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June 16, 2023

VIA E-MAIL

President Aaron Peskin and Supervisors
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: 1151 Washington Street (2022-010833CUA)
CEQA Exemption Appeal (Board File No. 230592)

Dear President Peskin and Supervisors:

Our office represents Alison and Todd Davis, owners of 1151 Washington Street. The proposed project includes the construction of a four-story, 40-foot-tall building with 10 total dwelling units, including 1 three-bedroom and 9 two-bedroom units (the "Project"). The Project provides one Below Market Rate (BMR) unit that will be sold at an affordable rate to moderate-income individuals, which entitles the Project to a 5% density bonus and a waiver of development standards pursuant to the state Density Bonus Law, codified at Gov. Code § 65915.

The Project is located within a fully developed urban neighborhood. On April 7, 2023, the Planning Department determined that the Project qualified for a Class 32 In-fill Development categorical exemption from the California Environmental Quality Act ("CEQA").

Clayton Timbrell, a neighbor who lives next door at 1157 Washington Street, has appealed the CEQA Exemption. The appellant states that he supports a "reasonably-sized" project, but has submitted a CEQA appeal to oppose the Project as currently designed. The appellant argues that the Project does not qualify for a Categorical Exemption for two reasons. First, the appellant argues that CEQA's "unusual circumstances" exception applies to the Project. Second, the appellant argues that the City inappropriately relied on project specific mitigation measures to find that the Project is exempt from CEQA. Both of the appellant's assertions are incorrect.

The Unusual Circumstances Legal Standard.

The Legislature directed California's Natural Resources Secretary to prepare a "list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt." (Pub. Res. Code § 21084.) Referred to as Categorical Exemptions, certain classes of projects, despite their *potential* to have an effect on the environment, have ***already*** "been determined not to have a significant effect on the environment and which shall, therefore, be exempt from the provisions of CEQA." (CEQA Guidelines § 15300.) This is because "common sense tells us that the majority of private projects . . . may be approved exactly as before" CEQA's enactment. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247,

272.)

The appellant incorrectly argues that little more than a "fair argument" that a project "may" have a significant effect on the environment is sufficient to demonstrate that a project does not qualify for a Categorical Exemption due to the "unusual circumstances" exception. This is incorrect. The California Supreme Court, in a section of an opinion entitled "A Potentially Significant Environmental Effect Is Not Alone Sufficient to Trigger the Unusual Circumstances Exception," explicitly rejected the appellant's argument. (*Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097.) Because projects that fall within a Categorical Exemption have *already* been determined *not* to have a significant impact on the environment despite the *potential* for impacts, a project opponent must demonstrate significantly more than a "fair argument" to show that the unusual circumstances exception applies.

To demonstrate that a project requires more in-depth CEQA review, a project opponent must "establish an unusual circumstance with evidence that the project *will* have a significant environmental effect," and that evidence must be "convincing." (*Berkeley Hillside Pres., supra,* 60 Cal.4th at 1105.) Alternatively, a project opponent may show a "reasonable possibility" that the project will have a significant effect on the environment, if the opponent can also demonstrate that the significant effect is caused by an unusual circumstance "that distinguishes it from others in the exempt class." (*Id.*) Here, the appellant fails to demonstrate that the unusual circumstance exception applies.

There are No Unusual Circumstances Applicable to the Project.

First, the appellant fails to demonstrate that there are any unusual circumstances that distinguish this project from others in its class. Try as he might to argue otherwise, there is nothing unusual regarding a proposal to construct a housing project on a residentially zoned parcel in a fully developed urban neighborhood.

The appellant primarily argues that an unusual circumstance exists due to soil samples that show concentrations of soil contaminants at levels slightly above Environmental Screening Levels ("ESLs"). The appellant was apparently unconcerned about soil contaminants when he excavated a new basement level for his own home next door (see Planning File No. 2015-006142PRJ), nor would he be concerned about this issue if the Project were "reasonably-sized," but is now gravely concerned that *this* project will cause significant effects.

