BOARD OF APPEALS
Date Filed: July 19, 2021

City & County of San Francisco

REHEARING REQUEST

Michael Turon, Appellant(s) seeks a rehearing of **Appeal No**. **21-035** which was decided on **July 7, 2021.** This request for rehearing will be considered by the Board of Appeals on Wednesday, **August 11, 2021**, at 5:00 p.m. **and will be held via Zoom video platform.**

Pursuant to Article V, § 9 of the Rules of the Board of Appeals, the **response** to the written request for rehearing must be submitted by the opposing party and/or Department no later than **10 days from the date of filing, on or before July 29, 2021** and must not exceed six (6) double-spaced pages in length, with unlimited exhibits. The brief shall be double-spaced with a minimum 12-point font size. An electronic copy should be e-mailed to: boardofappeals@sfgov.org julie.rosenberg@sfgov.org and scott.sanchez@sfgov.org

You or your representative **MUST** be present at the hearing. It is the general practice of the Board that only up to three minutes of testimony from each side will be allowed. Except in extraordinary cases, and to prevent manifest injustice, the Board may grant a Rehearing Request only upon a showing that new or different material facts or circumstances have arisen, where such facts or circumstances, if known at the time, could have affected the outcome of the original hearing.

Based on the evidence and testimony submitted, the Board will make a decision to either grant or deny your request. Four votes are necessary to grant a rehearing. If your request is denied, a rehearing will not be scheduled and the decision of the Board will become final. If your request is granted, a rehearing will be scheduled, the original decision of the Board will be set aside, and after the rehearing, a second decision will be made. Only one request for rehearing and one rehearing are permitted under the Rules of the Board.

Requestor or Agent (Circle One)

Signature: Via Email

Print Name: Ryan Patterson

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SAN FRANCISCO BOARD OF APPEALS

MICHAEL TURON, Appellant, vs. CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO PLANNING DEPARTMENT, Respondents.	Appeal No.: 21-035 **REHEARING REQUEST** BPA Nos: 2020/0611/8414 & 2020/1005/5941 Subject Property: 2722-2724 Folsom Street Hearing Date: July 7, 2021

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I. INTRODUCTION

On July 7, 2021, the Board of Appeals heard Appeal No. 21-035 (the "Appeal"). The subject of the Appeal was the San Francisco Planning Department's Request to Suspend BPA Nos. 202006118414 and 202010055941 (collectively, "Permits"). The Board denied the Appeal and upheld the request for suspension (the "Decision"). (Motion, July 7, 2021 hearing[1].) The Board should have instead granted the Appeal because the San Francisco Planning Department had no legal basis to suspend the permits.

II. LEGAL STANDARD

A rehearing of the Appeal is necessary "to prevent manifest injustice." (Rules of the Board of Appeals, § 9(b).) Abuse of discretion is established under Code of Civil Proc. § 1094.5(b).

III. ARGUMENT

A. The Decision Constitutes an Unconstitutional Taking of Appellant's Property.

The state and federal Constitutions guarantee real property owners "just compensation" when their land is taken for a public use. (Cal. Const., art. 1, § 19; U.S. Const., 5th Amend.; *Penn Central Transp. Co v. City of New York* (1978) 438 U.S. 104, 124 ("*Penn Central*").) And, the inquiry focuses in large part on the economic impact of the regulation. (*Penn Central, supra,* 438 U.S. at p. 124; also see, *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 774 [a regulation may effect a taking even though it "*leaves the property owner some economically beneficial use of his property.*" (emph. in orig.)].)

The City's Decision constitutes an unlawful taking of Appellant's Property. In the prior litigation between Appellant and the City, the City stipulated that the Property was a two-unit building, and that it had *formerly* contained an illegal kitchen, which had been destroyed by a fire. After that lawsuit had settled, and in reliance upon that stipulation, Appellant applied for BPA No. 202003066357 (the "Abatement Permit") and the subject Permits at issue in this Appeal, to cure the NOV and repair his Property. DBI added to the Abatement Permit's scope of work that all repairs were to be made in the "laundry area"—the area in which the *former* illegal kitchen had been located. Thus, the City conceded that the Property contained two units, no illegal use

[1] "Video" avail. at https://sanfrancisco.granicus.com/MediaPlayer.php?view_id=6&clip_id=38915.

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remained—or at a minimum that no illegal kitchen remained—and the space was to be a laundry thereafter. After the Permits were issued, Appellant spent over $400,000 in hard construction costs in reliance on those Permits, which also meant withdrawing over $200,000 from his retirement account. While Appellant was barely able to allocate enough money for the work under the scope of the Permits, he was fully prepared to complete that work.

Now, given the City's brand-new position—that a third, illegal unit exists at the Property, and "the plans on file with [the subject Permits] misrepresent the existing conditions of the subject property" by omitting the illegal kitchen—and the fact that the fire damage repairs cannot be completed due to the City's suspension, Appellant cannot obtain financing to continue construction at the Property, and his family is out of money. In short, upholding the Decision will force Appellant to sell the Property at a loss or face certain foreclosure. This interferes with Appellant's investment-backed expectations and constitutes either a substantial or total deprivation of the economic value of Appellant's Property. The City's attempt to force an additional unit into the Property for rental to tenants also constitutes a taking by physical occupation. (*See Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063.)

B. <u>The Decision Violates Appellant's Substantive Due Process Rights.</u>

A substantive due process allegation lies where a party alleges the government engaged in "egregious official conduct" that can be said to be "arbitrary in the constitutional sense" or an "'abuse of power' lacking any 'reasonable justification in the service of a legitimate governmental objective.'" (*Shanks v. Dressel* (9th Cir. 2008) 540 F.3d 1082, 1088 intern. cit. omit.) "[T]he rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary." (*Lockary v. Kayfetz* (9th Cir. 1990) 917 F.2d 1150, 1155.)

The Decision, which deprives Appellant of the ability to complete work under the lawfully issued Permits, is a targeted, arbitrary determination, expressly made to punish Appellant for what the City considers to be his past misdeeds. Prior to the approval and subsequent suspension of the Permits, the departments had full knowledge of the history and status of the former kitchen area. However, because the City is angry at Appellant for (1) using the lawful, but politically unpopular, owner move-in eviction procedure after purchasing the Property, and (2) suing the City in the

prior litigation (and obtaining full relief via a settlement), it has continued its abusive tirade. The City's malicious intent is also shown, *inter alia*, by its past act of wrongfully canceling the Garage Permit without notice to Appellant (and only to be later cured by Appellant appealing that cancellation to the Board of Appeals (Appeal 20-077)). The City has no rational basis for the Decision, and any offered is plainly pretext, given the history of this dispute.

C. <u>The Decision Violates Appellant's First Amendment Rights.</u>

The First Amendment of the U.S. Constitution guarantees "the right of the people . . . to petition the Government for a redress of grievances" (U.S. Const. Amend. I; accord, *White v. Lee*, (9th Cir. 2000) 227 F.3d 1214, 1227) and "prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." (*Lacey v. Maricopa Cty.* (9th Cir. 2012) 693 F.3d 896, 916, int. quot. and cit. omit..) A First Amendment violation occurs when "by his actions [the defendant] deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct." (*Mendocino Envtl. Ctr. v. Mendocino Cty.* (9th Cir. 1999) 192 F.3d 1283, 1300 int. quot. and cit. omit.) This requires "only a demonstration that defendants '*intended* to interfere with . . . First Amendment rights,' and whether such acts 'would chill or silence a person of ordinary firmness from future First Amendment activities.'" (*Mendocino Envtl. Ctr., supra*, 192 F.3d at p. 1300 int. cit. omit.)

Here, the City violated Appellant's First Amendment rights when it imposed the Decision in retaliation for, *inter alia*, Appellant suing the City in the prior litigation. Appellant's prior lawsuit against the City is speech protected by the First Amendment. (*Lacey, supra,* 693 F.3d at pp. 916-917.) That lawsuit was filed after the City wrongfully denied Appellant's permit to correct the unit count at the Property from three to two. Shortly after filing suit, the City conceded its error, and agreed to settle the lawsuit by correcting the Property's records. However, angry that the Appellant had obtained permits to remove illegal units, performed an owner move-in eviction, and sued and prevailed on his claim that the Property only had two units, it imposed the Decision. The Decision was therefore "motivated by retaliatory animus." (*Lacey, supra*, 693 F.3d at p. 917.) Moreover, it does not matter if the City had additional, legitimate reasons for such imposition (though it did not), as long as the retaliatory one was a "motivating factor."

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(*Mendocino Envtl. Ctr., supra,* 192 F.3d at p. 1300; also see, *Perry, supra,* 408 U.S. at pp. 597–598.) Further, the City's conduct here would likely deter a person of ordinary firmness from exercising future First Amendment rights as a result of such acts. (*Mendocino Envtl. Ctr., supra,* 192 F.3d at p. 1300.) Thus, the Decision must be reversed.

D. <u>The Decision Violates Appellant's Right to Privacy.</u>

The Decision seeks to compel the Appellant to either legalize the alleged Unauthorized Dwelling Unit ("UDU") or participate in the Planning Code § 317 removal processes. The Appellant has no interest in creating accommodations for public use. This is therefore a violation of Appellant's constitutional right to privacy in, and control of, an owner's property for the owner's own use. (*Tom v. City & Cty. of San Francisco* (2004) 120 Cal. App. 4th 674; *Coal. Advocating Legal Hous. Options v. City of Santa Monica* (2001) 88 Cal. App. 4th 451, 458.)

E. <u>The Decision Is Barred by the Doctrines of Laches and Estoppel.</u>

The Planning Department took the position in the October 2018 appeal that if the space in question was not a third legal unit, it was an UDU. The Department had full knowledge of the property's configuration, including building plans and the full history of the permitting, the fire, and the resolution with the City Attorney's Office. When the Appellant filed the subject fire repair permit last year, the Department reviewed the application, had discussions with the planner who was handling those previous unit-count issues, and approved the permit with full knowledge of the situation. In fact, the Department considered pursuing this issue in April 2019 and declined to do so. (Patterson Decl. Exh. 1; Turon Decl. ¶3.) Likewise for DBI. Mr. Duffy had the plans for the Property, and he inspected the space personally. Mr. Duffy instructed the Appellant to withdraw the prior fire repair permit application, which explicitly referenced the illegal second kitchen destroyed by fire, and Mr. Duffy—on his own initiative—added the words "laundry area" to the replacement permit, which is his prerogative. There was simply no misrepresentation here.

