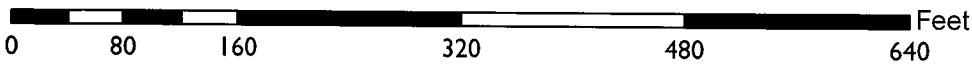


Case File Number: PLN16092-A01 &amp; PLN16092-A02 (PLN16092)

August 2, 2017

<b>Location:</b>	605-9 <sup>th</sup> Street - See map on reverse
<b>Assessor's Parcel Numbers:</b>	(001-0211-006-00)
<b>Proposal:</b>	Appeal of the Zoning Manager's approval of a Regular Design Review, Minor Variance, and Conditional Use Permit application to demolish an existing one-story commercial building and construct an eight-story, 25-unit residential building with ground floor parking and lobby space.
<b>Original Applicant/Contact:</b>	Joe Hernon / (415)705-9922
<b>Appellant/Contact:</b>	Christopher J. Roberts/ (510)891-0413 Miller Starr Regalia/ (925)935-9400
<b>Owner:</b>	Ninth & Jefferson Associates, LLC (Joe Hernon)
<b>Case File Number:</b>	PLN16092-A01 & PLN16092-A02
<b>Original Case File Number:</b>	PLN16092
<b>Planning Permits Required:</b>	Regular Design Review for new residential construction; Minor Variance for a side yard setback encroachment on the south side of the building for floors 6,7 and 8 due to the stairs, elevator and a 2-foot section of living space not stepping inward at a one foot for every five feet above portions of the building over 55 feet; and Minor Conditional Use Permit for an elevator penthouse above 12 feet with a proposal of 19 feet.
	<i>Note: A Minor Conditional Use Permit for off-street parking was also approved for 23 off-street parking spaces where 24 were required. However, the Planning Code was revised to eliminate off-street parking for multifamily dwelling projects in the CBD zone (Oakland Planning Code Section 17.116.060(A)(1)). As a result, the Minor Conditional Use Permit for off-street parking is no longer required.</i>
<b>General Plan:</b>	Central Business District
<b>Zoning:</b>	CDB-R Central Business District Residential Zone.
<b>Environmental Determination:</b>	Exempt, State CEQA Guidelines Section 15332; In-fill Development and Section 15183; Projects consistent with a Community Plan, General Plan or Zoning.
<b>Historic Status:</b>	Not A Potential Historic Property; Survey Rating: F3
<b>Service Delivery District:</b>	Metro
<b>City Council District:</b>	3
<b>Status:</b>	Application approved by the Zoning Manager on October 25, 2016; Project appealed on November 4, 2016.
<b>Staff Recommendation:</b>	Deny the Appeal and uphold the Zoning Manager's approval.
<b>Finality of Decision:</b>	Final (not administratively Appealable pursuant to OMC Sec. 17.132.030)
<b>For Further Information:</b>	Contact case planner <b>Michael Bradley</b> at (510) 238-6935 or mbradley@oaklandnet.com

# CITY OF OAKLAND PLANNING COMMISSION



Case File: PLN16092-A01 and PLN16092-A02  
Appellants: Christopher J. Roberts & Miller Starr Regalia  
Address: 605 – 9th Street  
Zone: CBD-R

## **SUMMARY**

The project applicant, Joe Herson, is proposing to demolish an existing one-story commercial building and construct an eight-story building containing 25 residential dwelling units above ground floor parking for 23 spaces and an entrance lobby (*Attachment A*). The project is located at the corner of Jefferson and 9<sup>th</sup> Streets and is surrounded by the Oakland Flower Market, which wraps the site.

The original application was submitted to the Bureau of Planning on April 4, 2016. The application was considered an administrative case, subject to Zoning Manager review and approval, based on the scope and size of the project. The applicant held two community meetings for the neighborhood to discuss the project and any potential concerns. Staff attended one of these meetings. The project was also publicly noticed twice (*Attachment B*). After a thorough review of all public comments, the project was approved by the Zoning Manager on October 25, 2016 with specific findings for approval and subject to conditions of approval (including Standard Conditions of Approval). All interested parties, including neighbors and the appellants, were notified of the decision.

The 10-day Appeal period ended on November 4, 2016 at 4:00 PM (*Attachment C*) and two, separate and timely Appeals were filed by Christopher J. Roberts (PLN16092-A01) and Liang Hoi Phua (Bill Phua), Linli Lee, Lee Chin Phmah, Lee Chye “Eddie” Phmah, and Wei Keng “Joel” Phmah, represented by Miller Starr Regalia (the “Miller Starr Appellants”) (PLN16092-A02). Christopher Roberts resides in the multi-family development on the opposite diagonal corner and Bill Phua is the owner of the Oakland Flower Market property located directly adjacent to the project on both 9<sup>th</sup> Street and Jefferson Street.

Under Planning Code 17.132.020, the Administrative Appeal Procedure, the appellant must state where an error or abuse of discretion was made by the Zoning Administrator or where the Zoning Administrator’s decision is not supported by evidence in the record. The arguments raised by both appellants are summarized below in the *Basis for the Appeal* portion of this report, along with staff’s response to each argument (*Attachment D*). For the reasons stated in this report and attachments, including the appellants failure to assert error, abuse of discretion or lack of evidence in the Zoning Manager’s decision, staff recommends the Planning Commission deny the Appeals, thereby, upholding the Zoning Administrator’s approval.

## **PROPERTY DESCRIPTION**

The 5,004-square foot project site lot is located at the corner of Jefferson and 9<sup>th</sup> Streets and contains an existing one-story, vacant commercial warehouse constructed in 1958 (per County of Alameda public records). The other parcels on the corner at the Jefferson and 9<sup>th</sup> Street intersection consist of 585-9<sup>th</sup> Street (constructed in 2008), 555-10<sup>th</sup> Street (constructed in 1998) and 619-10<sup>th</sup> Street (constructed in 2009). The subject block consists of a majority of one-story warehouses on 8<sup>th</sup>, 9<sup>th</sup> and Jefferson Streets (east side of the block) and two to three-story residential buildings at the end of the block and facing Martin Luther King Jr. Way (west side of the block). The project site is located approximately 450 feet and separated by a five-story building on a fully developed city block from the Old Oakland Historic District and is surrounded by the Oakland Flower Market that wraps the site and has a surface parking lot to the west of the building.

