

# Allen Matkins

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## Via Electronic Mail

April 8, 2019

Norman Yee, President  
and the San Francisco Board of Supervisors  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco, CA 94102-4689  
Bos.legislation@sfgov.org

**Re: April 9, 2019 Meeting  
Agenda Items 20-27  
Appeals of CPE and CUA  
1052 -1060 Folsom Street and 190-194 Russ Street**

Dear President Yee and Supervisors:

On behalf of Golden Properties LLC, the owner of the above-referenced property, we submit this correspondence with regard to the above-referenced Agenda Items. The purpose of this correspondence is to exhaust Golden Properties' administrative remedies in the event that this Board votes to grant either appeal and thus disapproves the subject project. As such, this correspondence incorporates by reference all oral and written communications to the Planning Commission and this Board with regard to the appeals.

The Planning Department's February 4, 2019 Response to the CEQA appeal provides substantial evidence supporting Staff's Community Plan Evaluation (CPE) determination per CEQA Guidelines section 15183. As stated therein, "the appellant has not demonstrated nor provided substantial evidence to support a claim that the CPE fails to conform to the requirements of CEQA for a CPE pursuant to CEQA section 21083.3 and CEQA Guidelines section 15183." There are simply no legitimate bases upon which to grant the appeal, nor would any trier of fact find one.

Similarly, the conditional use authorization (CUA) appeal is baseless, as reflected in the April 1, 2019 Staff Report. It is predicated almost exclusively on appellant's unsubstantiated complaints about shadows. Instead of addressing the findings and evidence required under Planning Code section 303, appellant simply makes a conclusory claim that the project "is detrimental to the general welfare of persons residing in the vicinity, including but not limited to their use of the Park." The appeal is legally inadequate and must be dismissed. We therefore strongly request that the Board deny the appeals at its April 9 meeting.

**I. GRANTING EITHER APPEAL WOULD INFRINGE UPON GOLDEN PROPERTIES' CONSTITUTIONAL PROTECTIONS AND STATUTORY RIGHTS UNDER CODE OF CIVIL PROCEDURE SECTION 1094.5**

**A. Constitutional Procedural Due Process Protections**

"While the police power is broad, its exercise cannot be divorced from the requirements of procedural due process." *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal. App. 4th 1160, 1187. "In essence, due process principles are intended to guarantee a fundamentally fair decisionmaking process." *Id.* at 1188. "At a minimum, due process requires notice and an opportunity for a hearing, and the other safeguards that may be required vary with the circumstances." *Ibid.* "In each of these steps a landowner is entitled to notice and a hearing, a decision based upon factual findings rather than speculation, and a right of review of the decision. A landowner is obviously not necessarily entitled to approval, but the landowner is entitled to agency action based upon appropriate criteria and to approval unless the agency finds cause for denial." *Id.* at 1201.

"Just as in a judicial proceeding, due process in an administrative hearing also demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication." *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal. App. 4th 81, 90. "In fact, the broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and the undeniable public interest in fair hearings in the administrative adjudication arena, militate in favor assuring that such hearings are fair." *Ibid.* Violations of procedural due process are also actionable under 42 USC §1983, entitling the aggrieved party to a damages award and attorneys' fees.

In this case, there are questions regarding whether the Board's hearings on the appeals involve a "fundamentally fair decisionmaking process." For example, if Supervisor Haney does not recuse himself from this proceeding despite his prior involvement on behalf of Mission Economic Development Agency (MEDA) relating to this project, it would undermine the "appearance of fairness and the absence of even a probability of outside influence on the adjudication." The prejudice to Golden Properties resulting from Supervisor Haney's participation despite his conflict of interest would be amplified by the Board's uncodified "supervisory prerogative" practice, wherein the Supervisor whose district the appealed project is located (Haney in this case), is essentially the sole decisionmaker on such appeals because the other Supervisors agree to vote in concert with that Supervisor.

**B. Section 1094.5's Statutory Requirements for a Fair Hearing/Abuse of Discretion**

Similar to the due process protections under the federal and state constitutions, Code of Civil Procedure section 1094.5(b) requires that an adjudicatory decision be set aside if the decision if the administrative proceeding is unfair. *Nasha v. City of Los Angeles* (2004) 125 Cal. App. 4th 470, 482.

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Section 1094.5(b) also requires a local agency decision to be set aside upon a showing of a prejudicial abuse of discretion. *Bell v. City of Mountain View* (1977) 66 Cal. App. 3d 332, 342. "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." Code of Civ. Proc., § 1094.5(b.). The record is clear that the findings for the CPE and CUA support those decisions and that the evidence in the record supports those findings. To the contrary, appellant's claims fail to articulate how the findings cannot be made, nor can it provide any substantial evidence in support.

With regard to Section 1094.5's separate "not proceeded in the manner required by law" factor, the "law" to which the agency must comply includes statutes, ordinances, and constitutional due process requirements. *Georgia-Pacific Corp. v. California Coastal Comm.*, (1982) 132 Cal. App. 3d 678, 701; *Negrete v. State Pers. Bd.* (1989) 213 Cal. App. 3d 1160, 1165. As set forth above, granting either appeal would violate the City's due process requirements and statutory obligations.

### **C. Other Constitutional Issues**

A denial of the project at this point would be arbitrary, capricious, and unreasonable, and thus violate Golden Properties' substantive due process and property rights guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution. Moreover, a denial would be arbitrary, irrational and intended to discriminate and deprive Golden Properties of its rights without any rational relation to a legitimate governmental interest, thereby denying Golden Properties of its equal protection of the laws.

