

ATTACHMENT 1

Appeal Petition

APPEAL PETITIONS MUST BE FILED WITH THE CITY CLERK'S OFFICE WITHIN 14 CALENDAR DAYS AFTER THE DATE OF THE DECISION

APPEAL TO Beverly Hills COMMISSION OR CITY COUNCIL

PLEASE TYPE OR PRINT CLEARLY IN BLACK INK

JANUARY 26, 2011
Date

In accordance with the appeals procedure as authorized by the provisions of the Beverly Hills Municipal Code, the undersigned hereby appeals from the decision of Beverly Hills Planning Commission (Official, Board or Commission involved) rendered on JANUARY 13, 2011; which decision consisted of: The grounds submitted for this appeal are as follows: (WARNING: State all grounds for appeal. Describe how decision is inconsistent with law. Use extra paper if necessary.)

① Granting of Conditional Use Permit at 4465 Wilshire Blvd Beverly Hills CA by resolution of the Beverly Hills Planning Commission on January 13, 2011; including determination of exemption of the project from review from the California Environmental Quality Act ("CEQA").

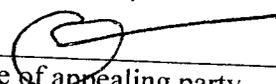
② The grounds for the Appeal are set forth in an attached letter consisting of 13 pages plus 3 additional attached pages.

The undersigned discussed the decision being appealed with:

SUSAN IKAIY-KEENE on JANUARY 25, 2011
(Department Head(s) Involved) Date

It is requested that written notice of the time and place for the hearing on this appeal before the City Council be sent to:

TODD ELLIOTT, ESQ. / TRUMAN & ELLIOTT, LLP 626 Wilshire Blvd Suite # 550
Name Address Los Angeles, CA 90017


Signature of appealing party
c/o Truman & Elliott, LLP
626 Wilshire Blvd. Suite 550 Los Angeles, CA
Address 90017
TEL: (213) 629-5300 FAX: 213-629-1212
Telephone Number & Fax Number

Fee Paid \$5,027.70

(For City Clerk's use)

DATE RECEIVED

LOG NO. 05-11

Written Notice mailed to appellant:

Copies to: City Council, City Manager, City Attorney, Community Development/Planning
Involved Department

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626 Wilshire Boulevard, Suite 550
Los Angeles, California 90017
Tel: (213) 629-5300
Fax: (213) 629-1212
www.trumanelliott.com

TRUMAN & ELLIOTT LLP

January 26, 2011

VIA ELECTRONIC MAIL AND HAND DELIVERY

Honorable Mayor Delshad and
Members of the Beverly Hills City Council
City of Beverly Hills
455 N. Rexford Drive, First Floor
Beverly Hills, California 90210

Re: Appeal of Planning Commission's Approval of a Conditional Use Permit for the Proposed Equinox Exercise Club at 9465 Wilshire Boulevard, Beverly Hills, California 90212 and Related Determination of an Exemption from the California Environmental Quality Act ("CEQA")

Dear Honorable Mayor Delshad and Honorable Members of the City Council:

On behalf of our clients, Ron and Sharon Gart and Neighbors Organized to Protect the Environment in Beverly Hills ("N.O.P.E. Beverly Hills"), we write to appeal the Planning Commission's approval of the proposed Equinox Exercise Club at the property located at 9465 Wilshire Boulevard, Beverly Hills, California ("Proposed Project"). At its hearing on January 13, 2011, the Planning Commission approved the Proposed Project without analyzing thoroughly all available evidence. If the Planning Commission had undertaken its deliberative mandate by examining all arguments regarding the Proposed Project, it would have concluded that the findings of facts required to approve an exercise club in the Beverly Hills Business Triangle and within the designated "pedestrian-oriented area" of the City could not be made affirmatively.

The Planning Commission blatantly disregarded its duty as a deliberative body, and instead of analyzing and deliberating on the ability of the Commission to make certain required findings for approval, the Commission instead dismissed evidence of a project opponent which cast doubt on the Commission's ability to make the necessary findings. The Planning Commission also approved the project despite its violation of the California Environmental Quality Act ("CEQA"). Accordingly, we respectfully request the City Council grant the appeal and overturn the decision of the Planning Commission.

