



**AGENDA ITEM
BUILDING BOARD OF APPEALS MEETING
DATE – FEBRUARY 22, 2017
BUSINESS ITEMS**

DATE : February 14, 2017

TO : Building Board of Appeals

FROM : Rachel O'Shea, CBO, CFM
Benicia Chief Building Official

SUBJECT : **APPEAL OF BUILDING OFFICIAL'S DECISION TO ISSUE AN EMERGENCY DEMOLITION PERMIT FOR FOUNDRY AND OFFICE BUILDINGS LOCATED AT 678 EAST H STREET, BENICIA (APN 0080-180-050)**

EXECUTIVE SUMMARY:

On October 28, 2016, APS West Coast, Inc. dba AMPORTS filed an application for an emergency demolition permit for the demolition of the Foundry and Office building located at 678 East H Street, Benicia. Both buildings are designated historic landmarks. The Building Official determined that the emergency demolition permit should be issued based on the hazardous condition of the buildings and supported by experts contracted by the City. The appellants seek to prevent the demolition of the two buildings.

RECOMMENDATION:

Adopt Resolution 17-01 denying the appeal and upholding the determination of the Building Official to issue the emergency demolition permit.

GENERAL PLAN:

- 4.1 Make community health and safety a high priority for Benicia
 - 4.1.1 Strive to protect and enhance the safety and health of Benicians when making planning and policy decisions.
 - 3.1.1 Encourage reuse of historic buildings, if feasible, encourage relocation rather than demolition.

STRATEGIC PLAN:

No strategic issues apply.

CEQA:

Project is statutorily exempt from CEQA. PRC § 21060.3. Emergencies; 21080 (b) (4), Emergency Projects; PRC 21080 (b) (1), Ministerial Projects.

BACKGROUND:

On October 28, 2016, APS West Coast, Inc. dba Amports filed an application for an emergency demolition permit for the demolition of two buildings located at 678 East H Street, Benicia. The two buildings, identified as the "Shipping Office" and the "Foundry Building" (also known as the Pacific Mail Docks) are located on a large single parcel at the Southwest border of Benicia. The site, formerly owned by Yuba Industries, is presently owned by Amports, an automotive terminal management company.

The application for the emergency demolition permit. The Building Official previously had "red tagged" both buildings on the site which expressly prohibited any entry or occupancy due to the extremely dangerous condition of the buildings. Both buildings are designated historic landmarks.

Two Safety Assessment Program ("SAP") evaluators, contracted by the City, conducted an inspection and SAP evaluation of the two buildings. One evaluation on December 17, 2015 and another by a different evaluator updated the report on December 20, 2016.

The Building Official reviewed the demolition application and the SAP reports and pursuant to the authority provided in BMC 17.54.100 A, determined that the emergency demolition permit should be issued. The appellants filed a timely appeal of the decision which the Appeals Board is considering at this hearing.

SAP Reports

Both SAP evaluations of the buildings reveal serious and ongoing structural safety hazards.

The initial SAP report dated December 17, 2015 is 117 pages long and was prepared by Chris Gale of 4 LEAF, Inc. an engineering, construction management and building inspection firm. The report contains descriptive text and numerous photographic images clearly showing the dilapidated and dangerous condition of both buildings. The Executive Summary provides in part:

"The current condition of the buildings is extremely poor and continual failure is anticipated due to site conditions and lack of

appropriate strength of the materials that make up these buildings." (page 114).

"It is my recommendation that emergency demolition and safety conditions be implemented immediately...[A]bsolutely nobody should be allowed to enter the buildings under any circumstances. This includes firefighters, police and paramedics under any circumstance." (page 117).

The Executive Summary by Fred Cullen who prepared the December 20, 2016 report clearly summarizes the lack of structural integrity of both buildings:

"I have reviewed the December 2015 report and accompanying photos. The SAP Evaluator listed several bullet points, all of which I agree with, but have expanded upon below. The buildings continue to fail structurally and this is most notable in the Foundry. The wood lintel supporting the bricks above the large opening had cracked due to excessive deflection at some point in the past and had a crude repair to limit the crack. The failure now, due to recent fires, has markedly increased with more bricks falling out for the full depth of the wall and much more loss of bricks above the lintel. The added deflection over the last year appears to be approximately 4".

