizen's lawsuit first filed in San Francisco Superior Court on December 26, 2019?

Clearly, the Mayor's Office, the City Controller's Office, and the Mayor's Office of Housing and Community Development (MOHCD) have done everything they can to keep this news out of media reporting.

As far as is known, this news is being exclusively reported for the first time here in the *Westside Observer* newspaper.

It was very disappointing when the San Francisco Citizens' General Obligation Bond Oversight Committee (CGOBOC) — which is charged with oversight of all voter-approved G.O. bonds — held a hearing on March 22 to receive updates on three separate Affordable Housing Bonds that were presented.

Between the three presentations made by MOHCD and the question-and-answer period from CGOBOC members, the three bonds were discussed and dispensed with, within a record-setting 34 minutes flat.

Fully 60% of the 34 minutes involved the *2016 Bond*, which repurposes unused funds left over from the *1992 Seismic Safety Loan Program* general obligation bond. It focuses only on preservation and seismic safety of properties at-risk of conversion to market-rate uses in order to preserve the affordability of existing rental housing, protect residents at risk of displacement, and improve seismic safety. The *2016 Bond* doesn't finance new affordable housing construction or acquisition of properties without seismic improvements.

The *2015 Bond* involves \$310 million for new and rehabilitated affordable housing projects and the *2019 Bond* involves \$600 million for the same purposes.

Considering the hearing involved over \$1 billion in Affordable Housing Bonds, a mere 34 minutes does not suggest adequate oversight is being performed by CGOBOC.

There was next to no news presented during the March 22 CGOBOC meeting about the status and progress of San Francisco's \$600 million Affordable Housing Bond passed nearly a year-and-a-half ago in November 2019.

Then on March 30, I received a Google alert about Laguna Honda Hospital (LHH) that I had set up 20 years ago to receive any news involving the hospital. The alert indicated LHH is being leveraged as collateral — again! — for an additional \$80.2 million issuance of Certificates of Participation (COP's). [Editor's Note: COP's are a form of long-term municipal debt that requires payment of both principal and interest, but do not require voter approval to issue.]



Never Underestimate a Man With a Banjo: One disgruntled Libertarian's frivolous lawsuit held San Francisco's 2019 Affordable Housing Bond hostage.

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Curious about the new COP's for \$80.2 million, I contacted the City Controller's Office. I was then shocked while talking to City Controller staff when I stumbled across news that a lawsuit has been stalling the *2019 Affordable Housing Bond*.

Here's what has recently been learned.

March 22 CGOBOC Hearing

As has been reported in the past, CGOBOC converted from semi-annual updates about each bond measure under its oversight to just a single formal annual presentation from each bond's sponsoring City Department, plus an informal update six months later from the CGOBOC member assigned as a liaison to a given bond.

The March 22 CGOBOC meeting included a single agenda item for the Mayor's Office of Housing and Community Development (MOHCD) to present updates to CGOBOC on the 2015, 2016, and 2019 Affordable Housing Bonds.

MOHCD presented updates on the 2015 and 2016 Housing bonds in extremely fast and sketchy updates: Just 3 minutes and 13 seconds on the *2015 Bond*, and 10 minutes and 5 seconds on the *2016 Bond*.

For their part, CGOBOC members asked a paucity of questions on both Bonds, spending just 9 minutes asking questions and getting answers on the *2015 Bond*, and 10 minutes and 13 seconds asking questions and getting answers on the *2016 Bond*.

MOHCD indicates 98% of the first tranche of the \$310 million *2015 Bond*, 93% of the second tranche, and just 12% of the third tranche of the *2015 Bond* have been spent to date. Spending of the remaining *2015 Bond* amount is expected to accelerate in 2023, eight years after passage of the *205 Bond*! What's taking so long?

MOHCD indicated the *2015 Bond* has produced 400 housing units to date, and another 379 units are currently in construction, for a total of 779 affordable housing units. MOHCD claims another 740 are in predevelopment, but as I have [reported](#) in the past, spending for the vast majority — at least 454 — of those 740 units are not actual new or rehabilitated affordable housing units. Rather, MOHCD is padding its total housing units produced by the *2015 Bond* by tacking on additional units that will be constructed with non-Bond proceeds that are served by infrastructure projects funded by the *2015 Bond*, such as roads and sidewalks in the Sunnydale and Potrero public housing projects.