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I. THE PLANNING COMMISSION APPROVED A CONDITIONAL USE PERMIT FOR A REDUCTION OF THE PARKING REQUIREMENTS FOR THE PROPOSED USE DESPITE ITS INABILITY TO MAKE THE NECESSARY FINDINGS OF FACT.

Only with approval of a conditional use permit, pursuant to section 10-3-1618.B, wherein the Planning Commission makes certain findings of fact with evidence supporting those findings can an exercise club be approved with less than the required number of dedicated on-site parking spaces. The Proposed Project fails to satisfy these criteria.

Beverly Hills Municipal Code section 10-3-1618.B states that:

[T]he planning commission may issue a conditional use permit to allow up to fifty percent (50%) of the parking facilities of a use that is primarily daytime use to be used to satisfy the parking facilities required by this article for an exercise club or private training center considered to be primarily an early morning and/or nighttime use, provided the latter use has different peak hours of operation than the daytime use, and provided further that all of the following criteria are met... (emphasis added.)

Accordingly, there are a number of threshold inquiries which must be satisfied for the shared parking plan to meet code requirements. The Proposed Project could be approved for shared parking only if: (1) the use of a parking facility proposed as a shared parking facility is primarily a day use; (2) the proposed Exercise Club is primarily an early morning and/or nighttime use; **and** (3) the gym has different peak hours of operation than uses in the shared parking facility.

The Proposed Project intends to use the parking facility in the adjacent building at 265 Beverly Drive ("MGM Building"), which will be occupied by Metro Goldwyn Mayer (MGM). The building located at 9465 Wilshire Boulevard ("Bank of America Building") and the MGM Building share an underground parking lot, connected underground at the third subterranean garage level of the two buildings. The Bank of America Building currently contains 212 parking spaces. However, based on a long-term covenant between the two buildings, the Bank of America Building has control of an additional 262 parking spaces dedicated within in the MGM Building parking facility. Accordingly, the Bank of America Building controls 474 parking spaces and the MGM Building controls 485 parking spaces.

The first inquiry is whether the use of a parking facility proposed as a shared parking facility is primarily a day use. While the general office and bank uses in the Bank of America Building and the retail and MGM office uses in the MGM Building are primarily day uses, these uses do not maintain "normal working hours" typically associated with day uses. A survey conducted on January 11-12, 2011 of the office uses in the Bank of America Building indicates that most businesses at the Bank of America Building close their offices at 6 p.m. or later. (See

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Attachment 1, Survey of Businesses at 9465 Wilshire/MGM Operating Hours). In fact, the average closing time in the Bank of America Building is 6:52 p.m. MGM's offices, at their current location in Century City, close at 6 p.m, at the earliest. It is likely that MGM will keep similar hours of operation in the MGM Building once it has moved.

Accordingly, most of the current and future tenants at the two buildings do or will not leave their offices until at least 6 p.m., or, later. Because the Proposed Project maintains maximum parking demand between 5 p.m. and 7 p.m., severe parking shortages and, accordingly, congestion would result within the parking lot of the buildings during peak hours of operation of the exercise club. Parking will be difficult to find and cars entering and exiting the buildings during this time will back-up and block traffic on the street. Substantial evidence indicates that the parking facility proposed as a shared parking facility is not primarily a day use.

Second, and most importantly, the shared parking analysis fails on the second threshold inquiry. Parking data prepared by the Applicant clearly indicates the proposed Equinox Exercise Club is and will not be an early morning and/or nighttime use, as required by the Code. In its Supplemental Staff Report, dated January 13, 2011, City staff states that because "the parking demand studies demonstrate that the exercise club has peak parking demand between the hours of 6:00 PM and 7:00 PM", it is "considered a nighttime use because [peak parking demand] occurs later than normal business hours for general office uses." (p.8). However, the Hourly Parking Utilization Summaries provided by the applicant for the Equinox Westwood and Santa Monica locations clearly show that the Equinox is not an early morning and/or primarily a nighttime use.