In addition, a denial would violate Golden Properties' civil rights under 42 U.S.C. § 1983. Golden Properties will have suffered monetary damages in the event of a disapproval, which have been exacerbated by the reduced price upon which Golden Properties sold five buildings to MEDA and the San Francisco Land Trust (SFLT) in February 2016 as part of the Mayor's Office of Housing involvement to move this project forward.

In addition, Golden Properties agreed to provide a higher percentage (25%) of the project's units as affordable units than what the City could legally require, with the expectation that the project application would be processed expediently and fairly. Several years later, it is evident that the expected expediency has not occurred, and the fairness of the proceedings will be evaluated in large part on the events during the April 9 Board meeting.

## **II. THE CEQA APPEAL IS WITHOUT MERIT**

As noted above, the Planning Department's February 4 response to the appeal underscores how meritless and perfunctory this appeal is. Clearly, this appeal is predicated on appellant's belief that SOMCAN's political connections will lead to the result they seek, as no person that was legitimately concerned about the environment or the neighborhood would waste the City's resources

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by pursuing an appeal based on a project's maximum shadow increase of less than 1% above current conditions. SOMCAN's reliance on shadows as a tool to delay or defeat development was recently rejected by the First Appellate District regarding the 5M project, and this Board should similarly reject such tactics in order to implement its mission to provide critically-needed market rate and affordable housing units in the City.

Public Resources Code section 21083.3 and CEQA Guidelines section 15183 mandate that projects that are consistent with the development density established by existing zoning, community plan or general plan policies for which an environmental impact report (EIR) was certified, shall not be subject to additional environmental review except as might be necessary to examine whether there are project specific significant effects which are peculiar to the project or its site. Section 21083.3 essentially acts as a statutory exemption to further CEQA review, albeit with the identified limits noted. Statutory exemptions generally apply to projects that the Legislature determines promote an interest important enough to justify foregoing the benefits of additional review.

Section 21083.3 specifically provides that if a parcel has been designated in a community plan to accommodate a particular density of development, and an EIR was certified for that planning action, CEQA review for a project on that parcel "shall be limited to effects upon the environment which are peculiar to the parcel or to the project and which were not addressed as significant effects in the prior [EIR], or which substantial new information shows will be more significant than described in the prior [EIR]." Pub. Res. Code § 21083.3(a). "An effect of a project upon the environment shall not be considered peculiar to the parcel or project, for purposes of this section, if uniformly applied development policies or standards have been previously adopted by the city or county, with a finding... that those development policies or standards will substantially mitigate that environmental effect when applied to future projects." Pub. Res. Code § 21083.3(d).

CEQA Guidelines section 15183 specifies that examination of environmental effects shall be limited to those effects that: (a) are peculiar to the project or parcel on which the project would be located; (b) were not analyzed as significant effects in a prior EIR on the zoning action, general plan or community plan with which the project is consistent; (c) are potentially significant off-site and cumulative impacts that were not discussed in the underlying EIR; or (d) were previously identified in the EIR, but which, as a result of substantial new information that was not known at the time that the EIR was certified, are determined to have a more severe adverse impact than that discussed in the underlying EIR. CEQA Guidelines section 15183(c) also provides that if an impact is not peculiar to the parcel or to the proposed project, then an EIR need not be prepared for the project solely on the basis of that impact.

Under these established CEQA rules, there is no evidence that would mandate any environmental review beyond the CPE issued by the City. The Planning Department's February 4 response meticulously analyzes the project and the applicable law, and clearly refutes appellant's broad claims. The CEQA appeal must be denied.

### III. THE CUA APPEAL IS WITHOUT MERIT

The April 1 Staff Report provides the requisite findings and substantial evidence to support the CUA, and responds to and rebuts appellant's claims. As such, there is no basis upon which to grant the appeal.

Moreover, the project appears to be protected under the Housing Accountability Act (HAA)<sup>1</sup>, which prohibits a local agency from taking actions to impair or deny projects such as the subject project except under specific statutory requirements. Under the HAA, in order for a local agency to disapprove a housing development project, it must base its decision upon written findings supported by a preponderance of the evidence on the record, none of which apply here. Gov. Code § 65589.5(j)(1). The phrase "disapprove a housing development project" includes disapproving a project application, including any required land use approvals or entitlements necessary for the issuance of a building permit. Gov. Code § 65589.5(h)(5). If a court determines that the local agency violated subdivision (j), the court: may direct the local agency to comply with the HAA; may direct it to approve the project if it determines the agency acted in bad faith; shall award attorneys' fees and costs; and may impose fines and multiply those fines under certain circumstances. Gov. Code 65589.5(k)(1)(A).

Even if Golden Properties' project were not subject to the HAA, adjudicatory proceedings such as a CUA approval are subject to Government Code section 1094.5(b), which requires that a disapproval of a project be supported by the requisite findings, which in turn are supported by substantial evidence in the record. *Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles* (1974) 11 Cal.3d 506, 515. In this case, the record clearly demonstrates that the project's approval is supported by the Planning Commission's express findings and the evidence in the record. There is no substantial evidence that contravenes this approval, so any decision to disapprove the project would constitute a clear abuse of discretion under Government Code section 1094.5(b) and subject to a petition for writ of mandate.

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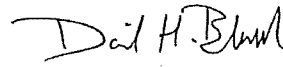
<sup>1</sup> Gov. Code § 65589.5(j). The project also provides the requisite number of low income units under the State Density Bonus Law (Gov. Code § 65915).

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Golden Properties expects that this Board will carefully and dutifully examine the facts and before it and deny the appeals. Based on the record for this matter, there is no other justifiable outcome. There is no basis to grant either appeal.

Very truly yours,

A handwritten signature in black ink, appearing to read "David H. Blackwell". The signature is written in a cursive style with a large initial "D".

David H. Blackwell