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BY EMAIL

Hon. President Herb Wesson
Hon. Members of the City Council
c/o Brian Walters
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Re: Council File 18-0249
ENV-2017-2449-CE
3314 Lugano Place
Response to CEQA Appeal
Hearing Date: June 5, 2018
Agenda Item 16

Honorable President Wesson and Councilmembers:

We represent Stephanie Savage and Michael Swischuk, the owners of the Property and Applicants for the approved and affirmed single-family residence. During the May 21, 2018 hearing of this Council's Planning and Land Use Management ("PLUM") Committee, the Project opponent made several misleading assertions regarding the requirements of environmental review under the California Environmental Quality Act ("CEQA"), and we respond to those assertions. Briefly, and as described further below, the proposed residence is fully zoning compliant, falls firmly within the four corners of the Categorical Exemption adopted and then affirmed, and the Appellant's attempts to exploit the narrow "unusual circumstances" exception is unavailing. The Council should follow the recommendation of the PLUM Committee and affirm the decisions of the Director of Planning and the Area Planning Commission to adopt a Categorical Exemption, and reject this appeal.

1. The Project Fits within the Four Corners of the Categorical Exemptions Adopted for the Project.

The Project opponent does not dispute—nor could she credibly dispute—the Project comprises a single-family residence and that development bounds the Property on at least three sides. Thus, the two Categorical Exemptions adopted for the Project indisputably apply, and the opponent must demonstrate the existence of "unusual circumstances" **and** that those unusual circumstances lead directly to significant and unavoidable impacts. *See Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal. 4th 1086 (2015). The California

Supreme Court has established that "it is not enough for a challenger merely to provide substantial evidence that the project *may* have a significant effect on the environment." (*Id.* at p. 1105; emphasis in original.) This is consistent with the State Legislature's determination that categorically exempt projects may have effects that are typical of such projects, but are not considered significant for the purposes of CEQA. *Id.*

Here, the opponent urges that, in essence, the mere existence of some historical resources in the same neighborhood as the Project constitutes such an unusual circumstance. This is followed by the assertion that what opponent concedes is a mere handful of more contemporary interpretations of historic building types has failed to provide any evidence—let alone substantial evidence—of unusual circumstances or of a significant impact as a result of those unusual circumstances. In fact, a number of historical resources exist throughout the City, as do historic districts and historic preservation overlay zones.

Similarly, any claim by the opposition of the existence of a wildlife corridor is belied by the facts. As stated in our prior correspondence, the available evidence in the record demonstrates no corridor exists or could exist on the Property. Fencing on most of the surrounding properties—including the appellant's property—prevents free movement from one natural area to another using the Property. Moreover, even the correspondence provided by the opponent from the Santa Monica Mountains Conservancy demonstrates the opposite of what the appeal claims.

Simply put, the City's determination that no unusual circumstances exist on the Property is supported by substantial evidence, and no evidence indicates the contrary.

2. The Prior Consideration of a Mitigated Negative Declaration for a Different Project does not Bind the City in This Case.

The opponent claims, among other things, the City's prior consideration of a Mitigated Negative Declaration ("MND") for two projects proposed more than ten years ago forecloses the use of a categorical exemption here. That claim is simply wrong.

As a preliminary matter, the City *never adopted an MND* for either project, and both were denied. As no adoption ever occurred, the City could not be bound by any determinations within that document.

Moreover, the City's policy regarding CEQA review and the use of categorical exemptions has shifted substantially in the intervening decade. In 2006 and 2008, when the MND referenced by opponents was drafted, the City did not typically process exemptions, though they existed within the City CEQA Guidelines. Thus, even though the prior projects may have qualified for such exemptions, the City was far less likely to consider such exemptions, but did not specifically disqualify their use. This is consistent, as well with the recent California Supreme Court decision in *Berkeley Hillside Preservation, supra*, which clarified and to some extent altered the use of categorical exemptions state-wide, and in ways that would have colored their use with respect to larger houses in hillside areas.

