

File No. 230848

Committee Item No. _____

Board Item No. 84

COMMITTEE/BOARD OF SUPERVISORS

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Date: _____

Board of Supervisors Meeting

Date: July 25, 2023

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Prepared by: Lisa Lew

Date: July 21, 2023

Prepared by: _____

Date: _____

1 [Findings Reversing the Categorical Exemption Determination - 1151 Washington Street
2 Project]

3 **Motion adopting findings to reverse the Planning Department’s determination that the**
4 **proposed project located at 1151 Washington Street is categorically exempt from**
5 **environmental review.**

6
7 WHEREAS, On April 7, 2023, the Planning Department issued a CEQA Categorical
8 Exemption Determination for the proposed project located at 1115 Washington Street
9 (“Project”) under the California Environmental Quality Act (Pub. Resources Code, Section
10 21000 *et seq.*, "CEQA"), the CEQA Guidelines (California Code of Regulations, Title 14,
11 Division 6, Chapter 3, Sections 15300-15387), and San Francisco Administrative Code,
12 Chapter 31; and

13 WHEREAS, The project site is a 3,571-square-foot parcel in the Nob Hill neighborhood,
14 occupied by an existing 30-foot-tall, three-story, single-family residence that is approximately
15 3,050 square feet in size with two off-street parking spaces; and

16 WHEREAS, The project sponsor proposes the demolition of the existing single-family
17 residence and construction of a 40-foot-tall (50-foot-tall with penthouses), four-story over
18 basement residential building containing 10 for-sale townhouses and one off-street van
19 parking space, access to the proposed units would be from a 5-foot-wide pathway that would
20 step up along the eastern edge of the property, from Washington Street, the proposed
21 pathway would include a bicycle ramp, the proposed building would be approximately 12,300
22 square feet in size, and would utilize the state density bonus program; and

23 WHEREAS, On November 1, 2022, Dana Manea (representing the project sponsor)
24 filed a project application with the department for the Project; and

1 WHEREAS, Pursuant to CEQA, on April 7, 2023, the department determined that the
2 Project was categorically exempt from CEQA, under CEQA Class 32 - Infill Development
3 (CEQA Guidelines Section 15332, "Exemption Determination"), and that no environmental
4 review was required; and

5 WHEREAS, On April 20, 2023, the Planning Commission ("Commission") conducted a
6 duly noticed public hearing at a regularly scheduled commission meeting and approved the
7 Conditional Use Authorization for the proposed Project; and

8 WHEREAS, On May 17, 2023, Richard Drury of Lozeau Drury, LLP, on behalf of
9 Clayton Timbrell ("Appellant"), filed an appeal of the Categorical Exemption determination;
10 and

11 WHEREAS, On May 19, 2023, Hanmin Liu, on behalf of the Upper Chinatown
12 Neighborhood Association ("UCNA"), filed a memorandum indicating that UCNA joined the
13 appeal of the exemption determination filed by Richard Drury (on May 17, 2023), and noting
14 that UCNA was not raising any new issues or enlarging the scope of the appeal; and

15 WHEREAS, By memorandum to the Clerk of the Board dated May 22, 2023, the
16 department determined that the appeal was timely filed; and

17 WHEREAS, On June 27, 2023, this Board held a duly noticed public hearing to
18 consider the appeal of the exemption determination filed by Appellant; and

19 WHEREAS, At the hearing, Appellant and members of the public presented evidence
20 and testimony that the Project does not meet the requirements for a Class 32 Categorical
21 Exemption; specifically, the testimony highlighted the fact that the Project site is adjacent to
22 the Betty Ann Ong Recreation Area and playground, and upslope from such park; that the site
23 contains several hazardous contaminants and will require environmental remediation in close
24 proximity to park users, including children; and that the Project configuration, containing a
25

1 total of 10 units in a narrow lot, with many of the units only accessible by a narrow alley, is
2 unusual; and

3 WHEREAS, Under Section 15300.2 of the CEQA Guidelines, “[a] categorical
4 exemption shall not be used for an activity where there is a reasonable possibility that the
5 activity will have a significant effect on the environment due to unusual circumstances;” and

6 WHEREAS, In *Berkeley Hillside Preservation v City of Berkeley* (“*Berkeley Hillside*”)
7 (2015) 60 C4th 1086, the California Supreme Court considered the “unusual circumstances”
8 exception to CEQA’s categorical exemptions; and

