

# REUBEN, JUNIUS & ROSE, LLP

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**Delivered Via Email (bos.legislation@sfgov.org)**

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

**Re: 66 Mountain Spring Avenue  
Opposition to Appeal of the Categorical Exemption  
Planning Department Case No. 2018-007763ENV  
Our File No.: 11597.01**

Dear President Yee and Supervisors:

This office represents the owner of the property located at 66 Mountain Spring Avenue (“Property”). The owner is proposing to demolish the existing building and construct a new three-story home to more comfortably accommodate his family (“the “Project”). The Property is located on a steeply sloped block, with an overall development pattern of downslope homes that are 1-2 stories at street level and upslope homes that are 3-4 stories at street level. The proposed Code-compliant Project is 2 stories at street level, within the allowable buildable area, and the Planning Department determined it is consistent with the Residential Design Guidelines (“RDG”). On February 20, 2020 the Planning Commission took Discretionary Review and unanimously approved the Project with three minor conditions, including eliminating some of the property line windows, providing a notch on one of the rear corners of the building, and reducing the size of the roof deck.

The appellant fails to show that the categorical exemption is not supported by substantial evidence or that any exceptions to the exemption apply here. The appellant’s claims that the Project may result in significant aesthetic or geotechnical impacts are baseless. The Project has incorporated the recommendations of the geotechnical report and will comply with the Slope and Seismic Hazard Zone Protection Act during Shoring & Structural addenda review as required under the Code. In addition, the Project is compatible with the existing development pattern in the area and will also not result in significant aesthetic impacts. Therefore, the appeal is without merit and should be dismissed.

## A. 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 under CEQA.

CEQA designates certain classes of projects as “categorically exempt.”<sup>1</sup> The lead agency’s determination that a project is categorical exempt is subject to the substantial evidence test.<sup>2</sup> Because CEQA does not require public agencies to follow any specific procedure for the exemption determination, an agency is not limited to asserting only those exemptions that were asserted in the administrative record before the reviewing body.<sup>3</sup>

If a project fits within one or more of the categorical exemptions listed in the CEQA Guidelines, the lead agency does not need to conduct environmental review unless the project fits within one of the delineated exceptions. Such limited circumstances include the following: (1) there is a reasonable possibility of a significant effect on the environment due to unusual circumstances; (2) significant cumulative impacts from projects of the same type will result; or (3) the project will have impacts on a uniquely sensitive environment.<sup>4</sup> When an agency finds that a proposed project is subject to a categorical exemption, it is not required to determine that none of the exceptions applies. Instead, the burden of proof shifts to the appellant to produce evidence that one of the exceptions to the categorical exemption applies.<sup>5</sup>

The Project was issued a Class 1 and Class 3 exemption. A Class 1 exemption applies to the “[d]emolition and removal of individual small structures” including “up to three single-family residences” in urbanized areas.<sup>6</sup> A Class 3 exemption applies to the new construction of “one single-family residence...in a residential zone” or in urbanized areas “up to three single-family residences.”<sup>7</sup> The new construction of the 3-story single-family home at issue here clearly fits within the class of activities subject to a Class 3 exemption. It is well-established that an agency may combine several exemptions to find a project exempt.<sup>8</sup>

Appellant makes no attempt to argue an exception to the exemption applies. Rather, appellant argues the Project will cause a significant impact based on its noncompliance with the Slope and Seismic Hazard Zone Protection Act and based on its aesthetics.

Reversal of the Planning Department’s determination is only appropriate if substantial evidence fails to support such determination.<sup>9</sup> Substantial evidence is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to

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<sup>1</sup> Pub. Resources Code § 21084(a), 21080(b)(9); 14 Cal. Code Regs. § 15300, et seq. (CEQA Guidelines).

<sup>2</sup> *Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, 219-220.

<sup>3</sup> See, e.g., *California Farm Bureau Fed’n v. California Wildlife Conserv. Bd.* (2006) 143 Cal.App.4th 173, 190.

<sup>4</sup> CEQA Guidelines § 15300.2.

<sup>5</sup> *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105 (“*Berkeley Hillside*”).

<sup>6</sup> CEQA Guidelines § 15301(l).

<sup>7</sup> CEQA Guidelines § 15303(a).

<sup>8</sup> See, e.g., *Surfrider Foundation v. California Coastal Commission* (1994) 26 Cal.App.4th 151.

<sup>9</sup> *Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1114-1116.

support a conclusion, even though other conclusions might also be reached.”<sup>10</sup> In applying the deferential substantial evidence standard, any reasonable doubts must be resolved in the lead agency’s favor.<sup>11</sup>

## **B. CEQA Issues Raised**

### **1. The Project Will Not Result in Significant Seismic or Geotechnical Impacts**

The appellant argues that the City is unable to assess the Project’s potential seismic and slope impacts because the Project did not comply with the Slope and Seismic Hazard Zone Protection Act (“SSPA”). In fact, a geotechnical report was prepared that specifically addresses the potential applicability of the SSPA, notes that during the site visit no evidence of active slope instability was observed, and provides recommendations that have been incorporated into the Project. As required, the Project will comply with the SSPA during the Department of Building Inspection’s review of the Shoring & Structural addenda and will undergo additional review by the Structural Advisory Committee. All seismic and geotechnical concerns will be resolved as part of this process. This is standard practice for applying the SSPA and because the SSPA is a legal obligation no mitigation measure is necessary to apply it to the Project.

