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April 10, 2025

Delivered Via Messenger and E-Mail (bos.legislation@sfgov.org)

President Rafael Mandelman and Supervisors
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

Re: 2142 22nd Street - Opposition to CEQA Appeal
BOS File No.: 250134
BOS Hearing Date: April 15, 2025
Planning Department Case No.: 2024-005274ENV
Our File No.: 12859.01.01

Dear President Mandelman and Supervisors:

Our office represents 2142 22nd Street LLC (“**Project Sponsor**”), the project sponsor and owner of the property located at 2142 22nd Street (“**Property**”), Assessor’s Block 4094, Lot 038. The Property is currently improved with a small 1,214-sf single-family residence. The project sponsor proposes to demolish the existing structure and build a new 6-story-over-basement 9,195-sf building with 4 residential dwelling units (“**Project**”).

There is no merit to the CEQA appeal filed by 2132 & 2136 22nd Street HOA (“**Appellant**”), the next-door neighbor. The Appellant’s property is located uphill of the Property and is improved with a 6-story residential building, constructed in 1990 and converted into 2 condominium units in approximately 1997. The Appellant’s primary concerns appear to relate to the Project’s design, including the necessity to protect or close few of their property line windows, the possibility of which has been known by the Appellant since before they purchased their units due to the existence of a recorded notice on their title. See copy of a notice attached as Exhibit A, and recorded against the Appellant’s property on February 3, 1993, clearly stating the Appellant’s agreement (through their predecessor) to agree to protect or close property line windows in the event the adjoining property is improved.

To the extent the Appellant is concerned about construction activities for the new building, the Project Sponsor welcomes, and has welcomed, coordination with the Appellant. The Project Sponsor hosted neighbor meetings, has been responsive to the Appellant’s questions, modified the Project e.g. by accommodating a taller fence in response to Appellant’s private concerns, and has requested copies of the Appellant’s building drawings in order to coordinate on construction details. So far, the Appellant has not agreed to release copies of their building’s drawings from the Department of Building Inspection (“**DBI**”) records to the Project Sponsor. Most authentic construction activity concerns can usually be resolved between neighbors, and this is no exception as long as the Appellant chooses to cooperate and coordinate.

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As the Project Sponsor's attorney for the CEQA appeal, I also reached out to the Appellant's attorney several times in an effort to understand the Appellant's concerns and to see if there was an opportunity to address those, but did not receive any substantive response.

A. PROJECT BENEFITS

The Project offers several benefits to the neighborhood and the City as a whole, including:

- Redevelopment of an underutilized parcel to provide additional housing; and
- Net addition of 4 new housing units to the City's housing supply, with a total of 5 new dwelling units (in lieu of an existing, dilapidated single-unit building).

B. STANDARD OF REVIEW

Under San Francisco Administrative Code Section 31.16, the Board of Supervisors is required to affirm the exemption determination if it finds that the Project conforms to the requirements for exemptions set forth in CEQA. The Project was deemed to be categorically exempt from CEQA, under Class 1 (Existing Facilities) and Class 3 (New Construction or Conversion or Small Structures), by the Planning Department on December 18, 2024.

Certain categories of projects are exempt from environmental review under CEQA because they generally do not have significant effects on the environment. Where a project is exempt, no further environmental evaluation is required unless a recognized exception under the CEQA Guidelines applies (e.g. there is a reasonable possibility of significant environmental effects due to unusual circumstances).¹ The overall standard of review applicable here is "substantial evidence" standard, which means that the courts will defer to the agency's decision provided it is supported by substantial evidence, which is the case here.

The appellant claims that the unusual circumstance and scenic highways exceptions apply under CEQA Guidelines Section 15300.2, preventing the use of categorical exemptions for the Project. This is incorrect. As is shown in the record before you, including this brief, the Planning Department's responses, and in other supporting materials, the Planning Department properly evaluated the Project under CEQA, and correctly concluded that the Project is exempt under Classes 1 and 3. There are no unusual circumstances that apply to the Property and Project, and the scenic resource exception is inapplicable to the Property.

C. UNUSUAL CIRCUMSTANCE EXCEPTION DOES NOT APPLY

In order to prove that unusual circumstances defeat a categorical exemption, the Appellant must demonstrate two things:

- (1) that there are unusual circumstances that distinguish a project from others in the exempt class, and
- (2) that there is a fair argument that a project will have significant environmental impacts due to those unusual circumstances.²

¹ Cal. Code Regs. Tit. 14 ("CEQA Guidelines") Sec. 15300.2.