When calculating the data presented by the Applicant in Attachment A of the Parking Study (Equinox Westwood Hourly Parking Utilization Summary) and that in Attachment B of the Parking Study (Equinox Santa Monica Hourly Parking Utilization Summary), it is clear that the exercise use proposed for the Bank of America Building is not primarily an early morning and/or primarily a nighttime use. "Primarily" is defined by Merriam-Webster's Dictionary as "for the most part." Synonyms of "primarily" include basically, chiefly, generally, largely, mainly, mostly, on the whole, overall, predominantly, and principally. Accordingly, it is safe to assume that primarily means at least half or than fifty percent (50%).

The Applicant's own data clearly shows that the Equinox locations in Westwood and Santa Monica have an early morning and nighttime utilization of no greater than thirty-five percent (35%) on any given day for its morning and nighttime usages. As indicated below on the attached chart, on no single day does early morning or nighttime use of the exercise club at Westwood exceed twenty-eight percent (28%). It is certain that the proposed Beverly Hills location will maintain similar operating utilization and accordingly will be neither primarily an early morning and/or nighttime use. For purposes of providing a conservative view on the figure below, hours before 8 a.m. were considered early morning and hours after 6 p.m were considered nighttime. In fact, when early morning and nighttime usage is combined, only on Tuesdays, at the Westwood location, does the early morning and nighttime usage of the exercise club

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the bank is still open. Based on the survey conducted, as discussed above, it is very likely that more than seventy-two percent (72%) of the parking facilities are utilized at 5 p.m. and more than fifty seven percent (57%) of the parking facilities are utilized at 6 p.m. Only at 7 p.m., when most of the offices in the Bank of America Building are closed will the parking utilization significantly decrease. A more realistic parking analysis, unlike that conducted in the Applicant's Parking Study, using data provided by the Applicant, would look more like that indicated below. In its Parking Study, staff indicates that the proposed uses at the Bank of America Building would require the following number of parking spaces.

EBH Project	36,663 nsf	5.16 spaces/1,000 nsf
Bank	5,651 nsf	2.40 spaces/1,000 nsf
Office	122,784 nsf	2.40 spaces/1,000 nsf

<u>Hour Beginning</u>	<u>Peak Parking Demand</u>	<u>Parking Supply</u>	<u>Parking Surplus</u>
5:00 PM	494 spaces	474 spaces	(20) spaces

By adjusting the actual office utilization to actual operating hours, subtracting out approximately 10% of the office uses which close prior to 5 p.m., while maintaining the decreased utilization of the bank uses at 5 p.m. (72%), approximately 494 parking spaces (219 + 10 + 265) would be required under a realistic analysis, resulting in a deficiency of 20 parking spaces. Even with generous assumptions that at the 5 p.m. hour the proposed Equinox use is utilizing only 83% of parking capacity (which is unlikely based on the data it presented), a total of 457 parking spaces at 5pm would be required, resulting in a deficiency of 10 parking spaces. Accordingly, under a realistic analysis, there is a deficiency of parking for the proposed use which will lead to congestion and traffic back-up on to the public streets.

When combined with the tight corners, awkward parking arrangements, and triple tandem parking in the Bank of America parking garage, there is very good chance that at its peak, the proposed project will cause severe parking issues in the Wilshire/Beverly area. The peak hours of the gym (which are not nighttime uses in this building based on the data presented by the Applicant) are the same as the hours when tenants of the Bank of America Building and the William Morris Building are still using the parking garage. Therefore, the Proposed Project would fail to meet the requirements set forth in Beverly Hills Municipal Code section 10-3-1618.B, and cannot be approved.

In sum, most of the building patrons would still be parked or in the process of leaving as the exercise club patrons would be entering the Building and looking for parking. Therefore, staff's statement that "the parking demand study demonstrates the peak hour demand for the entire building (5:00 pm – 6:00 pm) will yield a surplus of 65 parking spaces" is untrue and refuted by substantial evidence. Accordingly, since the proposed exercise club is not primarily an early morning and/or nighttime use as purported by City staff and because there is not enough

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available parking during peak gym hours, the Planning Commission, therefore, could not make affirmative findings of fact to approve a shared parking use and the project cannot be approved.

II. THE PLANNING COMMISSION APPROVED A CONDITIONAL USE PERMIT FOR THE PROPOSED EXERCISE CLUB USE DESPITE ITS INABILITY TO MAKE THE NECESSARY FINDINGS OF FACT.