9 WHEREAS, In *Berkeley Hillside*, the Court explained that lead agencies can approach
10 the question as to whether a project presents “unusual circumstances” in two ways, under the
11 first approach, agencies consider two distinct questions: 1) whether the project presents
12 unusual circumstances; and 2) whether there is a reasonable possibility that a significant
13 environmental impact will result from those unusual circumstances, an agency need not
14 address the second prong of this test unless it first finds that some circumstance of the project
15 is unusual, under the second approach, if an agency finds the project will have a significant
16 impact, that finding necessarily establishes that some circumstance of the project is unusual,
17 and the exception applies; and

18 WHEREAS, The Court explained that an agency’s determination whether the
19 circumstances are unusual is a factual inquiry subject to the substantial evidence standard of
20 review, under which the agency weighs the evidence to decide if the circumstances presented
21 by the project are unusual; and

22 WHEREAS, If the agency finds that the project presents unusual circumstances, the
23 second question it must address is whether there is "a reasonable possibility of a significant
24 effect on the environment due to" those circumstances, the agency answers this question by
25

1 determining if there is *any* substantial evidence before it that would support a *fair argument*
2 that a significant impact on the environment may occur; and

3 WHEREAS, The Planning Department found that the Project is subject to a Class 32
4 Categorical Exemption for Infill Projects, and that there are no unusual circumstances that
5 would preclude reliance on that Categorical Exemption; and

6 WHEREAS, This Board finds that substantial evidence in the record suggests that this
7 case does present unusual circumstances, on two distinct grounds – first, the location of the
8 Project vis a vis the Betty Ann Ong Recreation Center, and second, the configuration of the
9 Project on a narrow upslope lot, which presents unique access challenges to fire-fighters and
10 first responders in case of emergency, the location and configuration of the Project are
11 unusual, in that:

- 12 • When the Department conducted its evaluation of the Project under CEQA, the
13 department did not require an analysis of the Project’s shading on the adjacent
14 recreation center, because “[t]he City does not regulate shadows cast by
15 projects that are less than 40-feet in height.” Planning Code section 295 only
16 regulates shadow of buildings that are 40 feet or higher;
- 17 • However, the record shows that because of the topography of the area, the
18 Project is upslope from the Betty Ong Recreation Center, and hence the
19 Project’s height, when viewed from the recreation center, significantly exceeds
20 40 feet;
- 21 • The fact that the Project’s height as viewed from the recreation center
22 significantly exceeds the 40-foot height threshold that governs shadow analysis
23 under Section 295 of the Planning Code is an unusual circumstance that makes
24 this Project unique, compared to other projects of less than 40-feet;

- 1 • Regarding the Project configuration, the Planning Department acknowledged in
2 its Response to the Appeal dated June 16 that “fire department access to 9 of
3 10 units at 1151 Washington Street might be somewhat atypical for newer
4 development projects,” yet the department concluded that the Fire Department
5 had confirmed that there was adequate access;
- 6 • However, evidence in the record shows that this site and Project configuration is
7 indeed unusual in San Francisco. For instance, Appellant submitted testimony
8 from Burt Engineering and Construction and from architect Robert Baum, which
9 explain why the “project represents a very unique and unusual construction
10 development” and that “[t]he proposed design is quite unusual,” particularly as it
11 relates to the means of ingress, egress, firefighter ladder access, and
12 emergency access; and

13 WHEREAS, Under *Berkeley Hillside*, when there is substantial evidence of unusual
14 circumstances in the record, as here, the next step is for the lead agency to consider whether
15 there is "a reasonable possibility of a significant effect on the environment due to" those
16 circumstances, this prong is satisfied if there is a *fair argument* that these unusual
17 circumstances may result in an environmental impact, here, there is enough evidence in the
18 record to meet this low threshold, for instance:

- 19 • The Project’s plans show the Project would significantly shade the recreation
20 center’s basketball courts and playground area. Evidence in the record includes
21 a shadow analysis which shows that the Project would significantly shade the
22 playground and courts during peak times of use.
- 23 • There was ample testimony from members of the public that Betty Ann Ong
24 Recreation Area represents a unique and very valuable open space resource for
25 members of the adjacent community, many of whom live in dense apartment

1 buildings and lack access to comparable open space, recreational opportunities
2 and sunshine.

