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May 20, 2020

VIA EMAIL ONLY

President Norman Yee
c/o Angela Calvillo, Clerk of the Board
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

Re: Appeal of CEQA Categorical Exemption Determination
Planning Case No. Case No. 2017-014666ENV
743 Vermont Street, San Francisco

Dear President Yee and Honorable Members of the Board of Supervisors:

This appeal concerns a project that would illegally remove an unauthorized dwelling unit and does not disclose this in the project description. The project at 743 Vermont Street, San Francisco (the “Property”) proposes a large horizontal and vertical addition to the existing house at the Property (the “Project”). The Project description does *not* disclose that it would also remove an Unauthorized Dwelling Unit (“UDU”) at the Property, or even that this UDU exists. Planning staff previously noted that the Project proposes legalizing the UDU at the Property, but now suggest this is not the case. The Project has been described in multiple inconsistent ways, resulting in a flawed CEQA analysis.

The Project Sponsor’s brief and Planning Department report attempt to gloss over the inconsistent Project descriptions, suggesting that the shifting Project descriptions do not matter. This is not correct; under CEQA, it is crucial that a project description be “accurate, stable and finite” for proper environmental review to occur. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) Here, the categorical exemption must be rescinded because the Project description is inaccurate and unstable, rendering the CEQA analysis defective as a matter of law.

The Project Sponsor also attempts to muddy the waters by claiming that the Appellant previously built a “similar if not identical” project. This is not correct. No UDU existed at, or was removed from, the Appellant’s property. The Appellant’s project was designed sensitively to preserve neighbors’ access to light and air. The rear walls of the existing respective buildings are

in line, and the Project Sponsor is proposing to significantly expand the subject building beyond this point, while also raising the roof height and flattening the entire roof at that height, boxing off more air and light, instead of maintaining a similar pitched roof.

A. Project Background

On September 19, 2018, the Planning Department issued a categorical exemption for the Project (the “2018 CatEx”). The Project description for the 2018 CatEx proposed:

Demolition of the rear portion of the dwelling beginning approx. 25 feet from the front face of the building. Demolition of the existing gable roof beginning approx. 16 feet from the front face of the building. Construction of a new addition which will extend to the rear footprint 4'-11" to the east and to within 1'-0" to the north. This will be the same for both the second and third floors. The addition and remodel will include a remodeled kitchen, and bedroom on the second floor and new master bedroom and remodeled bath on the third floor. There will be a new deck off the master bedroom to the north. The existing interior winder stairway will be removed and replaced with a new stairway with landing. The extent of the addition/remodel will have a flat roof approx 6 inches above the existing ridgeline.

What the Project description did *not* disclose was the fact that a UDU exists on the ground floor of the Property. To wit, the ground floor includes four unpermitted rooms, including a street-facing room with a window and a closet, and a full bathroom (including a bathtub) attached. These rooms are independent from the other residential unit at the Property; there is no internal access to them from the upper levels of the Property. This space is in reality a UDU. (Planning Code § 317(b)(13)). It was designed to be used as a separate and distinct living space, and it has been used for this purpose. The Project plans misleadingly depicted the unpermitted rooms as “storage” space. On March 6, 2019, DBI issued a Notice of Violation in relation to these unpermitted rooms (NOV No. 201928061).

The Appellant appealed the Planning Commission’s approval of the 2018 CatEx on the basis the Project description was inaccurate, and the Project would result in the removal of the UDU. This appeal was ultimately not heard because the Planning Department agreed the Project description was inaccurate and rescinded the 2018 CatEx in April 2019, noting that “new information was presented requiring a revision to the plans and scope of work of the 201710272504 building permit for the proposed 743 Vermont Street project.” Similarly, the Planning Department’s report for this appeal notes:

On April 8, 2019 the department rescinded the September 20, 2018 categorical exemption due to a potential change in the project’s physical scope of work

associated with the legalization of four ground floor rooms, including a full bathroom which was constructed without the benefit of permits.