Exercise facilities are not permitted on the ground floor of buildings in the Beverly Hills Business Triangle. (BHMC, §10-3-1617.) To approve a conditional use permit for the Proposed Project, the Planning Commission must conclude the Proposed Project satisfies certain findings of fact pursuant to Beverly Hills Municipal Code sections 10-3-3800 and 10-3-1655.B. Despite the revisions to the Staff Report for the Proposed Project and a supplemental Staff Report, no significant changes were made to the findings which would affect the ability of the Planning Commission to affirmatively make these findings. Staff provides no evidence to support the findings of fact required to approve the Equinox Exercise Club.

The Planning Commission must first have determined that “the proposed location of any such use will not be detrimental to adjacent property or to the public welfare.” (BHMC, § 10-3-3800.) This finding cannot be made. The Bank of America Building is located in the middle of the Beverly Hills Business Triangle at one of the busiest, most accident-prone intersections in the City. The ground floor of this building is intended by the Zoning Code and General Plan for less intense, pedestrian-friendly retail/service uses and restaurant uses. As evidenced by the parking study developed by the Applicant, Equinox clubs are highly dependent on auto users and generate automobile rather than pedestrian traffic. The Westside Equinox locations studied in the parking study indicate that most members live or work within walking distance of those facilities. However, there are very few residential properties in the vicinity of the project site. Consequently, the Proposed Project would be more auto dependent than those exercise clubs studied by the Applicant.

The large 37,000 square foot private exercise club in the Beverly Hills Business Triangle would occupy both corners of Wilshire Boulevard and Beverly Drive, would screen out pedestrian views from the street and would increase the daily trips and traffic in the area. Essentially, the ground floor would permanently look like a building that is undergoing renovation with blacked out windows. The placement of a nominal “café/retail store,” intended for use by private club members and not the general public, would not be sufficient to mitigate for the loss of the intended use of this property as an office/retail use. The Proposed Project would increase the number of daily vehicle trips in the area, further congesting Wilshire and Beverly Boulevard during peak traffic hours. Despite proposed review by the Architectural Commission, the façade would not be a “pedestrian-friendly design” when the underlying use is not pedestrian-friendly. This is axiomatic. Some improved landscaping doesn’t achieve the intended purpose of pedestrian friendly uses. The landlord can improve the landscaping without the Proposed Project. Any allegation that the exercise club would bring in more people to shop in the City or eat at the City’s restaurant is unsubstantiated and without foundation.

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Further, over thirty accidents per year occur at the intersection of Wilshire Boulevard and Beverly Drive. Adding an additional 1,130 daily trips to this congested and accident-prone intersection would further degrade the safety of the area and would result in significantly more accidents and injuries. Staff, in its proposed finding, does not acknowledge or address this important public safety issue. In fact, we provided a letter to Planning Staff indicating the high number of accidents that occurred over the past three years at that location. Staff ignored the letter and did not respond or try to indicate how public safety concerns would be alleviated.

Second, the Planning Commission must find that the “proposed restricted use is compatible with and will not result in any substantial adverse impacts to surrounding uses.” (BHMC, § 10-3-1655.B.1.) As indicated above, an exercise club use is not intended to be located at the proposed site. Accordingly, the Proposed Project would result in a number of adverse environmental impacts as well as negatively impact the pedestrian-oriented nature of the Business Triangle.

The placement of a private exercise facility in the heart of the Business Triangle at one of the busiest most accident-prone intersections in the City would be incompatible with the pedestrian oriented uses in the surrounding area. The Business Triangle is recognized internationally for its collection of fine retail stores and superior restaurants. Major department stores as well as the historic Beverly Wilshire Hotel are located along the western portion of Wilshire Boulevard, footsteps from the Proposed Project site. The core of Beverly Hills’ retail identity and activity is the Business Triangle. The lack of conformity of the Proposed Project with the Zoning Code and General Plan would adversely affect surrounding uses and the neighborhood by decreasing pedestrian use of the area, creating a gap of pedestrian-friendly businesses along Wilshire Boulevard between world famous Rodeo Drive and Beverly Drive.