Importantly, the prior designs evaluated in the MND were substantially larger and required substantially more grading than the Project at issue here. The 2006 case¹ involved a 6,398 s.f. of total floor area, as well as a swimming pool, with 3,023 cubic yards ("c.y.") of grading²—more than twice the floor area, one more story, and about eight times more grading than the proposed Project here. As a result, that proposal also required a haul route approval, which the Project here does not.

The 2008 proposal was even larger than the 2006 proposal, at 6,425 s.f. of floor area (4,912 s.f. of residence), and also with three stories at 36 feet high. Like the 2006 proposal, the 2008 proposal required about 3,000 c.y. of grading and therefore also required a haul route permit. The determination letter also found that, like the 2006 proposal, the then-proposed residence would have been substantially larger than and out-of-scale with surrounding development (within 500 feet), with an average house size of 2,399 s.f. and the largest house totaling 4,235 s.f.³

Thus, in both prior cases, the City easily determined they were out of scale with their surroundings and proposed substantial quantities of grading (triple the threshold volumes for haul route permits). In fact, ***the primary reason for the use of an MND for the prior cases was the substantial amount of grading***, not the factors claimed by appellant.⁴ These factors are relevant in the context of categorical exemptions given the holding of *Berkeley Hillside Preservation* that a large residence does not, by itself, constitute a unusual circumstance for the purposes of eligibility of a categorical exemption, a consideration that might color City decision-makers' judgment with respect to CEQA compliance.

In contrast to the prior cases, the Project proposes a residence of 2,710 s.f.⁵; less than 500 c.y. of grading, with no requirement for a haul route approval; and no swimming pool. The residence is almost exactly the average size of residences within 500 feet of the Property, as tabulated in the determination letter for the 2008 proposal, and is smaller than all three existing homes on the Lugano Place cul-de-sac.⁶ As the Project is consistent with existing development, requires a reasonable amount of grading that does not trigger any need for further approvals, and would occur on a site with no unusual circumstances, the use of a categorical exemption here was appropriate and amply supported by substantial evidence.

¹ DIR-2006-9425-SPP-DRB, Determination Letter, p. 1 of 13.

² *Id.*, Determination Letter, p. 4 of 13.

³ DIR-2008-3227-SPP-DRB, Determination Letter, pp. 1-5.

⁴ DIR-2006-9425-SPP-DRB, Determination Letter, p. 4 of 13.

⁵ We also note that changes to the Baseline Hillside Ordinance since the 2006 and 2008 proposals exempt 200 s.f. of the garage from floor area calculations, as opposed to 400 s.f. Therefore, an "apples-to-apples" comparison would yield a residence of about 2,510 s.f., or almost exactly the average house size within 500 feet of the Property, according to the 2008 Determination Letter.

⁶ According to ZIMAS, 3306 Lugano Place/3267 Ledgewood Drive (appellant's home) is 2,962 s.f., and 3321 Lugano Place is 3,899 s.f., and 3305 Lugano Place/6311 Heather Drive is 2,929 s.f.

3. The PLUM Committee Should Affirm The Decisions of The Director And The Area Planning Commission And Uphold The Categorical Exemption.

Any claim of unusual circumstances or a significant impact requires the support of substantial evidence., and the opponent bears the burden of proof to demonstrate the inapplicability of a Categorical Exemption, particularly with respect to unusual circumstances. (*Berkeley Hillside Preservation*, 60 Cal. 4th at 1105.) As described above, the evidence in the record concerning the impacts claimed by the opponent contradicts those claims, and the consideration of an MND for prior and very different proposals under different circumstances is not relevant here. Simply put, the opponent has failed to meet her burden, and the record for the proposed residence cannot support a rejection of the categorical exemption at issue here. Therefore, we urge the Council to follow the recommendation of the PLUM Committee, reject the unfounded claims of the opponent, deny the appeal, and uphold the adoption and affirmation of the categorical exemption for the proposed residence.

Very truly yours,



KEVIN K. MCDONNELL and
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KKM:neb

cc: Hon. Councilmember David Ryu, Council District 4 (via email)
Nicholas Greif, Council District 4 (via email)