Indeed, the Sunnydale and Potrero public housing projects involve renovating or replacing existing public housing units to reach eligibility for accelerating moving them from HUD's Section 9 program (*Public Housing Operating Fund*) into its Section 8 program (rental housing for low-income and elderly tenants). That work was supposed to have started over a year ago, but starting that work was delayed due to COVID.

The only other news about the *2015 Bond* is that MOHCD informed CGOBOC verbally that Midpen's teacher housing project at the Francis Scott Key annex site at 43rd and Irving Street is not going to open until 2025, contradicting MOHCD's accompanying written report that indicated construction is expected to be completed in 2023. MOHCD didn't indicate to CGOBOC why it may end up taking an entire decade to get the teacher housing project at Francis Scott Key completed. Sadly, no CGOBOC members bothered to ask why it may take an entire decade. The failure to ask that question reeks of rotten and weak "*oversight*."

As for the \$600 million *2019 Affordable Housing Bond*, MOHCD spent a miserly one minute and 29 seconds on March 22 updating CGOBOC members about progress on the *2019 Bond*.

MOHCD merely reported that a [list of projects](#) to be funded by the *2019 Bond* had been approved by San Francisco's Capital Planning Committee and the Board of Supervisors on October 6, 2020, and that the first \$252.6 million tranche of the *2019 Bond* ("Social Bonds – Affordable Housing 2019, Series 2021A") would be sold by the end of the month of March. Indeed, the delivery date of that first tranche of the *2019 Bond* occurred on March 30, 2021, which appears to have taken a month longer, because it was previously reported in October 2020 that the first tranche was projected to be sold by February 2021.

That was completely ridiculous. The first tranche of the *2015 Affordable Housing Bond* was sold on Wednesday, October 19, 2016 —

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11 months after voters approved the bond in November 2015. No member of CGOBOC bothered asking why it took 17 months to sell the first tranche of the *2019 Bond* when it had taken only 11 months to sell the first tranche of the *2015 Bond*. More rotten oversight by CGOBOC.

Sadly, CGOBOC members spent no time at all asking any questions or getting answers about the *2019 Bond*.

During the March 22 hearing, CGOBOC member Jane Natoli made some remarks in her role as CGOBOC's liaison to MOHCD on the *2015 Bond* and *2016 Bond*. She spent a total of 4 minutes and 32 seconds presenting her Liaison Report.

She pointedly noted that no CGOBOC member had been appointed — or had volunteered — to be CGOBOC's liaison to MOHCD on the *2019 Bond*. Perhaps that's why CGOBOC members raised absolutely no questions about the *2019 Bond*.

Although \$150 million — fully 25% — was set aside for Senior Housing in the *2019 Bond*, no CGOBOC members asked any questions about why only 100 senior housing units may be being funded from the *Bond* for the senior housing project at Laguna Honda Hospital, after the developer selected by MOHCD for the project (Mercy Housing) had proposed building 375 senior housing units at LHH.

For my part, I provided remote oral testimony by phone and 150-word written public testimony for inclusion in the March 22 CGOBOC meeting minutes, indicating that it was absurd that neither members of the public nor CGOBOC members have been presented a list of projects to be funded by the *2019 Bond*. That stands in stark contrast to the *2015 Bond*, because just three months after voters passed the \$310 million *Affordable Housing Bond* in November 2015 MOHCD presented its initial planning report to CGOBOC in January 2016, and by June 2016 MOHCD presented a preliminary detailed list by street location to CGOBOC and the public.

At the end of the section of the meeting about the three Affordable Housing Bonds on March 22, Natoli appears to have gotten the message and pointedly noted that CGOBOC should be given a list about what is being funded by the *2019 Bond*.