- 3 • The proximity of the Project to the recreational area and the playground also
4 poses a fair argument of environmental risk to the park's users, given that the
5 Project site is contaminated and located uphill from the park and its users. There
6 was ample testimony and discussion of the nature of the contaminants and their
7 potential health effects. The Planning Department relied on the
8 Maher Ordinance (codified in Article 22A of the San Francisco Health Code and
9 Section 106.3.2.4 of the San Francisco Building Code) for its conclusions that
10 site will be remediated to meet protective health and safety standards, but the
11 Department did not explain whether the proximity of the Project to the
12 playground may expose park users, particularly children, to the contaminants
13 present at the site while the remediation is ongoing, and whether that potential
14 for exposure would be an environmental impact.
- 15 • The record also contains evidence supporting a fair argument that the Project
16 may result in impacts to the environment related to safety and emergency
17 access due to its unusual configuration, as explained in the testimony of Burt
18 Engineering and Construction and Robert Baum, referenced above; and

19 WHEREAS, In reviewing the appeal of the exemption determination, this Board
20 reviewed and considered the exemption determination, the appeal letters, the responses to
21 the appeal documents that the Planning Department and the project sponsor prepared, the
22 supplemental responses filed by the Appellant and the Planning Department, and the other
23 written records before the Board of Supervisors and all of the public testimony made in
24 support of and opposition to the exemption determination appeal; and

25

1 WHEREAS, Following the public hearing, in Board of Supervisors Motion No. M23-098,
2 the Board of Supervisors conditionally reversed the Categorical Exemption determination,
3 subject to the adoption of written findings in support of such determination based on the
4 written record before the Board of Supervisors as well as all of the testimony at the public
5 hearing in support of and opposition to the appeal; and

6 WHEREAS, The written record and oral testimony in support of and opposition to the
7 appeal and the oral and written testimony at the public hearing before the Board of
8 Supervisors by all parties and the public in support of and opposition to the appeal of the
9 exemption determination, including the deliberations by the members of the Board, is in the
10 Clerk of the Board of Supervisors File No. 230592, and is incorporated in this Motion as
11 though set forth in its entirety; now, therefore, be it

12 MOVED, That based on the above findings, this Board reverses the Categorical
13 Exemption determination issued by the Planning Department, and finds that the Categorical
14 Exemption determination does not comply with CEQA, because the Project presents unusual
15 circumstances that may cause a significant impact on the environment, as explained above;
16 and, be it

17 FURTHER MOVED, That this Board finds that as to all other topics analyzed in the
18 Categorical Exemption, that document complies with CEQA; is adequate, accurate and
19 objective; is sufficient as an informational document; its conclusions are correct; and it reflects
20 the independent judgment of the City; and, be it

21 FURTHER MOVED, That this Board remands Categorical Exemption to the Planning
22 Department to undertake further environmental review of the Project consistent with this
23 Motion, before further consideration of any Project approvals; and, be it

24 FURTHER MOVED, This Board's action upholding this appeal voids the Planning
25 Commission's Conditional Use Authorization approval identified in Planning Case No. 2022-

1 010833CUA, issued by the Planning Commission by Motion No. 21310; however, in upholding
2 the appeal the Board does not take any position on the merits of the Project, and is not
3 disapproving the Project, but rather remanding the CEQA determination to the Department for
4 further environmental review consistent with this Motion.

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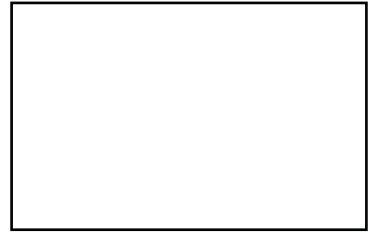
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Introduction Form

(by a Member of the Board of Supervisors or the Mayor)



I hereby submit the following item for introduction (select only one):

- 1. For reference to Committee (Ordinance, Resolution, Motion or Charter Amendment)
- 2. Request for next printed agenda (For Adoption Without Committee Reference)
(Routine, non-controversial and/or commendatory matters only)
- 3. Request for Hearing on a subject matter at Committee
- 4. Request for Letter beginning with "Supervisor inquiries..."
- 5. City Attorney Request
- 6. Call File No. from Committee.
- 7. Budget and Legislative Analyst Request (attached written Motion)
- 8. Substitute Legislation File No.
- 9. Reactivate File No.
- 10. Topic submitted for Mayoral Appearance before the Board on

The proposed legislation should be forwarded to the following (please check all appropriate boxes):

- Small Business Commission Youth Commission Ethics Commission
- Planning Commission Building Inspection Commission Human Resources Department

General Plan Referral sent to the Planning Department (proposed legislation subject to Charter 4.105 & Admin 2A.53):

- Yes No

(Note: For Imperative Agenda items (a Resolution not on the printed agenda), use the Imperative Agenda Form.)

Sponsor(s):

Subject:

Long Title or text listed:

Signature of Sponsoring Supervisor: