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March 23, 2020

Angela Calvillo
Clerk of the Board
San Francisco Board of Supervisors
City Hall, Room 244
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

RE: Notice of Appeal and Appeal of San Francisco Planning Commission's CEQA Exemption for 66 Mountain Spring Avenue, (Case No. 2018-007763ENV)

Dear Ms. Calvillo:

PLEASE TAKE NOTICE THAT, pursuant to San Francisco Administrative Code Section 31.16, and on behalf of Ms. Margaret Niver, Mr. Ronald Niver ("Nivers") and Rosemarie MacGuiness (collectively "appellants"), this letter appeals the San Francisco Planning Department's issuance of a categorical exemption from the California Environmental Quality Act ("CEQA") for the above referenced matter. Specifically, this appeal arises from the Planning Commission's grant of discretionary review on February 20, 2020. (Exhibit A) As of this writing, neither the Planning Department nor the Department of Building Inspection have issued final permits for the proposed project.

I. Introduction

Code Section 31.16 requires appellants to submit a letter of appeal to the Clerk of the Board within 30 calendar days of the approval action describing the grounds for appeal. Here, the Planning Department asserts the approval action is the Planning Commission's February 20, 2020 vote to grant discretionary review *and* approve the project. The appellants' grounds for

appeal include violations of CEQA, San Francisco’s Slope and Seismic Hazard Zone Protection Act and San Francisco’s Residential Design Guidelines. Specifically, as more fully discussed below, prior to project construction, CEQA requires the City to:

1. Conduct required seismic and geo-technical analyses to ensure that the project has fully mitigated all potential slope instability impacts;
2. Investigate potentially significant impacts on aesthetic resources due to the City’s failure to comply with its own land use planning requirements.

II. Background

1. The City’s Project Description

The City’s CEQA determination described the project as: “Demolition of a two-story single family home and construction of a new three-story single family home.”¹

2. Actual Project Description

Mountain Spring Avenue is a small street just below the Sutro Tower in an area of Twin Peaks known as Clarendon Heights. There are approximately 15 houses on the north side of Mountain Spring Avenue, including several historic homes. The project proponent, Transatlantic Construction Company (“developer”), seeks to demolish one of those homes, a 2,100 square foot house built in 1947 by noted San Francisco architect Oliver Rousseau, and replace it with a structure approximately three times as large (5,869 square feet according to the Section 311 Notice). The proposed project would be massive by comparison to the other homes on the north side of Mountain Spring Avenue -- much larger overall, much taller at the street level and much larger in comparison to the lot size. The developer’s proposed structure is also inconsistent with the design and character of the other homes on the north side of Mountain Spring Avenue.

3. Procedural Background

On December 4, 2018, twenty-nine neighbors, nearly every person residing on Mountain Spring Avenue, signed a letter to the developer requesting additional information, including a copy of any historic resource evaluation, geotechnical reports and information about the amount

¹ CEQA Categorical Exemption Determination, p. 1.

of excavation the proposed project would entail. However, the developer refused to provide the residents with any of the requested information. The neighbors' letter also contained a detailed description of their concerns, including specifics about project modifications necessary to bring the project into compliance with the City's Residential Design Guidelines. The letter requested a response but the developer never provided one. Instead, the final building plans submitted to the City ignored almost all of the neighbors' requests and actually increased the square footage of the proposed project.

On November 1, 2020, six neighbors, including two who live adjacent to the project site, filed requests for discretionary review with the Planning Commission based on nearly identical grounds that the project was inconsistent with San Francisco's Residential Design Guidelines and the Residential Design Team's analyses, and presented serious seismic and steep slope concerns.

On February 6, 2020, the Nivers sent a letter to the Planning Commission detailing the historic and cultural significance of Mountain Spring Avenue and its place in the surrounding neighborhood.

On February 19, 2020, the Nivers sent a letter to the Planning Commission specifically pointing out the project was not eligible for a CEQA Class 1 exemption because the project was not in compliance with San Francisco's Slope and Seismic Hazard Zone Protection Act,² and was inconsistent with local land use requirements such as San Francisco's Residential Design Guidelines.

On February 20, 2020, the Planning Commission held a hearing where appellants and other members of the public spoke out against the proposed project; opposing it on grounds that a massive 3-story building with a roof deck (which no other home on the north side of Mountain Spring has) was wholly out of character with the other homes on Mountain Spring Avenue.

The developer's team initially defended the full proposal to the Commission, but during the course of the hearing, the developer pivoted, and offered a set of minor cosmetic changes to the Commission. The DR requesters were blindsided by the developer's last-minute offer of

² San Francisco Ordinance 121-18.

these changes and were not given a reasonable opportunity to consider them. Importantly, these changes did not address the DR requesters principle concerns about the project. The developer made no attempt to achieve a mutually acceptable solution with the community.