Third, the Planning Commission must determine the proposed use “will not result in an overconcentration of non-pedestrian oriented uses in the block in which the proposed restricted use will be located.” (BHMC, § 10-3-1655.B.2.) With approval of the Proposed Project the entire block along Wilshire Boulevard would contain non-pedestrian oriented uses and much of the window space will be opaque. Most of Beverly Drive, but for the small café, also would be non-pedestrian-oriented. A small café/retail shop proposed by the Applicant would not overcome the significant loss of pedestrian-oriented uses. The leasing of the new building under construction to the north has not been completed, and, accordingly, the conclusion that retail/pedestrian-oriented uses would exist cannot be made. The argument that the Proposed Project increases pedestrian-oriented uses is inappropriate and misleading. The current ground floor vacancies and building layout provide the first opportunity in many years for 150 feet of pedestrian-oriented frontage along Wilshire Boulevard and Beverly Drive. The Proposed Project would not provide the City the benefits of a pedestrian-oriented use. Instead, Staff is content to prevent pedestrian-oriented uses in this location for the next 15 years.

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Fourth, the Planning Commission must determine “granting the request for a conditional use permit will not adversely impact the public health, safety or general welfare and will leave ample space available for future retail growth in designated pedestrian oriented areas.” (BHMC, § 10-3-1655.B.3.) As indicated, the Proposed Project would result in numerous environmental impacts and would cut-off key pedestrian thoroughfares from their intended use.

Adding an additional 1,130 daily trips to this congested and accident-prone intersection would further degrade the safety of the area and would result in significantly more accidents and injuries. Staff, in its proposed finding, does not acknowledge or address this important public safety issue. In fact, we provided a letter to Planning Staff indicating the high number of accidents that occurred over the past three years at that location. Staff ignored the letter and did not respond or try to indicate how public safety concerns would be alleviated.

As a result of the proposed project, there will be no “future retail growth” in the pedestrian oriented area here as Staff has allowed for a 15 years term on the conditional use permit. This violates the requirements of the findings and negates the ability of the Planning Commission to have affirmatively made this finding.

Finally, the Planning Commission must conclude “the configuration of building in which the proposed space is located is not suited to pedestrian-oriented retail uses and does not contribute to the pedestrian experience.” (BHMC, § 10-3-1655.B.4.) Staff creates a post-hoc rationalization why the Bank of America Building is not suited for pedestrian oriented uses. To the contrary, the Bank of America building is located on one of the busiest corners in the City. Located half a block from the historic Beverly Wilshire Hotel and steps from Rodeo Drive and pedestrian-oriented uses up and down Beverly Drive, the property could serve as a pedestrian-friendly linkage between Rodeo and Beverly Drive. The loss of ground floor frontage to pedestrian-oriented uses would be a permanent loss to the City. The term of the proposed conditional use permit is 15 years.

Further, the building’s architecture, with its curved façade, actually calls to the pedestrian, creating a courtyard along Wilshire Boulevard and a patio-like space at the corner of Wilshire Boulevard and Beverly Drive. The ground floor space is actually very inviting to the pedestrian. After many years as a bank, it would be devastating to not seize the opportunity to create pedestrian oriented uses here as guided by the General Plan.

III. THE PROPOSED PROJECT IS INCONSISTENT WITH THE CITY’S GENERAL PLAN.

In its Staff Report, staff lists three General Plan policies all of which relate to pedestrian oriented uses. Upon examination, the Proposed Project does not stand up to any of these policies.

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First, staff cites Land Use Policy 2.8:

LU 2.8 Pedestrian-Active Streets. Require that buildings in business districts be oriented to, and actively engage the street through design features such as build-to lines, articulated and modulated façades, ground floor transparency such as large windows, and the limitation of parking entries directly on the street. Parking ingress and egress should be accessed from alleys where feasible. (Imp. 2.1)

However, the Proposed Project clearly violates this mandate as it will have minimal change to the façade except for a fin wall with advertising and additional landscaping. The windows will not be transparent. Improved landscaping does little to improve the pedestrian oriented nature of this property and the Proposed Project is not required to improve the landscaping. The landlord can improve the landscaping without the Proposed Project.

