

EXHIBIT 13



Department of Conservation and Development
County Planning Commission – Board of Appeals
Tuesday, December 16, 2014 – 7:00 .P.M.

STAFF REPORT

Agenda Items # 2 & 3

Project Title:	Appeal of Zoning Administrator's Decision to Approve a 2-Lot Minor Subdivision and Commercial Building in Alamo
County File(s):	MS11-0006 and DP12-3029
Applicant/Owner:	Albert Rubey
General Plan/Zoning:	Commercial (CO)/ Retail Business District (R-B), Sign Control Combining District (-S-2)
Site Address/Location:	3189 Danville Boulevard, Alamo/APN 191-093-048
California Environmental Quality Act Status:	Categorically Exempt
Project Planner:	Gary Kupp, (925) 674-7799
Staff Recommendation:	Deny the appeal and uphold the Zoning Administrator's decision to approve the project.

I. PROJECT SUMMARY

This is an appeal of a request for approval of a Minor Subdivision to subdivide a developed 58,326-square-foot parcel into two lots and a Final Development Plan for construction of an approximately 3,000-square-foot, two-story commercial building, and to modify the site's off-street parking configuration. The applicant also requests approval of a Tree Permit to work within the driplines of five (5) code-protected Valley Oak trees for the construction of the proposed commercial building. No variances are requested.

II. RECOMMENDATIONS

- A. **FIND** the project to be categorically exempt from the California Environmental Quality Act (CEQA) [Section 15315 (Minor Subdivision), Section 15303(c) (Final Development Plan)].
- B. **DENY** the appeal by TRH Holdings and **UPHOLD** the Zoning Administrator's decision to approve the project.

- C. **APPROVE** the vesting tentative map received and Final Development Plan, based on the attached findings and conditions of approval.

III. BACKGROUND

The Zoning Administrator approved the project on August 4, 2014 (see attached July 7, 2014, Staff Report). An appeal was filed on August 14, 2014, over the right to use 30 deeded parking spaces in Alamo Plaza Shopping Center and regarding compliance with the California Environmental Quality Act (CEQA). The appellants are TRH Holdings LLC, represented by the law firm of Miller Starr Regalia.

On April 17, 1979, 30 parking spaces located off-site on adjacent parcels 191-090-047 and 191-180-018 were deeded to Albert Rubey for exclusive use by patrons of his existing commercial building located at 3189 Danville Boulevard in Alamo (see attached 1979 grant-of-easement). THR Holdings, located across the street from Mr. Rubey at 3236 Stone Valley Road, claims that the same deed grants them use of the 30 spaces as well. The 1979 deed refers to 50 spaces total, with 30 of the spaces designated for use by the property located at 3189 Danville Boulevard (owned by Albert Rubey), and the other 20 spaces, located at 3240 Stone Valley Road, designated for use by 3236 Stone Valley Road (currently owned by TRH Holdings). Both properties were owned by Albert Rubey at the time the deed was recorded.

A January 2013 letter from Miller Starr Regalia, representing TRH Holdings, disputed Mr. Rubey's exclusive use of the 30 parking spaces, and claimed that they have the right to use the spaces as well. Since the project is dependent upon the exclusive use of the 30 spaces by the proposed minor subdivision, the County informed Mr. Rubey that the project could not move forward until the legal question regarding the deeded spaces was settled. On March 8, 2013, Mr. Rubey's legal counsel responded (see attached) to Miller Starr Regalia in a letter contending that the appellant's interpretation of the 1979 easement was incorrect and that the 30 spaces in question are, in fact, for the exclusive use of 3189 Danville Boulevard. The letter went on to state that if any disagreement remained, TRH Holdings should file suit. After a period of several months, during which the appellants were silent on the issue, and without a suit being filed, the County considered the matter settled and moved forward with processing the development applications.

