

November 23, 2015

London Breed, President
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, Ca. 94102-4689

**RE: Appeal of 22 Ord Court Conditional Use Authorization
Planning Case No. 2013.1521CUAV
Board of Supervisors Appeal File No. 151113**

Dear President Breed and Members of the Board:

Executive Summary

Earlier in 2015, the Board of Supervisors voted unanimously to support Supervisor Scott Wiener's Interim Zoning Controls for a small area in the Eureka Valley neighborhood. The Interim Zoning controls were created in response to an outcry from many neighbors that projects, which threatened the unique character of the neighborhood, were being built. The Interim Zoning Controls provide an additional layer of consideration for developers looking to build or renovate in the area, with a focus on overall building scale and the preservation of a reasonable amount of open space.

The project at 22 Ord Court is the first project in the impacted Interim Zoning Controls area where a developer was granted a Conditional Use permit to exceed both the scale and open space requirements of the legislation. **We ask that you disapprove the Conditional Use permit for the following reasons:**

- Neighbors, in cooperation with an experienced architect in San Francisco, have demonstrated that there are very feasible options for the developer to create a

project that adheres to the Interim Zoning Controls – there has not been a clear demonstration of the “infeasibility” of alternatives by the developer.

- A significant number of neighbors have spoken already – with more than double the required signatures gathered to support the appeal of the Conditional Use decision.
- The project as designed is harmful to the unique nature of the neighborhood.
- The project is precedent setting, and an opportunity for the Board of Supervisors to join many concerned neighbors in backing up the decision you made earlier this year by requiring developers to clearly demonstrate the feasibility hurdle before being granted such Conditional Use permits.



Overview

The project consists of a vertical addition to an existing home at 22 Ord Court and also the construction of a new home at the rear of the lot which fronts on States Street on this RH-2, through lot. We appeal the Conditional Use at 22 Ord Ct. because the project does not meet the required "feasibility" standards set out in the interim zoning controls applicable to our neighborhood, nor does it meet the standard conditional use findings, most notably the key requirement that the development be "necessary or desirable for, and compatible with, the neighborhood or the community." Prior to the conditional use hearing, we offered a generous compromise to the developer who refused not only our offer but who also refused to make any counteroffer.

The proposed 22 Ord Ct., and adjacent 24 Ord Ct. projects, from the same project sponsor, fall within the boundaries of the Interim Zoning Controls for Large Residential Projects in RH-1, RH-2, and RH-3 Zoning Districts adopted unanimously by the Board of Supervisors on March 10, 2015.¹

This project, and its sister project at 24 Ord Ct., were heard together as a package at the Planning Commission through the Discretionary Review process: first on December 4, 2014, then February 12, 2015, upon which time they were again continued. Of significant concern to the neighborhood and Commissioners were the preservation of large Monterey Cypress trees at the back of 24 Ord Ct. (they overhang States St.) and the scale of both projects. Thus, the Commissioners sent the project back for redesign on two occasions. Subsequent to the last DR hearing, we participated in the development of the interim zoning controls now applicable to

¹ Board of Supervisors Resolution No. 76-15, File No. 150192
<http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions15/r0076-15.pdf>

our neighborhood. These controls appropriately require conditional use for both projects (22 and 24 Ord Ct.). Both projects returned to the Planning Commission on September 24, 2015 for a conditional use hearing where the project at 24 Ord Ct. was imperfectly denied (explained below) and the project at 22 Ord Ct. was approved. We appeal the approval of the project at 22 Ord Ct. because both buildings on the lot are too large and because the developer refused to compromise on either or both projects and continues to pursue a large project at 24 Ord Ct.

Interim Legislation

The new legislation requires conditional use for large additions *or* large new structures. The proposal consists of both -- a large addition to one building *and* the construction of another large structure in the required rear yard. It requires both a conditional use *and* a rear yard variance.

