

BOARD OF APPEALS, CITY & COUNTY OF SAN FRANCISCO

Appeal of
SCOTT KEELING)
Appellant(s))
vs.)
DEPT. OF BUILDING INSPECTION,)
REDEVELOPMENT AGENCY APPROVAL Respondent)

Appeal No. 08-183

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT the above named appellant(s) appeals to the Board of Appeals of the City and County of San Francisco from the decision or order of the above named department(s), commission, or officer.

The substance or effect of the decision or order appealed from is the issuance on Dec. 1, 2008, to Mercy Housing, Perm it to Erect a Building (five-story, 120 unit residential /retail building with 13,286sf of ground floor area) at 365 Fulton Street.

APPLICATION NO. 2008/07/11/6520S

Address & Tel. of Appellant(s):

Scott Keeling, Appellant
462 Ivy Street
SF, CA 94102

Address & Tel. of Permit Holder(s):

Mercy Housing, Permit Holder
c/o Sheela Jivan, Attorney for Permit Holder
1360 Mission Street #300
SF, CA 94103

I, Scott Keeling declare under penalty of perjury that the foregoing is true and correct.

Entered on Dec. 11, 2008 at San Francisco, California.

FOR HEARING ON Feb. 11, 2009

Scott C. Keeling
Appellant or Agent

NOTICE OF DECISION & ORDER

The aforementioned matter came on regularly for hearing before the Board of Appeals of the City & County of San Francisco on February 11, 2009, and the order was **UPHELD** by the Board of Appeals.

PURSUANT TO § 4.106 of the Charter of the City & County of San Francisco and Article 1, § 14 of the Business & Tax Regulations Code of the said City & County, and the action above stated, the Board of Appeals hereby orders that the issuance of the subject permit by the Department of Building Inspection (DBI) is **UPHELD** on **CONDITION** that a good neighbor policy be implemented regarding communications and maintenance, and with **ADOPTION OF FINDINGS**.

SAID GOOD NEIGHBOR POLICY AND FINDINGS WERE ADOPTED BY THE BOARD ON MARCH 25, 2009, AND ARE ATTACHED. REVISED PLANS ARE NOT REQUIRED, AND THE SUSPENSION MAY BE LIFTED.

BOARD OF APPEALS
CITY & COUNTY OF SAN FRANCISCO

Frank Fung
Frank Fung, President

Last Day to Request Rehearing: April 6, 2009

Request for Rehearing: None

Rehearing: None

Notice Released: April 7, 2009

Cynthia G. Goldstein
Cynthia G. Goldstein, Executive Director

If this decision is subject to review under Code of Civil Procedure § 1094.5, then the time within which judicial review must be sought is governed by California Code of Civil Procedure § 1094.6.

**BOARD OF APPEALS
CITY & COUNTY OF SAN FRANCISCO**

Appeal No(s). 08-183

<u>SCOTT KEELING,</u>)	
)	Appellant(s)
)	
vs.)	
)	
<u>DEPT. OF BUILDING INSPECTION,</u>)	
REDEVELOPMENT AGENCY APPROVAL)	Respondent

FINDINGS

On February 11, 2009 and March 25, 2009, the Board of Appeals ("Board") held duly noticed public hearings on Scott Keeling's ("Appellant") appeal of Building Permit No. 200807116520S ("Permit"). Mercy Housing California and Community Housing Partnership ("Project Sponsors") propose to construct 120 units of supportive housing for formerly homeless individuals at 365 Fulton Street (the "Project").

Having heard all of the public testimony and reviewed the record on this matter, the Board of Appeals hereby grants the appeal and upholds the Permit based on the following findings and subject to the following conditions:

1. The Project is located in an NC-3 Zoning District in the former Western Addition Redevelopment Project Area A-2. The Redevelopment Plan for Western Addition Redevelopment Project Area A-2 expired on December 31, 2008. The Project is located within the boundaries of the Market and Octavia Area Plan, in an NCT-3 zoning and 65-X height and bulk district in the former Western Addition Redevelopment Project Area A-2. The Redevelopment Plan for Western Addition Redevelopment Project Area A-2 expired on December 31, 2008. The Project is located on "Parcel G," a vacant lot directly adjacent to the Performing Arts Garage at the southeast corner of Fulton and Gough Streets. Parcel G was formerly occupied by a portion of the Central Freeway. The State conveyed Parcel G to the San Francisco Redevelopment Agency ("Agency") following the freeway's demolition.
2. According to the Record, on August 31, 2006, the Agency issued a Request for Proposals for 115-120 efficiency units of supportive housing plus ground floor retail on Parcel G. The Agency selected Project Sponsors in 2007.
3. The Agency and Project Sponsors proceeded diligently through the Agency entitlement process, which included extensive community outreach, at least 26 meetings in the Hayes

Valley or Western Addition neighborhoods where Parcel G is located, and at least two hearings before the San Francisco Redevelopment Agency Commission ("Agency Commission"). By Resolution No. 49-2008, the Agency Commission granted variances required by the Western Addition A-2 Redevelopment Plan for the Project for density, parking and off-street loading. These variances would not have been required to approve the Project under the City's underlying zoning.