The Project sponsor subsequently filed a permit application to legalize these rooms (BPA No. 201904037052). On September 5, 2019, the Planning Department issued a new categorical exemption for the Project (the “2019 CatEx”). The Project description for the 2019 CatEx is substantially the same as the 2018 CatEx description, except that it also states “In addition, the project would include the legalization of an existing bathroom and 3 storage rooms at the ground floor level (garage) to comply with Notice of Violation #201928061.”

The 2019 CatEx suffers from the same deficiencies as the 2018 CatEx, in that it inaccurately describes the ground floor as “storage” space. Moreover, the Project description has shifted throughout the environmental review process. Nevertheless, the Planning Commission approved the 2019 CatEx at its January 9, 2020 hearing. (Administrative Code § 31.04(h)(1)(A).)

B. The Categorical Exemption Must Be Rescinded

a. The Project Description Is Not “Stable”

The central purpose of CEQA is to ensure that all potential environmental impacts of a project are disclosed and analyzed. A project description, including the baseline conditions, must be sufficient to allow an adequate evaluation and review of its environmental impacts. An “accurate, stable and finite project description is the sine qua non of an informative and legally sufficient” CEQA document. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) For a project description to be stable, it must be consistent: “incessant shifts among different project descriptions . . . vitiate the city’s [environmental review] process as a vehicle for intelligent public participation.” (*Id.*) Contrary to the Project Sponsor’s assertion, this case is not confined to its particular facts; rather, it sets out a generally applicable standard for the contents of a CEQA project description. Numerous appellate cases have confirmed that an accurate and consistent project description is “necessary for an intelligent evaluation of the potential environmental effects of a proposed activity.” (See *McQueen v. Board of Directors* (1998) 202 Cal.App.3d 1143; *Burbank-Glendale-Pasadena Airport Auth. v. Hensler* (1991) 233 Cal. App. 3d 577.)

Here, the Project description for the 2019 CatEx is unstable because it has changed throughout the CEQA review process. The Project description claims that it is legalizing “an existing bathroom and 3 storage rooms,” but this is at odds with how the Project was apparently represented to City staff. Prior to the Planning Commission hearing, the Planning Department confirmed that the 2018 CatEx “was rescinded and a new one was reissued to include additional scope of work that included legalization of an unauthorized dwelling.” As the Planning Commission hearing report noted:

The issue of the potential unauthorized dwelling unit was raised in the [February 14, 2019] hearing, and no change to it was being proposed. **The project sponsor is seeking to legalize the UDU.**

(Emphasis added.)

At the Planning Commission hearing on January 9, 2020, the Planning Department representative announced that “the project sponsor is seeking to **legalize this unauthorized dwelling unit.**” (See hearing tape at www.sfgovtv.org.) That is, the Planning Department acknowledged that a UDU exists at the Property, and that the Project seeks to legalize it. However, the Categorical Exemption decision makes *no reference* to the existence or legalization of a UDU at the Property.

The staff report for this appeal admits that staff erred in giving two different Project descriptions. The report states that on at least two separate occasions, Planning staff “mischaracterized the legalization of the ground floor rooms . . . as legalization of a potential unauthorized dwelling unit or UDU.”¹ This was the official statement on the record regarding what the Project involves. CEQA requires an accurate and stable Project description that informs the public what is being reviewed. The Project description has changed back and forth from legalization of a UDU to legalization of ‘storage rooms.’ These are materially different Project descriptions. The inconsistent and varying descriptions of the Project throughout this process mean the Project description is uncertain, unstable, and inaccurate – even if one of the purported Project descriptions was correct at one time. This shifting Project description vitiates meaningful public participation in the CEQA process and proper agency review of the Project’s impacts. As a result, the CEQA process was fatally flawed and must be redone.

b. The Project Description Is Not “Accurate”

In addition to being stable and consistent, a Project description must be accurate. “Only through an accurate view of the project” may the public and public agencies assess the impacts of a Project. (*City of Santee v. County of San Diego, supra*, 214 Cal.App.3d 1438 (2007)). Here, the Project description is inaccurate because it does not disclose the existence of a UDU at the Property. In most cases, Conditional Use Authorization is required to remove a UDU. If the Project is approved, and a Certificate of Final Completion is ultimately issued that does not disclose the UDU’s existence, the UDU will be unlawfully removed by the stroke of a pen.