On March 5, 2014, the County sent TRH Holdings a public notice of intent to adopt a negative declaration, as required by CEQA when a negative declaration is prepared. There was no response to the CEQA notice contesting the negative declaration, use of the parking spaces, or any other aspects of the project at that time. On April 2, 2014,

Miller Starr Regalia filed a Public Records Act request and copied the entirety of both project files. Here again, no suit or objection to the use of the parking spaces or any other aspects of the project was filed at this time. The project was scheduled for hearing before the Zoning Administrator for July 7, 2014. After over a year of silence by the appellants on the issue of the 30 parking spaces, on July 3, 2014, four days prior to the hearing, Miller Starr Regalia submitted a letter, once again contesting the use of the spaces, and on the day of the hearing submitted another letter contesting the adequacy of the CEQA Negative Declaration, of which the appellants were duly notified and to which they submitted no response during the proper response period. In light of these two letters, the Zoning Administrator continued the hearing to August 4, 2014, in order to review the issues raised. After consideration of the letters, the Zoning Administrator approved the project at the August 4, 2014 hearing, which decision was subsequently appealed by TRH Holdings on August 14, 2014.

IV. SITE/AREA DESCRIPTION

The project site is addressed as 3189 Danville Boulevard and is located on the northwest corner of the Stone Valley Road West/Danville Boulevard intersection. The existing parcel is entirely developed. The development consists of a two-story, multi-tenant office building and parking lot. Immediately adjacent to the subject parcel to the north and west is the Alamo Plaza Shopping Center. The surrounding area is also commercial in nature, consisting of various retail stores, service stations, banks, restaurants, and professional offices.

V. PROJECT DESCRIPTION

The proposed project is to subdivide a 1.33-acre rectangular parcel into two lots, resulting in a 51,651-square-foot lot (Parcel A) and a 6,675-square-foot lot (Parcel B). The vesting tentative map shows that Parcel A will be a semi-rectangular corner lot located at the intersection of Stone Valley Road West and Danville Boulevard, and Parcel B will be divided out of the northwest corner of the existing 1.33-acre parcel. The project also proposes the eventual development of an approximately 3,000-square-foot, two-story commercial building to be constructed on Parcel B, and modification to the off-street parking configuration of both proposed parcels. The applicant has submitted a conceptual building design of possible future development for Parcel B.

VI. APPEAL OF ZONING ADMINISTRATOR'S APPROVAL OF PROJECT

On August 14, 2014, Miller Starr Regalia submitted a letter (see attached) on behalf of TRH Holdings appealing the project primarily for reasons already set forth in their letters of July 2 and July 7, 2014. The August 14 letter also introduced new issues

related to CEQA and the Zoning Administrator's authority. These letters are responded to below in chronological order.

1. **Miller Starr Regalia Letter, Dated July 2, 2014:** The main point of this letter is the appellant's assertion that the 1979 easement conveys a total of 50 parking spaces without limiting or allocating the spaces between 3189 Danville Boulevard and 3236 Stone Valley Road. The letter further contends that TRH Holdings is entitled to the "full beneficial use of the entire easement," which would include use of the 30 spaces located across the street by Mr. Rubey's property, and refers to the map attached to the easement document to support this claim. The July 2 letter is incorporated by reference into the August 14, 2014, appeal letter.

Staff Response: In response, staff also refers to the attached map in the 1979 document that divides the easement into two areas: "A" and "B". Section A refers to the property located at 3236 Stone Valley Road, and section B refers to the property located at 3189 Danville Boulevard. Map area A states that a *"20 parking space use [is] granted to [the] adjacent parcel to the East."* The "adjacent parcel to the East" is 3236 Stone Valley Road, and the language clearly states that 20 spaces are for use by that property. Map area B states that a *"30 parking space use [is] granted to [the] adjacent parcel to the East,"* which in that instance is 3189 Danville Boulevard. Upon reading the easement and looking at the associated map, common sense dictates that there was a clear intent to divide the 50 parking spaces between the two properties in a 20/30 split. A previous entitlement, County File #DP3047-80 (see attached DP3047-80 Site Plans), was granted based on this arrangement. There is no mention in the entire 1979 document that use of the 50 spaces is to be shared between the two properties. Furthermore, staff notes that at no point in any of the appellant's letters do they concede any right to the use of their 20 spaces by Mr. Rubey and his patrons, which would be expected if their interpretation of the 1979 document were correct.

During the hearing the Zoning Administrator received testimony from Mr. Rubey, an original signatory to the parking easement, who indicated that the intent of the easement was to provide a 20/30 division the 50 spaces. Prior to approving the project, the Zoning Administrator explained his approach and reasoning regarding the parking. The Zoning Administrator indicated that the March 8, 2013, letter from Mr. Rubey's counsel and the July 2, 2014, letter from the counsel for THR Holdings referenced the same easement document, but came to opposite conclusions. Thus, the Zoning Administrator considered the letters from opposing counsels to be a wash. The Zoning Administrator went on to explain that Mr. Rubey provided first-hand testimony as to the intent of the easement. As the appellant was unable to provide similar first-hand testimony to refute Mr. Rubey's testimony, the Zoning

Administrator was inclined to accept Mr. Rubey's testimony as a true reflection of the intent of the easement.

2. **Miller Starr Regalia Letter, Dated July 7, 2014:** This letter was submitted on the day of the July 7, 2014, Zoning Administrator hearing. The letter claims that the CEQA Initial Study was so flawed that it did not serve the basic, fundamental purposes of CEQA. The letter also claims that the Initial Study did not adequately address the project's potential impacts in terms of Aesthetics, Air Quality, Biological Resources, Geology, Greenhouse Gas Emissions, Hydrology and Water Quality, Noise, Traffic and Transportation, and Cumulative Impacts. The July 7 letter is incorporated by reference into the August 14, 2014, appeal letter.

Staff Response: The Zoning Administrator ultimately found the project to be categorically exempt from CEQA and did not adopt the Initial Study/Negative Declaration. The following discussion responds to the July 7 letter and supports the Zoning Administrator's CEQA finding.

- **Aesthetics:** The July 7 letter claims that the assessment of aesthetic impacts is deficient because the project description (i.e., the description of the building and its uses) is inadequate.

The Initial Study provided a description of the project site and surrounding area and incorporated the project plans. The subject property is located in close proximity to other commercial and retail buildings in Alamo Plaza shopping center. The surrounding commercial area is made up of offices, gas stations, and retail stores of varying ages and architectural styles. The plans depict a two-story, 26-foot 8-inch tall, 2,875-square-foot commercial building located in a Retail Business zoning district. The architecture is similar in terms of style and scale to the existing building on the project site and the buildings across Stone Valley Road West owned by the appellant. Because these buildings all have the same zoning, it is reasonable to expect that their uses would be similar.

At the August 4 hearing the Zoning Administrator explained that the project approval would require development to be consistent with the plans assessed in the Initial Study. The appellant has submitted no evidence demonstrating that the proposed building would be inconsistent with the character of downtown Alamo or the surrounding commercial buildings.

- **Air Quality:** The July 7 letter claims that the project's impacts on air quality have not been evaluated adequately and that potentially significant impacts may occur.

At the August 4 hearing the Zoning Administrator addressed this issue two ways. First, the Bay Area Air Quality Management District's (BAAQMD) 1999 CEQA Guidelines screening methodology for new projects was cited. The Guidelines provide a table showing various types of development and the project size (square footage or number of units) generally necessary to impact air quality in terms of the criteria pollutant Nitrous Oxides (NOx). The Guidelines indicate that a detailed study should be undertaken if a project comes within 20 percent of the values indicated in the table. The purpose of this is to help lead agencies determine which projects might result in an air quality impact and which ones clearly would not. According to the BAAQMD, in order for a medical office building to impact air quality in terms NOx, the project would have to be approximately 110,000 square feet. For a supermarket the value is 24,000 square feet. The proposed building would be approximately 3,000 square feet.

The 2010 BAAQMD CEQA Guidelines contain a more comprehensive list of land uses and address additional pollutants, including greenhouse gases. According to the 2010 Guidelines, a 117,000-square-foot medical office building, a 42,000-square-foot supermarket or a 33,000-square-foot "high turnover" restaurant would result in a significant NOx impact. For greenhouse gas emissions, the values are 22,000, 8,000, and 7,000 square feet, respectively. Based on the Guidelines, it is clear that at 3,000 square feet there is no possibility that the proposed building would result in a significant air quality or greenhouse gas impact.