Second, staff cites land Use Policy 11.1:

LU 11.1 Preservation of Pedestrian-Oriented Retail Shopping Areas. Preserve, protect and enhance the character of the pedestrian-oriented retail shopping areas, which are typified by a variety of retail shops with displays to attract and hold the interest of pedestrian shoppers, to ensure the continuity of the pedestrian experience. (Amended by Resolution No. 80-R-6218, 8-19-80.) (LU 2.2.3, pg LU-6)

The Proposed Project does not “preserve, protect or enhance” the character of the pedestrian oriented retail shopping area. There is very little in the design of the proposed project to attract and hold the interest of pedestrian shoppers.

In sum, the vehicle-oriented, non-retail/service aspect of the Proposed Project is inconsistent with the General Plan. One of the critical 2010 amendments to the General Plan, which was intended to address the community’s desires, stated:

[That the] Location and design of buildings and their relationship to public sidewalks are intended to energize and enliven pedestrian activity throughout the city, but especially in the business triangle and the commercial corridors.

The placement of an exercise facility, in which over 120 feet of frontage along Wilshire and Beverly Drive would be closed to the public with opaque walls, expressly violates the General Plan goals.

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It is wrong to conclude the small café and better landscaping would actually improve the pedestrian-oriented quality of the block because the subject site currently does not have retail/pedestrian-oriented uses. With the ground-floor vacancies in the building, the opportunity exists to locate retail/pedestrian-oriented uses and improve the quality of the area. Accordingly, the Proposed Project fails to meet the approve General Plan mandates.

IV. THE PROPOSED PROJECT VIOLATES CEQA.

The California Environmental Quality Act, Public Resources Code section 21000, *et seq.* (“CEQA”), requires a lead agency to analyze the potential adverse environmental impacts that may be caused by a proposed project. The City staff determined the Proposed Project is exempt from CEQA as “an existing facility” under a Class 1 Categorical Exemption, as well exempt under a Class 2 and Class 32 Categorical Exemption.

Moreover, the City cannot use a categorical exemption where “there is any reasonable possibility that a project or activity may have a significant effect on the environment.” (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1191.) Further, a categorical exemption may not be used where “there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” (*Azusa Land Reclamation Co., supra*, 52 Cal.App.4th 1165; CEQA Guidelines, § 15300.2.)

CEQA Guidelines section 15064(f)(1) provides:

If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.

As discussed below, substantial evidence supports a fair argument that there may be a number of potentially significant adverse effects caused by the Proposed Project, including impacts on traffic and circulation, noise, and historic resources. Therefore, a categorical exemption may not be used in this instance and an EIR must be prepared for the Proposed Project.

Staff provided a 100-page “Categorical Exemption Report” to promote its position. The use of a categorical exemption for the Proposed Project is improper and, unusual circumstances surrounding the Proposed Project preclude the use of a categorical exemption for the Proposed Project.

A. Categorical Exemptions may not be used for the Proposed Project.

1. Class 32 Categorical Exemption, CEQA Guidelines section 15332

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CEQA allows a categorical exemption for urban infill projects in limited circumstances. This exemption may not be used, however, when unusual circumstances exist as they do at this particular site. (CEQA Guidelines §15300.2(c).) The Bank of America Building is located in the middle of the Business District at one of the busiest and most accident-prone intersections in the County. We provided this information to City Staff in a letter dated December 20, 2010, indicating a traffic accident occurs at the intersection of Beverly Drive and Wilshire Boulevard at least every 60 days, which is five times the rate of some of the worst intersections in Los Angeles. The Categorical Exemption Report fails to even mention this unusual circumstance or the impact an additional 1,130 trips would have on public safety at this intersection.

A Class 32 categorical exemption may not be used when there is the potential for adverse change to a historic resource. The Bank of America Building was identified as an historic resource because it appeared on a survey conducted by the City of Beverly Hills in 2006 and was identified on a DPR 523 Form (See Attachment 2, State of California Primary Record Form DPR 523A) as a contributor to a potential California Register district (Criterion 3) of Post World War II modern office buildings. CEQA section 15064.5(a)(2) defines as significant any resource included in a local register of historical resources, as defined in section 5020.1(k) of the Public Resources Code or identified as significant in an historic resource survey meeting the requirements section of 5024.1(g) of the Public Resources Code shall be presumed to be historically or culturally significant. Here, the form identifies the building built in 1960 as "Historic".