CGOBOC is now scheduled to hold its next hearing on all three Affordable Housing Bonds on December 6, 2021, a little earlier than a full year between formal report presentations.

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Notably, MOHCD didn't share with CGOBOC members on March 22 that a lawsuit may be stalling progress on the *2019 Bond*. You'd think MOHCD would have been upfront about the lawsuit to the very committee — CGOBOC — providing oversight on all three Affordable Housing Bonds. But you'd be wrong.

New \$80.2 Million COP's

The Google alert I received on March 30 about Laguna Honda Hospital indicated a \$80.2 million COP's Series 2021A (Multiple Capital Improvement Projects) would use LHH's North and South patient residence towers plus LHH's Pavilion Building, along with San Francisco's San Bruno Jail complex, as leased assets to secure the COP financing.

“ LHH's two residence towers and its Pavilion Building have previously been used as 'collateral' multiple times in the past for several different COP-funded projects. ”

Proceeds of the Series 2021A COP's will be used to finance acquisition of property for purposes of relocating the operations of San Francisco's Hall of Justice building.

When I contacted the City Controller's Office with questions about these new COP's, Controller staff indicated my memory was correct that LHH's two residence towers and its Pavilion Building have previously been used as “*collateral*” multiple times in the past for several different COP-funded projects, including for Road Repaving and Street Safety (RRSS), in addition to General Obligation Bond funding voters had previously passed at the ballot box for other RRSS projects.

Almost lamely, Controller staff admitted concerns have been raised about the LHH property having been repeatedly used as leased-asset *collateral* in the “pool” of assets the City relies on to secure COP financing. The Controller's staff indicated the Controller's Office is working with the City's Real Estate Division to identify other City property and assets that can be added to the asset pool in the future.

The Citizen's Lawsuit Stalling Affordable Housing Bond

On December 26, 2019 Michael Denny filed an *In Pro Per* [lawsuit](#) in San Francisco Superior Court against John Arntz, San Francisco's Director of Elections and City Attorney Dennis Herrera contesting San Francisco's 2019 municipal election (San Francisco Superior Court case number CPF19516970). The lawsuit is a special Superior Court proceeding, alleging multiple violations of California's election code and San Francisco's municipal election code regarding the November 2019 "Proposition A" \$600 million Affordable Housing Bond.

In Pro Per is used to describe people who handle their own cases, without the benefit of a licensed lawyer. Mr. Denny — a previous Secretary of the Libertarian Party of San Francisco (LPSF) — has filed multiple lawsuits in the recent past as an independent citizen, not in his role as a member of LPSF. LPSF itself appears to be ineligible to be listed as a complainant on lawsuits filed independently by its members.

It should be noted that LPSF was the official opponent of the November 2019 "Prop. A" in the voter guide, even though it may have been ineligible to sign on to Denny's Superior Court lawsuit. LPSF asserted in its official Opponents Argument in the November 2019 voter guide that "*affordable housing programs in reality make housing less affordable,*" and that "*affordable housing programs are NOT an incentive to build more housing.*"

Just like the YIMBY's who misguidedly believe market-rate housing will somehow trickle down to create affordable housing, LPSF apparently believes San Francisco's government should "*get out of the way*" and allow developers to build whatever they want.

LPSF members — including Denny on at least two occasions — have filed lawsuits in the past requesting election results be invalidated, asserting that local governments can present bond measures on ballots — but the ballot measures must include a true and impartial synopsis of the purpose of the proposed measure, and must use language that is neither argumentative nor likely to create prejudice for or against the measure.

Denny's lawsuit challenging the *2019 Affordable Housing Bond* asserted seven contested grounds of action alleging highly arcane technical violations.

The first ground alleged that the question put to voters on the ballot did not contain the phrase "*shall the measure be adopted?*" that is required by California Election Code 13119(a), using instead the phrase the "*... shall the City and County of San Francisco issue \$600,000,000 in general obligation bonds?*".

The third ground alleged California Election Code 13119(c) requires official ballot statements use "*language that is neither argumentative nor likely to create prejudice for or against the measure.*" Denny alleged much of the language used in the official ballot statement and the voter guide used terminology presenting *reasons* to pass the Bond measure, therein creating prejudice favorable for the measure.