"The complete failure of this building may happen from many different causes: failure of the overstressed trusses; additional fire damage to the lintel; final total structural failure of the fire-damaged and rotted lintel; loss of all or a portion of the wood framed long wall, due to fire, termites, rot or simple vandalism; added differential settlement due to added soil moisture, or earthquake. The collapse of the building WILL happen without heroic and hazardous remedial work, and that work would only be a temporary Band-Aid."

"Both buildings are severe attractive nuisances. The internal structures are all in various stages of collapse with a strong likelihood of failing completely while occupied by one or more trespassers, leading to the exposure of first responders to unacceptable levels of risk. The rotten floors in the Shipping Office expose both first responders and trespassers to the possibility of falling into the existing basement." Staff notes that there is no exit from the basement.

"One issue with both buildings, as pointed out in the 2015 report, is the lack of an adequate foundation to survive a seismic event which is very likely to occur at any time within the next thirty years, according to both state and federal agencies. Due to the non-engineered soil underlying this site, liquefaction is almost assured; the existing foundations are typical of older brick buildings with a very narrow footing width. Given the great weight of these buildings, differential settlement will occur, causing total structural failure in these already weakened buildings." (page 10).

The second report continues:

"The buildings do constitute an attractive nuisance and there are severe safety hazards due to the disrepair of the structures including the on-going collapse of roofs, floors, and interior structures. There is also the presence of friable flooring material, likely asbestos-based." (page 3).

Commentary on the Shipping Office:

"The building has suffered numerous natural and manmade insults. There are multiple structural failures in the walls caused by differential settlement of the soil. Lateral support for the walls is provided by the roof, which is in progressive collapse. The building has also suffered damage from several fires, set either intentionally or accidentally by trespassers. The roof and floor show a considerable increase in collapsed area compared with last year's report." (page 5).

Commentary on the Foundry Building.

"The Foundry, noted in the City's "Historic Context Statement" as the Pacific Steamship Company Foundry, has only three of its original walls. The fourth, northeast, long wall is wood frame with corrugated steel cladding. This framing is not adequate to resist loads imposed by the brick wall opposite. The roof covering has failed, leading to the probable loss of trusses. This building is nearing total collapse from multiple deficiencies. It should have photo documentation followed by demolition." (page 6).

A full reading of both reports clearly establish that both buildings are in imminent danger of collapse supporting the Building Official's determination to issue Amports the emergency demolition permit.

Appeal

Appellants raise a number of issues in their appeal. The primary contention as outlined in **Points 1 and 2 of the appeal** is that the proposed demolition of the buildings cannot occur without compliance with the California Environmental Quality Act (CEQA)- For the reasons stated below, staff disagrees with the appellants that CEQA applies in this case.

As previously noted, the demolition of the buildings is statutorily exempt from CEQA. Two exemptions apply.

Emergency Project Exemption

Public Resources Code section 21080 (b) (4) exempts projects where "Specific actions [are] necessary to prevent or mitigate an emergency." This section

exempts not only projects that mitigate the *effects* of an emergency but also the projects that *prevent* emergencies. (See *Calbeach Advocates vs. City of Solana Beach*, (2002)103 CA 4th 529,539). The imminent collapse of the buildings need not be found to be an unexpected occurrence to constitute an emergency. It can be anticipated and action to mitigate the emergency is permissible under CEQA.

Based upon the information contained in both SAP reports, there is substantial evidence before the Board of Appeals that the potential collapse of the buildings constitutes an occurrence that involves a clear and imminent danger requiring immediate action even though the exact timing of the event cannot be predicted.

Ministerial Project Exemption

CEQA does not apply to ministerial projects. (PRC section 21080 (b) (1), Guidelines section 15268 (a)).

"The distinction between ministerial and discretionary projects applies as well when an historic building is involved. Whether CEQA applies in the first place depends not on the historic character itself but on whether the project is ministerial or discretionary."

