Jomsky, Mark

From: Erika Foy <foyfamily@sbcglobal.net>

Sent: Thursday, July 18, 2019 12:56 PM
To: Jomsky, Mark
Cc: Tornek, Terry; Reyes, David; Wilson, Andy; Mermell, Steve; Hampton, Tyron; McAustin, Margaret; Masuda, Gene; Madison, Steve; Gordo, Victor; Kennedy, John; Paige, Jennifer; Mirzakhanian, Talyn; Thyret, Pam
Subject: Erika Foy 253 South Los Robles

Dear Mr Jomsky, City Council and Mayor,

I believe the city has not disclosed enough detailed environmental impacts in regards to the development 253 South Los Robles especially in a cumulative manner with the multitude of other developments in close proximity. By claiming 253 South Los Robles is "infill exempt" the community is at a loss of understanding the environmental impacts the project will have with traffic, traffic noise, air quality of idling cars next to kitchen windows, tree removal and the adjacent impacts on historic structures and the neighboring building 245 Cordova. Did you know that 245 Cordova might be caused to lean when the subterranean garage is dug for 253 South Los Robles?

CEQA is the law of our state for a reason. It is there to help evaluate the environmental impact on communities especially disadvantaged and historic communities.

The city has been misleading and negligent in explaining the environmental impacts for those living in and around 253 South Los Robles especially in regards to traffic noise. Using the street Cordova as the main segment for traffic noise counts is wrong mainly because the city self proclaims it to be one of the least traveled streets. Traffic noise is based on traffic counts and the city used the least invasive streets to claim CEQA exemption.

Not only is there an issue with traffic counts, CEQA can only be exempt if the project fits within our General Plan and it is obvious by every count this is not the case. When residents agreed on our General Plan they did not assume you would be taking out protected trees, agreeing on ugly architecture and going beyond state levels of traffic noise limits. What happens to all those who live in affordable units near these massive developments on Los Robles? Are they not protected under CEQA when it comes to environmental concerns?

I believe the city has yet to make a solid case that this project is what we agreed upon in 2015 with our General Plan. Please record my full support of Ken McCormick's opinion piece. My hope is every city official and council member reads it. This appeal is not about affordable housing but rather protecting those who must live with the cumulative effects of massive new development in and around their community.

Thank you, Erika Foy

https://gcc01.safelinks.protection.outlook.com/?url=http%3A%2F%2Fwww.pasadenanow.com%2Fmain%2Fguest-opinion-ken-mccormick-ceqa-and-urban-projects-does-it-matter%2F%23.XTDCxyVlDDu&data=02%7C01%7Cmjomsky%40cityofpasadena.net%7C1e61097ae50e487d459c08d70bb9f92a%7C82d9fc002c664402a28fc6bcdc32e491%7C1%7C1%7C636990765690742605&sdata=phAT7hkqlrRUwyZvVrsZOnRz8eod2F9zGbyqQvuPfVQ%3D&reserved=0

Sent from Erika's iPhone

CARLSON & NICHOLAS, LLP
Attorneys at Law

301 E. Colorado Blvd., Ste. 320
Pasadena, California 91101
(626) 356-4801

www.carlsonnicholas.com

Scott W. Carlson, Partner — Scott@carlsonnicholas.com
Francisco J. Nicholas, Partner — Frank@carlsonnicholas.com
Richard A. McDonald, Of Counsel — RMcDonald@carlsonnicholas.com

July 18, 2019

Mayor Terry Tornek
Vice-Mayor Tyron Hampton
Hon. Council Members Madison, Gordo, McAustin, Kennedy, Masuda, and Wilson
City Council of the City of Pasadena
100 North Garfield Avenue, Rm. S249
Pasadena, California 91109

Re: July 22 Agenda Item – Call for Review of 253 S. Los Robles (AHCP No. 11869)

Dear Mayor Tornek, Vice-Mayor Hampton, and Honorable Members of the City Council:

Your July 22, 2019 Agenda has the call for review of the Board of Zoning Appeals' ("BZA") April 3, 2019 decision to approve Affordable Housing Concession Permit ("AHCP") No. 11869. The BZA decision affirmed the Hearing Officer's ("HO") November 7, 2018 decision to approve two concessions for the project under the State Density Bonus Law. The first concession is a small increase in the floor area ratio ("FAR") from 2.25 to 2.65. The second concession is a small increase in the height from 75 feet with height averaging to 80 feet. [1] [2]

1. The Applicant reiterates its request that the Mayor and Councilmember Wilson recuse themselves for the reasons set-forth in its April 12, 2109 correspondence to the City Council, which it incorporates by reference herein. In addition to the evidence cited therein, the Applicant further cites as evidence of the probability of their bias the comments of both during the presentation of the Predevelopment Plan Review to the City Council on September 18, 2017. *See, e.g.,* CC Video at 4:19:02 and 4:22:00 where the project is characterized by them as a "dramatic remake" of this part of town and, if built, creating a "messy part of town." *See also,* Exhibit "A" attached hereto and incorporated herein by this reference.

2. The Applicant incorporates by reference herein all of its objections to the City's processing of this AHCP as set-forth in its April 12, 2019 correspondence to the City Council. The Applicant further incorporates all of the objections and claimed violations of State Law set-forth in the JMBM letter of July 3, 2109 for the appeal of AHCP 11879.

Letter to City Council
July 18, 2019

On behalf of the Applicant, we respectfully request that the City Council affirm the BZA's approval of this AHCP and CEQA determination for the following reasons.

First, the proposed project is a code complaint project that requires no variance and no zoning entitlements other than the AHCP. As shown on Exhibit "B", and as will be explained by the architect, the project is designed to be contextual and in harmony with the surrounding area by being lower in height than the adjacent building to the north. As it transitions to the building to the south of it, it scales down the entire block from north to south. The front setback also is at a sufficient depth to provide visual relief along Los Robles Avenue. Neither concession thus presents any detriment to the neighborhood or the City; and, any other design complaints from the appellants have nothing to do with the findings for the AHCP and can be addressed by the Design Commission.

Second, the findings by the HO and the BZA are well-supported by substantial evidence. The Project also complies with the applicable General Plan, Specific Plan, and zoning regulations, as modified by the City's density bonus ordinance.

Third, the project falls squarely within the four corners of the Infill Development (Class 32) Categorical Exemption (the "CE") from the California Environmental Quality Act ("CEQA"). Please note, a CE does not mean that there has been no environmental review, as the appellants mistakenly assert. To the contrary, extensive traffic, noise and vibration, air quality, and greenhouse gas emissions, and historic resource analyses were prepared for the project, and subsequently updated to specifically address the appellants' concerns about traffic intersections and historic resources. Not <u>one</u> of those expert reports found any evidence to support any of the appellants' objections. Not one appellant has submitted any contrary, credible expert reports to support their baseless assertions.

Nonetheless, the appeal contends that there are three exceptions to the use of the CE that apply in this case. The first exception is based upon their unsupported assertion that the two-story office building on the project site is a historic resource and of negative impacts on the Madison Heights neighborhood. The second exception is that there are cumulative impacts that negate the CE. The third exception is the catch-all for "unusual circumstances."

With regard to the first alleged exception, two historical resources report were prepared by Sapphos Environmental and ESA to evaluate the historical significance of the existing office building on-site, and the potential effects of the project on the nearby Madison Heights neighborhood. Neither found any such significance or impacts, nor could they. California law is clear that a 'Substantial adverse change' in the significance of a historical resource means 'physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings such that the significance of an historical resource would be materially impaired.' (Cal. Code Regs., tit. 14, § 15064.5, subd. (b)(1).) Further, well-established case law reiterates that '[t]he significance of historical resources is materially impaired when the project "*[d]emolishes or materially alters* in an adverse manner those *physical characteristics* of an historical resource that [account for or] convey its historical significance." (Cal. Code Regs., tit. 14,] § 15064.5 subd. (b)(2)(A), italics added.)" *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 374.

Despite this legal standard, appellants assert without any expert evidence that the building is historical and will impact the Madison Heights neighborhood. However, as the staff report demonstrates, City Staff and all of the experts who have researched the project have concluded just the opposite. The extensive remodeling of the building, the details of its construction, and the appellant's own papers show that it was not, and never has been, considered a historic resource, nor eligible for historic designation. The building also is not associated with significant events and has only an ephemeral connection to any significant individual or period in time. It does not contain any potential for significant data regarding the past, and consequently, does not meet the eligibility criteria for listing on either national or State registers of historical resources. It thus is not an historic resource for the purposes of CEQA.[3]

With regard to the second exception for cumulative impacts, appellants contend that certain intersections were not studied in the traffic analysis. However, the logically relevant intersections were initially studied and the intersections cited by appellants were subsequently studied by ESA as explained in the Staff Report. Moreover, California law clearly provides that, "the agency's selection of the geographic area impacted by a proposed development falls within the lead agency's discretion, and … [a]bsent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately." CEQA Guidelines, § 15130, subd. (b)(3); *Ebbetts Pass Forest Watch v. Department of Forestry & Fire Protection* (2004) 123 Cal.App.4th 1331, 1351–1353. *See also, Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 415 ("A project opponent or reviewing court can always imagine some additional study or analysis that might provide helpful information. It is not for them to design the EIR. That further study ... might be helpful does not make it necessary.") There is simply no evidence the City abused its discretion by failing to consider the traffic impacts on the logically relevant intersections.

With regard to the third exception for "unusual circumstances", appellants must produce substantial evidence sufficient to establish "an unusual circumstance" prohibiting the proposed use. Under the California Supreme Court's opinion in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, that is simply impossible.

In particular, in the *Berkeley Hillside* case, the applicant sought a hillside permit for a 6,478-square-foot house with an attached 3,394-square-foot 10-car garage, covering 16% of a steeply sloped (about 50%) lot in a heavily wooded area on Rose Street in Berkeley. The trial court denied the petition for a writ of mandate by the neighborhood group holding there were not unusual circumstances to the project, but the Court of Appeal reversed and granted it. The Supreme Court then took up the issue of how the unusual circumstances exception to categorical exemptions should be applied by lead agencies.

---

3. Although the Appeal suggests a fair argument exists for a significant impact on an historical resource on the Property, the law is clear that the "fair argument" standard does not apply to determinations of whether a resource is historic, even within the context of a mitigated negative declaration, rather than the categorical exemption at issue here. *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1068. The standard is substantial evidence, which appellants have failed to meet. *See also, Friends of Willow Glenn Trestle v. City of San Jose* (2016) 2 Cal. App. 5th 457.

The Supreme Court held that the "unusual circumstances" exception can only be used to preclude the use of a categorical exemption if an "unusual circumstance" that differentiates the project from the general class of similarly situated projects; and, if so, when the unusual circumstance that pertains to the project creates a "reasonable possibility" that the project may result in a "significant environmental impact." The Court expressly rejected the appellate court's interpretation of the "unusual circumstances" test, finding that "the Court of Appeal erred by holding that a potentially significant environmental effect itself constitutes unusual circumstances."

Following the Supreme Court's decision, the First District Court of Appeal filed its opinion affirming the trial court's judgment on September 23, and later ordered it published on October 15, 2015. *Berkeley Hillside Preservation, et al. v. City of Berkeley* (1st Dist., Div. 4, 2015) 241 Cal. App. 4th 943, 2015WL 6470455. The opinion states that a party challenging a categorical exemption decision by seeking to establish the unusual circumstances exception cannot prevail merely by providing substantial evidence that the project may have a significant environmental effect. Rather, such a party must establish an unusual circumstance by distinguishing the project from others in the exempt class.

On February 3, 2016, the California Supreme Court denied further review of the case, thus letting the Court of Appeal's decision stand, i.e., there were no unusual circumstances that precluded the use of the categorical exemption for the proposed residence despite its size, large garage, and construction on a steep slope.

Here, appellants contend the building is historic and the project is near the Madison Heights neighborhood, all of which is unusual. However, the experts have concluded the building is not historic; and, as for the mere proximity of the project to the Madison Heights neighborhood constituting an unusual circumstance, the City contains 20 historical districts and numerous other individual resources. Development near or adjacent to any of these resources is thus very common.

Both the project to the north and the project to the south also were found to be categorically exempt. As with the project, the City determined the approvals for those projects could not have a significant effect on any nearby historical resources, and therefore a categorical exemption was appropriate. As the project here proposes a lower density bonus and a substantially reduced height in comparison, it could not result in a greater effect on an adjacent historic resource. There is thus nothing unusual.

Moreover, under Section 15332 of the Guidelines, substantial evidence of a significant effect on the significance of a resource is a disqualifying factor, not just any effect on any aspect of the resource. Here, the ESA Report evaluated the potential for indirect effects of the project on adjacent or nearby historical resources, precisely to address proximity, and determined no potential exists for the project to have a significant indirect effect on the significance of any off-site resource, nor inhibit the ability of the resource to convey its significance, as setting is only one of seven aspects of integrity of an historical resource, and no significant direct effects would occur to any of the alleged resources. No argument thus exists that the significance of the district

would be affected to an extent that would threaten its listing on the National Register. Therefore, the project could not substantially reduce the significance of the Madison Heights neighborhood, and the Appeal neither provides no substantial evidence to prove otherwise.

Finally, the appeal contends the AHCP is inconsistent with the City's General Plan with regard to noise, traffic, land-use, and that the KMA Study is flawed.

With regard to their consistency assertions, California law is clear that a finding of consistency with the General Plan does not require strict consistency with every policy or with all aspects of a plan. Courts have consistently recognized that land use plans attempt to balance a wide range of competing interests, and a project need only be consistent with a plan overall. Even though a project may—and likely will—deviate from some particular provisions of a plan, it remains consistent with that plan on an overall basis. *Friends of Lagoon Valley v. City of Vacaville*, (2007) 154 Cal. App. 4th 807, 815.

Consistent with the BZA's decision, California courts also have consistently distinguished between policies that are objective and mandatory and those that are not for the purpose of determining overall consistency with the plan. For example, in *Sequoyah Hills Homeowners Assn. v. City of Oakland*, (1993) 23 Cal. App. 4th 704, 719, the Court rejected a challenge to a document based on inconsistency with policies, reiterating, "a project need not be in perfect conformity with each and every [] policy" to be consistent with the General Plan. In fact, the Court treated the idea of complete consistency as impossible, stating, "it is beyond cavil that no project could completely satisfy every policy stated in the [General Plan], and that state law does not impose such a requirement." *Id.* The Court further found that "none of the policies on which appellant relies is mandatory," and rejected the claim of non-conformity on that basis. *Id.*

CEQA Guidelines, Appx. G, §10, subd. (g), further provides that applicable General Plan policies refer to those that were "adopted for the purpose of avoiding or mitigating an environmental effect." As such, even if the policies were arguably mandatory (they are not) or that were adopted for the purpose of avoiding or mitigating a significant environmental effect, the Project complies with them as described in detail in the ESA and other expert reports.[4]

Contrary to Appellants' unfounded assertions, the Project would advance a range of planning policies articulated in the General Plan, as well as the quantifiable development standards listed therein. As those objective development standards ***are*** mandatory, the Project is consistent overall with the General Plan. As described in *Wollmer v. City of Berkeley*, (2011) 193 Cal. App. 4th 1329, 1348, the inconsistencies cannot relate to the grant of the concessions under a density bonus, and the City cannot apply development standards in manner that would have the effect of physically precluding development of the Project as proposed.