The remaining five grounds Denny presented in his lawsuit were equally as arcane.

On February 5, 2020 Superior Court Judge Ethan P. Schulman dismissed Denny's Superior Court lawsuit. In doing so, Schulman noted Denny had raised substantially identical claims in a separate *pre-election* challenge, which the Superior Court had previously dismissed on *demurrer* (i.e., that the petitioner's claim(s) were irrelevant or invalid). Schulman further noted Denny's *post-election* challenges were simply a continuation of his prior *pre-election* challenge of the same "Prop. A" ballot measure by substantially raising the same claims and issues, again.

Schulman dismissed Denny's grounds 1, 2, 3, 5, and 7 since his challenges alleging the lack of impartial analysis of ballot measure applies only to pre-election activities, and that Denny had not demonstrated that the so-called forbidden activities had affected the outcome of voters passing "Prop. A" in November 2019.

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“ Just like the YIMBY’s who misguidedly believe market-rate housing will somehow trickle down to create affordable housing, LPSF apparently believes San Francisco’s government should ‘get out of the way’ and allow developers to build whatever they want. ”

Despite having lost his pre-election and post-election lawsuits about the *2019 Affordable Housing Bond*, Denny chose to file an appeal to the Court of Appeal on March 26, 2020. It took the Superior Courts Appeals Division until August 28, 2020 to complete that the appeal had been certified by the Court of Appeal.

It's almost as if Denny, other members of LPSF, and LPSF itself may believe that filing lawsuits to challenge the *2019 Affordable Housing Bond* will somehow get government *out of the way* and allow developers to build whatever types of housing that they wish.

Of San Francisco's 511,325 registered voters there are just 2,906 registered Libertarians, a paltry 0.6% of registered voters (as of April 5, 2021). It's shocking that the LPSF political party represents less than one percent of San Francisco's registered voters, yet a single LPSF member has managed to hold the *2019 Affordable Housing Bond* hostage to get the government "*out of the way*" of housing developers.

Indeed Mr. Denny — perhaps spellbound by the Libertarian Party's slogan "*Minimum government, maximum freedom*" — has single-handedly held the *2019 Bond* hostage with his futile lawsuit to overturn passage of the *2019 Bond*, despite the fact that 143,055 San Franciscans voted in favor of passing the Bond.

It's not yet known if the Court of Appeals has concluded hearing Denny's appeal, or whether Denny will petition the State Supreme Court to review any decision from the Court of Appeal.

What *is* currently known, is that the City of San Francisco is confident and expects it will prevail, regardless of the Supreme Court's decision.

While Mr. Denny may have been within his First Amendment rights to file his lawsuit, it's clear that lawsuit delayed issuing the first tranche of the *2019 Bond*. The Controller's Office of Public Finance presented a bond issuance [timeline](#) on September 19, 2020 indicating it planned to sell the Bonds in November 2020, but they weren't sold until five months later in March 2021. City Hall sources have confirmed there was a nexus between Denny's lawsuit and the five-month delay selling the first tranche of the bond. MOHCD should have informed CGOBOC about the nexus. The introduction of the request to the Board of Supervisors seeking authorization to sell the bonds may have also involved additional months of delay.

Mr. Denny, Nicholas Smith (who is also an LPSF member), and Starchild (who is now LPSF's chairperson), filed an earlier lawsuit (Superior Court Case number CGC19575070) on April 5, 2019 also challenging the November 6, 2018 *Embarcadero Seawall Earthquake Safety Bond*, alleging many of the same issues Denny raised challenging the November 2019 *Affordable Housing Bond*. Although the Superior Court dismissed the *Seawall* lawsuit, Denny, Smith, and Starchild appear to have also appealed that dismissal to the Court of Appeals.

Loose Ends

As far as the *2019 Affordable Housing Bond* goes, several loose ends remain unanswered.