The project site is within an area that is subject to the City's Maher Ordinance, which is designed to protect public health and safety by requiring appropriate handling and treatment of contaminated soils encountered in the construction process. Prior to expansion of Maher Ordinance sites in 2013, the Maher Ordinance was only applicable to the Eastern Shoreline, and the requirements to appropriately handle soil contaminants were "only enforceable on a case-by-case basis through CEQA mitigation measures and conditions of project approval." (Board File No. 130369.)

To avoid case-by-case handling of soil contaminants and ensure that more projects *could* qualify for a CEQA exemption, the City enacted Ordinance No. 155-13 to significantly expand the Maher Ordinance map and require more areas of the City to comply with its requirements. As a

result, a large portion of the City is covered by the Maher Ordinance map. Encountering contaminated soils within San Francisco is the norm, not an unusual circumstance, and the City's Maher Ordinance was specifically designed to appropriately handle this process appropriately. If being subject to the Maher Ordinance were an unusual circumstance, half the City would be ineligible for a CEQA exemption.

The appellant argues that encountering slightly elevated ESLs automatically qualifies as an unusual circumstance. ESLs are established by the Regional Water Quality Control Board and provide conservative screening levels intended to expedite the identification and evaluation of common soil contaminants. Such levels do not demonstrate that adverse impacts to human health will occur, but simply that additional evaluation will occur. That is precisely what occurred here. The appellant cites to *McQueen v. Bd. of Directors* (1988) 202 Cal. App. 3d 1136 to suggest that the presence of elevated ESLs are, by law, an unusual circumstance. *McQueen* dealt with the sale of Air Force land for "public open space" that contained abandoned fuel tanks, transformers, and "drums containing solvents and other chemicals" that were highly toxic and hazardous, which an Air Force Colonel admitted "may be illegal." (*Id.* at 1142.) The illegal sale of land containing abandoned drums of toxic chemicals is a far cry from the situation here.

The appellant also appears to argue that the presence of greater than 25% slopes, *in San Francisco*, is an unusual circumstance. Topography must be assessed in context and claims that steep slopes in San Francisco are an unusual circumstance have already been specifically rejected. In *Protect Telegraph Hill v. San Francisco* (2017) 16 Cal.App.5th 261, 272, the court stated flatly that the "slope of the project lot (approximately 30%) is not unusual for San Francisco." The California Supreme Court similarly dismissed a claim that an unusual circumstance existed regarding a project that was on a "steep slope (approximately 50 percent grade) in a heavily wooded area." (*Berkeley Hillside*, *supra*, 60 Cal.4th at 1093.)

The appellant also argues that because the project is adjacent to the Betty Ong Recreation Center, this presents an unusual circumstance. It is unclear how the presence of an urban park with a paved playground and basketball court located next to a townhouse complex presents an unusual circumstance. Boasting over 220 parks within 46.9 square miles, the presence of an urban park within the City is clearly not an unusual circumstance. The appellant's comparison to *Lewis v. Seventeenth Dist. Agric. Assn.* (1985) 165 Cal. App. 3d 823, which involved the approval of holding stock car races within a residential neighborhood, is nearly as absurd as comparing drums of toxic waste to slightly elevated ESLs.

The project includes the construction of a housing project in a residentially zoned area in a heavily urbanized area completely surrounded by urban uses. In short, there are no unusual circumstances applicable to the project. Thus, the only way the appellant can show that the unusual circumstances exception applies is by establishing, by convincing evidence, that the Project *will* cause a significant environmental effect, which he fails to do.

The Appellant Fails to Provide Convincing Evidence that the Project will Cause a Significant Environmental Effect.

The appellant concedes that that there is no evidence that this housing project in a residentially zoned urban area will not cause a significant environmental effect, instead stating that the project *could* have a significant effect, which is not the appropriate standard. Regardless, even the appellants' arguments regarding *potential* effects are based on inaccuracies and false statements.