² *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.

The first step is to determine whether substantial evidence supports the agency's determination that there are no unusual circumstances. There is a presumption in favor of the agency's determination, and it must be upheld "if there is any substantial evidence, contradicted or uncontradicted, to support it."³ Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might be reached."⁴ "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence."⁵

The court in *Berkeley Hillside* articulated another means to establish the unusual circumstances exception when an agency finds the project does not present unusual circumstances. The Appellant has the burden to demonstrate there is substantial evidence in the record that would support a fair argument that a significant impact on the environment may occur as a result of the unusual circumstances. "Evidence that a project *may* have a significant effect is not alone enough to remove it from a class consisting of similar projects that the Secretary has found '*do not* have a significant effect on the environment.'"⁶ Accordingly, "an agency must weigh the evidence of environmental effects along with all the other evidence relevant to the unusual circumstances determination, and make a finding of fact."⁷

1. Slope and Liquefaction are not an Unusual Exception

The Appellant claims that the unusual circumstances exception applies to the Project because the Project is planned on a substantially sloped site, located in a State Liquefaction Hazard Zone, and is subject to the Seismic Hazard Zone Protection Act ("SSHZP Act"). However, none of these circumstances are unusual.

The SSHZP Act, codified in Building Code Section 106A.4.1.4, is in itself evidence that development on slopes within San Francisco that "exceeds an average slope of 4 horizontal to 1 vertical grade" is common enough that the Board of Supervisors adopted legislation to protect the public health, safety, and welfare when development occurs on such sites.⁸ As such, the slope of the Property is not an unusual circumstance.

San Francisco is a city with many hills, and to put the applicability of the SSHZP Act in visual terms, please see the map below, where the areas highlighted in blue color are those that have slopes greater than 25% (i.e. >4H:1V), and thus are subject to SSHZP Act. As can clearly be observed, significant portions of the City are subject to SSHZP Act, and the Property's location within a parcel subject to SSHZP Act is not an unusual circumstance.

³ *Berkeley Hillside* at 1128 ["when an agency has determined that a project falls within an exempt category, the project enjoys a considerable procedural advantage . . . When an agency finds that a project is subject to a categorical exemption, it impliedly finds that it has no significant environmental effect, and the burden shifts to the challengers of the proposed project to produce evidence that the project will have a significant effect."].

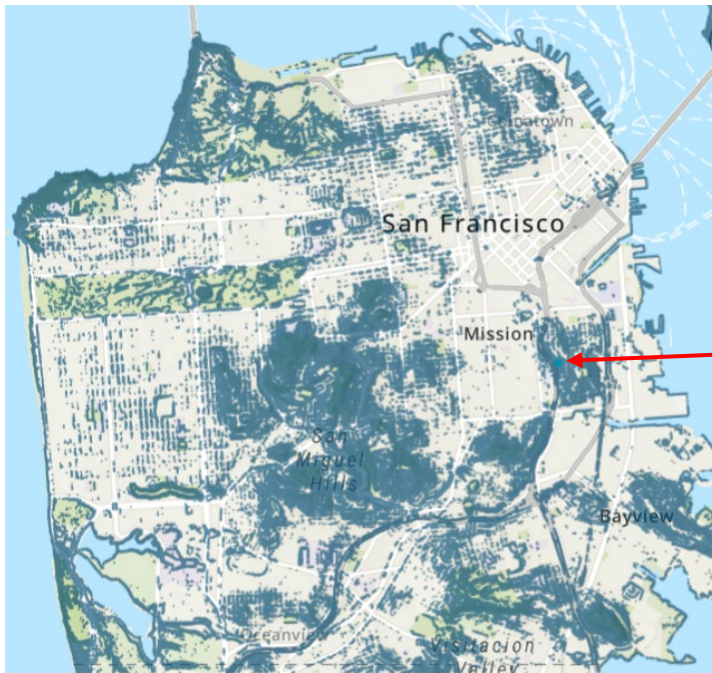
⁴ *Citizens for Responsible Equitable Envir. Dev. v. City of San Diego* (2011) 196 Cal.App.4th 515, 522.

⁵ CEQA Guidelines § 15384.