### **2. The Project Will Not Result in Significant Impacts to Aesthetic Resources**

Appellant argues that the Project conflicts with a number of Residential Design Guidelines and therefore results in significant aesthetic impacts. However, due to an amendment to CEQA enacted in 2013, **aesthetic impacts are not considered significant under CEQA for residential projects on infill sites within transit priority areas.**<sup>12</sup> As a residential in-fill Project within one-half mile of multiple major bus stops, the Project is exempt from review of aesthetic impacts.

Even if aesthetic impacts were evaluated for significance, the appellant has not met their burden of showing that the Project involves unusual circumstances and that an exception to the exemption applies here. As discussed in detail below, the proposed 5,454 square foot home is similar in both square footage and FAR to other homes in the area. In a case involving a much larger 6,478 square foot single-family home with an attached 3,394 square foot 10-car garage, the First District Court of Appeal found that the project did not present unusual circumstances sufficient to overturn the use of a Class 3 exemption.<sup>13</sup> The same is true here.

Contrary to the appellant’s claims, the Project is consistent with the RDG, as determined by Planning staff. The RDG set forth general guidelines to “[d]esign the scale of the building to be compatible with the height and depth of surrounding buildings.”<sup>14</sup> The Project team incorporated recommendations from RDAT to make the Project compatible with the

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<sup>10</sup> CEQA Guidelines § 15384(a).

<sup>11</sup> *Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1114-1115.

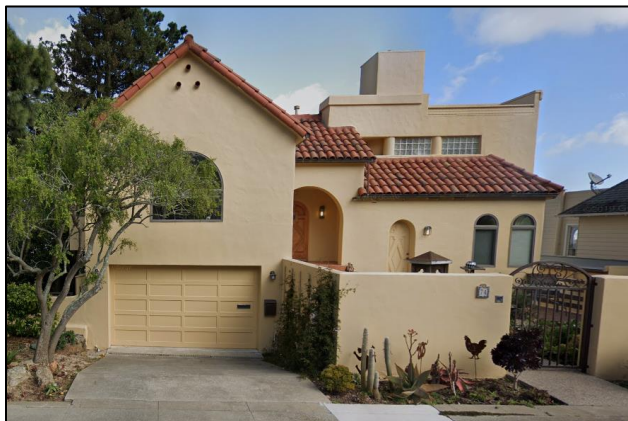
<sup>12</sup> CEQA Guidelines § 21099(d)(1).

<sup>13</sup> *Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943, 956-957.

<sup>14</sup> Residential Design Guidelines, p. 32.

neighborhood. These design features include varying the front facade, lowering the height, adding window configurations that break the line of sight with the adjacent neighbors, creating cutouts in the rear corners of the building, and increasing side setbacks.

Appellant’s claim that the massing and height of the building are out of character with the neighborhood are unfounded. Like the proposed Project, most properties on the downslope portion of the street are three stories and present as two stories at street level. In fact, the property next door at 74 Mountain Spring Avenue is very similar in terms of massing at the street level. Both have a one-story over garage massing at the front-most portion of the property with the main entrance set back and a portion of the upper floor further stepped back. This implements recommendations in the RDG and from RDAT to reduce massing through façade articulation and setbacks at upper floors and is compatible with the neighborhood character regardless of square footage.



74 Mountain Spring Avenue



Proposed Project at 66 Mountain Spring Avenue

Even so, the square footage of the proposed Project is consistent with new development in the area despite the appellant’s claims to the contrary. The chart below shows the projects in the area that are over 5,000 square feet. It is clear that the Project is similar to other existing buildings in the area both in terms of square footage and FAR. Nothing about the height or massing of the Project presents unusual circumstances, and the appellant has not met their burden of proving that the Project *will* have a significant environmental effect.

SIMILAR PROJECTS IN THE NEIGHBORHOOD <sup>15</sup> (in ascending order)			
Address	Building Area (sf)	Lot Area (sf)	FAR (rounded)
100 Palo Alto Ave	5,177	5,000	1.0
53 Saint Germain Ave	5,248	4,000	1.3
3 Clarendon Ave	5,400	4,459	1.2
66 Mountain Spring	5,454	5,000	1.1
140 Saint Germain Ave	5,701	5,000	1.1
75 Mountain Spring	5,732	9,997	0.6
33 Mountain Spring	5,928	13,194	0.4

<sup>15</sup> All information in this table is from the Multiple Listing Service.

170 Saint Germain Ave	6,500	4,996	1.3
65 Saint Germain Ave	6,897	8,786	0.8
401 Twin Peaks Blvd	7,056	6,442	1.1
150 Glenbrook Ave	7,346	5,271	1.4
37 Saint Germain Ave	7,557	4,000	1.9
50 Saint Germain Ave	7,616	5,000	1.5

**B. Conclusion**

Requiring further environmental review to be conducted for the Project is unnecessary and unsupported by law. The appellant has not provided evidence that any of the exceptions to the exemption apply here and has not met the standard necessary to overturn the City's decision to issue a categorical exemption for the Project. Therefore, we respectfully request that you deny the appeal.

Very truly yours,

**REUBEN, JUNIUS & ROSE, LLP**



John Kevlin

cc: Supervisor Sandra Lee Fewer  
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