



Correspondence is available for review in the Office of the City Clerk or on the City's Official Website at http://www.cityofsacramento.org/webtech/streaming_video/live_council_meetings.htm

Correspondence Supplemental 1 Meeting of March 10, 2009

1. Item # 18 1012 – 1022 K Street Rehabilitation Project

Please note Correspondence has been received from many sources and duplications may have occurred.

- a. Correspondence
 1. Myron Moskowitz , Attorney at Law

Previously submitted correspondence is available for review at the City of Sacramento Website at http://sacramento.granicus.com/ViewPublisher.php?view_id=7 October 16th Agenda Item # 28 or the City Clerk's office at Historic City Hall- 915 I Street.

lal

RECEIVED
CITY CLERK'S OFFICE
CITY OF SACRAMENTO

Myron Moskovitz
Attorney at Law
Suite 1042, 601 Van Ness Ave., San Francisco, Calif. 94102
Phone: (510) 384-0354; FAX: (415)563-6872
e-mail: mmoskovitz@ggu.edu; website: myronmoskovitz.com

2009 MAR 10 P 3: 05

March 10, 2009

Mayor and City Council of City of Sacramento
Chair & Members of the Board of the
Sacramento Housing & Redevelopment Agency
915 I Street
Sacramento, CA 95814

Re: Item scheduled for public hearing on March 10, 2009, entitled: "Agreement – 1012-1022 K Street Rehabilitation Project."

Dear Mayor & Councilmembers:

I represent the Sacramento Hospitality Coalition, whose members own businesses and real property in Downtown and Midtown Sacramento that would be adversely affected if you approve this item.

My clients object to your approval of this item, and they will assert their rights in subsequent litigation if this item is approved.

Their objections are based on your staff's failure to study and report possible adverse effects of this proposal on the environment and economy of the downtown area and the surrounding communities. This failure violates the requirements of the California Environmental Quality Act ("CEQA"), the City of Sacramento's General Plan, Central City Community Plan, Cultural and Entertainment District Master Plan, and the Amended Merged Downtown Redevelopment Plan and Five-Year Strategy.

The resolution that your staff has asked you to approve states that you have determined that this proposal "is exempt from CEQA requirements." This statement is incorrect.

Your staff report relies upon CEQA Guideline sections 15332 and 15301 as the basis for concluding that an exemption applies. CEQA does categorically exempt projects that the Secretary of the California Resources Agency has determined have no significant effect on the environment. Public Resources Code Section 21084. However, because a project that is claimed to be categorically exempt may be implemented without any CEQA review whatsoever, the exemptions are strictly construed. *City of Coronado v. California Coastal Zone Conservation Commission* (1977) 69 Cal.App.3d 570.

In addition, “A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstance.” Section 15300.2(c). As discussed below, here there are unusual circumstances that raise a reasonable possibility that the proposal will have a significant effect on the environment.

This project involves not just physical reconstruction, but also a significant subsidy to a potential competitor of existing businesses. The range of physical impacts that potentially flow from the proposed subsidy go well beyond those found in section 15332 (traffic, noise, air quality or water quality) to include secondary physical impacts on existing buildings and neighborhoods elsewhere in the City. This is precisely the type of secondary impact that, according to our appellate courts, falls within the scope of CEQA analysis. *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App. 3d 151. Additionally, as noted by the staff report, the proposed project requires significant hazardous material abatement and environmental remediation. These facts constitute unusual circumstances. *McQueen v. Bd. of Dir.* (1988) 202 Cal. App.3d 1136

No exemption lies here, because there *is* a reasonable possibility that the project will have a significant effect on the environment, in the respects listed below – none of which were adequately studied and reported by the Agency. The environmental impact report prepared for the larger downtown area fails to address potential secondary physical impacts and potential release of hazardous materials. That report is now out-of-date and currently inaccurate, so it cannot serve as a proper basis for this proposal. And even if that report were currently accurate, the proposed project does not qualify as a mere “infill” project, as claimed by your staff. In *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, the court held that similar facts do not justify an infill exemption.

Please note that the proposed exemption is inconsistent with the Agency’s determination in 2007 that another proposed project for exactly the same site (1012 K Street) was *not* exempt from CEQA and that an environmental impact report *must* be prepared for a development project for that site.

In addition, the City’s and Agency’s failure to study these possibilities and report their conclusions to the public for their consideration violates the City of Sacramento’s General Plan, Central City Community Plan, Cultural and Entertainment District Master Plan, and the Amended Merged Downtown Redevelopment Plan and Five-Year Strategy. State law requires that this Agency’s actions be consistent with these plans. *Redevelopment Agency of the City of Berkeley v. City of Berkeley* (1978) 80 Cal.App.3d 158, 171. Also, the proposal is inconsistent with the City’s and Agency’s 2005 plan for K Street, which calls for cultural, arts and entertainment venues that significantly increase foot traffic.

Objection #1: There Is A Reasonable Probability That The Project Will Contribute to Urban Decay and Blight.

If successful, Frisky Rhythm, Dive Bar, and Pizza Rock might become the “in” places to go in Downtown Sacramento for a year or two – drawing business away from existing businesses in Midtown and Downtown Sacramento who serve the same customer base. We are now in a recessionary period, and these existing businesses are having a difficult time surviving. They have lost between 20% and 40% of their revenues over the past year. The economy – and the customer base for these businesses - is likely to get even worse over the next couple of years. Approval of this proposal and the opening of these three new attractions are likely to drive many existing businesses into bankruptcy, leading to more vacant premises in downtown and midtown Sacramento. More vacant premises will cause even more physical, environmental, and economic decay.