⁶ *Berkeley Hillside* at p. 1115.

⁷ *Id.*

⁸ See San Francisco Building Code ("SFBC") Sec. 106A.4.1.4.2.

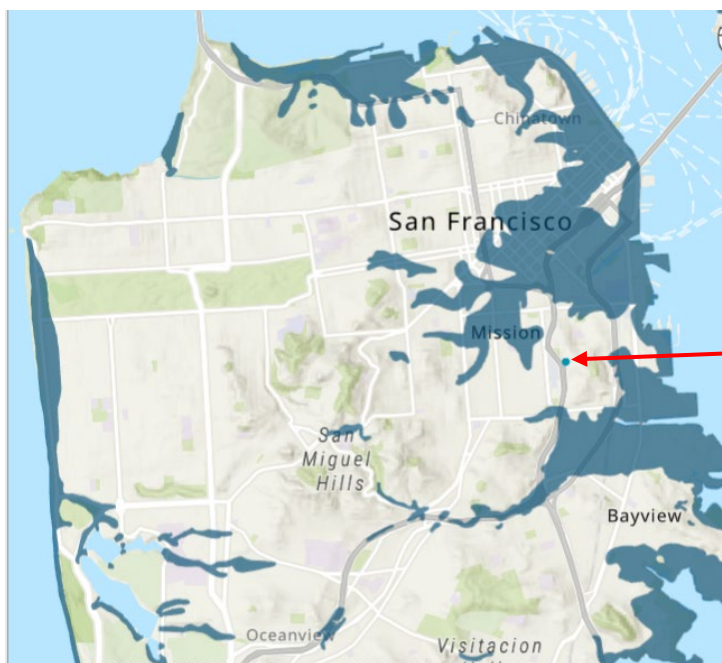


PROPERTY

Source: Planning Department's Property Information Map, accessed April 9, 2025, at:

<https://sfplanninggis.org/pim/map/?layers=Slope%20of%2025%20percent%20or%20greater>

It is also common for many housing projects in the City to be located in a State Liquefaction Hazard Zone. Contrary to actual facts, the Appellant claims that the Property is located in a State Liquefaction Hazard Zone – that is not the case. The map below shows the prevalence of liquefaction zone in the City, which also would not present an unusual circumstance, notwithstanding the fact that the Property is not located in a Liquefaction Hazard Zone.



PROPERTY

Source: Planning Department's Property Information Map, accessed April 9, 2025, at:

<https://sfplanninggis.org/pim/map/?search=2142%2022ND%20ST&layers=Seismic%20Hazard%20-%20Liquefaction>

DBI is well equipped to handle building permit review and construction on parcels that are subject to SSHZP Act, per Building Code Section 106A.4.1.4 and additional checklists and other requirements that DBI regularly applies to the review of those construction projects, which are many, not unusually few as suggested by the Appellant.

Projects that are subject to the SSHZP Act are required to undergo additional review for structural integrity and effect on hillside or slope stability, in addition to other requirements.⁹ Any additional requirements that apply to the Project under the SSHZP Act will help to ensure there are no environmental impacts.

The Appellant prematurely and falsely claims that the Project applicant has failed to retain a licensed geologist as required by the SSHZP Act, citing SF Building Code Sec. 106A.4.1.4.4(a), which:

“[a]ll permit applications submitted to the Central Permit Bureau for construction work on properties subject to the Slope and Seismic Hazard Zone Protection Act shall include report(s) prepared and signed by both a licensed geologist and a licensed geotechnical engineer identifying areas of potential slope instability...”¹⁰

The requirement cited by the Appellant (and copied above) applies under the Building Code, and to building permit applications submitted to the Central Permit Bureau. The Project Sponsor has not yet submitted a (building) permit application to the Central Permit Bureau, and thus the cited code section does not apply to the current stage of completing environmental review and obtaining an approval for the Project based on conceptual design evaluated by Planning. Every project requires a building permit, which includes more detailed drawings and plans, including the project’s structural, mechanical, foundation, electrical, and other details that are beyond the level of review by the Planning Department. The Project Sponsor will comply with all applicable requirements of the SSHZP Act, when those requirements are due and timely.