In the moment, the DR requesters did their best to review and respond to a new project proposal not described in writing. Appellant Rosemarie MacGuinness asked the Commission to postpone the hearing so they could assess the changes away from the pressure of an ongoing public hearing, but the Commission did not grant a continuance. Instead, absent any factual analysis of whether the developer's 11th hour proposed changes resolved anything, the Commission hastily granted discretionary review, but approved the project with the developer's new modifications. Again, members of the public were only afforded a few minutes, an insufficient time, to digest the new proposal before its adoption. The Commission made the following changes:

1. Eliminate the west property line windows at the upper two floors;
2. Provide a notch at the northwest rear corner at the upper two floors to match the notch at the northeast corner and;
3. Reduce the roof deck to maintain 10 feet from the side building walls and an additional 5 feet from the front.³

Therefore, despite the Commission's grant of discretionary review and findings the project presented extraordinary circumstances, the proposed project remains an enormous three-story single-family dwelling with a rooftop deck and parapet, resulting in a street-facing two-story flat roof building with a mass that is grossly out of scale with all of the other north-side, downslope homes on Mountain Spring Avenue. As approved, the new building would unnecessarily add a wholly discordant element to that side of the block. In addition, the parcel itself is a steep hillside at risk of slope failure in the event of an earthquake;⁴ or, increasingly, climate-related intense winter storms.⁵

³ See Exhibit A, attached hereto.

⁴ One of the General Plan's priority policies is that "the City achieves the greatest possible preparedness to protect against injury and the loss of life in an earthquake."

⁵ California Climate Adaptation Strategy. A Report to the Governor of the State of California in Response to Executive Order S-13-2008.

III. Grounds for Appeal: California Environmental Quality Act

The ‘foremost principle’ in interpreting CEQA is that it must be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.⁶ CEQA requires agencies to conduct a three-tier process to ensure that the environmental consequences of their decisions are fully considered.⁷ The first tier is jurisdictional, requiring an agency to complete a preliminary review to determine whether an activity is subject to CEQA.⁸ An activity that is not a “project” is not subject to CEQA.⁹ The second-tier concerns exemptions from CEQA review, both statutory and categorical.¹⁰ If a project does not fall within an exemption, the agency must “conduct an initial study to determine if the project may have a significant effect on the environment.”¹¹

If there exists “no substantial evidence that the project **or any of its aspects** may cause a significant effect on the environment,” the agency prepares a “negative declaration” that briefly describes the reasons supporting its determination.¹² CEQA's third tier applies if the agency determines substantial evidence exists that an aspect of the project may cause a significant effect on the environment. In that event, the agency must prepare a full environmental impact report. As a preliminary and overarching matter, all available evidence shows this project is not eligible for a categorical exemption under CEQA. Categorical exemptions are allowed for certain classes of activities that can be shown to not have significant effects on the environment.¹³ Public agencies utilizing CEQA exemptions must support their determination that a particular project is exempt with substantial evidence that supports each element of the invoked exemption.¹⁴ A court will reverse an agency’s use of an exemption if the court finds evidence a project may have an adverse impact on the environment.¹⁵

⁶ *Communities for a Better Env’t v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 109.

⁷ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.

⁸ CEQA Guidelines, § 15060; see Pub. Resources Code, § 21065.

⁹ Public Resources Code (see § 21065).

¹⁰ Pub. Resources Code, § 21080(b)(1) (2).

¹¹ CEQA Guidelines, § 15063(a).

¹² *Id.*, §§ 15063(b)(2);15070 (emphasis added).

¹³ CEQA § 21084(a).

¹⁴ CEQA § 21168.5.

¹⁵ *Dunn Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 656.

1. The project may cause significant seismic and geo-technical impacts

The City's categorical exemption omitted any discussion of how the project would meet the requirements to comply with San Francisco's Slope and Seismic Hazard Zone Protection Act (SSPA).¹⁶ The SSPA applies to all property that exceeds an average slope of 4H:1V (25%) or falls within certain mapped areas of the City.¹⁷ Reviewing the Planning Department's map makes clear the subject property is within an identified hazardous zone. Specifically, the subject property appears within hazard zone section 2706 of the City's map. And even a visual inspection of the site confirms the project would be located on a very steep hillside with residences directly below.

At this juncture the City is unable to assess the project's potential seismic and slope impacts because there is no evidence in the record the developer complied with the SSPA. The developer was required to submit a SSPA checklist and information sheet to the Department of Building Inspection and Planning Department describing the proposed construction, average slope of the property, the property location and other pertinent details. The results of a developer's SSPA analysis informs the City on the additional documentation needed to ensure any construction activities and permanent structures would be safe. None of this basic information was included with the categorical exemption materials.