This possibility is increased by two unusual features of this proposal. First is the \$8.6 million taxpayer subsidy – about ten times the square-footage cost typically spent to develop projects – that you are asked to approve. It is rare for a government agency to subsidize nightclubs and bars. This unusual subsidy will enable the recipient to lower his prices and undercut the existing businesses, who must operate in the market without any public subsidy. Second, this proposal provides that the City and Agency will receive some of the profits from the nightclub, bar, and restaurant – putting these public agencies in direct competition with existing businesses, and thereby lowering the City’s incentive to render financial and non-financial assistance to these businesses.

These features will also make it even more difficult to attract *new* private investors – who usually see hospitality as a fruitful field for private capital. The staff report concedes, at page 7, that “K Street Mall is still viewed as a high risk area for investors.”

After these new “entertainment” venues drive existing businesses into bankruptcy, Frisky Rythm, Dive Bar, and Pizza Rock might not survive themselves. The success of nightclubs (with appurtenant restaurants and bars) depends on the notoriously transient tastes of a fickle public. One day a trendy club becomes very popular, and the next day (or week or month) the customers’ eyes wander to a new venue – perhaps one outside downtown Sacramento. (The City’s most recent nightclub venture – America Live – failed in three years.) The once “hot” places are left behind to rot – just as did the businesses they drove into bankruptcy. The net result: a “hole” of very serious urban decay at 10th and K Streets, making downtown Sacramento becomes much worse off than it was before this proposal was adopted.

We note that the City and Agency have failed to study the possibility that the tenant for the proposed project might have a history of opening one or more “trendy” nightclubs that went broke after just a few years of operation, leaving behind a vacant shell that made the neighborhood worse off than before the nightclub opened. Nor have the City and Agency studied the possibility that the tenant for the proposed project might have operated other nightclubs that have had a history of public safety issues, including

batteries, driving under the influence, and other alcohol-related problems. If such problems arise in significant number at the proposed site, this will drain police services from surrounding areas, contributing to an increase in crime and urban blight in those areas.

The source of these problems, we suggest, is the City's continuing *piecemeal* approach to redeveloping the downtown – failing to implement a plan that encompasses an area large enough to make a real difference. One after another, islands of hope sink in a surrounding sea of despair. The staff report's description (at pages 14-15) of successful entertainment districts in Denver, San Diego, Austin, Long Beach, and Seattle is very revealing: while the report describes the *final product* in each city, it contains no description of *how the final product was achieved* – by Sacramento's failed piecemeal approach, or by comprehensive planning and implementation for an entire area during a defined time period.

Objection #2: There Is A Reasonable Probability That The Project Will Negatively Affect Traffic Patterns and Air Quality.

The staff report estimates that these three new businesses will draw “Approximately 4,000 [to] 5,000 patrons to the Downtown area a week.” Page 5. While the report guesses that these patrons will appear “primarily during off-peak hours”, the proposal puts no restrictions on the times these businesses might be open to the public. This lack of restriction is significant, as it influenced staff's analysis of the relationship of the proposed businesses compared to existing hospitality venues. Other than wishful thinking, the report includes no evidence to support a conclusion that other existing businesses will not be adversely affected. This flaw is similar to that set aside by the appellate court in *San Joaquin Rapter v. County of Merced* (2007) 149 Cal.App.4th 649, in which the court set aside an environmental impact report modeled on average conditions, when in fact there were no limits on the ability of the operator to unilaterally exceed average conditions. “Lunch-Time Specials” might draw patrons during the day, and late afternoon “Happy Hours” might draw patrons during the heaviest commute times. Indeed, the staff report admits that the tenant “plans to partner with conventioners and businesses to use the venues *during the day* for meetings and events to further enliven K Street during the day.” Page 6; emphasis added. Additional day-time traffic will impact traffic patterns for the entire city

Objection #3: There Is A Reasonable Probability That The Project Will Spread Asbestos and Other Hazardous Materials Into The Surrounding Atmosphere.

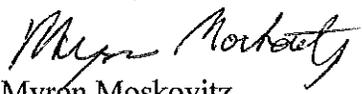
The staff report concedes that demolition of the buildings to be used for this proposal (“formally [sic] the Hit-or-Miss and Rite Aid buildings” – page 2) will require “hazardous material abatement”, that “The environmental remediation is critical and time sensitive”, and that “There is currently a health risk exposure for team members until the abatement is complete” (page 3). These materials include “asbestos lead and other contaminants.” Page 8.

Nevertheless, the City and Agency have failed to furnish the public with any information regarding the likelihood that demolition of the buildings might spread such toxic materials to the public and to surrounding neighborhood, and the proposal contains no measures mitigating this possibility. The acknowledge presence of hazardous materials precludes the use of a categorical exemption.

Also, the City and Agency have failed to study the possibility that the tenant for the proposed project might have a history of improperly storing hazardous materials in at other nightclubs and restaurants he has operated, and a history of evading laws banning smoking in the workplace.

For these reasons, you should defer consideration of the proposal until your staff properly addresses these concerns.

Yours truly,


Myron Moskowitz