There are two special findings that must be made to approve a conditional use under the interim legislation: one is that it must be proven that it is infeasible to develop a project that does not exceed 55% lot coverage and the other is that a second building can only be constructed on a through lot if it is infeasible to build two units in one building:

“FURTHER RESOLVED, That the Planning Commission shall only grant a Conditional Use authorization allowing residential development to result in greater than 55% lot coverage upon finding unique or exceptional lot constraints that would make development on the lot infeasible without exceeding 55% total lot coverage, or, in the case of the addition of a residential unit, that such addition would be infeasible without exceeding 55% total lot coverage;

FURTHER RESOLVED, That the Planning Commission, in considering a Conditional Use authorization in a situation where an additional new residential unit is proposed on a through lot on which there is already an existing building on the opposite street frontage, shall only grant such authorization upon finding that it would be infeasible to add a unit to the already developed street frontage of the lot.²

The project does not meet either infeasibility requirement and also does not meet the standard conditional use findings, as further described below.

Findings Not Met

As to the feasibility findings, the developer stated in his conditional use application that it was infeasible to build within 55% and on only one side of the lot because the lot was steep, the lot was narrow and such a project would cast too great a shadow. Many lots within the City and within the RH-2 zoning district of equal or greater steepness contain two units within one building not exceeding 55% lot coverage. Indeed, this is how the standard RH-2 rules came about in 1978 -- from planners seeing that most RH-2 lots on both hills and level lots were developed at this degree of lot coverage. The lot is 25 feet wide. For San Francisco this is not narrow; THIS IS THE STANDARD LOT WIDTH. The proposed project results in a shadow SIGNIFICANTLY in excess of the shadow that would be cast by a single building at 22 Ord that did not require a conditional use or variance.

Both property owners and tenants in the neighborhood chipped in to engage an architect to look at the feasibility issue from a design standpoint. The architect, F. Joseph Butler,

² Board of Supervisors Resolution No. 76-15, File No. 150192
<http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions15/r0076-15.pdf>

AIA, who has extensive experience designing residential projects in San Francisco over many decades, confirmed it is entirely feasible to design a two-unit building at 22 Ord Ct. as well as at 24 Ord Ct., both of which would fall within 55% lot coverage. An example of a single structure with two units is shown in the graphic on page 11 as 24 Ord Court. Such a building is feasible for either or both sites -- 22 and/or 24 Ord Court. Mr. Butler's letter attesting to feasibility is also attached.

Finally, the term "feasible," which is not defined in the Planning Code, has been defined in the state's most important land use legislation -- CEQA. The California Resources Code specifically defines this term as:

*"capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors."*³

Over and over again in precedent-setting California Appeals Court rulings, this standard has been further refined to ask the question: *"whether the marginal costs of the alternative as compared to cost of the proposed project are so great that a reasonably prudent [person] would not proceed with the [altered project]"*⁴

So here we would ask, if you were to disapprove the two-building proposal, would a reasonably prudent owner then proceed instead with a two-unit proposal within the existing home at 22 Ord Ct. or would he find it so infeasible he would not proceed at all. Given that turning buildings like 22 Ord Ct. from 1 unit to 2 units occur all the time, it is obvious the

³ California Public Resources Code, Section 21061.1.

<http://law.onecle.com/california/public-resources/21061.1.html>,

reaffirmed in CEQA guidelines and numerous court cases: § 21061.1; Guidelines, § 15364; *Goleta II, supra*, 52 Cal.3d at p. 565; *Laurel I, supra*, 47 Cal.3d at p. 402, fn. 10.

⁴ *SPRAWLDEF v. San Francisco Bay Conservation and Development Commission (Waste Connections, Inc., RPI) (1st Dist., Div. 1, 2014) 226 Cal.App. 4th 905*. Reasserted in *Citizens of Goleta Valley v. Board of Supervisors, supra*, 197 Cal.App.3d at p. 1181 and *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, etal.

answer is "yes" -- a reasonably prudent owner would pursue turning 22 Ord Ct. into two units if the Board disapproved the proposal for two separate buildings.