Where a local or regional policy of general applicability, such as an ordinance, is adopted to avoid or mitigate environmental effects, a conflict with that policy in itself indicates a potentially significant impact on the environment.¹⁸ In fact, inconsistencies between a proposed project and applicable local rules must be looked at under CEQA.

¹⁶ See San Francisco Ordinance 121-18. The San Francisco Board of Supervisors passed the SSPA on May 15, 2018, two days before the developer sought an application for a demolition permit with DBI; therefore, the SSPA is the operative ordinance for this project appeal. However, were the Planning Department to claim the SSPA is inapplicable, the project site is nonetheless subject to the earlier Slope Protection Act and must comply with the City's landslide requirements.

¹⁷ https://s3.amazonaws.com/sfplanninggis/Slopes+Poster_lowRes70DPI.pdf

¹⁸ *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903.

Accordingly, because the City has failed to comply with the SSPA, neither City agencies or the public have any technical information on whether project construction could undermine slope stability at the project site and what measures would be required to safeguard adjacent and downslope residences. The City must prepare a proper CEQA analysis on this potentially significant impact.

2. The project may cause significant impacts on aesthetic resources

Pursuant to Appendix G of the CEQA Guidelines, agencies must assess whether a project would conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project adopted for the purpose of avoiding or mitigating environmental effects. The record shows the proposed project is not consistent with San Francisco's Residential Design Guidelines or with the residential design team's (RDT) recommendations. Instead, the RDT reviewed the developer's proposed project and found:

“The mass of the project is out of scale with adjacent homes. These homes reduce their scale through a combination of sloping down to the entry and multiple volumes and shaped roofs that break up their massing. Recommend maintaining slope down to entry, lowering ceiling height of second floor, eliminating parapet, and breaking up massing/ roof forms to reduce scale.”

The RDT went on to find that the project ran afoul of numerous Residential Design Guidelines regulating residential buildings':

- Visual character;
- Scale and form;
- Scale at the street;
- Topography;
- Proportion;
- Rooflines;
- Entrances; and
- Parapets.

In response to these concerns, the developer offered to make a modest reduction of the overall street-facing height of the proposed project. Inexplicably, the RDT accepted this superficial change which did nothing to address the applicable Guideline requirements. The appellants agree with the RDT's findings that the street-level height and massing of the proposed

project is grossly out of proportion with all other residences on the downslope, north side of Mountain Spring Avenue. The proposed project would result in negative aesthetic impact for all of Mountain Spring Avenue, and must be analyzed under CEQA.

As shown above, when a project conflicts with local ordinances, adopted to avoid or mitigate environmental effects, those conflicts themselves indicate potentially significant impacts on the environment.¹⁹ In fact, inconsistencies between a proposed project and applicable local rules must be looked at under CEQA. Here the City invoked a Class 1 categorical exemption which applies to existing facilities. Exempt projects include interior or exterior alterations, additions to existing structures that do not double the size of the building or additions under 10,000 sq/ft.²⁰ But the City's exemption document admits the proposed would be the "demolition of a two-story single family home and construction of a new three-story single family home." Therefore, on its face, the project is not eligible for the CEQA exemption the City invoked.

There is substantial evidence in the record showing the project presents potentially significant impacts on local land use rules and ordinances. Accordingly, the proposed project may not be exempted from CEQA. Instead, the City must prepare an environmental document that proposes feasible alternatives and mitigation measures to the project that would reduce or eliminate impacts on the neighborhood.

THE LAW OFFICES OF GLORIA D. SMITH



By: Gloria D. Smith

¹⁹ *Id.*

²⁰ CEQA Guidelines § 15301.



SAN FRANCISCO PLANNING DEPARTMENT

Discretionary Review Action DRA-0687

HEARING DATE: FEBRUARY 20, 2020

Record No.: 2018-007763DRP-06
Project Address: 66 Mountain Spring Avenue
Building Permit: 2018.0517.9469
Zoning: RH-1(D) [Residential House, One-Family-Detached]
40-X Height and Bulk District
Block/Lot: 2706 / 025
Project Sponsor: Amir Afifi
SIA Consulting
1256 Howard Street
San Francisco, CA 94103
DR Requestors: Rosemarie McGuinness
60 Mountain Spring Avenue
San Francisco, CA