The Project at the Property is subject to SSHZP Act, along with all other Building Code requirements. This means that in addition to reports, the structural and shoring plans, and other data that is included with the building permit submittal for DBI’s review, DBI will follow its procedures, which for some projects include third party peer review of the reports and/or review by the City’s Structural Advisory Committee. The geotechnical engineer and certified engineering geologist will also participate during certain construction activities, including excavation and drilling. In sum, DBI’s well-established procedures exist and are applied to projects to ensure construction safety, and this Project will follow and abide by all applicable requirements.

2. Serpentine Bedrock is not an Unusual Exception

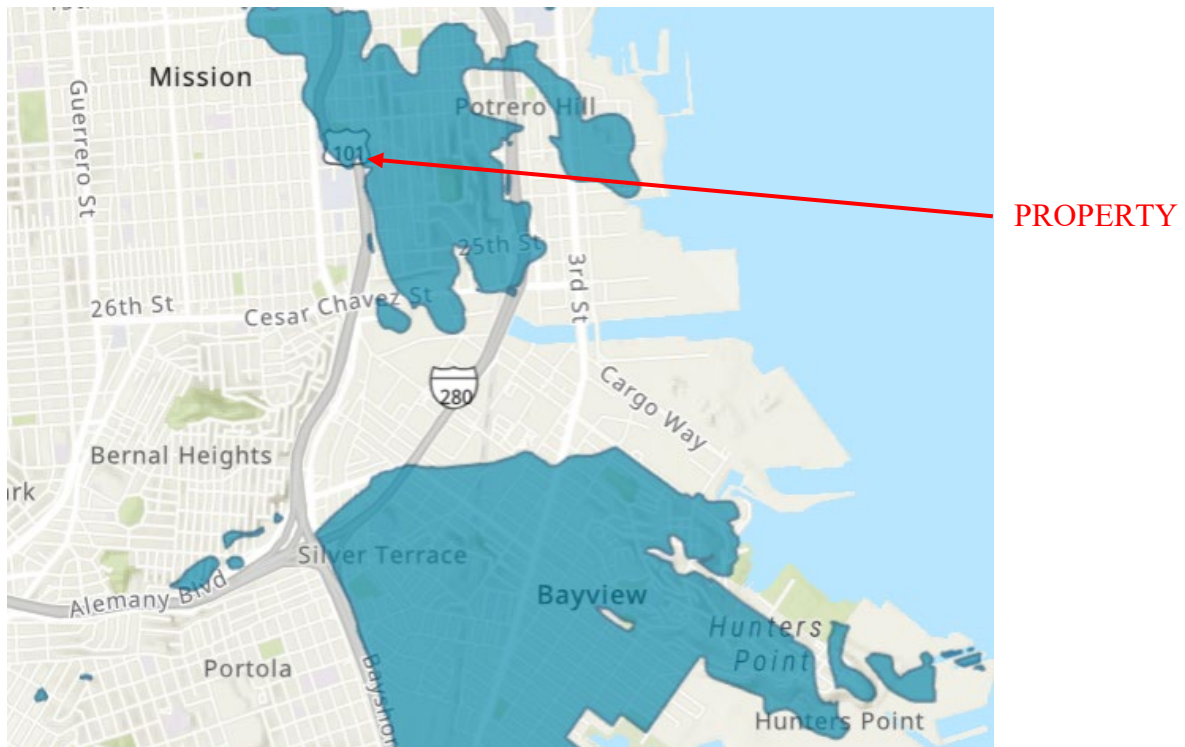
The Appellant also claims that the unusual exception applies because Serpentine Bedrock underlies the Property. The reality is that many of the surrounding properties are built on the same serpentine materials and have been for many years. Serpentine is a California rock. Standard OSHA regulations apply and need to be followed to prevent possible hazards for area residents

⁹ See SFBC Sec. 106A.4.1.4, *et seq.*

¹⁰ Appellant Brief dated April 4, 2025.

and construction workers during excavation, and soil and rock profiling is conducted during excavation to provide for proper documentation and methods for disposal of any excavation materials. But as noted by the Appellant themselves, “Serpentine Bedrock is present in various areas in the City”¹¹, and is not uncommon and certainly not an unusual exception.

As shown in the map below, many sites near the Property are on Serpentine Bedrock.