If we depart from case law to find the meaning of the term and just use the common sense meaning, one would ask -- can a two-unit project in one building be done in a way that makes sense? The answer is also "yes" -- both existing Ord Court buildings can be made into two unit buildings without going beyond 55% lot coverage and without having to put separate structures at both ends of the lots.

Every conditional use must include a number of findings, including that the proposal is necessary or desirable for, and compatible with, the neighborhood or the community. This proposal is neither necessary nor desirable because it overdevelops the lot (lot coverage would be over 64% as compared to the standard of 55%) and builds in both the buildable area and the required rear yard. It increases the square footage by 164%, adding a total of almost 4000 sf (3,932 sf) to the existing 2400 sf home. It reduces the open space around the significant trees at 24 Ord Court. And it will most certainly act as a negating precedent for the new interim legislation, as it is the first project to be considered under this legislation.

Our neighborhood is unusual in that it is largely made up of through lots as opposed to two separate lots back to back. While some lots in our neighborhood have buildings on both ends, many do not. Many of the rear yards that are not developed have mature trees that together provide a transitional habitat for birds and other wildlife between the hardscape of Market Street below and the protected open space of Corona Heights above. The green ovals below show the many nearby lots that are not built on both ends and which contribute to the rustic and transitional nature of our neighborhood. The white oval is the project site (which

includes both 22 and 24 Ord Court). Indeed, the mature Monterey Cypress on 24 Ord is in fact a principal stopping place for the wild parrots of Corona Height. As Planning Commissioner Richards noted at the hearing on February 12, 2015, "those kind of big Monterey Cypress Trees **do** define the neighborhood."⁵ Through lot development here and elsewhere removes the trees and the open space around the trees, destroys the habitat, and will remove the rustic feel -- a defining characteristic of our neighborhood.



In the upper right is Corona Heights -- unimpeded open space. What you have in our neighborhood is a transition zone. It provides a buffer between the open space and the blocks downhill that are without any street-facing open space. The buffer area includes three streets interspersed with both street-facing development and street-facing open space -- it's a mix of both. It's a transitional neighborhood creating a gentle bridge between hardscape and open space.

⁵ Planning Commission Hearing 2/12/2015, SFGovTV, timestamp: 4:24
http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=20&clip_id=22100

The proposal would put two units each in excess of 3100 sf on the lot, which are not likely to be affordable given recent trends in real estate prices in San Francisco. Two smaller units in one building could still be family-sized and more affordable. It is a misnomer to say the City needs more housing of every type -- both market rate and below market rate. The Planning Department's own monthly tracking of housing shows the City has created more than 100% of its goal for above moderate income housing (116%) but dismally below its below moderate income housing goals (13.9%) and equally bad for low income housing goals (14.1%).⁶ And yet, we as a City continue to approve almost exclusively new high-end housing such as the proposal.



Upper States Street is defined by through lots shared with Ord Ct. to the South and Museum Way to the North. Many large, decades old, significant trees reside in these zoning protected rear yards, and provide the character, bucolic nature, and beauty that define States Street. They also provide habitat for the wild parrots of Corona Heights.

⁶ Monthly Regional Housing Need Report, see page 2.
http://commissions.sfplanning.org/cpcpackets/DirectorsReport_20151118.pdf