## **PROJECT DESCRIPTION**

The proposed development would include demolition of an existing one-story commercial building and construction of an eight-story, 32,945 square foot, 25-unit residential building. The project proposes 23 off-street parking spaces where currently none are required (see *Zoning Analysis* section).

The intersection at the project site has a five-story multi-unit building at each corner and the proposal will create a vertical volume at the subject corner consistent with the other three corners in the established intersection. The project would contain earth-tone exterior plaster and metal panels at the upper levels with a terracotta base and dark bronze accents at the windows and ground floor level. The color and material palette is similar to that of other residential buildings in the area. The proposed design will relate well with surrounding buildings in terms of setting, scale, bulk, height, materials, and textures.

## **GENERAL PLAN ANALYSIS**

The subject property is located within the Central Business District (CBD) classification per the Land Use and Transportation Element (LUTE) of the General Plan. The CBD classification is intended to encourage, support and enhance the downtown area as a high-density mixed-use urban center of regional importance and a primary hub for business, communications, office, government, high technology, retail, entertainment and transportation in Northern California. The desired character and uses includes a mix of large-scale offices, commercial, urban (high-rise) residential, institutional, open space, cultural, educational, arts, entertainment, service, community facilities and visitor uses. The intensity/density of the CBD is a maximum FAR of 20 and allowable residential density is 300 units per gross acre, although the LUTE notes that in some areas lower intensity/densities may be appropriate. Although not a comprehensive list, the following General Plan objectives and policies apply to the project:

Objective N3 of the Oakland General Plan Land Use and Transportation Element states: “Encourage the construction, conservation, and enhancement of housing resources in order to meet the current and future needs of the Oakland community”.

Policy N3.1 – Facilitating Housing Construction – Facilitating the construction of housing units should be considered a high priority for the City of Oakland.

Policy N3.2, Encouraging Infill Development: In order to facilitate the construction of needed housing units, infill development that is consistent with the General Plan should take place throughout the City of Oakland.

Policy D10.1 – Encouraging Housing – Housing in the downtown should be encouraged as a vital component of a 24-hour community.

Policy D10.2 – Locating Housing – Housing in the downtown should be encouraged in identifiable districts, within walking distance of the 12<sup>th</sup> Street, 19<sup>th</sup> Street, City Center, and Lake Merritt BART stations to encourage transit use, and in other locations where compatible with surrounding uses.

The proposal would construct a new medium to high density residential building on an underutilized site. The project would be located within close proximity to Downtown, Old Oakland, 12<sup>th</sup> Street BART station, and bus lines. The site also has adequate public infrastructure to serve the development. The project, with 25-units, on a 5,004-square foot site, is under the maximum General Plan density of 34-units by nine (9) units. Therefore, the project is consistent with the CBD classification and LUTE policies.

## **ZONING ANALYSIS**

The subject property is located within the CDB-R Central Business District Residential Zone and Height Area 2 which has an 85-foot height limit. The CBD-R zone is intended to create, maintain, and enhance areas of the Central Business District appropriate for residential development with small-scaled compatible ground-level commercial uses. The maximum permitted zoning density for the site is 25 units which is the proposed project's density.

The project was approved with a Minor Variance for a side yard setback encroachment on the south side of the building for floors 6,7 and 8 due to the stairs, elevator and a 2-foot section of living space not stepping inward at a one foot for every five feet above portions of the building over 55 feet; and Minor Conditional Use Permits for (1) an elevator penthouse above 12 feet with a proposal of 19 feet; (2) 23 off-street parking spaces where 24 are required (24 parking spaces required due to an excess of bicycle parking spaces provided, thus a reduction from 25 parking spaces).

Since the approval of the Minor Conditional Use Permit for off-street parking, the Planning Code was revised to no longer require off-street parking for multifamily dwelling projects in the CBD zone (see Oakland Planning Code Section 17.116.060(A)(1)). As a result, the Minor Conditional Use Permit for off-street parking is no longer required. It should be noted that the project is near several forms of transit on Broadway and 11<sup>th</sup> Street. Further, there are several auto-fee parking lots in the area including the 171-parking space lot at 12<sup>th</sup> Street and Jefferson Street that is approximately three blocks from the subject site. The provided parking will not affect the general quality and character of the neighborhood since it is appropriately screened and within the volume of the building.

The proposed project is also consistent with the Regular Design Review Criteria. Staff made the appropriate findings for approval of all permits (*Attachment C*).

## **ENVIRONMENTAL DETERMINATION**

The California Environmental Quality Act (CEQA) Guidelines list the projects that qualify as categorically exempt from environmental review. The proposed project is exempt from CEQA pursuant to Section 15332, Infill Development and Section 15183, Projects consistent with a Community Plan, General Plan or Zoning. Although a fuel tank was once located on the parcel, the site does not appear on any California EPA Cortese List database. The project will be subject to all uniformly applied development standards adopted by the City Council and applied as standard Conditions of Approval to address any environmental impacts as a result of the project. Furthermore, as discussed above and as a separate and independent basis, the project is consistent with the General Plan's goals and policies.