(*Friends of Juana Briones House v City of Palo Alto* 190 CA 4th 286, 299 citing *Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 91 [18 Cal.Rptr.2d 641].)

As stated in the Guidelines:

"'Ministerial' describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (Guidelines, § 15369.)

The Guidelines do not specifically address whether a demolition permit is ministerial or discretionary but the Guidelines and case law do recognize that building permits are generally held to be ministerial and therefore not subject to CEQA. (*Friends of Briones House* at pages 302-303.)

The particular ordinance relied upon by the Building Official in deciding to issue the demolition permit is BMC section 17.54.100. The full text of the ordinance is attached.

This section is found in Chapter 17.54, Historic Overlay District. While the buildings are not within this overlay district, they are designated historical landmarks in the Arsenal Historic Conservation Plan (page 18), which brings them within the regulatory framework of the District.

Under most circumstances the ordinance provides:

"The building official shall not issue a permit for construction, alteration, enlargement, or demolition of a building or structure located in an H district or of a designated landmark without the prior approval of the community development director or the historic preservation review commission." (BMC section 17.54.100 A.)

In such cases prior to demolition of an historic structure discretionary review would be conducted by the Community Development Director or the Historic Preservation Commission. This type of review would be subject to CEQA.

However, subsection A further provides:

"Prior approval of the community development director or the historic preservation review commission is not required for permit applications of an emergency nature to rehabilitate an unsafe building or to demolish the structure for the same reasons."

This exception to the normal review process removes the discretionary aspect of the review. Under these conditions, the Building Official does not have the power to require anything of the applicant if the Building Official determines an emergency exists based upon facts presented. The Building Official is only applying the use of fixed standards or objective elements. (Guidelines section 15369.)

Section 116 of the California Building Code defines unsafe structures as:

"(a) All buildings or structures which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing use constitute a hazard to safety or health or public welfare, by reason of inadequate maintenance, dilapidation, obsolescence, fire hazard, disaster damage, or abandonment, as specified in this Code or in any other effective ordinance or statute, are, for the purpose of this section, unsafe buildings and constitute an unsafe condition..."

The Building Official reviewed both SAP reports, applied applicable California Building Code (CBC) and provisions to the facts contained in the reports and

determined that the demolition permit should be issued. The Building Official had no discretion to demand more of the applicant.

Point 3 of the appeal states that “the owner of a historic property cannot be permitted to demolish a property through neglect.” The appellant cites section 17.54.120 to support this contention. Section 17.54.120 reads:

“All property owners in H districts and owners of designated landmarks shall have the obligation to maintain structures and premises in good repair. Structures and premises in good repair shall present no material variance in apparent condition from surrounding structures in compliance with the provisions of this chapter. Good repair includes and is defined as the level of maintenance that ensures the continued availability of the structure and premises for a lawfully permitted use, and prevents deterioration, dilapidation, and decay of the exterior portions of the structure and premises.”

Staff notes that while it is true that the applicant bears a portion of the responsibility for the deterioration of the structures, there is third party involvement as well. Namely, trespassers who have set fires and vandalized the structures. This code section refers to the obligation of owners of historic structures to maintain those structures; but that does not mean that if the structures become hazardous a demolition permit can't be issued.

Regardless of this code section, staff does not believe that allowing a dangerous structure to remain is a solution, or was the intention of the code. As discussed above, Chapter 17.54 does not apply to emergency demolitions and therefore has no application under these circumstances.

Point 4 of the appeal states that the City should evaluate all options to enforce the municipal code, including fines, and loss of further entitlement. This is not really an appealable contention but rather a suggestion of what the appellants believe the City should do and is outside the jurisdiction of the Board of Appeals.

Point 5 of the appeal addresses the appellants' contention that there is no emergency and that the property owner's negligence should not be permitted to constitute an emergency. This contention has been addressed above. Staff believes that there is ample evidence that this is an emergency.

Point 6 of the appeal is not an appealable contention but rather a suggestion of what the appellants believe the City should do. The appellants suggest the City should commission an evaluation by a structural engineer with specific historic preservation qualifications to provide a neutral third party evaluation of the structure that outlines specific recommendations for stabilization.