2. Class 1 Categorical Exemption, CEQA Guidelines Section 15301

Staff in its supplemental report to the Commission dated January 13, 2011 asserts a Class 1 categorical exemption should apply because, even though the Proposed Project would involve construction to the first three floors of the building, it would not result in total reconstruction of the floors and predominately would consist of new partitions/non structural walls, finishes, millwork, electrical and plumbing. However, the CEQA Guidelines specify a key consideration in determining whether this exemption applies is whether the project involves "negligible" or no expansion of an existing use. Here, the use changes from a bank to a health club and from a use allowed by right to a use that requires a conditional use permit. The significant expansion in use is not the type envisioned by the CEQA Guidelines as one eligible for a categorical exemption. Accordingly, a Class 1 categorical exemption is not a proper exemption for the Proposed Project.

3. Class 2 Categorical Exemption, CEQA Guidelines Section 15302

Staff asserts a Class 2 categorical exemption for reconstruction of an existing building applies. This exemption covers reconstruction when a new structure is located on the same site and will have substantially the same purposes and capacity as the replaced structure. Here, an exercise club would replace offices and a bank. An exercise club would generate more people, more traffic and increase the use of the building. Further, the increased demand for parking for

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the Proposed Project indicates greater capacity is necessary for the Proposed Project, making this exemption unusable. Thus, this exemption is inapplicable.

B. Deficiencies in the Categorical Exemption Report.

1. Traffic

Upon initial review of the project, when staff assumed that there would be a loss of daily vehicle trips as a result of the Proposed Project, we commented that staff's analysis was incorrect and made improper assumptions. Staff, without acknowledging our comments, then completely changed its analysis and later concluded that the Proposed Project would actually result in a gain of 1,130 additional daily vehicle trips – a number very similar to the number we proposed would result from the Proposed Project. Now, staff has prepared a traffic report, as part of a Categorical Exemption Report, which like the initial attempt has serious flaws. The Report's conclusions, like that of initial report, grossly underestimate the potential adverse impact of the Proposed Project on traffic and circulation.

While Staff developed a traffic report for the Proposed Project, Staff studied only a limited number of intersections and overlooked at least two key intersections. The stop-controlled intersection located at Rexford Drive and Dayton Way must be studied to determine if vehicles approaching from the east would impact this intersection. Additionally, one or both of the stop-controlled intersections at either Roxbury/Charleville or Bedford/Charleville must be studied as vehicles traveling from the south needing to access Wilshire Boulevard east of Linden Drive will use these stop-controlled intersections. Without further study of these intersections, the traffic report is deficient.

2. Noise

The Categorical Exemption Report appears not to have studied the potentially significant effects on ambient noise from operation of the Proposed Project.

3. Cultural/Historic Resource

The Bank of America Building was constructed in 1960 and designed by Victor Gruen Architects. Located on an iconic corner in the Beverly Hills Business Triangle, this late mid-century building was designed by the inventor of the "regional shopping centre". Malcolm Gladwell, writing in *The New Yorker*, suggested that "Victor Gruen may well have been the most influential architect of the twentieth century." However, Gruen also came to recognize the self-sustaining city by constructing large buildings to serve the business and commercial needs in key nodes of the City. The Bank of America Building represents this model by maintaining office uses on the upper floors with an intended use of retail and pedestrian-focused uses on the ground floor. The exterior design of the structure also represents the post-war era with its curved façade

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shaped inward away from the public as if inviting the public, while simultaneously displaying the awe of the structure with large ground floor windows and stone columns.

In addition, The Bank of America Building was identified as an historic resource as it appeared on a survey conducted by the City of Beverly Hills in 2006 and was identified on a DPR 523 Form (See Attachment 3, State of California Primary Record Form DPR 523A) as a contributor to a potential California Register district (Criterion 3) of Post World War II modern office buildings.

The effect of the Proposed Project on the landmark Bank of America Building has not been properly analyzed and any exterior modifications to this building should be prevented until the designation process of the building as a state and federal historic resource is complete.