Language in the legal text in the November 2019 voter guide indicated that as part of oversight of, and transparency involving, the *2019 Housing Bond*, the City would ("shall") create a web page outlining and describing the bond program, including progress and activity updates. As of April 1, MOHCD has not created such a web page or made it available on-line.

Language in the legal text in the voter guide also promised that an annual report on the *2019 Bond* would be provided to the Mayor and the Board of Supervisors. MOHCD indicated on April 6, 2021 that no annual report was provided to the Mayor and Board of Supervisors, responding by saying:

“ Despite having lost his pre-election and post-election lawsuits about the 2019 Affordable Housing Bond, Denny chose to file an appeal to the Court of Appeal on March 26, 2020.”

“ It's shocking the LPSF political party represents less than one percent of San Francisco's registered voters, yet a single LPSF member has managed to hold the 2019 Affordable Housing Bond hostage.”

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“Other than the information provided to the Board (and previously sent to you) when seeking their approval for the first issuance of the 2019 Affordable Housing Bond, there have been no subsequent reports to the Board.”

MOHCD was referring to the October 6 report presented to the Board of Supervisors seeking authorization to sell the \$252.6 million first tranche of the 2019 Bond. By not producing an annual report on the 2019 Bond, MOHCD is signaling that it decided it didn't need to comply with the oversight promises made in the legal text in the 2019 voter guide.

Finally, the secrecy about placing senior housing on LHH's campus continues.

As I previously [reported](#), news quietly surfaced on July 7, 2020 that Mercy Housing California was chosen as the developer for a senior housing project on LHH's campus, after Mercy proposed building up to 375 units of independent housing and assisted living units. Few San Franciscans have heard that Mercy Housing was chosen, because MOHCD has kept the news quiet, and it hasn't been covered by our local major news media.

On December 27, 2020, a records request was placed to MOHCD asking for Mercy Housing's feasibility analysis concerning its proposal to build 375 senior housing units LHH's campus. The same records request also asked MOCD to provide the total number of units for the LHH housing project that will be included in *all tranches* of the 2019 Affordable Housing Bond, since the October 6 documentation presented to the Board of Supervisors seeking authorization to issue the first tranche of the Bond had indicated it was for funding only 100 senior housing units on the LHH campus, not 375 units.

On January 4, 2021 MOHCD responded to the December 27 records request by indicating that Mercy Housing's feasibility analysis would be provided by January 15. MOHCD also reported on January 4:

“There is no additional information on the [total] number of [senior housing] units [for LHH] in the various [2019 Bond] tranches besides what was provided to the Board [of Supervisors] in October 2020.”

On April 3, another records request was submitted to MOHCD seeking Mercy Housing's feasibility study that MOHCD had previously said would be provided by January 15.

MOHCD didn't respond to the April 3 follow-up records request by the submission deadline for this article. MOHCD finally responded on April 7 saying:

“The feasibility study is not yet complete; MOHCD believes it will be complete by the end of May.”

No explanation has been offered as to why Mercy Housing hasn't completed a feasibility analysis fully 10 months after it was named the developer for the LHH senior housing project, and what may be causing the delay.

The secrecy involving Mercy Housing's feasibility study and placing senior housing on LHH's campus continues, unabated.

[Full Disclosure: I took out a paid argument in the 2019 voter guide opposing the 2019 Affordable Housing Bond, not because I believe San Francisco government should *get out of the way* of housing developers and not because I oppose affordable housing. Instead, my paid argument was because of MOHCD's truly rotten track record and performance on San Francisco's 2015 Affordable Housing Bond, since it appears that bond will produce less than 1,000 new affordable housing units, voters weren't told beforehand that MOHCD would reserve and allocate up to 30% of new units for the homeless, too much of the bond was earmarked for infrastructure rather than housing units (including infrastructure to support 125 market-rate units), and because a \$42 million program for middle-income rental units promised to voters was unilaterally eliminated by MOHCD post-election.]

Monette-Shaw is a columnist for San Francisco's Westside Observer newspaper, and a member of the California First Amendment Coalition (FAC) and the ACLU. He operates stopLHHdownsize.com. Contact him at monette-shaw@westsideobserver.com.

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