The appellants' main argument is that the project could potentially cause human health impacts from contaminated soil based on elevated ESLs. Again, ESLs are conservative screening levels intended expedite evaluation of common soil contaminants and do not demonstrate adverse impacts to human health. The appellant uses deceptive quotations to suggest that the Site Mitigation Plan (SMP) is relying on "visual and olfactory observations" to determine the level of contaminants. To the contrary, soil samples have already been analyzed to determine the presence of contaminants. The appellant is quoting language from the *contingency* plan that is only relevant if construction activities "reveal conditions *substantially different from what is expected*." (SMP, p. 9.) The fact that the SMP includes procedures to deal with issues that are "not anticipated to be encountered" demonstrates that the SMP is thorough, not inadequate.

The appellant also falsely states that the SMP was prepared for an earlier project that only included a small addition to the existing building, and that the SMP is inadequate for the project as currently proposed. This is simply wrong. Page 1 of the SMP clearly states that "the site is planned for a 4-story building with (10) new townhomes." The soil samples were taken for the original project, but the SMP was specifically designed for this project. The appellant also claims, without evidence, that the that the vapor intrusion mitigation system *may* be inadequate because the project includes a subgrade bedroom. Perhaps the appellant stopped reading there, because the SMP also requires a minimum of two sampling events following installation to ensure vapors do not exceed screening levels and includes converting the passive venting system to an active venting system if necessary. (SMP, p. 11.)

The appellant is clearly grasping at straws and needs to resort to distorting the record to drum up fear. As explained above, the Maher Ordinance was specifically designed to ensure public health and safety from potential soil contaminants that are extremely common in San Francisco, and its requirements have been successful in accomplishing that goal. The SMP has been reviewed and approved by the Department of Health, and there is no evidence that this Project is out of the ordinary and will cause significant environmental effects.

The appellant also argues that the project will cause significant shadow impacts to the Betty Ann Ong Recreation Center next door to the project site. The appellant acknowledges that the Planning Code only requires the City to make findings regarding shadowing when a project exceeds forty feet, which is not the case here, but the appellant nonetheless argues that the shadow impacts will be a significant environmental impact. The appellant also relies on his own shadow analysis, which *was* based on an earlier iteration of the project that included significantly larger rooftop penthouses. (See Planning File No. 2022-008223PPA; CEQA Appeal Exhibit G, p. 1.) The report also acknowledges that the analysis was "preliminary" and recommended a "high-resolution detailed survey of the recreation center" to meet City standards for conducting shadow analysis. (*Id.* 2-3.) Despite this report's preliminary analysis based on a larger project

that did not take into account additional existing shadows caused trees and landscaping, the report's likely still found that the existing shadow load was over 76% and the project's new net shadow would be less than 3%. The appellant does not provide support for the proposition that this (likely overestimate) of new shadow qualifies as a significant environmental impact.

Finally, the appellant argues that the project does not provide proper fire access, and therefore would cause significant "public services" impacts. The project architect has already addressed the appellant's incorrect code-compliance claims (see **Exhibit A**), and regardless the Project will also go through DBI and Fire review in the building permit phase. The Planning Commission has required that the Project be re-reviewed if any of the appellant's purported code-compliance complaints cause any changes to the project.

The Project is Not Relying on Mitigation Measures to Qualify for an Exemption.

The appellant also argues that the Project is inappropriately relying on mitigation measures to qualify for an exemption, including the Maher Ordinance SMP and geotechnical report recommendations. The appellant cites court cases where a local agency applied site-specific special conditions on a project to specifically mitigate identified environmental impacts to argue that a project cannot mitigate into an exemption. However, that is not the case here. Rather, the project developed an SMP and geotechnical report to comply with existing regulatory standards. This type of argument has already been rejected, as it is well accepted that an "agency may rely on generally applicable regulations to conclude an environmental impact will not be significant and therefore does not require mitigation." (*S. F. Beautiful v. City of S.F*. (2014) 226 Cal.App.4th 1012, 1033.) Reliance on site specific geotechnical recommendations was explicitly approved, as "customary measures should be adequate to address anticipated risks that arise during project excavation" (*Protect Telegraph Hill, supra,* 16 Cal.App.5th at 273.)