Megan O'Keefe
75 Mountain Spring Avenue
San Francisco, CA

Lynn and Roy Oakley
32 Mountain Spring Avenue
San Francisco, CA

Dagmar Beyerlein
74 Mountain Spring Avenue
San Francisco, CA

Margaret and Ronald Niver
65 Mountain Spring Avenue
San Francisco, CA

Michael and Catherine Donovan
50 Mountain Spring Avenue
San Francisco, CA
Staff Contact: David Winslow – (415) 575-9179
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ADOPTING FINDINGS RELATED TO TAKING DISCRETIONARY REVIEW OF RECORD NO. 2018-007763DRP-06 AND THE APPROVAL OF BUILDING PERMIT APPLICATION NO. 2018.0517.9469 TO DEMOLISH AN EXISTING 2-STORY, ONE-FAMILY HOUSE AND CONSTRUCT A NEW 3-STORY SINGLE-FAMILY HOUSE AT 66 MOUNTAIN SPRING AVENUE WITHIN THE RH-1(D) (RESIDENTIAL HOUSE, ONE-FAMILY-DETAHCED) ZONING DISTRICT AND A 40-X HEIGHT AND BULK DISTRICT.

PREAMBLE

On May 17, 2018, Amir Afifi filed for Building Permit Application No. 2018.0517.9469 to demolish an existing 2-story, single-family house, and construct a new 3-story single-family house at 66 Mountain Spring Avenue within the RH-1(D) (Residential House, One-Family-Detached) Zoning District and a 40-X Height and Bulk District.

On November 1, 2019 Rosemarie McGuinness, Megan O'Keefe, Lynn and Roy Oakley, Dagmar Beyerlein, Margaret and Ronald Niver, Michael and Catherine Donovan, (hereinafter "Discretionary Review (DR) Requestors") filed an application with the Planning Department (hereinafter "Department") for Discretionary Review (2018-007763DRP-06) of Building Permit Application No. 2018.0517.9469.

The Project is exempt from the California Environmental Quality Act ("CEQA") as a Class 3 categorical exemption.

On February 20, 2020, the San Francisco Planning Commission (hereinafter "Commission") conducted a duly noticed public hearing at a regularly scheduled meeting on Discretionary Review Application 2018-007763DRP-06.

The Commission has heard and considered the testimony presented to it at the public hearing and has further considered written materials and oral testimony presented on behalf of the applicant, Department staff, and other interested parties.

ACTION

The Commission found there are extraordinary or exceptional circumstances in this case and hereby takes Discretionary Review requested in Record No. 2018-007763DRP-06 and approves Building Permit Application 2018.0517.9469 with the following conditions:

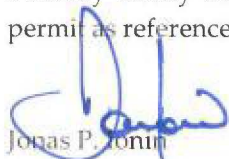
1. Eliminate the West property line windows at the upper two floors;
2. Provide a notch at the nothwest rear corner at the upper two floors to match the notch at the northeast corner and;
3. Reduce the roof deck to maintain 10 feet from the side building walls and an additional 5 feet from the front.

APPEAL AND EFFECTIVE DATE OF ACTION: Any aggrieved person may appeal this Building Permit Application to the Board of Appeals only after the Department of Building Inspection (DBI) takes action (issuing or disapproving) the permit. Such appeal must be made within fifteen (15) days of DBI's action on the permit. For further information, please contact the Board of Appeals at (415) 415-575-6880, 1650 Mission Street # 304, San Francisco, CA, 94103-2481.

Protest of Fee or Exaction: You may protest any fee or exaction subject to Government Code Section 66000 that is imposed as a condition of approval by following the procedures set forth in Government Code Section 66020. The protest must satisfy the requirements of Government Code Section 66020(a) and must be filed within 90 days of the date of the first approval or conditional approval of the development referencing the challenged fee or exaction. For purposes of Government Code Section 66020, the date of imposition of the fee shall be the date of the earliest discretionary approval by the City of the subject development.

If the City has not previously given Notice of an earlier discretionary approval of the project, the Planning Commission's adoption of this Motion, Resolution, Discretionary Review Action or the Zoning Administrator's Variance Decision Letter constitutes the approval or conditional approval of the development and the City hereby gives **NOTICE** that the 90-day protest period under Government Code Section 66020 has begun. If the City has already given Notice that the 90-day approval period has begun for the subject development, then this document does not re-commence the 90-day approval period.

I hereby certify that the Planning Commission takes Discretionary Review and approved the building permit as referenced in this action memo on February 20, 2020.



Jonas P. Smith
Commission Secretary

AYES: Diamond, Fung, Imperial, Johnson, Koppel, Moore

NAYS: None

ABSENT: Richards

ADOPTED: February 20, 2020

GLORIA D. SMITH
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 National
Park Foundation

2884
15-7444/2540

03.23.20 Date

Pay to the Order of S.F. Planning Department \$ 640⁰⁰
Six hundred forty — Dollars

YOSEMITE NATIONAL PARK



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For 2018-007763 ENV



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