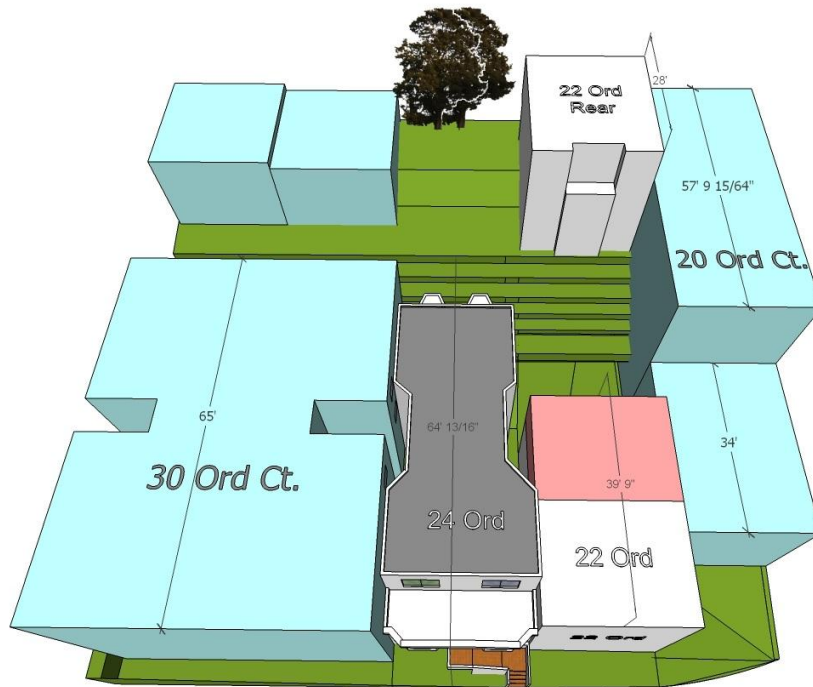
Wild Parrots in the 24 Ord Court Monterey Cypress

Neighbors' Good Faith Compromise Attempts

Although we felt that with the new controls in place neither proposal (22 Ord Ct. nor 24 Ord Ct.) met the required findings, especially the infeasibility finding for construction of two buildings on a thru lot, we also believed that a compromise would demonstrate the neighborhood's sincere intentions to work with developers and thereby encourage future developers to work with neighbors instead of against them. We therefore offered to meet the developer half way: we would support a proposal in which a conditional use and variance would be granted for two reduced-sized structures at 22 Ord Ct. in exchange for a smaller project in a single building at 24 Ord Ct. that would not require conditional use or variance and

which would not be anywhere near the two Monterey Cypress on the States Street side of the lot.

This is best understood in the graphic below, which was submitted by neighbors to the Planning Department and Planning Commission at the Sept. 24 Planning Commission Hearing.



Neighbor Proposed Compromise allowing maximum density and preserving the trees

In this graphic, States Street is at the top, Ord Ct. is at the bottom. 22 Ord Ct. is on the right, and 24 Ord Ct. is on the left. Commissioner Richards referenced this graphic multiple times when questioning the project sponsor and others at the Sept. 24 Hearing. As shown in the graphic, neighbors had proposed that the structure on the States Street end be scaled back from 36' to 28' in length, and that the 3rd floor of the existing 22 Ord Ct. building would be expanded on the third floor, but that the project sponsor not add an additional 4th floor on top of that. The drawing also shows that a second unit would be added to the existing 24 Ord Ct.

building and that the structure need only have 3 levels and would no longer require a structure on both ends, thus eliminating the conflict with the trees. There would be no decks on either structure.

By a 6 to 1 vote the Commission voted an intent to disapprove 24 Ord Ct. (an intent because the staff had not prepared a motion of disapproval) and also approved the project at 22 Ord Ct. After we appealed the conditional use, the developer withdrew the Conditional Use Application on 24 Ord Ct. to avoid the possibility of a final disapproval motion from ever being acted upon. Fortunately, at the recent hearing on November 19th, Commissioner Richards pointed out that Article 4, Section 6c of the Commission's published Rules and Regulations prohibit the withdrawal of a conditional use after an intent to disapprove.⁷ Action on the disapproval motion is now scheduled for December 3rd. We are concerned that because a new building behind 22 Ord Ct. would be constructed, the Zoning Administrator will make a ruling exempting a new building at the rear of 24 Ord Ct. from a variance requirement and that the conditional use requirement will be obviated by the expiration of the Interim controls or by a piecemeal approach that gets approval for a rear building first and then comes back with an expansion proposal of 24 Ord that would further erode the unique neighborhood characteristics we are seeking to preserve.