Second, the Zoning Administrator cited the proposed Saranap Village project near Walnut Creek, for which a draft environmental impact report (DEIR) was nearly complete at the time of the hearing. The Saranap Village project proposes to construct 235 multi-family units and approximately 43,500 square feet of commercial and retail space. The air impact analysis for the DEIR concluded that the project would not result in significant air quality impacts. The BAAQMD has since indicated that it has no comments on the Saranap Village DEIR, thus suggesting that the air impact analysis is correct. Saranap Village dwarfs the proposed project in size and scope, is located in the same air basin, and is only four miles away along the same freeway corridor. Since Saranap Village would not result in a significant air quality impact, it is unreasonable to conclude that the proposed project *would* result in a significant impact. The appellant has provided no evidence to the contrary.

- **Biology:** The July 7 letter claims that the project's impacts on biological resources have not been evaluated adequately and that potentially significant impacts may occur.

On March 12, 2014, the California Department of Fish & Wildlife (DFW) issued a No Effect Determination letter for the project (see attachment). A No Effect Determination signifies that the DFW has reviewed the project in terms of assessing CEQA filing fees and has determined that the project will have no effect on fish and wildlife resources, including habitat. The appellant has submitted no evidence showing that the DFW determination is incorrect or that an impact to biological resources would occur.

- **Geology:** The July 7 letter claims that the project's impacts on geology and soils have not been evaluated adequately and that potentially significant impacts may occur.

The project site is a flat, paved parking lot, a portion of which would be redeveloped. The proposed building must comply with the California Building Code. Standard procedure for the Building Inspection Division's engineering and plan-check staff is to review the project prior to issuance of construction permits to determine any special geologic or seismic requirements for the building. A geotechnical/soils report will be required at that time. The plan check process for standard buildings mitigates any potential impacts.

At the August 4 hearing the Zoning Administrator pointed out that there are numerous *hillside* homes in Alamo that well exceed the proposed building's size, which were reviewed and approved for building permits under this same review procedure, and these homes have not resulted in significant geological impacts. Thus, it was unreasonable to think that a small building on a flat, already developed site would result in impacts. The appellant has submitted no evidence to the contrary.

- **Greenhouse Gas Emissions:** The July 7 letter claims that the project's impacts on greenhouse gas emissions have not been evaluated adequately. See the discussion on Air Quality impacts above. The project would not result in significant greenhouse gas impacts.
- **Hydrology and Water Quality:** The July 7 letter claims that the project's impacts on hydrology and water quality have not been evaluated adequately.

There are no creeks, streams or other bodies of water on the subject property. All runoff from the site would be directed to San Ramon Creek through the existing public storm drain system, as is currently the case. Thus, there would be no change in drainage patterns.

Public Works Department conditions of approval (COA) numbers 33-39 address stormwater runoff concerns pursuant to the National Pollutant Discharge Elimination System and the County's Stormwater Management and Discharge Control Ordinance. These conditions will assure avoidance of any impacts to water quality. Specifically, COA #33 which states:

The applicant shall be required to comply with all rules, regulations and procedures of the National Pollutant Discharge Elimination System (NPDES) for municipal, construction and industrial activities as promulgated by the California State Water Resources Control Board, or any of its Regional Water Quality Control Boards....

Compliance with this condition must include developing long-term best management practices for reduction or elimination of stormwater pollutants. Further, COA #34 states:

The applicant shall submit a FINAL Storm Water Control Plan and a Stormwater Control Operation and Maintenance Plan to the Public Works Department, which shall be reviewed for compliance with the County's National NPDES Permit and shall be deemed consistent with the County's Stormwater Management and Discharge Control Ordinance §1014 prior to issuance of a building permit.

