CITY OF SAN JOSE
CAPITAL OF SILICON VALLEY
Planning, Building and Code Enforcement

PLANNING DIVISION 05/20/2024 SUBJECT TO CHANGE

APPEAL OF ENVIRONMENTAL DETERMINATION APPLICATION

Per Municipal Code 21.07.040, the San José City Council will hear appeals to the environmental determination made by City staff at a project's public hearing. This application form must be completed as instructed below to facilitate the appeal.

WHO MAY APPEAL

Any person may file.

DEADLINE

File this completed application by **no later than 5:00 p.m. of the third business day** following the day of the public hearing that relied upon the Environmental Determination.

FEES & PROCESS

View the current fee for an Environmental Determination Appeal on the Table of Applications at www.sanjoseca.gov/PlanningApplications. The fees vary depending on whether you are a project applicant or non-applicant.

HOW TO SUBMIT - 2 OPTIONS

- **In-Person (no appointment required):** Before the filing deadline stated above, come to the Planning Offices, third floor of City Hall (200 E. Santa Clara Street, San José) to submit the application. You may pay the appeal fee in-person or staff may email you an invoice which must be paid within 14 calendar days of the invoice date for the appeal to be valid.
- **Email:** Before the filing deadline stated above, email the completed application and any attachments to PlanningTechs@sanjoseca.gov. If the appeal is timely and complete, staff will email you an invoice for the appeal fee, which must be paid within 14 calendar days of the invoice date for the appeal to be valid.

WHAT TO SUBMIT

☐ This application form, completed and signed. You must state with specificity the reasons that the Environmental Determination should be found not to be complete or not to have been prepared in compliance with the requirements of CEQA.

Only appeals that are based on issues that were raised at the public hearing or in writing prior to the public hearing will be considered.

City staff will set a public hearing date before the City Council; the appeal item will be placed on the agenda. Staff will also prepare a recommendation of action to the City Council.

FOR QUESTIONS

Speak with a City Planner at 408-535-3555; see phone service hours at www.sanjoseca.gov/Planning.

Para información en español, comuníquese con un Planificador de la ciudad al 408-793-4100.

Để được hỗ trợ, nói chuyện với Người lập kế hoạch thành phố tại 408-793-4174.

continued >

Please download and save this computer-fillable form to your computer. Follow instructions for Digital Forms.

The undersigned respectfully requests an appeal for the following environmental determination.

1. REASON/S FOR APPEAL: *If more space is needed, attach a separate sheet.*

Please see Attachment 1 attached hereto and incorporated herein.

2. PERSON FILING APPEAL

PRINT NAME: The Zotta Family Trust by & through Joshua Safran, Esq.

MAILING ADDRESS: One Almaden Boulevard, Suite 700, San Jose, California 95113

EMAIL: jsafran@strategylaw.com PHONE: 510.384.7627

Joshua Safran, Esq. Digitally signed by Joshua Safran, Esq. Date: 2025.06.16 15:48:10 -07'00' 06/16/2025

● SIGNATURE OF PERSON FILING THE APPEAL DATE: [MM/DD/YYYY]

For electronic submittal or virtual appointments, a **Digital ID Signature** is required.
For in-person appointments, an original ink signature is required.

3. CONTACT PERSON IF DIFFERENT FROM PERSON FILING APPEAL

PRINT NAME:

MAILING ADDRESS:

EMAIL: PHONE:

Attachment 1

for

Appeal of Environmental Determination Application for
California Environmental Quality Act ("CEQA")
Class 32 Categorical Exemption ("CatEx") for
Site Development Permit ("Permit") for File Nos. H24-046, AT24-013, & ER24-195
Northwest corner of Race Street and West San Carlos Street ("Property")
(1301 West San Carlos Street & 255-263 Race Street; APNs: 261-42-059, -060, and -064)

I. Background

The Property is currently occupied by a rundown commercial building (the "Existing Building") of approximately 3,817 square feet. The Existing Building is currently occupied by tenants – a restaurant and a hair salon – both on very short term month-to-month leases that require a significant investment of time and resources by the owner of the Property, The Zotta Family Trust ("Owner"), to operate and maintain. The Owner has no desire to continue to maintain and operate the Existing Building, and its continued presence onsite would make future redevelopment plans infeasible and untenable.

On July 11, 2024, 4G Development ("Applicant"), with the Owner's approval, applied to the City of San Jose for a Site Development Permit to allow for the redevelopment of the entire Property with a brand new quick service restaurant of approximately 5,139 square feet, an outdoor patio, and associated improvements (the "Project"). The redevelopment of the Property contemplated by the Project necessarily entailed the demolition of the Existing Building to make way for the new, larger building and associated amenities.

On June 11, 2025, the Project came for a hearing before Hearing Officer Sylvia Do, Division Manager on behalf of Christopher Burton, Director, Planning, Building and Code Enforcement ("Hearing Officer"). Based on the detailed evidence, analysis, and studies presented by City staff, set forth in the staff report dated June 2, 2025, submitted by Tina Garg on behalf of the Director of Planning, Building, and Code Enforcement, including the substantial reports, analyses, and assessments attached ("Staff Report"), the Hearing Officer determined that the Project met all the criteria for the CatEx from CEQA, for Infill Development projects. Specifically, the Hearing Officer found that the Project would be consistent with all criteria listed in CEQA Guidelines Section 15332 and would not trigger any of the disqualifying exceptions listed in CEQA Guidelines Section 15300.2.

To the great surprise and confusion of the Applicant and Owner, the Hearing Officer then announced the approval of the Permit for the Project subject to the "condition" that the Existing Building not be demolished and that the Project be redesigned to accommodate and incorporate the Existing Building (the "Condition"). Although it is unclear exactly what evidence in the record or findings were relied upon by the Hearing Officer to impose this Condition, it appears that the Hearing Officer stated that the Project proponents "failed" to demonstrate that they had met the criteria for issuance of a Demolition Permit under Section 20.80.460 of the Municipal Code.