---

4. The Appeal also references Specific Plan guidelines—which also are not mandatory—as evidence of a disqualifying inconsistency. However, as described above, these guidelines are only relevant to CEQA to the extent they were adopted to avoid or mitigate a significant environmental effect or are mandatory.

Letter to City Council
July 18, 2019

With regard to the KMA Study, the intent of the Density Bonus Law is to offset the costs associated with providing affordable units, not to decrease the overall cost of construction. KMA, therefore, will be present to explain its analysis and how the project does that. Further, to the extent necessary, we incorporate by refence the legal arguments and positions set – forth in the JMBM letter of July 3, particularly with regard to the City's requirement and use of such reports.

Last, as for appellants claim of a "specific, adverse impact", there is simply no evidence of a "significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." CEQA Guidelines Section 65589.5(j)(1). The City bears the burden to demonstrate that the evidence supporting its conclusion is greater than the evidence to the contrary. Moreover, the State Legislature confirmed the above with its passage of AB 3194 (Ch. 243, Stat. 2018), which modified section 65915.5(a)(3) of the Government Code to declare the Legislature's intent that specific adverse impacts to health and safety "will arise ***infrequently***" (emphasis supplied). Here, the appeal has failed to present any such evidence. Not only has the Appeal failed to provide evidence, but the evidence in the record concerning density, concessions, and environmental impacts contradicts the claims of the Appeal. Simply put, the Appeal has again failed to meet its burden, and the record for the proposed AHCP cannot support a rejection of the categorical exemption or denial of the AHCP.

We, therefore, respectfully request that the City Council deny the Appeal, and sustain the BZA's affirmation of the Project. Thank you.

Sincerely,

Richard A. McDonald, Esq.

EXHIBIT A

Stewart, Jana

From: Mermell, Steve
Sent: Monday, September 18, 2017 3:02 PM
To: Reyes, David
Subject: FW: affordable housing concession permits

David, let's discuss. Thx

Steve Mermell
City Manager – 626.744.6936
PASADENA
CITIZEN SERVICE CENTER 626.744.7311

From: Wilson, Andy
Sent: Monday, September 18, 2017 2:01 PM
To: Mermell, Steve <smermell@cityofpasadena.net>; Reyes, David <davidreyes@cityofpasadena.net>
Cc: Tornek, Terry <ttornek@cityofpasadena.net>; Thyret, Pam <pthyret@cityofpasadena.net>
Subject: affordable housing concession permits

Steve (& David) —

As you are aware, we have two informational projects tonight. Both have big asks wrt affordable housing concessions — exceeding height and blowing through FAR caps. It really feels like this process is giving developers carte blanche to ask for anything and everything. I am all for providing more affordable housing but it seems like this is becoming a free for all.

I am particularly concerned about FAR and heights which has the greatest impact on the neighborhood feeling (density). Do we need to look at downzone everything so that when folks ask for concessions we are back where we thought we would be? Obviously not something we are going to solve tonight but something we need to acknowledge and address quickly esp given the number of new developments popping up.

I look forward to your suggestions.

AW

Andy Wilson
Councilmember
City of Pasadena
District 7
awilson@cityofpasadena.net

Stewart, Jana

From: Wilson, Andy
Sent: Wednesday, September 20, 2017 4:06 PM
To: Erika Foy
Subject: Fwd: density bonus.pptx
Attachments: density bonus.pptx

FYI. I am taking up this issue. Would be good to have support of MHNA. Unfortunate that violating our general plan is specifically NOT an adverse impact. I am not anti-more/affordable housing but against over building what we signed off on as a community from our 6 year/$6mm general planning process

---

Andy Wilson
Councilmember
City of Pasadena
District 7
awilson@cityofpasadena.net

Begin forwarded message:

From: "Reyes, David" <davidreyes@cityofpasadena.net>
Subject: density bonus.pptx
Date: September 20, 2017 at 2:50:50 PM PDT
To: "Wilson, Andy" <awilson@cityofpasadena.net>
Cc: "Mermell, Steve" <smermell@cityofpasadena.net>

Good Afternoon CM Wilson,
Attached is the short piece I presented on Monday evening.

The laws and court cases have generally leaned towards developers under the State???s policy position of increasing the production of affordable housing. However, all proposed concessions still need to result in identifiable cost savings that are needed to build the units.

The two projects that were presented on Monday night have just recently been submitted and no analysis has been completed yet. The state law is designed to allow modifications to the zoning code when needed to promote the production of affordable housing but should not result nor was it intended to provide an outlet to completely disregard zoning regulations.

It is important to note that one of the findings for denial is that the project would result in an adverse impact on health/safety or the physical environment.

The state defines what an adverse impact is:

Cal. Gov. Code 65589.5: a ???specific, adverse impact??? means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or

Stewart, Jana

From: Wilson, Andy
Sent: Wednesday, September 20, 2017 4:07 PM
To: Sue Mossman
Subject: Fwd: density bonus.pptx
Attachments: density bonus.pptx

Good meeting last night. . Sorry I couldn???t stay but look forward to doing the survey and eager to find out where this goes.

