

1 [Finding appeal of statutory exemption for Wharf J-10 untimely but determining to hear and
2 determine the appeal]

3 **Motion finding the appeal of the statutory exemption issued on April 15, 2003 for Wharf**
4 **J-10 not timely filed but determining to hear and determine the appeal.**
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6 WHEREAS, On April 15, 2003, the Environmental Review Officer of the Planning
7 Department determined that the proposed work for Wharf J-10 was excluded from review
8 under the California Environmental Quality Act ("CEQA") because the proposed work
9 consisted of specific actions necessary to prevent or mitigate an emergency as provided in
10 California Public Resources Code Section 21080(b)(4) and the CEQA Guidelines, 14
11 California Code of Regulations Section 15269(c); and,
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13 WHEREAS, On May 6, 2003, 21 days after the determination by the Planning
14 Department, F. Alioto Fish Company ("Appellant") appealed the Planning Department's
15 decision to find the proposed work statutorily exempt from CEQA and supplemented the
16 appeal with a copy of the Environmental Review Officer's determination on May 7, 2003; and,
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18 WHEREAS, The California Public Resources Code Section 21151(c) was amended
19 effective January 1, 2003, to provide that such determinations are appealable to the elected
20 decision-making body, but the Board of Supervisors has not yet adopted specific procedures
21 or time lines providing for appeals of such determinations; and
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23 WHEREAS, Section 21151(c) previously provided for appeals to the elected decision-
24 making body of a certification of an environmental impact report and the Board of Supervisors
25 through San Francisco Administrative Code Section 31.16 requires submittal of an appeal of
an environmental impact report to the Board within twenty (20) calendar days of a certification
of an environmental impact report by the Planning Commission; and,

1 WHEREAS, The Board of Supervisor's held a duly noticed public hearing on June 10,
2 2003, to consider whether the appeal filed by Appellant was timely; and

3 WHEREAS, This Board reviewed and considered the written record before the Board
4 and all of the public comments made in support of and opposed to the question of whether the
5 appeal was timely; and

6 WHEREAS, Appellant have been aware for some time that Wharf J-10 has not been
7 considered a safe structure and has been aware of the efforts by the Port of San Francisco
8 ("Port") to resolve the unsafe status of the building, including the following information: (1) the
9 Port declared the structure unsafe for occupancy in August 2000, issued and enforced a
10 Notice to Vacate and installed temporary shoring and vertical support of the Wharf J-10
11 building; (2) following winter storms with high winds, on January 30, 2003, Port engineers
12 issued a report stating that the condition of the Wharf J-10 had continued to deteriorate since
13 the measures previously taken by the Port; (3) on March 12, 2003 the Chief Harbor Engineer
14 of the Port issued a written recommendation to the Port Director concluding that a dangerous
15 condition exists at Wharf J-10 given the continued deterioration of the substructure and
16 recommended its demolition; (4) on March 14, 2003, the Port Director submitted a request to
17 the Planning Department for a determination that the proposed work for Wharf J-10 is exempt
18 from environmental review under California Public Resources Code Section 21080(b)(4) and
19 the CEQA Guidelines, 14 California Code of Regulations Section 15269(c) because it is a
20 specific action necessary to prevent or mitigate an emergency; (3) on March 18, 2003 the Port
21 Director advised Appellant of the Port staff findings and of its request to Planning for a
22 statutory exemption because of the need to take immediate steps to demolish the Wharf J-10
23 superstructure and portions of the substructure due to the imminent threat of structural failure;
24 (4) on March 26, 2003 Appellant's Attorney, Marc Libarle, wrote to the Port Director to say that
25 F. Alioto objected to the statutory exemption that the Port was seeking, but offered no

1 evidence to contradict the finding of the Chief Harbor Engineer that the condition of the
2 structure poses an imminent and substantial hazard to life, health or safety; and (5) on April
3 14, 2003 the Port Director issued an emergency order and notice to the tenant and Appellant
4 advising that the tenant must take action within 48 hours to demolish the building or the Port
5 would do so; (6) Appellant took no action pursuant to that notice and offered no evidence to
6 the Port to contradict the findings that the structure presents a serious and imminent hazard to
7 the public health and safety; (7) on April 15, 2003, the Environmental Review Officer
8 determined that the proposed work for Wharf J-10 was statutorily exempt from CEQA under
9 California Public Resources Code Section 21080(b)(4) and the CEQA Guidelines, 14
10 California Code of Regulations Section 15269(c) Planning issued and on April 17, provided
11 mailed notice to interested parties including Appellant as required by San Francisco
12 Administrative Code Section 31.08(f); and

13 WHEREAS, On April 16, 2003, the San Francisco Fire Marshall notified the Chief
14 Harbor Engineer that the building at Wharf J-10 is structurally unsafe and fully supports the
15 Port's request to demolish Wharf J-10; and

16 WHEREAS, Following the determination by the Planning Department that the work at
17 Wharf J-10 was statutorily exempt from the California Environmental Quality Act, the Port
18 informed the public and Appellant about the Port's progress in carrying out the work by
19 providing a briefing on the work on April 15, 2003 to the Fisherman's Wharf Advisory Group,
20 of which Appellant is a member and which Appellant attended, on April 22, 2003 to the Port
21 Commission, at which Appellant and Appellant's counsel spoke and on April 28, 2003 by
22 teleconference between Port engineers and Appellant's consulting engineer; and

23 WHEREAS, The Port has implemented the directives in the Emergency Order requiring
24 the removal of lead and asbestos from the structure and selected a contractor to undertake
25 the demolition of the structure; and

1 WHEREAS, There is no reasonable basis for the Board of Supervisors to provide for a
2 longer time limit for appeal of a statutory exemption from CEQA than the twenty (20) calendar
3 days that the Board has provided for environmental impacts reports, particularly the appeal of
4 an exemption determination which involves an action to prevent a serious and imminent public
5 hazard; and

6 WHEREAS, The documentation provided by the Port regarding the emergency nature
7 of this work and in support of the facts set forth in this motion is on file with the Clerk of the
8 Board of Supervisors in File No. 030838, which is hereby declared to be a part of this motion
9 as if set forth fully herein; and

10 WHEREAS, On May 21, 2003, the San Francisco Superior Court issued a temporary
11 restraining order and ordered the City and County of San Francisco to show why a preliminary
12 injunction should not be issued to enjoin the Port from demolishing or commencing demolition
13 of the structures and/or improvements leased by Appellant at Wharf J-10; and

14 WHEREAS, The City and County of San Francisco is ordered to appear in San
15 Francisco Superior Court on June 11, 2003 for a hearing on whether a preliminary injunction
16 should issue; now, therefore, be it

17 MOVED, This Board finds that there is merit to a determination that the appeal filed by
18 Appellant in this matter is not timely filed for all of the reasons set forth above; and be it

19 FURTHER MOVED, That notwithstanding the foregoing, without prejudice to the City to
20 assert that the appeal was not timely filed in any litigation against the City, because there is
21 litigation pending concerning this matter and the Board does not want to further delay a
22 resolution of issues in this matter, the Board finds that it is in the interest of all concerned
23 parties to hear and determine the appeal of the statutory exemption issued on April 15, 2003
24 for Wharf J-10.

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