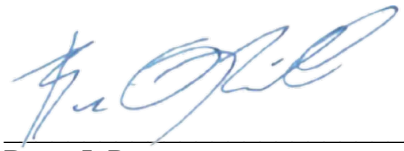
As a practical matter, the appellant's argument must be rejected. As explained above, the Maher Ordinance was amended in 2013 to encompass more of the City specifically to avoid case-by-case CEQA review for an extremely common condition. Nearly every housing project requires some amount of excavation and a geotechnical report, including the appellant's 2015 proposed basement expansion *that was also found exempt from CEQA*. Surely the appellant did not believe that *his* project required in-depth CEQA review. The appellants' position, that the City cannot rely on generally applicable regulations to qualify for an exemption, is untenable and unworkable. As the California Supreme Court confirmed decades ago, "common sense tells us that the majority of private projects . . . may be approved exactly as before." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 272.)

Conclusion.

The Project provides ten units of housing in an urbanized resident zone that is completely developed and clearly qualifies for an In Fill Exemption. The appellant fails to show the existence of any unusual circumstances and fails to provide convincing evidence that the project will have a significant effect on the environment. The Board should reject this appeal, uphold the exemption, and allow this much needed housing project to move forward.

Very truly yours,

PATTERSON & O'NEILL, PC



Ryan J. Patterson
Brian J. O'Neill
Attorneys for Alison and Todd Davis

EXHIBIT A

19 April 2023

Commission President Rachel Tanner
San Francisco Planning Commission
40 South Van Ness Avenue
San Francisco, CA 94103

Re: 1151 Washington CUA
– Consolidated Response to Robert Baum & Richard Drury Letters dated 4/17/23

Dear President Tanner, Vice-President Moore, and Commissioners,

This letter is in response to Architect Robert Baum's Letter (dated 4/17/23) and Attorney Richard Drury's Letter (dated 4/17/23) in opposition to my client's (Alison & Todd Davis) proposed 10-unit "Townhome" Project located at 1151 Washington (Block 0213 Lot 025).

It is my understanding that Mr. Baum's son is the owner of the single-family home located at 1155 Washington (Block 0213 Lot 024A) and that the underlying reason for Mr. Baum's numerous objections is to preserve the existing views from his son's property – with its numerous property line windows -- across the rear portion of my client's property.

Mr. Drury represents Clayton Timbrell, the owner of 1157 Washington (Block 0213 Lot 024) and, similarly, based upon my client's experience with Mr. Trimbell over several years, the real reason for his objection to the proposed Project is to preserve Mr. Trimbell's views across the middle portions of my client's property.

Since the preservation of private views across another's private property is not a legitimate reason to object to a Project, both Letters seek to create sufficient confusion and doubt to thwart the Project.

Since the Planning Code and State Density Bonus Law compliance, and the CEQA issues brought up in the Letters are best addressed by the Planning Department, this Response will focus on the Building and Fire Code issues shared by the Letters, since these issues are not the area of expertise nor charge of the Planning Department.

CODE-COMPLIANT MEANS OF EGRESS
(See Figure 1, attached)

Both Letters claim that the proposed Project's "Means of Egress" is not Code-compliant -- whereas, in truth, the Project is entirely in compliance with Building Code requirements.

In their Letters, Baum and Drury misunderstand and/or misrepresent the requirements of the 2023 San Francisco Building Code (SFBC).