Source: Planning Department’s Property Information Map, accessed April 9, 2025, at:
<https://sfplanninggis.org/pim/map/?search=4094038&layers=Serpentine%20Rocks>

3. No Unusual Circumstances

In sum, there are no unusual circumstances that apply to the Property. The Property’s slope and presence of serpentine rock are not uncommon, and more importantly are covered by City’s Building Code and other requirements, processes and standards. All of the applicable procedures and requirements will be followed by the Project, many of which occur at the building permit stage when excavation and shoring drawings have been prepared and submitted to DBI for review. With respect to Appellant’s CEQA argument, no fair argument has been articulated that the Project would have significant environmental impacts due to those conditions, notwithstanding that they are not unusual.

¹¹ See Appellant’s brief, dated April 4, 2025, p. 5.

D. SCENIC HIGHWAY EXCEPTION DOES NOT APPLY

In addition to the unusual circumstance exception (discussed above), the Appellant claims that the scenic highway exception also applies because there is potentially a significant and/or landmark tree¹² located on the Project site.

The Appellant clearly misunderstands the situations in which the scenic highway exception applies, and frankly misquoted the relevant text of the CEQA Guidelines. On page 5 of the Appellant's brief to the Board, the Appellant states:

"CEQA's Scenic Resources Exception provides "[a] categorical exemption shall not be used for a project which may result in damage to *scenic resources*, including but not limited to, trees ..." (Guidelines § 15300.2, *emph. Add.*)" (See Appellant's April 4, 2025 Brief, p. 5.)

Had the Appellant recited the full text of the scenic highway exception language, instead of a short excerpt conveniently leaving out the most relevant part, it would be obvious to see why the exception does not apply. The full text for CEQA's scenic highway exception provides:

"A categorical exemption shall not be used for a project which may result in damage to scenic resources, including but not limited to, trees, historic buildings, rock outcroppings, or similar resources, **within a highway officially designated as a state scenic highway**. This does not apply to improvements which are required as mitigation by an adopted negative declaration or certified EIR."¹³

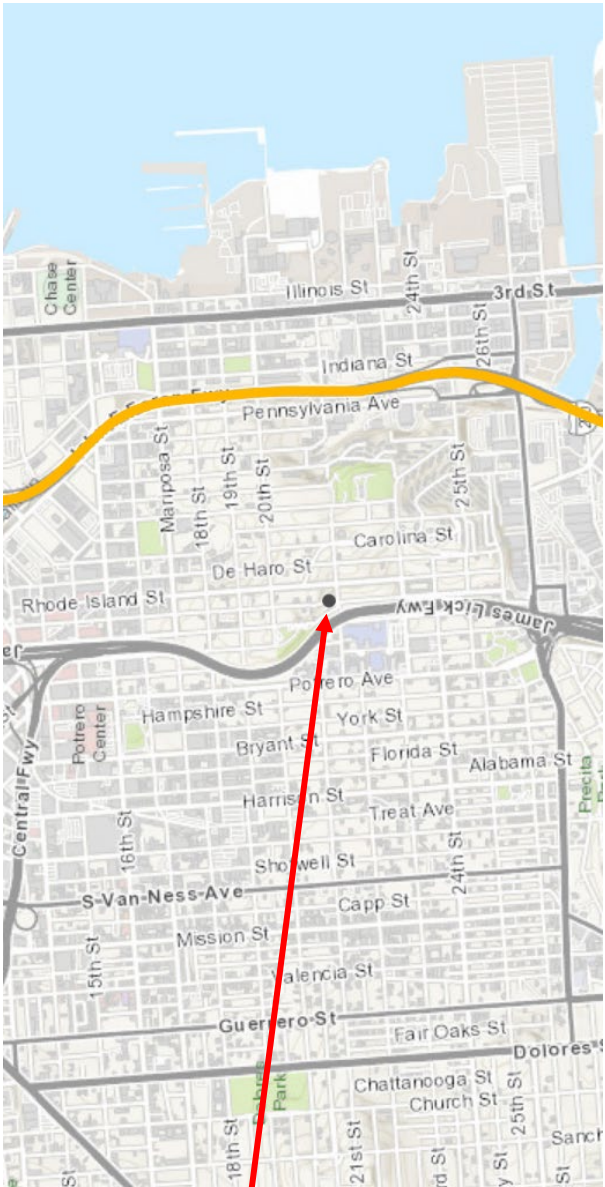
The scenic highway exception only applies to resources "within a highway officially designated as a state scenic highway." 22nd Street has not been officially designated as a state scenic highway, and therefore, this exception does not apply to the Project.¹⁴

Below please see an excerpt of the California State Scenic Highway System Map, by CalTrans. The Property is close to, but not within, Highway 101, which is not an official designated state scenic highway, and more than 10 blocks away from Highway 280, which has been deemed eligible (as shown in orange color), but has not been officially designated, as state scenic highway. In sum, the Property clearly is not within a state scenic highway, and thus this exception does not apply.