FYI from David. I am taking up this issue. Would be good to have support of PH. Unfortunate that violating our general plan is specifically NOT an adverse impact. I am not anti-more/affordable housing but against over building wrt what we signed off on as a community from our 6 year/$6mm general planning process

---
Andy Wilson
Councilmember
City of Pasadena
District 7
awilson@cityofpasadena.net

Begin forwarded message:

From: "Reyes, David" <davidreyes@cityofpasadena.net>
Subject: density bonus.pptx
Date: September 20, 2017 at 2:50:50 PM PDT
To: "Wilson, Andy" <awilson@cityofpasadena.net>
Cc: "Mermell, Steve" <smermell@cityofpasadena.net>

Good Afternoon CM Wilson,
Attached is the short piece I presented on Monday evening.

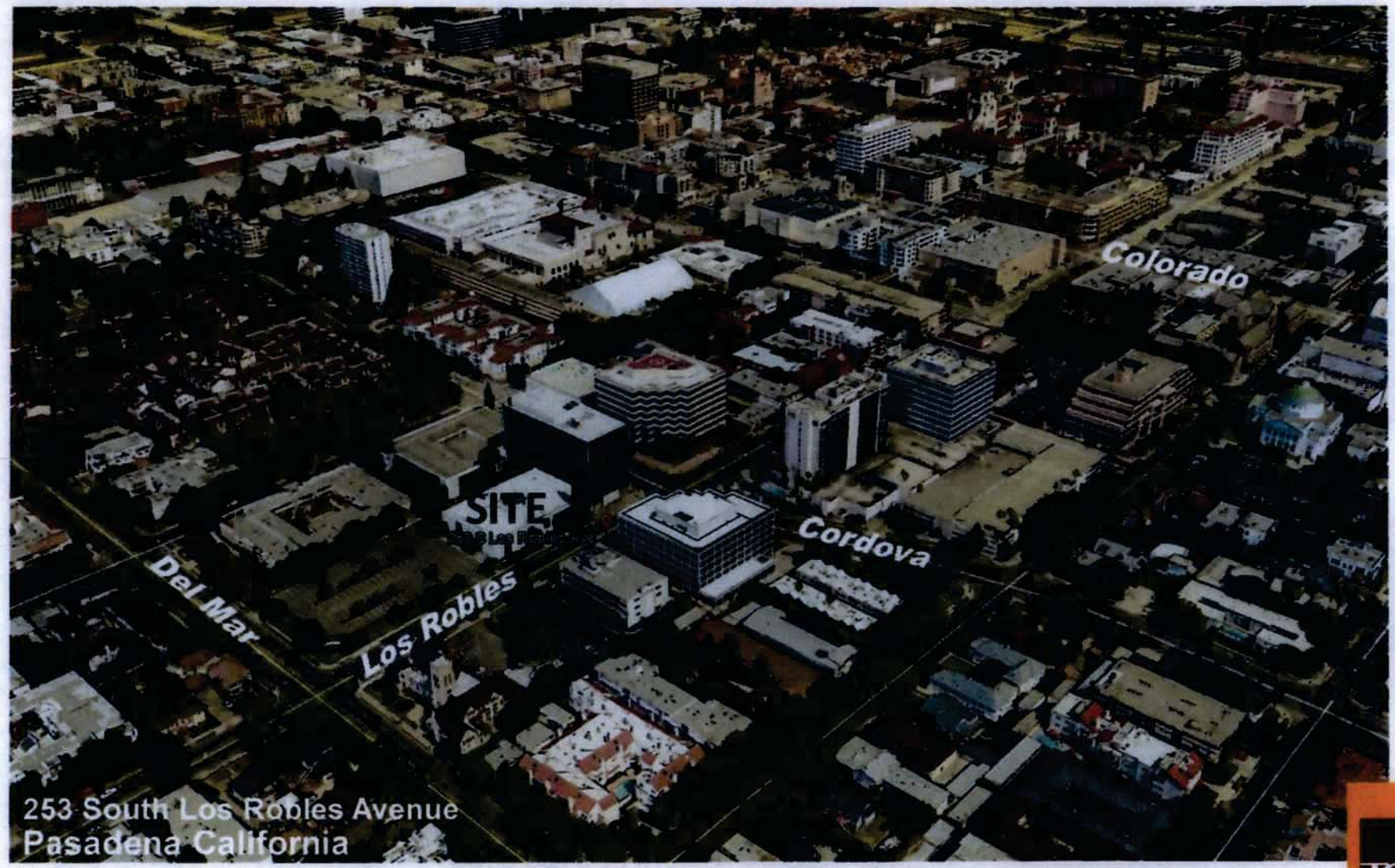
The laws and court cases have generally leaned towards developers under the State???s policy position of increasing the production of affordable housing. However, all proposed concessions still need to result in identifiable cost savings that are needed to build the units.

The two projects that were presented on Monday night have just recently been submitted and no analysis has been completed yet. The state law is designed to allow modifications to the zoning code when needed to promote the production of affordable housing but should not result nor was it intended to provide an outlet to completely disregard zoning regulations.

It is important to note that one of the findings for denial is that the project would result in an adverse impact on health/safety or the physical environment.