The UDU at the Property is partially depicted on the Project plans. The Project plans show three “storage rooms” on the ground floor at the Property, one of which has a front-facing window, a closet (which was omitted from an earlier version of the plans), and a full bathroom.

¹ As argued herein, the downstairs space is a longstanding UDU and should be legalized pursuant to Planning Code §317.

As Planning staff found, there is no permitting history for these rooms. Moreover, the ground floor does not have internal stairs – the room is separate and distinct from the upper levels at the Property. This space is in reality an unauthorized dwelling unit, as defined by the Planning Code. Section 317(b)(13) defines an “unauthorized unit” as:

... one or more rooms within a building that have been used, without the benefit of a building permit, as a separate and distinct living or sleeping space independent from Residential Units on the same property. “Independent” shall mean that (i) the space has independent access that does not require entering a Residential Unit on the property and (ii) there is no open, visual connection to a Residential Unit on the property.

The “storage room” on the ground floor meets each element of the UDU definition. It is independent from the upper unit at the Property, in that it has independent access from the street and no open, visual connection to the upper floors. The Appellant has confirmed in a sworn declaration that the ground floor space has been used as a separate and distinct living space. It has a closet (usually required for a bedroom), and a full bathroom with a bathtub attached to it, which was installed without a permit. It strains all credibility to suggest that a full bathroom was installed simply to serve a garage and storage area, particularly in a separate space that is not connected to the upper floors. A bathtub is for people, not storage boxes. The only plausible explanation is that this space is a separate dwelling unit – indeed, it has been described in MLS listings as a “bedroom” on the “lower level” and as a “bonus room and bath.” (Attached hereto as Exh. A.) “Bonus room” is well-recognized real estate parlance for habitable but unpermitted living space; storage space is not usually described as a bonus room.

The staff report and Project sponsor’s brief claim that these rooms are “storage” rooms, and not a UDU. However, if *at any point in the past* the rooms were used as a distinct living space, they would constitute a UDU under Planning Code section 317. That is, even if someone is not currently living in the ground floor space, that does not change the fact that it is a UDU. A property owner cannot simply move boxes into a space that would otherwise qualify as a UDU, in order to avoid the legalization or CUA process in Planning Code section 317. Similarly, Rent Board records do not conclusively reveal whether the ground floor space was ever lived in – they can only say whether any evictions have occurred at the Property.

Accordingly, the 2019 CatEx inaccurately describes the existing conditions because it characterizes the UDU as a “storage” area. The Project description does not disclose this UDU will be converted to a “storage” space, effectively removing the unauthorized unit during a period of critical housing need in San Francisco under the auspices of an alteration permit.

C. In The Absence Of An Accurate Project Description, It Is Premature To Assert That A Categorical Exemption Is Appropriate

The Project Sponsor asserts that the Project is categorically exempt from CEQA review as an “addition to an existing structure” (CEQA Guidelines section 15301). But this argument is premised on the Project Sponsor’s *incorrect* Project description. It is premature to assert that a categorical exemption is appropriate here, when there is no accurate or stable Project description. CEQA is steeped in procedural compliance, and the Project and its environmental impacts cannot be meaningfully analyzed unless all interested parties know what is actually being proposed. The categorical exemption issued for the Project is invalid because it is based on a flawed Project description.

The Project sponsor claims the Project simply proposes to legalize three storage rooms and a bathroom, and would require no physical changes. However, a project that involves a rezoning or change of use can be subject to CEQA review *even if no physical changes are proposed*, including where a project would remove residential units. In any event, some physical changes *are* depicted at the ground floor space, including the removal of a heater and a “W.H.”. And, if the UDU were required to be legalized, additional physical changes to the Property would likely be required. This is the very reason why the 2018 CatEx was correctly revoked. Unfortunately, the Planning Commission disregarded the Planning staff’s description of the Project and the evidence showing that a UDU exists at the Property. This has resulted in an uncertain and inaccurate Project description, so that it is impossible to conduct environmental review.