¹² The Appellant's argument re the existence of on-site trees is irrelevant given that the scenic highway exception does not apply. However, for the record, the Property does not contain any Landmark trees. To the extent there are any Significant Trees on the Property, the project sponsor will follow the standard approval processes under Article 16 of the City's Public Works Code. In any typical development project, a tree removal application (to the extent required) is usually filed after the receipt of Planning approvals, and the same will be done here, if applicable.

¹³ CEQA Guidelines Sec. 15300.2(d).

¹⁴ See California Department of Transportation "California State Scenic Highways," available at: <https://dot.ca.gov/programs/design/lap-landscape-architecture-and-community-livability/lap-liv-i-scenic-highways>.



PROPERTY

Source: California Department of Transportation “California State Scenic Highways” map: <https://caltrans.maps.arcgis.com/apps/webappviewer/index.html?id=465dfd3d807c46cc8e8057116f1aaca>

E. CONCLUSION

Requiring further environmental review to be conducted for the Project is unnecessary and contrary to CEQA law. The appellant has not provided any evidence that the analysis in the GPE is flawed or inadequate. Overturning the GPE on the basis of its reliance on the Housing Element EIR would not only go against established precedent regarding CPEs but would also discourage this beneficial housing project and similar projects in any part of the City that conduct CEQA review using a General Plan Evaluation. And in turn, this would further exacerbate the shortage of housing of all income types in San Francisco. Appellant has not provided substantial evidence to meet its burden to overturn the City’s decision to issue a GPE for the Project. Therefore, we respectfully request that you deny the appeal.

Very truly yours,

REUBEN, JUNIUS & ROSE, LLP

Tuija Catalano

Exhibits:

Exh. A – Recorded Notice on Appellant’s property requiring property line window closure

cc: Supervisor Connie Chan
Supervisor Stephen Sherrill
Supervisor Danny Sauter
Supervisor Joel Engardio
Supervisor Bilal Mahmood
Supervisor Matt Dorsey
Supervisor Myrna Melgar
Supervisor Jackie Fielder
Supervisor Shamann Walton
Supervisor Chyanne Chen
Angela Calvillo, Clerk of the Board
Don Lewis, Environmental Planner, Planning Department
Debra Dwyer, Environmental Planner/Manager, Planning Department
Lisa Gibson, Environmental Review Officer, Planning Department
Dane Bunton, Project Sponsor

CERTIFIED COPY

WALTERS ARCHITECTS
1240 18TH ST.
S.F. CA 94107

SAN FRANCISCO, CA RECORDER'S OFFICE
Bruce Jamison, Recorder
DOC- F283146

Wednesday, February 03, 1993 01:26:35pm
Rec 3.00 --- Pa 1.00
Stp --- Mic 1.00
Amt 5.00 ---
TOTAL -> \$5.00
REEL F808 IMAGE 0474

3 February 1993

DEPARTMENT of PUBLIC WORKS
450 McAllister Street
San Francisco, CA 94102

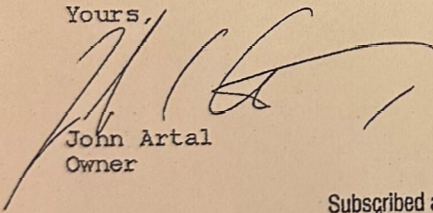
Building of Building Inspection

Re : Property Line Windows
2136 22nd Street App. No 9215062
4094 BK. 37607

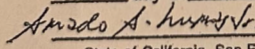
Dear BBI :

I, John Artal , as owner of the building located at 2136 22nd Street, am hereby providing this recorded statement that all openings depicted on adjoining property lines and as documented in the above permit application, shall be protected or closed with approved windows or wall construction, in the event that the adjoining property is improved in such a manner that the openings no longer comply with subsection 504 (d) of the San Francisco Building Code.

Yours,


John Artal
Owner

Subscribed and sworn to before me this
3rd day of Feb 19 93

 Notary Public
State of California, San Francisco County