The SFBC defines "Means of Egress" as *"A continuous and unobstructed path of vertical and horizontal egress travel form any occupied portion of a building or structure to a public way. A means of egress consists of three separate and distinct parts: the **Exit Access**, the **Exit**, and the **Exit Discharge**".*

The proposed Project possesses these 3 distinct parts. Within each "Tiny Townhome," the "Exit Access" is the route from the remotest part of the roof deck, down the spiral stair ("exit access stairway") and through the kitchen to the front door located at grade. Per the SFBC, the Townhome's front door – the transition from inside to outside -- is considered the "Exit." Once outside, one is in the "Exit Discharge." The "Exit Discharge" is in the form of a Code-compliant "Egress Court" that leads directly to a "Public Way" (i.e., Washington Street).

The Project consist of (10) Townhomes divided by 2-hour firewalls into (5) "Duplexes" of Group R-3 Occupancy. (See Project Drawings dated 03/17/23, Pages 10 thru 12.)

Per SFBC Sec. 1006.3.4.4, *"Group R-3 … occupancies shall be permitted to have one exit or access to a single exit."*

Per SFBC Table 1006.3.4(1) "Stories with One Exit or Access to One Exit for R-2 and R-3 Occupancies," the "Maximum Exit Access Travel Distance" is 125 feet.

Per Figure 1 (attached), the Project's "Exit Access Travel Distance" is 118'-5"
(Less than or equal to 125'-0").

Accordingly, the Exit Access is Code-compliant.

Per SFBC Sec. 1028.2 "Exit Discharge," *"Exits shall discharge directly to the exterior of the building. The exit discharge shall be at grade or shall provide a direct path of egress travel to grade. The exit discharge shall not reenter a building."*

Per Figure 1, the Project's "Exit" (each Townhome's front door) discharges directly to the exterior of the building (and at no point must one have to reenter a building).

Accordingly, the Exit is Code-compliant.

Per SFBC Sec. 1028.4 "Exit Discharge Components," "*Exit discharge components shall be sufficiently open to the exterior to minimize the accumulation of smoke and toxic gases."* The "Exit Discharge" is in the form of an open air "Egress Court" that leads to "Public Way" (i.e., Washington Street).

Per Sec. 1029.2 "Egress Courts – Width or Capacity" *"Egress courts serving Group R-3 … occupancies shall be no less than 36 inches in width."* Per Figure 1, the Project's Egress Court is 60 inches (i.e., 5-feet) in width.

Accordingly, the Exit Discharge is Code-compliant.

Note: Both Baum and Drury mistakenly apply the "Maximum Exit Access Travel Distance" of 125 feet to the length of the Exit Discharge. Per the SFBC, this "125 feet maximum" only applies to the "Exit Access" and not to the "Exit Discharge."

Per the SFBC, there is no maximum allowable distance that constrains the "Exit Discharge".

In summary, the Project's entire Means of Egress system is Code-compliant.

FIREFIGHTER ACCESS & EMERGENCY ESCAPE AND RESCUE OPENINGS (EEROs)
(See Figure 2, attached)

Both Letters, focusing on the Townhomes fronting the "Egress Court", claim the Building and Fire Codes (and associated Interpretations and Manuals) require that all bedrooms ("sleeping rooms" per the Code) have Emergency Escape and Rescue Openings (EEROs). The Letters go on to claim that there is insufficient room for firefighters to set up the ground ladders in order to access the EEROs.

Both claims are incorrect.

The Project's Townhomes along this frontage have bedrooms at the 3rd and 4th stories. Per SFBC Sec. 1031.2 "Emergency Escape and Rescue – Where Required" and DBI's Information Sheet No. EG-04 "Emergency Escape and Rescue Openings," "*…Basements and sleeping rooms below the 4th story above grade plane shall have not fewer that one emergency escape and rescue opening in accordance with this section."*

Accordingly, only the bedrooms at the 3rd story (i.e., "below the 4th story") must have an EERO. The bedrooms located at the 4th story are not required to have an EERO.

As clearly shown in Figure 2 (attached), there is plenty of room for firefighters to set up a ladder (e.g., a 50-foot "Bangor" Extension Ladder") at the ideal 70-degree angle specified in the SFFD "Truck & Ladder Manual (TLM) along the 5-foot-wide Egress Court in order to access the EEROs.