## APPLICATION REVIEW PROCESS

The original application was submitted to the Bureau of Planning on April 4, 2016. The application was considered an administrative case, subject to Zoning Manager review and approval, as it consists of less than 100,000 square feet of floor area proposed (a total of 32,945 square feet proposed). On June 17, 2016, the project was publicly noticed for a 17-day comment period. On August 8, 2016, the applicant organized a voluntary community meeting for the neighborhood to discuss the project and any potential concerns. On September 20, 2016, the applicant held another voluntary community meeting with Planning staff in attendance. On September 30, 2016, the project was re-noticed for another 17-day comment period due to minor revisions and clerical errors in the initial August 8th public notice. After a thorough review of all public comments, the project was approved by the Zoning Manager on October 25, 2016 with specific Findings for approval. All interested parties, including neighbors and the appellants, were sent a copy of the decision letter.

## BASIS FOR THE APPEAL

Appellant Christopher J. Roberts and Appellants Liang Hoi Phua (Bill Phua), Linli Lee, Lee Chin Phmah, Lee Chye “Eddie” Phmah, and Wei Keng “Joel” Phmah represented by Miller Starr Regalia (the “Miller Starr Appellants”), collectively referred to as “Appellants,” filed two separate and timely Appeals of the Zoning Administrator’s October 25, 2016 decision to approve the project.

The Appeals allege that:

- (1) the project is inconsistent with the General Plan and forthcoming Downtown Oakland Specific Plan,
- (2) the Zoning Manager’s findings are legally inadequate,
- (3) a categorical exemption is inappropriate, and
- (4) unusual circumstances exist precluding the use of an exemption.

The following is a summary of the specific issues raised in the Appeal along with staff’s response to each point. The basis for the appeal is shown in **bold** text and the staff response follows each point in regular type.

1. **The Miller Starr Appellants allege that the project is inconsistent with the General Plan and forthcoming Downtown Oakland Specific Plan. The Miller Starr Appellants state: “The Project cannot be approved because it is inconsistent with numerous applicable General Plan policies, including the following: [the Appeal goes on to list eleven (11) General Plan policies]. The Zoning Manager’s findings do not address any of these applicable policies. Moreover, the [City] cannot comply with the plain language of the many policies that new infill development respect, or be compatible with, existing development – which is fundamental, mandatory, and clear – if it approves the Project because the Project’s eight-story height, in this neighborhood, is inherently incompatible with my clients’ one-story building and with the neighborhood in general. A Project that is seven stories higher than my client’s adjacent one-story commercial building, and three stories higher than the existing five-story buildings at each corner of**

**the intersection, cannot be deemed consistent with these applicable General Plan policies.”**

Staff's Response:

The Appellants believe the project will be consistent with the General Plan and forthcoming Downtown Oakland Specific Plan if the project is substantially revised, in particular by reducing the project's height from eight stories to five stories. The Appellants have placed an emphasis on the proposed building height and surrounding context as the basis for the project's inconsistency with the General Plan.

The Appellants failed to state anywhere in the General Plan where the proposed building height would not be consistent with the intent or goals of both. As noted above, the intensity/density of the CBD is a maximum FAR of 20 and allowable residential density is 300 units per gross acre, although in some areas lower intensity/densities may be appropriate. However, these policies are related to density and intensity and not necessarily height. The General Plan specifically notes that the desired character and uses includes urban (high-rise) residential. Furthermore, the property is zoned for an 85' height limit. Also, the property is located in Downtown and the history of downtown development, and continuing today, includes smaller buildings next to larger structures as the Downtown continues to evolve. As such, an eight-story building next to a one-story building and across the street from five-story buildings is not out of context in the CBD area.

While Planning staff's determination is that the 25-unit project, as currently proposed, is consistent with the General Plan, it is important to note that the General Plan includes the following language:

*The General Plan contains many policies which may in some cases address different goals, policies and objectives and thus some policies may compete with each other. The Planning Commission and City Council, in deciding whether to approve a proposed project, must decide whether, on balance, the project is consistent (i.e., in general harmony) with the General Plan. The fact that a specific project does not meet all General Plan goals, policies and objectives does not inherently result in a significant effect on the environment within the context of the California Environmental Quality Act (CEQA). (City Council Resolution No. 79312 C.M.S.; adopted June 2005)*

Below are the eleven (11) General Plan policies that the Miller Starr Appellants list as being inconsistent with the project and staff's response.

Land Use and Transportation Element

*Policy I/C4.1 – Protecting Existing Activities. Existing industrial, residential, and commercial activities and areas which are consistent with long term land use plans for the City should be protected from the intrusion of potentially incompatible land uses.*

Staff's Response:

This Policy is located under the Objective I/C4 which is intended to minimize land use compatibility conflicts in commercial and industrial areas through achieving a balance between economic development values and community values. The proposed residential development is not located in a solely commercial or industrial area but in the CBD land use designation which intends a variety of uses. Even more specifically, in 2010, the CBD was rezoned creating several CBD sub-zones intended to specify residential, commercial,

pedestrian-retail and mixed-use areas in order to further implement the General Plan designation. The site was rezoned to the CBD-R Zone, a residential zone that also allows for ground floor retail.

The project is consistent with the long-term land use plans for the Central Business District and CBD-R zone and protects the area from the intrusion of incompatible land uses such as industrial uses, although smaller scale businesses are permitted. As such, the proposal is consistent with the long-term plans for the City and a residential use is not an intrusion into this area. Finally, the proposal will provide Oakland housing stock with an active, well-lit ground floor space that will include approximately 300 square feet of local-serving retail (in addition to a resident lounge). Residents of the proposed development are likely to patronize commercial businesses in the neighborhood, thus bringing greater commerce to the area. Therefore, the project meets this Policy.

*Policy D1.4 – Planning for Old Oakland. Old Oakland should be respected and promoted as a significant historic resource and character-defining element, with Washington Street as its core. Residential development in Old Oakland should be of mixed housing type, with ground-floor retail where feasible.*

Staff's Response:

The project is located in the Old Oakland sub-district, per the LUTE, which is generally bounded by Broadway, I-580, I-880 and 14<sup>th</sup> Street. This sub-district includes many different uses, buildings of differing architectural character and style. The project is not located in the Old Oakland Area of Primary Importance (API) historic district and is three blocks from the core of Old Oakland. It is separated from the API and surrounded by recent residential developments to the north, east and south which exhibit a different character from that of Old Oakland.