Through the efforts of our Supervisor's office subsequent to our filing the appeal, neighbors have met several times in another attempt to reach a compromise with the project sponsor. We will continue to focus on a successful outcome to this process.

⁷ San Francisco Planning Commission Rules and Regulations, 2015.
<http://www.sf-planning.org/index.aspx?page=1460>

The Appeal

The neighborhood supported this appeal with signatures from property owners representing over 40%⁸ of the area within 300 feet of the project. Additional signatures continue to come in. (Notably, many tenants in this City of renters also support the appeal; however, the City does not bother to recognize tenants' signatures in conditional use appeals.) This percentage represents more than double city requirements for this type of appeal and is indicative of the opposition to this project and of the support for the new controls. Should this project not be disapproved or appropriately scaled back, it will invalidate the purpose and intent of the new controls and ensure the characteristics of our neighborhood that are most important will be forever lost.

Conclusion

The neighbors ask that you reinforce the decision you made earlier this year when you created the Interim Zoning Controls. These controls set a high bar for developers to demonstrate exceptional lot constraints that would make development on the lot infeasible without exceeding the controls. That has not been the case for 22 Ord Court. This appeal presents you with an opportunity to deliver a clear message to the planning and development community that San Francisco cherishes the unique attributes of our neighborhoods. The City deserves the best planning and execution of projects that are aligned with the need and desires of our communities. By disapproving this project and requiring one that adheres to the zoning

⁸ Letter from SF Department of Public Works
<https://sfgov.legistar.com/View.ashx?M=F&ID=4117085&GUID=BB283587-7694-4AE5-A162-4EEBA4D3902B>

controls implemented for the Corona Heights neighborhood, you will encourage our developers to invest in projects that make sense for the City at large.

Attached below is a letter from Architect F. Joseph Butler, AIA

F. JOSEPH BUTLER
ARCHITECT

23 November 2015

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RE: File no. 151113-6; Planning Commission 2013.1521 CUAV; 2619/067

Dear President Breed:

Our office represents several neighbors supporting the Appeal by the Castro Eureka Valley Neighborhood Association, of the Conditional Use Authorization for a new single family residence at the rear of the lot known as 22 Ord Court. Our firm has over 28 years of experience designing primarily single family and 2 unit dwellings in San Francisco, both as alterations and as new construction.

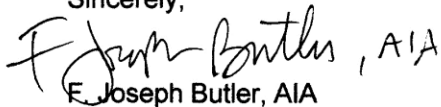
The existing building at 22 Ord Court, on Block 2619, Lot 067, **could feasibly** be expanded by a major alteration to include two units within the 55% lot coverage. There is nothing unique or exceptional about Lot 067, it has Planning Code compliant street frontage, lot width, and well exceeds the minimum lot size. Such an alteration for an additional unit would not have required a Conditional Use Authorization. San Francisco is filled with two unit buildings on such standard lots with similar slope.

Lot 067 however also fronts onto States Street, where the Project Sponsors propose to construct a new single family residence. Supervisor Wiener's Interim Controls Legislation would allow exceeding such limits when adding a unit, only upon finding that it would be infeasible to add a unit to the already developed street frontage. This is clearly not the case for either 22 Ord Court, or their adjacent property at 24 Ord Court.

The Sponsors cited natural lighting, slope steepness, and excessive shading of adjacent parcels as a rationale for infeasibility. However, the lot is even steeper at the rear, and the lower story of the new building proposed would be a basement with natural lighting from only one side.

Without meeting either of the infeasibility requirements, as required by the Interim Controls, there is no justification for this Conditional Use Authorization. Consistent with the legislation our appeal should be upheld.

Sincerely,


F. Joseph Butler, AIA

cc Members of the Board of Supervisors

MEMBER OF THE AMERICAN INSTITUTE OF ARCHITECTS