D. Conclusion

California, and San Francisco in particular, is in a housing crisis, and it is crucial that existing, naturally-affordable housing be preserved. This is why a Conditional Use Authorization is required for the removal of a UDU. The Project Sponsor should not be allowed to remove an existing housing unit from the Property by the stroke of a pen. The Appellant respectfully requests that the Board of Supervisors revoke the categorical exemption and require further environmental review pursuant to CEQA.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC



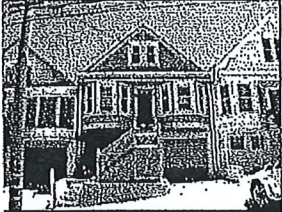
Ryan J. Patterson

Attorneys for Meg McKnight

EXHIBIT A

Single-Family Homes Agent Detail Report

Listings as of 02/05/19 at 8:46pm
 Street Address 743 to 743 vermont

MLS#: 25124	Closed	743 Vermont San Francisco 94107-2637	Potrero Hill	\$ 389,500		
		Single-Family Homes	LD: 07/01/97	OMD: 07/01/97	D/S: 9/E	
		Gross St: 22nd		Map: CT44		
		Blk/Lot/APN: 4074421		Zoning: Other		#Rms: 5
		BD: 2 BA: 2 Pkg: 1		Parking Type:		Year Built:
		~Sq Ft: 1100 Per Tax Records		\$/SF: 354.09		Lot SqFt: 0
		HOA:	HOA Dues: 0.00		Paid:	
		HOA Name:		HOA Phone:		
		Bullder/Architect:		Hm Protect		
				Plan:		
		Short Sale:	REO:	Pend. Lit.:	Probate:	Court:

Agent Only Remarks: Queen Anne Row House, Open Floorplan, Great Remodeled Kitchen Two Bedrooms, Two Baths Plus Bonus Room And Bath In Basement Area. Great Garden, Remodeled Throughout. Show By Appointment Sellers Transferred. Feels Like A Loft With Open Bedroom And Living/Dining Room. Some Views, Terraced Garden. No Fwy Nols On Quiet Side Of Vermont, Open Sun 2-4 Till Sold!

Show Appointment Only	Posses Close of Escrow	Park Auto Door	Type 2 Story	Style Victorian
Exter Wood Siding	Main 1 Bath	Upper 1 Bath	Upper 2 Bedrooms	Lower 1 Bedroom
Lower 1 Bath	Views City Lights	Views Lake	Kitchn Breakfast Area	Kitchn Dishwasher
Kitchn Garbage Disposal	Kitchn Gas Range	Kitchn Refrigerator	Kitchn Remodeled	Dining Formal
Roof Composition	Heat Wall Furnaces	Laund Washer/Dryer	Misc Garden	Misc Landscaping-Rear
Floors Wall to Wall Carpet	Ba Typ Shower Over Tub			

Brokers Tour Date: Time: Lockbox Only: Price Reduction:

Remarks:

Open House Date: Time:

Remarks:

Open House Date: Time:

Remarks:

Dimensions:	Living:	Dining:	Family:	Kit:	Master Bedroom:
Occupant:	Rent:	Type:	Name:	Phone:	
List Office:	Coldwell Banker Phone: 415-550-1300, FAX: 415-550-6729				List Type: ER
List Agent:	Paul T Christopher Primary: 415-252-5200 Fax: 415-554-8843				CSO: 2.5%
Email:	sfpaulchristopher@gmail.com				Internet: Y
Co-List Office:					Dual/Variable: No
Co-List Agent:					UCBC: 0.00
Email:					DOM: 39

Pending Date: 08/09/97 Sold Date: 09/19/97 Sale Price: 389,500 DOM: 39

SO: PRDN SA: Marlon T Broder SA Phone: 415-269-5486

Co-SO: Co-SA: Co-SA Phone:


Terms: Adjustable Conv.