The SAP reports were prepared at the City's behest by two third-party evaluators and were relied upon by the Building Official provide abundant support for the Building Official's decision to approve the emergency demolition permit.

Point 7 of the appeal contends that the processing of the demolition permit violates the spirit of the law and transparent government requirements. This contention is without merit, and staff believes that the reverse is true. No notice is required for a demolition permit. Staff received the 12/20/2016 SAP report on the morning of the HPRC meeting and communicated it to the commission, even though it was not required by any code. Staff communicated this to the HPRC in keeping with the spirit of an open and transparent government.

Point 8 of the appeal addresses the appellants' contention that CEQA applies in this case. As discussed above the emergency demolition permit is exempt from CEQA.

Point 9 of the appeal states that the City has not complied with the Downtown Mixed Use Master Plan (DMUMP) Mitigated Negative Declaration (MND) (2007); which includes a mitigation measure that a demolition ordinance be prepared. The appellants state that such an ordinance would not necessitate this appeal. This is not an appealable contention.

The City has complied with the MND. The wording of the DMUMP MND is as follows:

"While not a change to the draft Downtown Mixed Use Master Plan, the following environmental mitigation measures for the Master Plan shall be considered:

- a citizen involvement process for planning the City-owned East E Street lot;
- identifying the waterfront green as a public space that serves the master plan area; and
- adoption of a demolition ordinance for historic structures."

Staff notes that the MND wording is that a demolition ordinance for historic structures be considered, not that it be prepared. Further, staff does not believe that a demolition ordinance would have altered the Building Official's decision, as the buildings represent a hazard and constitute an emergency.

Point 10 of the appeal contends that the City has not complied with Certified Local Government (CLG) requirement 1F, which states that "procedural guidelines should include standards for demolition stays, design review criteria, anti-neglect requirements, and appeal strategies." This is not an appealable contention. The full section of CLG requirement 1F reads:

"The CLG commission will participate in the environment review of local projects in accordance with the requirements under the California Environmental Quality Act (CEQA). The commission may review and comment on permit actions affecting significant listed historic properties and other resources eligible for listing, in accordance with local ordinance requirements and with CEQA. Procedural guidelines should include standards for demolition stays, design review criteria, anti-neglect requirements, and appeal strategies."

As stated previously, this project is exempt from CEQA and staff has followed the BMC and the requirements of CEQA in making the determination to issue the demolition permit.

Point 11 of the appeal contends that the City did not comply with the public participation requirements of the CLG program. This is not an appealable contention. As noted previously, the City has provided opportunities for public input in accordance with appropriate regulations, standards, and guidelines.

Point 12 of the appeal contends that the applicant is piecemealing a larger project. There is no evidence to support the contention and is entirely speculative. It also goes beyond the jurisdiction of the Board of Appeals in determining whether the decision of the Building Official to issue the emergency demolition permit is supported by the record.

Point 13 of the appeal also addresses the appellants' contention that CEQA is applicable by stating that the City has not identified feasible measures to mitigate significant adverse changes to the significance of an historic resource. As discussed above, the project is exempt from CEQA, therefore, no mitigation is necessary.

Point 14 of the appeal is not an appealable contention but an argument by appellants why they believe the buildings should be preserved.

CONCLUSION:

Staff regrets that the buildings have been neglected over the years and that action was not taken to preserve in total this piece of Benicia heritage. We are also keenly aware that these buildings are a danger to the community and the safety of the community is our primary concern. The Building Official has determined that the emergency demolition permit should be issued based on the hazardous condition of the buildings and this determination is supported in reports by experts. Staff asks that the Board of Appeals deny the appeal and uphold the determination of the Building Official to issue the emergency demolition permit.

Attachments:

1. Draft Resolution
2. Building Permit Application dated 10/28/2016
3. Appeal dated 1/03/2017
4. Public Comment
5. BMC section 17.54.100
6. SAP Report 12/17/2015
7. SAP Report 12/20/2016