In fact, by orienting the ladder parallel, as opposed to perpendicular, to the building, firefighters do not have to rotate the ladder and, accordingly, they can deploy it more quickly and safely. Additionally, the projecting steel "Ladder Rests" allow firefighters to secure the ladder to the Rests, just as they would to a fire escape balcony, as recommended in the TLM (Page 2.6).

Furthermore, even though access is not required to the 4th story window -- as shown in Figure 2, the design of the Project goes the extra distance to provide firefighter ladder access to this 4th story bedroom as well.

Accordingly, the Project exceeds Code requirements for EEROs and provides enhanced safety for firefighters and occupants alike.

ACCESSIBLITY COMPLIANCE

Regarding accessibility, the Project complies with the applicable requirements of the SFBC Chapter 11A "Housing Accessibility".

Specifically, per Sec. 1102A.3.1 "Multistory Apartment or Condominium Dwellings in Buildings with No Elevators," "*At least 10 percent, but not less than one of the multistory dwellings … shall comply with the following:*

1. *The primary entry to the dwelling unit shall be on an accessible route unless exempted by site impracticality test in Section 1150A.*
2. *At least one powder room … shall be located on the primary entry level, served by an accessible route and shall comply with the provisions in Division IV.*
3. *All rooms or spaces locate on the primary entry level shall be served by an accessible route and shall comply with the provision in Division IV. Rooms and spaces located on the primary entry level and subject to this chapter my include, but are not limited to, kitchens, powder rooms, bathrooms, living rooms, bedrooms or hallways.*
4. *Common use areas covered by this section shall be accessible as required by this chapter."*

Since the Project has no elevator and consists of (10) multistory Townhome dwellings, at least (1) Townhome (i.e., 10%) must comply with the above requirements of Sec. 1102A.3.1.

The Townhome facing Washington Street has the requisite features (Items 1, 2 & 3). Its primary entry is accessible directly from the sidewalk and it has an accessible powder room, in compliance with the provisions in Division IV, located on the primary entry level that is served by an accessible route). (See Project Drawings dated 03/17/23, Page 14.)

Common use areas include the shared garage and trash, recycling & compost room located at street level. The garage contains (1) un-assigned parking stall consisting of a minimum 9-foot-wide van-accessible parking space with an adjacent 8-foot-wide loading space. All these common use areas are served by an accessible route (Item 4).

Accordingly, the Project is Code-compliant with regard to accessibility.

Sincerely,

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Principal
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cc. Commission Vice-President: Kathrin Moore
Commissioners: Derek Braun, Sue Diamond, Joel Koppel, Theresa Imperial, Gabriella Ruiz
Commission Secretary Jonas Ionin
Senior Planner Christopher May
Senior Environmental Planner Don Lewis