The project design respects Old Oakland by including a contemporary design with complementary colors and materials that do not detract from the API or its contributing properties nor tries to create a false replication of them, while recognizing the district's Grow and Change designation in the LUTE's Strategy Diagram. Therefore, the project meets this Policy.

*Policy D2.1 – Enhancing the Downtown. Downtown development should be visually interesting, harmonize with its surroundings, respect and enhance important views in and of the downtown, respect the character, history, and pedestrian-orientation of the downtown, and contribute to an attractive skyline.*

Staff's Response:

The project uses a color and material palette similar to that of other residential buildings in the area, resulting in a visually pleasing design that harmonizes with its surroundings. Further, it will fill in the established mid-rise intersection and thereby contribute to an attractive skyline.

The proposal will enhance desirable neighborhood characteristics by redeveloping a one-story vacant, graffiti covered building site with an attractive 25-unit residential building that is compatible with the neighborhood. Further, the building's site design proposes the driveway towards the rear on 9<sup>th</sup> Street thus not detracting from the entrance to the retail establishments on Jefferson Street. Additionally, the proposal provides an active well-lit,



corner ground floor retail space and resident lounge, which will emanate light outward and add eyes on the street. Therefore, the project meets this Policy.

*Policy D4.2 – Fostering a Positive Business Climate. A positive business climate which encourages attraction of new businesses and retention and expansion of existing businesses in downtown Oakland should be fostered, promoting Oakland’s locational (transportation) advantages and other amenities.*

Staff’s Response:

The project will demolish an under-utilized vacant and graffiti covered building and construct 25 residential units that will bring residents to the area, encouraging new businesses and helping to retain and expand existing businesses. In addition, the project will provide approximately 300 square feet of local-serving retail (in addition to a resident lounge) in the ground floor. Therefore, the project meets this Policy.

*Policy D10.5 – Designing Housing. Housing in the downtown should be safe and attractive, of high quality design, and respect the downtown’s distinct neighborhoods and its history.*

Staff’s Response:

The project is of high-quality design, and uses a color and material palette complimentary to other residential buildings in the area, thereby respecting the neighborhood. The project would contain earth tone exterior plaster and metal panels at the upper levels with a terracotta base and accents of dark bronze in the windows and ground floor level. The other materials include glass guardrails, metal awnings, exposed concrete columns, and mesh roll up door for the parking area. The project does not include false historicism and is similar to the residential buildings across the street.

*Policy D10.6 – Creating Infill Housing. Infill housing that respects surrounding development and the streetscape should be encouraged in the downtown to strengthen and create distinct districts.*

Staff’s Response:

The project is an infill housing development designed to respect the surrounding development and to provide a streetscape that strengthens the existing district. The proposal will enhance desirable neighborhood characteristics by redeveloping a one-story vacant, building site with an attractive 25-unit residential building that is compatible with the neighborhood. Further, the building’s site design proposes the driveway towards the rear on 9<sup>th</sup> Street to not detract from the retail entrances on Jefferson Street. Additionally, the proposal provides an active well-lit, corner ground floor retail space and resident lounge, which will emanate light outward and add eyes on the street. The project respects the neighborhood and is designed to accommodate future development at adjacent sites.

*Policy D11.1 – Promoting Mixed-Use Development. Mixed use developments should be encouraged in the downtown for such purposes as to promote its diverse character, provide for needed goods and services, support local art and culture, and give incentive to reuse existing vacant or underutilized structures.*

Staff’s Response:

The project is replacing a vacant, single-story commercial building with an eight-story, 25-unit residential development. The project is outside the Downtown and Old Oakland cores,

in an area that transitions from downtown and its vibrant mixed uses to a residential neighborhood consisting of single-family residences and small, multi-family developments.

The project provides much needed housing and includes approximately 300 square feet of local-serving retail at the corner of 9<sup>th</sup> and Jefferson Street. A resident lounge will also be provided on the ground floor.

In addition, the project applicant has offered to host artwork on the exterior of the building, on the stairwell facing the Flower Market roof, which could highlight the location of the Flower Market.

*Policy N11.3 – Requiring Strict Compliance with Variance Criteria. As variances are exceptions to the adopted regulations and undermine those regulations when approved in large numbers, they should not be granted lightly and without strict compliance with defined conditions, including evidence that hardship will be caused by unique physical or topographical constraints and the owner will be deprived of privileges enjoyed by similar properties, as well as the fact that the variance will not adversely affect the surrounding area nor will it grant special privilege to the property.*

#### Staff's Response:

The requested Variance will not undermine the project's consistency with the General Plan's goals and policies. The Variance is for a side yard encroachment on the south side of the building due to the stairs, elevator and a 2-foot section of living space not stepping inward at a one foot for every five feet above portions of the building above 55 feet. The Variance is warranted due to unique site constraints. In particular, the small size of the lot (5,004 square feet) and the lot dimensions make it difficult to provide the one foot step inward for every five feet above 55 feet without compromising the most efficient project design. Justification for the Minor Variance is based on the proposed project meeting the Residential Design Review criteria, and because strict compliance with the interior lot line step-back over 55 feet would decrease the livability and operational efficiency precluding an effective design solution. The most effective place for emergency access stairs and elevator for equitable access to all the units is on the interior lot line side of the building which needs access directly to a street. This design allows for the placement of pedestrian and auto access on 9<sup>th</sup> Street and ground floor glazing at the corner and street facing elevations (**Attachment A, page A2.01**). Due to this appropriate placement, a staircase and elevator cannot step inward whatsoever due to the required vertical shaft from ground floor to roof for construction. The Variance would allow for a minimal encroachment (104 square feet on the sixth floor; 208 square feet on the seventh floor; and 312 square feet on the eighth floor with an additional 64 square feet of floor area). This minimal encroachment would have little to no effect on adjacent properties.