The City cannot sit on its hands until now, some eight months later and after substantial work was performed and costs incurred, and surprise Appellant by suspending the Permits on the (erroneous) basis of a technical defect. This act is barred by the doctrines of laches and estoppel. (*City and County of San Francisco v. Pacello* (1978) 85 Cal.App.3d 637, 645.) Even if the City's

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contentions were accurate, it would still be the case here "that there was substantial compliance, that the property conformed to the code and that the technical failure of the [property owners' actions] constituted insufficient reason to deny them relief." (*Id*. at p. 644.) Had the City denied the Permits, requested a change to the building plans, or initiated an enforcement action at the outset, this situation would not have arisen. But by waiting until after construction was substantially complete (with numerous City inspections performed along the way), the City's actions have severely prejudiced the Appellant.

F. <u>There is No Path to Legalization or § 317 Removal of the Alleged Illegal Unit.</u>

1. The Code Prevents Legalization in this Case.

Planning Code § 207.3(b)(2) states, "the Department shall not approve an application for legalization of the unit if any tenant has been evicted pursuant to Administrative Code Section 37.9(a)(8) where the tenant was served with a notice of eviction after March 13, 2014 if the notice was served within five (5) years prior to filing the application for legalization." Likewise for an Accessory Dwelling Unit under § 207(c)(4). Appellant served a lawful notice of termination of tenancy for an owner move-in eviction under Administrative Code Section 37.9(a)(8) within the past five years. (Turon Decl. at ¶7.) Therefore, there is no path to legalization of the unit under Planning Code §§ 207.3 or 207(c)(4).[2]

2. The Code Also Prevents Removal in this Case.

Planning Code § 317(g)(2) states, "the Planning Commission shall not approve an application for Residential Merger if any tenant has been evicted pursuant to Administrative Code Section 37.9(a)(8) where the tenant was served with a notice of eviction after December 10, 2013 if the notice was served within five (5) years prior to filing the application for merger." As noted above, such a notice of eviction was served within the past five years. Therefore, if Appellant were to apply for Conditional Use Authorization to merge the contested space back into the legal dwelling unit (a path offered by the Board at the July 7 hearing), it could not be granted. Moreover, the City refuses to issue the Garage Permit, as discussed in Appellant's Appeal Brief, and a change of use to a nonresidential use is disallowed by the Property's RH-2 zoning. This means the

[2] Appellant will not execute a Regulatory Agreement waiving his state-law rights. (§ 207(c)(4)(H).)

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Appellant can neither legalize nor remove nor change the use of the purported illegal unit; the Board's Decision puts him in an impossible position, and it is arbitrary and capricious.

3. The Property's Physical Condition Prevents Legalization.

Substantial work has already been completed under the Permits, rendering a new kitchen infeasible. Since the prior plumbing and drainage have been torn out, and the slab includes a monolithic water/vapor-proofing system, installing a kitchen in the contested space would require tearing out substantially all of the work at enormous expense. (Buscovich Decl.)

G. <u>The Prior Appeal Did Not Determine that there was an Illegal Unit.</u>

The prior appeal did not determine that there was an illegal unit on the first floor of the Property. Rather, that appeal concerned the *legal* number of dwelling units at the Property. (Patterson Decl., **Exh. 1, 2**.) After Appellant filed a writ petition in Superior Court, the City agreed to settle and issued a new Certificate of Final Completion and Occupancy stating that there were only two legal units. There has never been a determination concerning whether there is an illegal unit—and there is not. Furthermore, such determination is beyond the scope of the Suspension Request. Commissioner Swig stated: "We support our City Department, Planning and DBI, because if we, once we start to undermine them there will be chaos, and the property owners have opportunities to move forward which is what is the most important thing going on. So I would, I would deny the appeal." (Video; hesitations om.) However, there is nothing to undermine, since there is no determination of an illegal unit. Moreover, the Board's fundamental purpose is to exercise impartial, quasi-judicial oversight over the departments.

H. <u>There is No Code Requirement to Redesignate a Former Illegal Kitchen that was Destroyed by a Fire as a Laundry.</u>

The Planning Department asserts that Appellant was required to get "proper permits" to document the current use of the Property. However, there is no Building or Planning Code requirement for this. (*See* Buscovich Decl. ¶5; Locicero Decl. ¶9.) The second, illegal kitchen on the first floor was destroyed by the fire.

July 19, 2021 Respectfully submitted,
/s/ Ryan J. Patterson, ZACKS, FREEDMAN & PATTERSON, PC

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REQUESTOR'S EXHITBITS FOR THE REHEARING REQUEST ON APPEAL NO. 21-035 @ 2722-2724 FOLSOM STREET

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