At the August 4 hearing the Zoning Administrator pointed out that the proposed building would replace paved parking that collects pollutants such as oil, antifreeze, and other chemicals associated with automobiles. The plans include new permeable landscaped areas that would filter and reduce runoff. Also, the project is subject to modern, more stringent standards related to stormwater quality and flow. Compliance with these standards ensures that the project would not result in significant impacts to water quality. The appellant has provided no evidence to the contrary.

- **Noise:** The July 7 letter claims that the project's impacts related to noise have not been evaluated adequately.

The project would generate noise during construction and as a result of slightly increased traffic volumes. Construction of the building would involve activities routinely associated with small-scale development in urbanized environments. The County customarily treats construction noise impacts as insignificant when they would occur in a developed area, would be short in duration, and would not involve especially noisy equipment and activities, such as pile driving, blasting, etc. The proposed project meets all of these criteria. The appellant has

submitted no information demonstrating that construction activities would result in a significant noise impact.

The traffic study indicated that the project would generate up to 72 new daily trips. Given the uses allowed in the R-B zoning district, these trips would involve vehicles like those that already traverse the area (i.e., personal vehicles, small delivery vehicles, etc.; not heavy trucks). In the context of the thousands of vehicles using roads in the project area each day, the 72 new vehicle trips of like kind clearly would not create significant noise impacts. The appellant has submitted no evidence to the contrary.

- **Traffic and Transportation:** The July 7 letter claims that the project's impacts related to traffic and transportation have not been evaluated adequately and that potentially significant impacts may occur.

The "mini" traffic study for the project (see attachment) indicated that it would generate up to 72 new daily trips, with 5 new trips in the A.M. peak hour and 9 new trips in the P.M. peak hour. A comprehensive traffic study typically is not required unless a project may generate 100 A.M. or P.M. peak hour trips or 50 peak hour trips at certain intersections. The traffic study concluded that the project would have an insignificant impact on levels of service at the Stone Valley Road/Danville Boulevard intersection. The study also found on-site parking and circulation to be adequate even after implementation of the project. The appellant has submitted no evidence demonstrating that a significant traffic/transportation impact would occur.

- **Cumulative Impacts:** The July 7 letter claims that the project could result in cumulative impacts related air quality, greenhouse gas emissions, and traffic.

As explained above, the proposed project's individual impacts related to air quality, greenhouse gas emissions, and traffic would be insignificant. The BAAQMD's 2010 CEQA Guidelines indicate that a cumulative impact would occur if a project exceeds one or more of the significance thresholds for criteria air pollutants or precursors. As the proposed project would not exceed any of the thresholds, there would be no cumulatively significant air quality impact.

The traffic study indicated that the project would not change the level of service at the Stone Valley Road/Danville Boulevard intersection. At the intersection the project would result in increased delays of 0.3 seconds and 0.5 seconds in the A.M. and P.M. peak hours, respectively. The County's Transportation Planning staff has indicated that such increases are not cumulatively considerable.

Zoning Administrator's Finding of CEQA Exemption

The Legislature has made certain categories of projects exempt from CEQA. When a lead agency determines that a project qualifies for a categorical exemption, the burden shifts to the challenging party to show that the project is not exempt. A challenger must produce substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the project from the categorically exempt class. As explained previously in this report, the appellant has produced little to no evidence demonstrating that the project would result in a significant environmental impact.

At the August 4 hearing the Zoning Administrator declined to adopt the Negative Declaration prepared by staff and instead found the project to be categorically exempt. The proposed commercial building falls under the Class 3 exemption for new construction or conversion of small structures (CEQA Guidelines Section 15303(c)), which exempts:

A store, motel, office, restaurant or similar commercial or institutional structure not involving the use of significant amounts of hazardous substances, and not exceeding 2,500 square feet in floor area. In urbanized areas, the exemption also applies to up to four such commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use, if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive.

Pursuant to the appellate court decision in *Patricia Ann Fairbank v. City of Mill Valley et al*, the Class 3 exemption can be used for one commercial building up to 10,000 square feet in size. Thus, the proposed building meets all of the criteria for this exemption.