#### Noise Element

*Policy 3 – Reduce the community's exposure to noise by minimizing the noise levels that are received by Oakland residents and others in the City. (This policy addresses the reception of noise whereas Policy 2 addresses the generation of noise.)*

#### Staff's Response:

This Policy includes Actions related to enforcing noise insulation standards as part of building permit applications and reviewing performance standards related to noise.

The project design will meet all State requirements for residential buildings, including the State's Noise Insulation Standards, which establish uniform minimum noise insulation performance standards to protect persons within new dwellings from the effects of excessive noise, including but not limited to hearing loss or impairment and persistent interference with speech and sleep. Charles A. Salter, a noise expert, has prepared a noise analysis for the project on behalf of the project sponsor, which Staff has independently reviewed and which can be relied upon. The noise analysis confirms that the project will be able to comply with the City's noise level standards and that the design of the project will minimize future residents' noise exposure. The noise analysis also confirms that the project will be able to meet City guidelines during project construction (*Attachment E-4*).

The project includes Condition 28: Construction Days and Hours, Condition 29: Construction Noise, Condition 30: Extreme Construction Noise, Condition 31: Construction Noise Complaints, and Condition 32: Operational Noise. These Conditions require restrictions on construction activities related to noise, noise reduction measures, noise management plan, notification of extreme noise, a compliant plan and compliance with performance standards. These Conditions which are uniformly applied development standards, initially and formally adopted by the Oakland City Council by Ordinance in 2008, apply to all development projects that meets certain standard thresholds and have been found to substantially mitigate environmental effects. Therefore, the project is consistent with this noise policy and noise impacts will be reduced with implementation of the Conditions.

#### Safety Element

*Policy HM-1 – Minimize the potential risks to human and environmental health and safety associated with the past and present use, handling, storage and disposal of hazardous materials.*

#### Staff's Response:

The project is a residential development and will not involve the routine use, handling, storage and disposal of hazardous materials. While the project is not on the Cortese List, a fuel tank was once located on the parcel as part of the site's previous use as a gas station. It is possible that hazardous materials may be found on the site and/or hazardous materials may be used during construction.

The project includes Condition 24: Hazardous Materials Related to Construction and Condition 25: Site Contamination. These Conditions require Best Management Practices, a Phase I Environmental Site Assessment, possibly a Phase II Assessment, a Health and Safety Plan to minimize negative effects to human health. These Conditions which are uniformly applied development standards have been found to substantially mitigate environmental effects. Therefore, the project is consistent with this policy and hazards or risks to human health will be reduced with implementation of the Conditions.

In addition, a Phase I and limited Phase II prepared for the project confirm that there has been no impact to subsurface soil or groundwater in the area where the fuel tank was once located, and that there are no elevated levels of any contaminant that could pose a threat to human health or the environment (*Attachment E-1*). Staff has independently reviewed these and the documents can be relied upon

*Policy HM-2 – Reduce the public's exposure to toxic air contaminants through appropriate land use and transportation strategies.* Staff's Response:

The City is responsible for establishing land use and transportation strategies that would reduce the public's exposure to toxic air contaminants (TACs). This Policy in the Safety Element includes Actions to continue enforcing performance standards related to TACs and particulate matter; discourage sources of air contaminants and encourage best available control technology; support efforts by the Bay Area Air Quality Management District related to permitting of stationary sources and emitting facilities; integrations of land use and transportation planning; and commenting on regional and state air quality plans.

As noted above, the City has adopted uniformly applied development standards imposed as Standard Conditions of Approval that reduce the public's exposure to air quality impacts during construction by requiring implementation of Condition 18 related to dust and emission reduction measures. The project also includes Condition of Approval 19, which requires implementation of health risk reduction measures, thereby reducing the proposed resident's exposure to TACs. As a residential project, it is not an emitter or a stationary source. Therefore, the project is consistent with this policy and air quality hazards or risks to human health will be reduced with implementation of the Conditions.

Furthermore, First Carbon Solutions' in-house air quality expert conducted a health risk evaluation that compared the proposed project to three other Downtown Oakland projects, which Staff has independently reviewed and which can be relied upon. Based upon that comparison, the expert confirmed that the potential construction impacts from the project would be substantially less than the City's significant thresholds (*Attachment E-2*).

2. **The Miller Starr Appellants also believe the project would violate applicable provisions of the forthcoming Downtown Oakland Specific Plan, including Key Recommendations A, B, and F for Old Oakland. The Miller Starr Appellants state: "The proposed eight-story Project is not appropriately scaled and in character with the neighborhood but rather in stark contrast to it. At a minimum, the Project should be revised so that it is no taller than the five-story buildings that already frame the intersection of 9<sup>th</sup> and Jefferson."**

Staff's Response:

The Downtown Specific Plan has not yet been adopted by the City Council and the Key Recommendations could change during the continued planning process. Until the Downtown Specific Plan is adopted, staff is under no obligation to consider the draft document when making decision on applications. However, Planning staff's determination is that the project, as currently proposed, is consistent with the draft Key Recommendations in the Downtown Oakland Specific Plan noted in the Appeal.

*A. Transform 9<sup>th</sup> Street to include context sensitive infill and safer street design.*

Staff's Response:

The project continues the transformation of 9th Street by filling in the last corner at the intersection of 9th Street and Jefferson Street. The project is in context with the surrounding development, will add seven new street trees, and will locate the garage entry a safe distance from the 9th Street/Jefferson Street intersection. The project will comply with the

requirement for pedestrian and streetscape improvements along with a well-lighted entry and ground floor to provide a safe pedestrian experience in front of the building.

*B. Fill in vacant or underutilized lots with scale-appropriate buildings that contribute to the public realm of the street.*

Staff's Response:

The project is an infill development on an underutilized site. It will comply with the City's streetscape improvement requirements by installing seven street trees and making necessary pedestrian improvements. It includes ground floor retail space and resident lounge, which wrap along Jefferson Street to 9<sup>th</sup> Street, providing visual interest at a pedestrian scale as well as "eyes on the street." The historically vacant and graffiti covered one-story warehouse will be replaced with an attractive residential building that will provide much needed housing and possibly provide for greater patronage of commercial uses in the area.