The state defines what an adverse impact is:

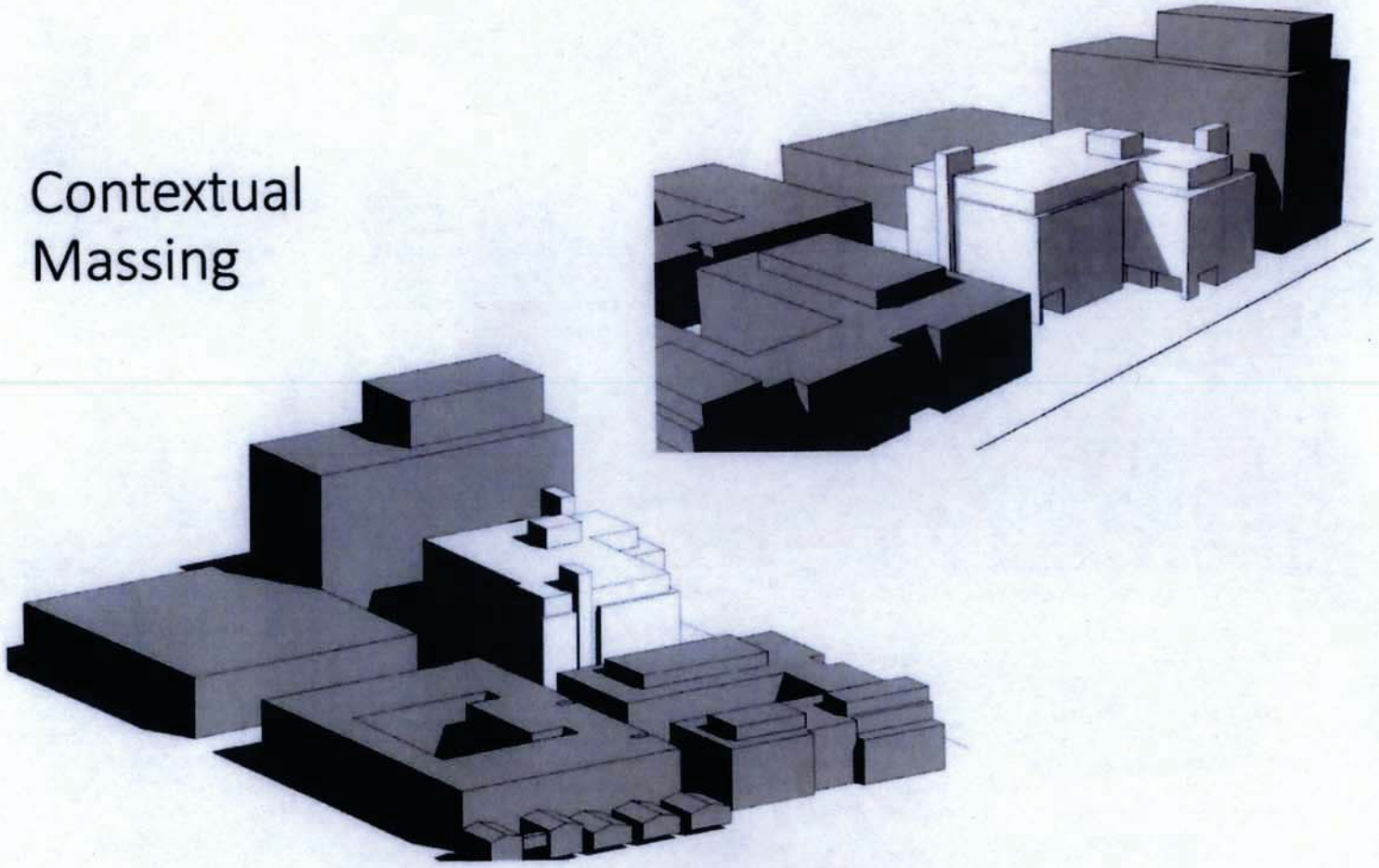
EXHIBIT B



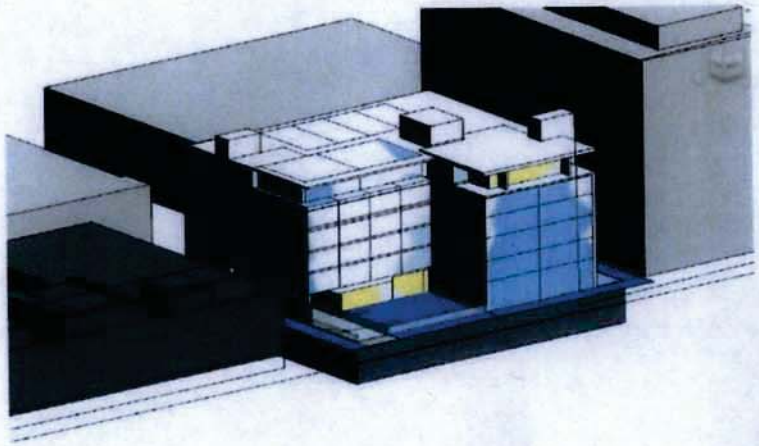
253 South Los Robles Avenue
Pasadena California