4. According to credible evidence in the Record, including testimony at the March 11, 2008 hearing and a July 1, 2008 memorandum from Agency Executive Director Fred Blackwell to Agency Commissioners (attached as Exhibit 1 to the Agency's January 29, 2009 opposition brief), the Agency and Project Sponsors consulted with City Planning during the Agency entitlement process to ensure that the Project would be consistent with the City land use controls and restrictions that would apply when the Western Addition A-2 Redevelopment Plan expired.
5. Based on the testimony of Planning Department Representative, Senior Planner Tina Tam, the Board further finds that the Project's uses, density, parking and loading, and heights are all permitted under the parcel's current City Zoning, and that the Zoning Administrator routinely grants the rear yard encroachment, open space and street projection variances that the Planning Code would require in similar circumstances. The Board further finds that the proposed affordable housing use is exactly how a multi-year City planning process, including extensive public input, concluded that the vacant lots resulting from the freeway removal should be used.
6. By Resolution No. 49-2008 adopted on July 15, 2008, the Agency adopted the Revised Preliminary Mitigated Negative Declaration and imposed the mitigation measures recommended in the Revised Preliminary Mitigated Negative Declaration; granted the variances described in Paragraph 3 above and conditionally approved the Project's schematic design, subject to subsequent approvals and refinements to be approved at Agency staff level. According to the Permit, the Agency finally approved the Project on November 26, 2008 and DBI issued the Permit on December 1, 2008.
7. The Project is consistent with and implements many of the policies of the San Francisco General Plan's Housing Element, including Policies related to affordable and supportive housing (e.g., Policies 1.5, 4.3, 4.4, 8.4, 8.6 and 10.1) and the San Francisco Plan to Abolish Chronic Homelessness.
8. The Board finds that there are no facts or inferences in the record of Building Code compliance issues associated with the project or the Permit and therefore finds that the Permits comply with the San Francisco Building Code.
9. Under the California Environmental Quality Act, California Public Resources Code §21000 et seq. ("CEQA") and San Francisco Administrative Code §31.04, and regardless of the rationale by which the Board upholds or overrules the Permit, the Agency is a separate local or public agency and the "lead agency" for the Project for the purposes of CEQA. The City is a "responsible agency" but not the "lead agency" for the Project and has no jurisdiction to consider an appeal of the Agency's certification of the Project's Revised Mitigated Negative Declaration.

10. The Board has had available for its review and consideration the Project's Final Revised Mitigated Negative Declaration, including the Mitigation Monitoring and Reporting Program, and correspondence and other documents related to the environmental review of the Project. This information is available for public review at the Board's office at 1650 Mission Street and is made part of the record before the Board by this reference.
11. The Board hereby adopts by reference, as if fully set forth herein, the findings set forth in Agency Resolution No. 49-2008, including the Mitigation Monitoring and Reporting Program and Agency Commission findings required by CEQA. The Board further finds that neither the Project nor the circumstances of the Project has changed since the Agency Commission's determinations described in Paragraph 10 above and the Board is not aware of any new information, as described in CEQA Guideline Section 15162, that changes the conclusions of the previous determinations. The Agency Commission already has adopted mitigation measures for this Project.
12. Under San Francisco Business and Tax Regulations Code Article 1, Section 8, the last day to appeal the Permits was December 16, 2008. Appellant timely filed these Appeals on December 11, 2008. The Western Addition Redevelopment Project Area A-2 expired on December 31, 2008.
13. The Board of Appeals held its last meeting of 2008 on December 17, 2008. Because the appeal period for the Permit did not close until December 16, 2008, the Board was not able to calendar the Appeal for its December 17, 2008 meeting. The next consecutive Board meeting occurred January 14, 2009, which was after the Redevelopment Plan for Western Addition Redevelopment Project Area A-2 expired.
14. This Appeal, and Appeals 08-188 and 08-189 of a building permit and a demolition permit for a Project at 1450 Franklin Street (calendared for adoption of findings contemporaneously with this Appeal), raise a matter of first impression: what law applies to an appeal of a project approved by the Agency and appealed when a Redevelopment Plan is in effect, but heard and determined by the Board of Appeals after the Redevelopment Plan has expired.
15. While a Redevelopment Plan is in effect, the Agency (and not the City Planning Department) determines, pursuant to Agency procedures, whether a proposed project is consistent with the applicable Redevelopment Plan's land use requirements. The Department of Building Inspection, in issuing a building or demolition permit for an Agency approved project, and the Board of Appeals in its *de novo* appeal, exercises discretion over the Project only as to non-land use, building code matters.
16. Under *Russian Hill Improvement Association et al., v. Board of Permit Appeals of the City and County of San Francisco et al.*, 66 Cal. 2d 34 (1967), the California Supreme Court held that a building permit is not final until the jurisdiction of the Board of Appeals is exhausted. *Russian Hill* further held that, as a *de novo* hearing body, the Board must apply the law in effect at the time of its final decision.
17. As explained above, the Board finds compelling evidence in the Record of this Appeal that the Permit, with the mitigation measures and conditions imposed by the Agency, substantively complies with the City land use controls and restrictions applicable to the site after the Redevelopment Plan for Western Addition Redevelopment Project Area A-2 expired. The Board further finds and concludes that the Project was not required to follow the