*F. Respect the scale and character of the neighborhood with new construction and rehabilitations of small warehouses, apartment buildings, and single-family homes.*

Staff's Response:

The project respects the scale and character of the neighborhood by providing a high-quality well-designed building that is in keeping with the setting, scale and character created by the surrounding buildings. It uses a color and material palette similar to other residential buildings in the area, and fills in the established intersection with a building similar in scale to those in the surrounding area, providing a transition from the taller downtown office buildings to the lower scale single family and multi-family buildings to the west. As designed with projections and recesses including balconies, the massing is broken up and with the flat roof design and stepping of the building away from the rear property line eight stories will complement the five-story buildings at the three other corners and not appear substantially taller.

**3. The Miller Starr Appellants allege that the Zoning Manager's findings are legally inadequate because they are alternately conclusory or belied by evidence. The Miller Starr Appellants state: "The findings adequately address the proposed Project's materials and textures, but gloss over the relationship of the Project in its setting, scale, bulk, and height to the surrounding area. In fact, the findings assert that the Project does not 'over mass' the other corner buildings, but they do not explain how this can possibly be so. The findings do not describe the height of the other corner buildings and how the Project's height compares with those existing buildings. Moreover, the findings do not even purport to assert that the Project will not 'over mass' my clients' adjacent one-story commercial building, presumably because no such assertion could feasibly be made." The Miller Starr Appellants also state: "In addressing [the General Use Permit Findings] requirements and attempting to explain how the tallest building at the 9<sup>th</sup> and Jefferson intersection could be compatible with and not adversely affect abutting properties such as my clients' one-story commercial building and the neighborhood, which presently has buildings no taller than five stories in height, the findings imply recite the required considerations without explanation." The Miller Starr Appellants also state: "Accordingly, the findings required to grant a minor variance have not been and cannot be made; the solution, instead, is to revise the**

**Project by reducing its height so that it does not require special treatment relative to surrounding properties.”**

**The second Appeal makes similar allegations, stating: “The allowed increase in height by a full 19 feet over the required 85 feet level is not supported by evidence in this matter and appears arbitrary. ... The Minor Variance for the additional height is not an effective design solution for a building that should be no more than 85 feet.”**

Staff's Response:

The project is located on a small 5,000-square foot lot at the corner of 9<sup>th</sup> Street and Jefferson Street. The other three lots at the intersection range from 15,000 to over 62,000 square feet. Four to six story structures exist on these larger lots, each of which is separated from the project by either 9<sup>th</sup> Street or Jefferson Street.

Because of the small lot, the project achieves its density vertically. The vertical mass complies with the 85-foot height limit and is two to four stories higher than the other structures at the intersection. The separation of the project from these shorter structures by the street and intersection provides perspective and context, creating visual interest and variety in building type, avoiding a uniform and monochrome development pattern. It creates a development pattern that is consistent with the variety of heights comprising Downtown Oakland. A two to four story height differential, separated by a public right-of-way, does not overshadow surrounding buildings but rather provides interesting variation and context in a vibrant urban core.

The lot adjacent to and surrounding the project is over 12,300 square feet. It is currently occupied by a single story commercial structure, the Oakland Flower Market. The Oakland Flower Market site, like the project site, is permitted to go up to 85 feet in height. Any future development of the site would not be adversely affected and the current use would not be impacted as it is a concrete single story structure and parking lot.

The neighborhood is in transition with single-story commercial structures and vacant lots being redeveloped as mixed-use and multifamily residential development. This redevelopment is consistent with the vision of the neighborhood under the General Plan and the draft Downtown Oakland Specific Plan. Neighborhoods in transition often have structures of varying heights, as is reflected in the current conditions where the structures across the intersection of 9<sup>th</sup> Street and Jefferson are taller than the Flower Market.

As designed with projections and recesses including balconies, the massing is broken up and with the flat roof design and stepping of the building away from the rear property line, eight stories will complement the five-story buildings at the three other corners and not appear substantially taller. Further, the bulk and mass of the structure is broken down by metal panel accents at the floor lines and at the decks, breaks that relate the building to the surrounding buildings.

The project at 85-feet is compliant with the Planning Code height limits. A Minor Variance is requested from the sideway setbacks required above 55-feet along the side yard. The project lot is small and the setbacks required are infeasible and place undue hardship on the project. The two stair egresses and elevator core are located along the interior side yard wall to allow the placement of pedestrian and auto access on 9<sup>th</sup> Street, and ground floor glazing at the corner and street facing elevations. Requiring a stepped side yard setback would push these required

mechanical and life safety features into the structure, shrinking and eliminating residential units, which is contrary to the City's stated goal of developing more housing. The stair and elevator encroachment is also very minimal with approximately 104 square feet on the sixth floor, 208 square feet on the seventh floor, and 312 square feet on the eighth floor with an additional 64 square feet of floor area. Strict compliance with the setback requirement would also decrease the livability and operational efficiency.

The project required Minor Conditional Use Permit for an elevator penthouse above 12 feet with a proposal of 19 feet. The proposed additional height of seven feet for the elevator penthouse is an effective design solution as many newer elevator shafts are requiring the additional height for safety mechanical equipment. The proposed elevator penthouse will consist of approximately 53 square feet on top of the building and will not be very visible from the street below. Therefore, granting the Minor Conditional Use Permit for the elevator penthouse will not adversely affect the livability or appropriate development of abutting properties and the surrounding neighborhood.

The Minor Conditional Use Permit for off-street parking is no longer required and whether the findings were adequate is moot.