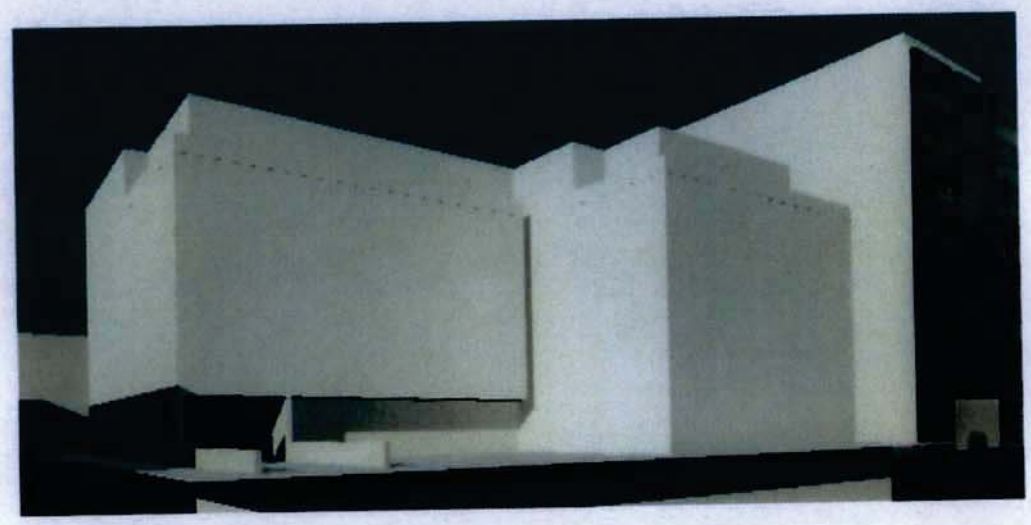
TGA
TYLER GONZALEZ ARCHITECTS, INC
Architecture · Planning · Landscape