II. Bases for Appeal of Environmental Determination

The Owner hereby appeals imposition of the Condition because it invalidates the CatEx and causes the Hearing Officer-revised Project to violate CEQA (and other laws including the City's own Code) for the following reasons:

A. The Condition Impermissibly Creates a New Project not Covered by the CatEx

Under the CEQA Guidelines, the term "project" applies to the "whole of an action" that may result in a direct or reasonably foreseeable indirect impact. 14 Cal. Code Regs. §15378(a). Under CEQA and the Guidelines, California's environmental review laws apply to activities that may cause "either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Public Resources Code §21065; 14 Cal. Code Regs. §15378(a).

The broad reach of the term "project" means that, when examining an activity to determine whether it could affect the physical environment, *an agency must consider the entire activity that is the subject of its approval*. *See, e.g., Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283 (emphasis added).

Here, the Hearing Officer did not and, indeed, could not, have evaluated the entire activity subject to her ultimate approval including the Condition because the Project before her simply did not contemplate the improvement and operation of the Property with two commercial buildings.

The Project necessarily involved the replacement of the Existing Building with a new building. The extensive and detailed Staff Report, which evaluated everything from traffic to public utilities to air and water quality, etc., upon which the Hearing Officer relied necessarily only evaluated the replacement of the Existing Building with a new building. The Project presented to the Hearing Officer did not include two commercial buildings on the Property. The Staff Report did not contemplate or study two commercial buildings on the Property. Yet, the Condition requires the Owner to develop the Property with two commercial buildings, which would entail a doubling of impacts, a set of impacts that were neither contemplated nor analyzed.

For this reason, the Condition is a poison pill that sabotages the Project contemplated by the Staff Report and invalidates the CatEx.

To avoid this precise problem, CEQA expressly requires that project descriptions submitted by applicants give an accurate and wholistic description of the entirety of the project proposed such that the environmental analysis may adequately evaluate the direct and indirect effects of the activity being approved. *See, e.g., McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1144. Here, the project description for the Project was unilaterally amended at the hearing without notice by the Hearing Officer over the objections of the Owner and Applicant after the environmental review was already completed for the Project proposed. This is simply not how CEQA works.

B. The Condition Is Not Linked to a Legitimate Public Purpose

In California, a city's ability to impose conditions on development projects is limited by the "nexus" and "rough proportionality" requirements, established in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. These cases, along with California Government Code Section 66000 et seq., ensure that conditions imposed on development are directly related to the project's impacts and are roughly equivalent to those impacts.

The "nexus" requirement establishes that there must be a clear connection (nexus) between the condition imposed and the specific impact of the development project. For example, a condition requiring a developer to dedicate land for a park must be linked to the increased need for recreational space created by the project. The "proportionality" requirement establishes that the impact of the condition on the developer must be roughly proportional to the impact of the development on the community. This means the condition cannot be excessive or overly burdensome in relation to the project's effects.

Under CEQA, mitigation measures may only be implemented to reduce or avoid significant environmental impacts. Here, there is no demonstrated basis for imposition of the Condition on the Project. The Hearing Officer did not make any finding that the Project would have any unmitigated impacts. Indeed, the Condition was not imposed in relation to any "impact" at all. Absent a legitimate and lawful public purpose connected to impacts of the Project, the Condition must be removed.

C. The Condition Is Inconsistent with the City's Code and Frustrates Fundamental Due Process

At the subject hearing, the Hearing Officer specifically found on the record that the Project met all of the criteria for issuance of Site Development Permit and found that it was consistent with the applicable planning designations and zoning requirements. This should have entitled the Owner and Applicant to issuance of the Permit, subject to reasonable conditions of approval. Instead, the Hearing Officer went on to make findings that the Project proponents "failed" to demonstrate that they had met the criteria for issuance of a Demolition Permit under Section 20.80.460 of the Municipal Code and, apparently for this reason, imposed the Condition requiring that the Existing Building remain in addition to the new building.

The fundamental problem with this basis for functionally denying the Project by imposing a condition that renders it infeasible is that the findings needed for approval of a Demolition Permit are not the findings required of an applicant for approval of a Site Development Permit. The Permit itself requires that the Owner separately and independently apply, in the future, for such a permit. Indeed, Condition 6 of the Permit expressly states: "A demolition permit may be issued for the existing structures only upon the submittal of a complete Public Works Grading Permit application or the submittal of a complete Building Permit application for new construction." Hence, under the terms of the Permit and the Code itself, by requiring that the Owner meet the burden required for a Demolition Permit before it even seeks one, the Hearing Officer has inappropriately put the proverbial cart squarely before the horse.

This changing of the rules of the game at the last minute, ignoring the published and noticed mandates of the Code, penalizing the Applicant and Owner for not presenting evidence they had no obligation to provide, and deviating from the Project contemplated in the Project application and evaluated in the Staff Report, all amounts to a fundamental violation of the Owner's due process rights.

Due process requires reasonable notice and a reasonable opportunity to be heard before a government decision affecting a protected interest is made. Changing the rules or criteria for evaluation *during* the hearing, without prior notice to the owner, deprives them of the ability to adequately prepare their case, gather necessary evidence, and present a meaningful defense based on the previously known rules. *See, e.g., Horn v. County of Ventura* (1979) 24 Cal.3d 605.

Under CEQA (see e.g. Public Resources Code §21004 and 14 Cal. Code Regs. §14040), mitigation measures that are beyond the powers conferred by law on lead agencies are legally infeasible. *Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, 291.