- 4. The Miller Starr Appellants assert that the use of a categorical exemption is inappropriate. The Miller Starr Appellants state: "Under CEQA's well-established standards, an agency is required to prepare an EIR, whenever substantial evidence in the record supports a 'fair argument' that a project may have a significant effect on the environment. ... Under the 'fair argument' standard, a categorical exemption does not apply where there is a fair argument, based on substantial evidence, that the project will have significant environmental impacts. In other words, if credible evidence shows that a project may cause a significant effect on the environment, the lead agency cannot make use of the exemption." The Miller Starr Appellants note: "'Substantial evidence' is defined by the CEQA Guidelines to include 'facts, reasonable assumptions predicated on facts, and expert opinion supported by facts.'" The Miller Starr Appellants further state: "In this case, there is a wealth of substantial evidence demonstrating that the proposed Project would have significant and adverse impacts on the environment, as well as unique or unusual circumstances."**

Staff's Response:

The information presented in support of the allegation that substantial evidence exists of a fair argument is general information regarding topics such as hazards, air quality, noise, traffic, shadows and shading. As the Miller Starr Appellants state, substantial evidence is defined by the CEQA Guidelines to include "facts, reasonable assumptions predicated on facts, and expert opinion supported by facts." (14 Cal. Code Regs. sections 15384(a), 15064(f)(5).) CEQA and the CEQA Guidelines also provide: "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous, or evidence of social or economic impacts which do not contribute to or are not caused by, physical impacts on the environment, is not substantial evidence." (14 Cal. Code Regs. section 21082.2(c); CEQA Guidelines section 15384.)

Appellants have not presented any facts or expert opinions. Rather, the information in the appeals classifies as argument, speculation and/or unsubstantiated opinion or narrative and, therefore, does not classify as substantial evidence.

Substantial evidence in the record exists and proves that the project qualifies for the exemptions used. As previously noted, technical studies have been prepared by experts in the field of noise, hazards, air quality and transportation, which Staff has independently reviewed and which can be relied upon. These studies amount to substantial evidence in support of the project's conclusions. Copies of these studies and reports are attached and their conclusion cited below.

Charles M. Salter, a noise consultant, prepared a noise analysis prepared for the project that confirmed that with implementation of sound rated façade and windows/doors, any noise impacts to future residents is within acceptable levels. The noise study also confirmed that construction noise and vibration from the project would be fully addressed through compliance with the City's established noise ordinance guidelines. As noted in the study, the project will comply with the following Standard Conditions of Approval related to noise: SCA 29: Construction Noise, SCA 30: Extreme Construction Noise, SCA 31: Construction Noise Complaints, SCA 32: Operational Noise, and SCA 41: Window and Door Details. In addition, although it is not expressly included in the Standard Conditions of Approval imposed by the City, the project would nevertheless have to comply with SCA 63 (community noise exposure, per Oakland Planning Code section 17.130.070, which directly relates to window treatments. The recommendations provided above would comply with and implement SCA 63.

Applied Remedial Service, Inc. ("ARS, Inc.") prepared Phase I and limited Phase II based on the site. It included a subsurface Physical Anomalies Survey where the site was explored for the potential of buried tanks, and four shallow soil gas samples were collected from the immediate vicinity of the former underground tank. The Phase I and limited Phase II confirmed there has been no impact to subsurface soil or groundwater in the area of the fuel tank and that there are no elevated levels of any contaminant that could pose a threat to human health or the environment.

First Carbon Solutions prepared an analysis of the health risk associated with the development of the project based a comparison of the project's land use intensity to that of three other downtown Oakland projects. The evaluation confirmed that given the size of the project and the findings of the other analyses in downtown Oakland, the project's potential construction impacts would be substantially less than the City's significance thresholds and would not have an air quality impact.

Finally, Fehr & Peers prepare a traffic analysis based on the City's current vehicle miles travelled ("VMT") standard (*Attachment E-3*), which Staff has independently reviewed and which can be relied upon. The traffic analysis confirmed the project would not result in substantial additional VMT and any project impacts with respect to VMT would be less-than-significant.

Staff reviewed the project and concluded that the project met the Infill Development criteria for compliance with CEQA. The site is not on any State list of contaminated sites, substantial evidence exists in the record to support this determination and the project will be required to implement the City's standard Conditions of Approval, which address and reduce any potential impact from the project to a less than significant level.

- 5. The Christopher J. Roberts Appellant alleges that Planning staff failed to do any realistic design review and the matter should be referred to the Planning Commission. The design was accepted "as is" and not compatible with the block, surrounding area, or Downtown Oakland. The appellant goes on to state: "This area at the outer edge of**



**the Old Oakland neighborhood is unique and staff should not have compared this project with those located at 14<sup>th</sup> and Broadway. To do so is in error and arbitrary. Using such a comparison demonstrates that no valid design review has taken place.”**

Staff Response:

The City performed adequate design review, but the appellant does not like the design. The appellant apparently feels the proposed design of the building is not compatible with the immediate area; however, the proposed design actually borrows many design elements from the contemporary corner building located directly across the street at 619-10<sup>th</sup> Street with the use of projections and recesses to break up the massing. Further, the project site is not located in the Old Oakland historic district nor is it located in an Area of Primary (API) or Secondary Importance (ASI). The project site is located approximately 450 feet and separated by a five-story building on a fully developed city block from the Old Oakland Historic District. The appellant suggests a false historic design would have been appropriate at the subject site and references the building design to projects located at 14<sup>th</sup> Street and Broadway although the Design Review findings in no way compare the project to any of the existing historic or contemporary buildings at that intersection.