Selling Comments:

Presented By: Jesse E Fowler (Lic: 01275521) / Sotheby's International Realty (Office Lic.)
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 Copyright ©2019 Rapattoni Corporation. All rights reserved.
 U.S. Patent 6,910,045
 Equal Opportunity Housing * All information deemed reliable, but not guaranteed.

Single-Family Homes Agent Detail Report

Listings as of 02/05/19 at 8:46pm

MLS#: 240456	Closed	743 Vermont San Francisco 94107-2637	Potrero Hill	\$ 649,000
		Single-Family Homes	LD: 07/24/02	OMD: 07/24/02
		Cross St: 19th	Map: CT44	D/S: 9/E
		Blk/Lot/APN: 4074021	Zoning:	
		BD: 2 BA: 2 Pkg: 1	Parking Type:	#Rms:
		~Sq Ft: 1100 Per Tax Records	\$/SF: 686.36	Year Built: 1904
		HOA:	HOA Dues: 0.00	Lot SqFt: 0
		HOA Name:	HOA Phone:	
		Builder/Architect:	Hm Protect Plan:	
		Short Sale:	REO:	Pend. Lit.:
			Probate:	Court:

Directions: Between 19th and 20th Street

Marketing Remarks: This updated Victorian Row House is on the north slope of Potrero Hill. The home has an open floor plan, skylights, bay windows and a city view. Off the updated kitchen is a sunroom/office area that leads to the tiered backyard with sunny deck, great for entertaining. There is a bonus room and bath in the garage as well as laundry area and ample storage. McKinley park is half a block away, great for dogs and there is a great play area for children. This home is ready to occupy.

Agent Only Remarks: First showing will be brokers tour Tuesday July 30th from 1:00-2:30pm. Easy to show after that, please call Marion at 269-5486. Escrow has been opened with Jani at Fidellly on Union Street

Show Call Listing Agent	Posses Close of Escrow	Park Auto Door	Park Garage	Style Victorian
Exter Wood Siding	Main 1 Bath	Main Dining Room	Main Kitchen	Main Living Room
Upper 1 Bath	Upper 2 Bedrooms	Views City Lights	Views Parital	Kitchn Breakfast Area
Kitchn Dishwasher	Kitchn Formlca Counter	Kitchn Garbage Disposal	Kitchn Gas Range	Kitchn Island
Kitchn Microwave	Kitchn Refrigerator	Dining Lvng/Dng Rm Combo	Dining Skylights	Oth Bonus Room
Oth Office	Foundn Concrete Perimeter	Roof Shingle	Heat Gas	Rm
Rm				Heat Wall Furnaces
Laund In Garage	Laund Washer/Dryer	Misc Bay Windows	Misc Decks	Misc Double Pane Windows
Misc Fenced Yard	Misc Landscaping-Rear	Floors Simulated Wood	Floors Wall to Wall Carpet	Ba Typ Stall Shower
Ba Typ Tub Only				

Brokers Tour Date: Time: Lockbox Only: Price Reduction:

Remarks:

Open House Date: Time:

Remarks:

Open House Date: Time:

Remarks:

Dimensions: 25X100 **Living:** **Dining:** **Family:** **Kit:** **Master Bedroom:**

Occupant: Owner **Rent:** **Type:** **Name:** **Phone:**

List Office:	Better Homes and Gardens Real Estate Phone: 415-921-0113, FAX: 415-921-1653	List Type: ER
List Agent:	James A Caldwell Primary: 415-872-7729 x2525	CSO: 3
Email:	JCaldwellre@gmail.com	Internet: Y
Co-List Office:		Dual/Variable: No
Co-List Agent:		UCBC: 0.00
Email:		DOM: 14

Pending Date: 08/07/02	Sold Date: 09/12/02	Sale Price: 755,000	DOM: 14
SO: NMSS	SA: NMSS	SA Phone:	
Co-SO:	Co-SA:	Co-SA Phone:	

Terms: Not Reported

Selling Comments:

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 U.S. Patent 6,910,045

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