Planning Code's *procedural* requirements, such as issuing "311 Notices" or securing a City Conditional Use Permit, that would be required for a comparable project initiated under the City Planning Code because the Project fully complied with comparable Agency's procedural requirements, including substantial public outreach and participation, required by the state authority with jurisdiction during the approval process. No public interest would be served, and significant waste in public and private time and resources would ensue, were the Board to require Project Sponsor to redo the multiyear public process. *Russian Hill* did not address changes in entitlement approval procedures, and we decline to find that the California Supreme court intended the Board, in its *de novo* capacity, to require projects subject to its holding to restart the entire application process.

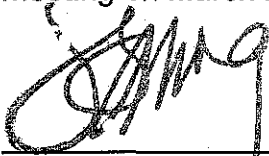
18. In the alternative, based on our findings in Appeals 08-188 and 08-189 calendared for adoption of findings contemporaneously with this Appeal, the Board finds and concludes that a permit approved by an Agency and issued by a City building department *before* a Redevelopment District terminates is distinguishable from the permit applied for before and appealed after a zoning change, the California Supreme considered in *Russian Hill*. The expiration of land use controls when a Redevelopment District expires differs from a change in City zoning because the expiration of a Redevelopment District involves an intergovernmental transfer of planning authority from a state agency to a local agency (in this case, the City); whereas zoning changes are planning policy changes made within the same jurisdiction. When San Francisco amends its zoning, it can, and frequently does, avoid the holding in *Russian Hill* and protect projects pending in the entitlement process by including provisions in the new zoning ordinance that "grandfather" in projects that have applied for building permits by a specified date. By including or omitting, "grandfathering" provisions, the City can regulate whether the policy objectives of the new zoning are compromised by allowing pending projects to proceed. The Redevelopment Agency lacks similar authority.
19. Like the City's Planning Department, the Agency is responsible for enforcing the land use aspects of proposed projects – except that the Agency's jurisdiction is limited to projects located within an established Redevelopment District, and its land use controls and restrictions are set forth in a multiyear Redevelopment Plan adopted by the Agency Commission and the Board of Supervisors rather than the City Planning Code.
20. Agency approval procedures are different from, but comparable to, approval procedures set forth in the City's Planning Code, and, in particular require similar significant public notice and opportunity to be heard. The Agency initiated the steps required for the Project in August of 2006. It took Project Sponsors more than two years to fully navigate Agency approval procedures.
21. The board further finds and concludes that no public benefit would be served by restarting an extensive Planning Code approval process under the facts of this Appeal – where the Board would not have had discretionary review authority over the Agency Commission's decision had it held a hearing before the Redevelopment Plan for Western Addition Redevelopment Project Area A-2 District expired. The Board declines to penalize Project Sponsors for the Board's inability to address the Appeal before the Redevelopment Plan expired.
22. The Board's conclusions set forth in this Determination are conditioned on Project Sponsor's adherence to the Good Neighbor policies it proposed as part of the resolution of this matter, which are attached hereto as Exhibit A and incorporated by this reference.

23. The Board's conclusions set forth in this Determination are conditioned on Project Sponsor's diligent commencement and completion of the work authorized by the Permit and required addenda as required by the San Francisco Building Code. Should the Department of Building inspection conclude that Project Sponsors' (or any successor in interest to Project Sponsors) rights under the Permit and required addenda have lapsed, any future Permit(s) shall comply in all respects to then applicable procedural and substantive City laws.

DETERMINATION

Based on the foregoing, the Board hereby upholds the Department of Building Inspection, overrules the Appeal, and upholds the Permit subject to the mitigation measures and conditions imposed by the Agency and Agency Commission, Project Sponsor's adherence to the Good Neighbor policies, and the diligent commencement and completion of work, as required by the San Francisco Building Code.

The undersigned hereby certify that the Board of Appeals adopted the finding above at its regular meeting on March 25, 2009.



Frank Fung, President



Cynthia G. Goldstein, Executive Director

GOOD NEIGHBOR POLICY

The project sponsor shall institute and maintain a good neighbor policy including the following components:

- convene a Project Advisory Committee (PAC) comprised of neighbors, local merchants, project staff and tenants to identify neighborhood concerns and formulate responses.
- provide phone numbers and email addresses of project management to members of the community.
- install and maintain exterior lighting at the building.
- maintain the exterior of the building and provide janitorial service which will include cleaning graffiti from the exterior of the building and cleaning the sidewalks when needed.

END.