Contextual Massing



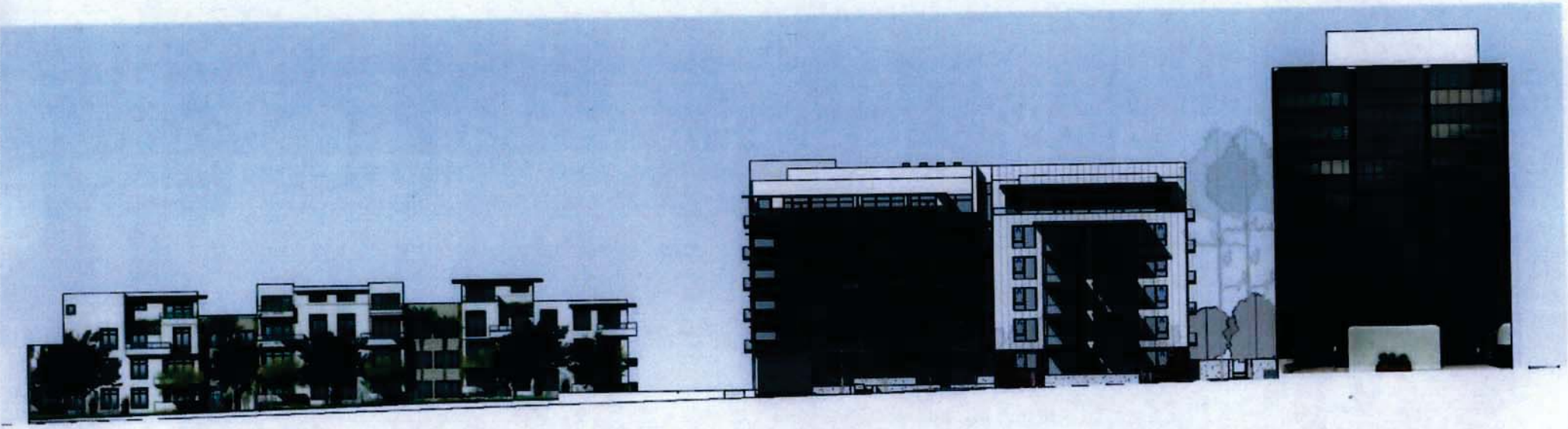
TYLER GONZALEZ ARCHITECTS, INC





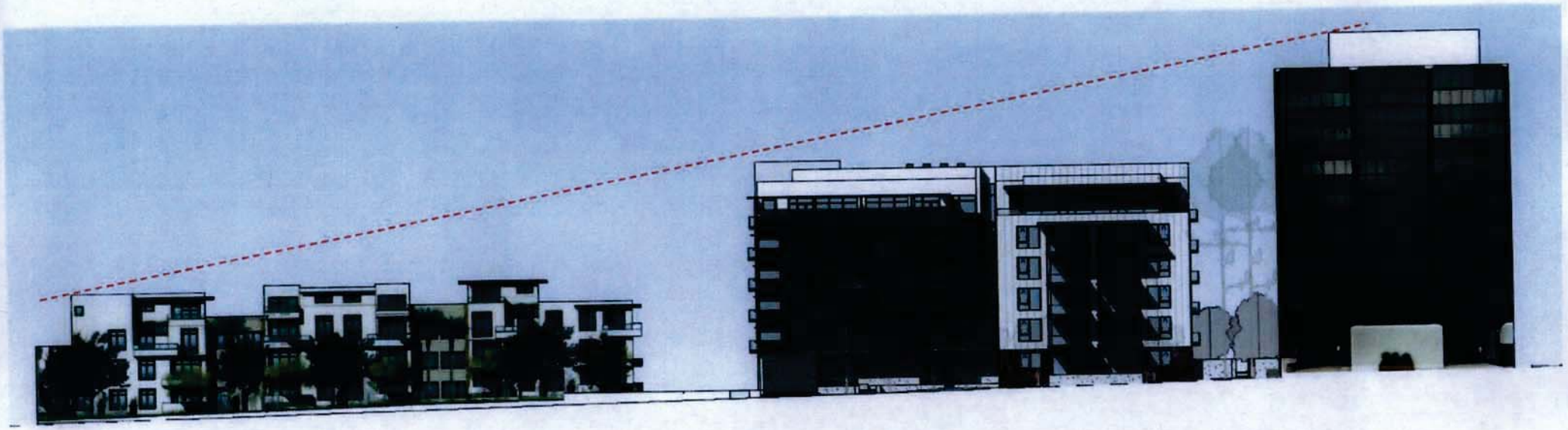
Contextual Massing

TGA
TYLER GONZALEZ ARCHITECTS, INC
Architecture · Planning · Landscape



Los Robles Street Elevation

TGA
TYLER GONZALEZ ARCHITECTS, INC
Architecture · Planning · Landscape



Los Robles Street Elevation

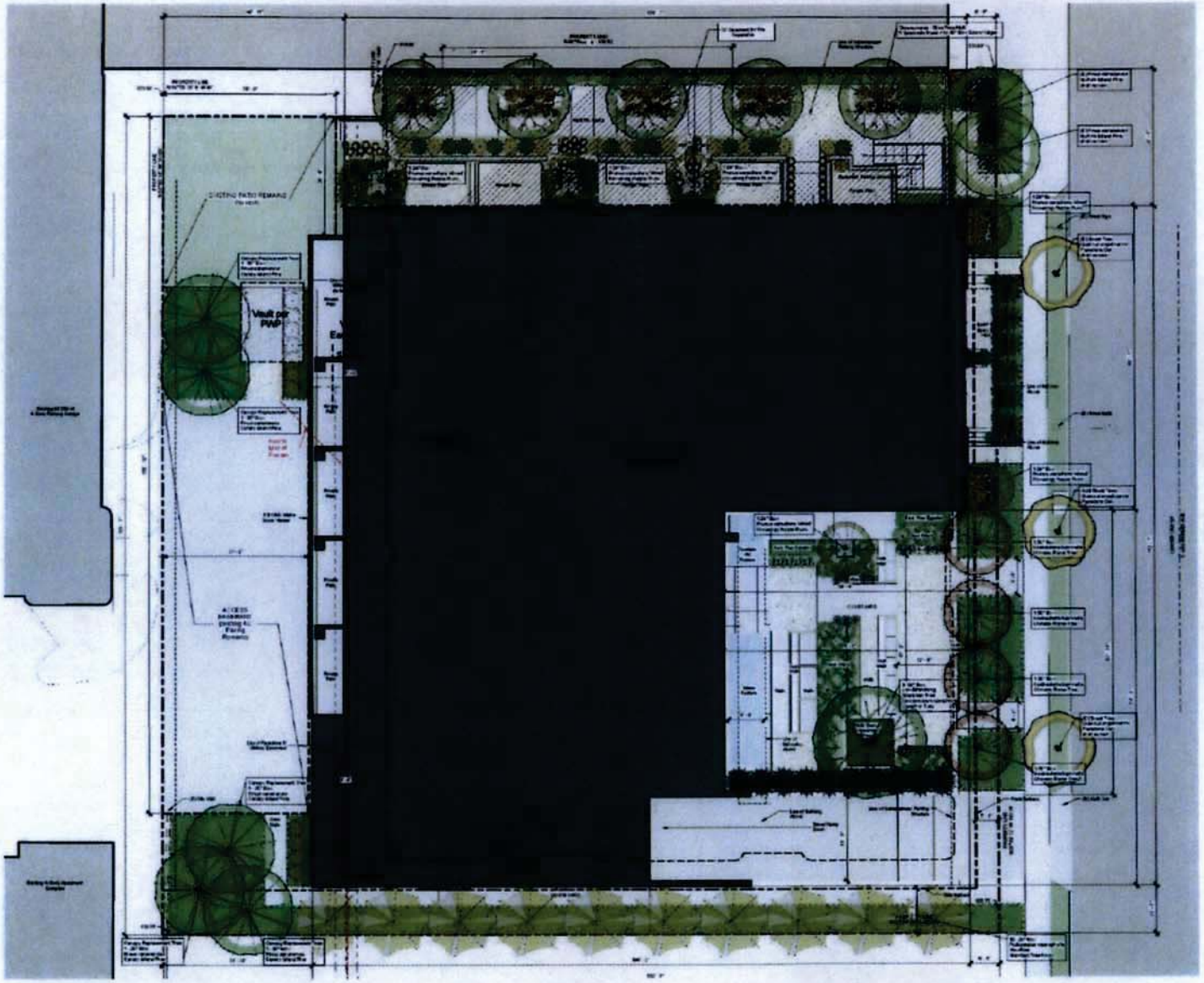
TGA
TYLER GONZALEZ ARCHITECTS, INC
Architecture · Planning · Landscape

View from Southeast

View from
Southeast

TGA
TYLER GONZALEZ ARCHITECTS, INC
Architecture · Planning · Landscape

Site Plan



TGA
TYLER GONZALEZ ARCHITECTS, INC
Architecture · Planning · Landscape