- 6. The Appellant alleges that granting the Minor Variance and Minor Conditional Use Permit is not supported by the findings or is necessary for the quality development. Granting these permits would negatively the neighboring properties and there is no need for the permits and the permits do not protect or preserve neighborhood characteristics.**

Staff Response:

As noted above, the Minor Variance is for a side yard encroachment on one side of the building (south side) due to the stairs, elevators and a 2-foot section of living space which do not step inward one foot for every five feet above portions of the building above 55 feet. The Minor Variance is warranted due to the small size of the lot (5,004 square feet) and the lot dimensions which require staff to balance unit accessibility and emergency access directly to a street pursuant to Building Code requirements, pedestrian and auto access on 9<sup>th</sup> Street which is the principal street, ground floor glazing at the corner and street facing elevations with the interior side step back from the smaller building. (*Attachment A, page A2.01*). Due to this appropriate placement, a staircase and elevator cannot step inward whatsoever due to the required vertical shaft from ground floor to roof for construction. The Minor Variance would allow for a minimal encroachment (104 square feet on the sixth floor; 208 square feet on the seventh floor; and 312 square feet on the eighth floor with an additional 64 square feet of floor area). This minimal encroachment would have little to no effect on adjacent properties.

- 7. Both Appellants allege that there are unusual circumstances as a result of the site's former use as a gas station, which the project qualifies for an exception to the exemption. Specifically, the Miller Starr Appellants state: "Unusual circumstances exist here given the Project site's former use as a gas station and given the excess**

**building height proposed at this corner of 9<sup>th</sup> and Jefferson relative to the existing five-story buildings at that intersection.” The second appeal states: “This case is an unusual circumstance because there is a reasonable possibility that activity will have a significant effect on the environment even though it is not on any State list.” Further, “Due to the use of underground storage tanks at the east end of the site and auto service and repair activity taking place the west end of the site, there is a reasonable possibility that the ground is still contaminated with gasoline, motor oil, and solvents containing volatile organic compounds (VOCs) used in an auto repair activity and that the underground gasoline tanks are still in place.”**

Staff’s Response:

The proposed project will not have a significant effect on the environment due to unusual circumstances. The existing commercial building was constructed in 1958 and it is likely that project would have addressed any hazards as part of construction. Furthermore, Oakland has many former gas station sites that have been and currently are undergoing re-development. As such, redevelopment of a former gasoline service station site is not unusual.

ARS conducted a Phase I Environmental Site Assessment for the site in conformance with the scope and limitations of ASTM Standard E 1527-13. The purpose of the Phase I ESA was to identify current and historical potential and actual recognized environmental conditions for the Property, which are defined in ASTM Standard E 1527-13 as “the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of future release.”

The Phase I ESA indicated the presence of an auto service station on the Property from the 1930s to the 1950s. As a result, a subsurface Physical Anomalies Survey was conducted to search for underground storage tanks (USTs) on the property using a variety of electronic instrumentations such as a magnetometer, a radar cone penetrating meter. Four shallow soil gas samples were also collected and analyzed from the immediate vicinity of the former UST location. The limited Phase II prepared for the project by ARS, Inc. confirmed that that there has been no impact to subsurface soil or groundwater in the area of the fuel tank and that there are no elevated levels of any contaminant that could pose a threat to human health or the environment. The Phase I also confirmed that the site is not on the Cortese List. Based on its expert opinion, ARS, Inc. concluded there has been no impact to subsurface soil or groundwater in the area of the former USTs, that there were no elevated levels of any contaminant that could pose a threat to human health or the environment and that no further investigation is warranted as any contaminates detected levels were at background residual levels for an industrial area.

As with all development in Oakland, the project will be required to comply with the City’s standard Conditions of Approval which include specific requirements for addressing any potential hazardous materials or contaminates discovered during construction. Compliance with these conditions is not an unusual circumstance and as the project has complied with the pre-construction evaluation and assessment requirements and as that evaluation and assessment has determined there are no unusual hazardous conditions on the site, the fact that the site was a former gas station

is not an unusual circumstance. Regarding the building height, an 85' building height is not an unusual circumstance and is not in and of itself a CEQA issue.

Finally, the Appellants have not presented any facts or expert opinions. The information in the Appeals is argument, speculation and/or unsubstantiated opinion or narrative and, therefore, does not classify as substantial evidence.

**CONCLUSION**

The Appellants have not demonstrated an error or abuse in discretion by the Zoning Administrator and has not shown where his decisions are not supported by substantial evidence. City of Oakland Planning staff believes that the proposed project satisfies applicable zoning criteria and meets the General Plan and Findings for approval. Furthermore, staff conducted appropriate environmental review for the project. Therefore, staff believes that the project approval of the application was issued correctly and the Appeal should be denied.

**RECOMMENDATIONS:**

1. Uphold staff's CEQA environmental determination
2. Deny the Appeal and uphold the Zoning Administrator's approval of the project based on this Appeal report.

Prepared by:



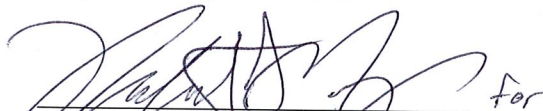
Michael Bradley  
Planner II

Reviewed by:



Scott Miller  
Zoning Manager

Approved for forwarding to the  
City Planning Commission:



for  
Darin Ranelletti, Interim Director  
Department of Planning and Building

**ATTACHMENTS:**

- A. Project Plans and Photos
- B. Public Notices and Community Meeting documents
- C. Approval Letter dated October 25, 2016
- D. The Two Appeals Filed by Christopher J. Roberts and the Miller Starr Appellants
- E. Applicant's Attorney July 13, 2017 Letter with accompanying Technical Reports
  - E1- ARS Inc., Phase I and Limited Phase II Environmental Site Analysis
  - E2- First Carbon Solutions, Health Risk Assessment
  - E3- Fehr and Peers, Vehicles Miles Traveled (VMT) Assessment
  - E4- Salter Associates Inc., Environmental Noise Study

**LEGAL NOTICE:**

**ANY PARTY SEEKING TO CHALLENGE THIS DECISION IN COURT MUST DO SO WITHIN NINETY (90) DAYS OF THE ANNOUNCEMENT OF A FINAL DECISION, PURSUANT TO THE CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 1094.6, UNLESS A SHORTER PERIOD APPLIES.**