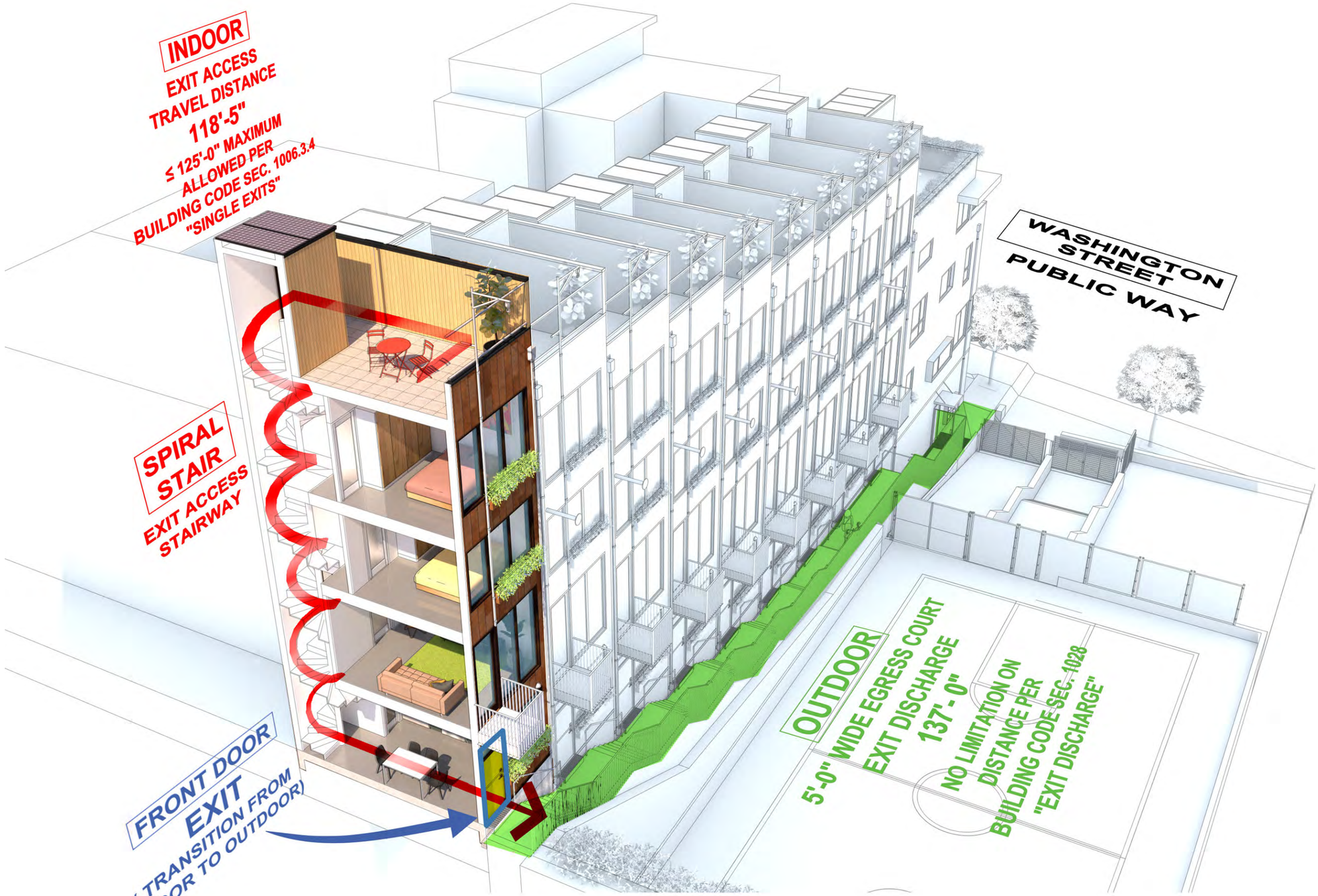

FIGURE (1) CODE-COMPLIANT MEANS OF EGRESS

FIGURE 2 CODE-COMPLIANT FIREFIGHTER ACCESS AND RESCUE OPENINGS

- (A) "DUTCH" STYLE FLAG HOIST SYSTEM
- (B) SOLAR PANELS
- (C) COMPOSITE WOOD SIDING
- (D) OUTDOOR PRIVATE DECK
- (E) ZINC/GALVANIZED DOWNSPOUTS
- (F) LARGE WINDOWS FOR ABUNDANT NATURAL LIGHT, AIR AND VIEWS
- (G) NATURAL CROSS VENTILATION
- (H) WINDOWSILL PLANTERS
- (J) WEATHERING STEEL SIDING
- (K) "DUTCH" SPIRAL STAIR CASE
- (L) PROJECTING BALCONY
- (M) "DUTCH" TYPE ENTRY DOOR
- (N) KITCHEN HERB GARDEN
- (O) DRAINAGE CHANNEL
- (P) BIKE RAMP

THE TINY TOWNHOMES OF NOB HILL