The proposed minor subdivision falls under the Class 15 exemption for minor land divisions (CEQA Guidelines Section 15315), which exempts:

...the division of property in urbanized areas zoned for residential, commercial, or industrial use into four or fewer parcels when the division is in conformance with the General Plan and zoning, no variances or exceptions are required, all services and access to the proposed parcels to local standards are available, the parcel was not involved in a division of a larger parcel within the previous 2 years, and the parcel does not have an average slope greater than 20 percent.

The proposed subdivision meets all of the requirements for the Class 15 exemption.

Finally, in making the CEQA determination the Zoning Administrator highlighted the fact that these exemptions require a project to be located in an urbanized area. It is understood that buildings, air pollution, noise, traffic, etc. already exist in urbanized areas. The clear intent of these exemptions is to allow small-scale projects in already developed areas, despite any minor impacts that could occur, because the qualities and characteristics of the urban environment itself render those impacts insignificant.

3. **Miller Starr Regalia Letter, Dated August 14, 2014:** The August 14 letter of appeal incorporates the July 2 and 7 letters by reference and states:

TRH also appeals on the basis that the environmental review for the Project under the California Environmental Quality Act was changed from a proposed negative declaration to a determination that the Project is categorically exempt without the prior opportunity to review or comment on that determination. We also believe that the County may not unilaterally adjudicate private property rights as was done with the parking easement in this case. Thus, the Zoning Administrator's approvals were in derogation of the law and not supported by the evidence.

Staff Response: At the July 7 hearing the Zoning Administrator suggested that the project may be exempt from CEQA and that an Initial Study/Negative Declaration may not be required, to which the appellant's legal counsel responded, *"The County has treated it [the project] as if it's not categorically exempt. If the County wishes to go back and decide that it is categorically exempt, it can do that, and then we can examine that issue. However, it didn't do that; it issued a Negative Declaration."* The Zoning Administrator continued the hearing to August 4, 2014, in order to give further consideration to the contents of the July 7 letter. While there is no statutory requirement under CEQA that notice be given or that a review period be provided for a project that is categorically exempt, the Notice of a Public Hearing that was distributed for the August 4 hearing indicated that the project may be found to be categorically exempt from CEQA. The notice was sent to the appellant and Miller Starr Regalia. The record demonstrates that opportunity was provided to review and comment on the new CEQA determination.

Finally, the appeal questions the Zoning Administrator's authority to adjudicate the issue of the parking easement. Staff notes that at no time prior to the Zoning Administrator's decision did the appellants suggest that the Zoning Administrator did not have authority to render a decision. In fact, the issue of authority was not raised in over 13 minutes of direct dialogue between the Zoning Administrator and

the appellant's counsel at the July 7 hearing. Only after the Zoning Administrator approved the project did the appellant suggest that the Zoning Administrator had no authority to do so.

VII. CONCLUSION

The proposed project is consistent with the Commercial General Plan designation and the zoning standards of the Retail Business District/Sign Control Combining District. The project would result in two parcels which are consistent with the sizes of other properties in the area. The appellant has submitted no evidence that warrants a reversal of the Zoning Administrator's decision to approve the project. Therefore, staff recommends that the Commission DENY the appeal by TRH Holdings, UPHOLD the Zoning Administrator's August 4, 2014, finding that the project is categorically exempt from CEQA, and UPHOLD the August 4, 2014, approval of County Files MS11-0006 and DP12-3029 based on the attached findings and subject to the attached conditions of approval.

ATTACHMENTS

- August 14, 2014, Appeal Letter from Miller Starr Regalia
- July 2, 2014, Letter from Miller Starr Regalia Regarding Parking Easement
- July 7, 2014, Letter from Miller Starr Regalia Challenging CEQA Initial Study/Negative Declaration
- March 8, 2013, Letter from Applicant's Legal Counsel Regarding Parking Easement
- 1979 Parking Easement
- Original Site Plans for Subject Site, County File #DP3047-80
- Department of Fish and Game No Effect Determination
- Traffic Study for Proposed Project
- Staff Report for July 7, 2014, Zoning Administrator Hearing
- Agency Comments
- Maps and Plans
- Site Photographs

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