V. CONCLUSION.

The City cannot make the required findings for the conditional use permit and cannot use a categorical exemption for the Proposed Project. The Planning Commission simply could not have made the necessary findings to show that the Proposed Project is an early morning and/or nighttime use. The proposed use would violate the provisions of Municipal Code section 10-3-1618.B because based upon substantial evidence it does not meet the requirements for a shared parking use. Additionally, because categorical exemptions do not apply to the Proposed Project, the City Council must grant the appeal and deny the proposed project. We respectfully request the City Council deny the Proposed Project.

Respectfully submitted,



Todd Elliott
of TRUMAN & ELLIOTT LLP

Attachments (2): Survey of BOA/MGM Office Users Operating Times
Jones & Stokes 2006 Survey (DPR 523) Form

MEMORANDUM

To: Todd Elliott, Esq.
From: Ema Haro, Office Manager
Date: January 11, 2011
Re: 9465 Wilshire Boulevard, Beverly Hills, CA Hours of Operation and
MGM Hours of Operation

Per your request, I called and researched online hours of operations for tenants at 9465 Wilshire Boulevard, Beverly Hills, California; I also telephoned MGM located at 10250 Constellation Boulevard in Century City, California. Here are the 9465 Wilshire Boulevard results of my inquiries:

	<u>Tenant:</u>	<u>Days:</u>	<u>Hours:</u>
1.	Bank of America	Mon – Fri:	9:00 a.m. – 6:00 p.m.
2.	Jean-Jacques Elbaz	Mon – Fri:	8:00 a.m. – 5:00 p.m.
3.	Original Artists	Mon – Fri:	9:00 a.m. – 7:00 p.m.
4.	Stuart Ketchum	Mon – Fri:	9:30 a.m. – 5:30 p.m.
5.	Family Office		Did not want to give Information
6.	Rich Not Gaudy/ The Pitt Group	Mon – Fri:	9:00 a.m. – 7:00 p.m.
7.	Donners' Company	Mon – Fri:	9:00 a.m. – 5:00 p.m.
8.	Baron & Budd, P.C (Sub-tenant Gerald V. Kassabian)	Mon – Fri:	8:00 a.m. – 5:30 p.m.
9.	Entertainment One	Mon – Fri:	8:30 a.m. – 7:00 p.m.
10.	The Gersh Agency	Mon – Fri:	8:30 a.m. – 7:00 p.m.
11.	Imagine Entertainment	Mon – Fri:	8:30 a.m. – 7:00 p.m.
12.	First International Diamond	Mon – Fri:	10:00 a.m. – 4:00 p.m.
13.	Special Artist Agency	Mon – Fri:	9:00 a.m. – 7:00 p.m.
14.	Phoenix Books	Mon – Fri:	8:30 a.m. – 5:30 p.m.
15.	DHX Media, Ltd.	Mon – Fri:	9:00 a.m. – 6:00 p.m.
16.	Archer Capital Management	Mon – Fri:	5:30 a.m. – 7:00 p.m.

TRUMAN & ELLIOTT LLP
MEMORANDUM

- | | | | |
|-----|---|------------|-----------------------|
| 17. | Principato-Young Management | Mon – Fri: | 8:00 a.m. – 7:30 p.m. |
| 18. | Kahn Asset Management
Abrams Factor Partners | Mon – Fri: | 9:00 a.m. – 4:00 p.m. |
| 19. | Montecito Picture Company | Mon – Fri: | No Specific Hours |
| 20. | Arroe Capital Management | Mon – Fri: | 9:00 a.m. – 6:00 p.m. |

Totals: 20 (2 did not give information)
Mean Closing Time: 6:52 p.m.

Building:

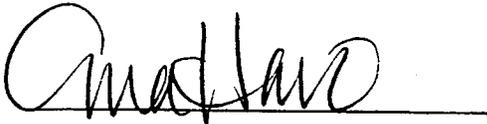
10250 Constellation Boulevard
Century City

Days:

Hours:

Mon – Fri: 9:00 a.m. – 6:00 p.m.

I, Ema Haro, a California Notary Public declare under penalty of perjury under the laws of the State of California that the above is true and correct.



A handwritten signature in black ink, appearing to read "Ema Haro", is written over a horizontal line.

Primary # _____

HR # _____

Trinomial _____

NRHP Status Code 3CD

PRIMARY RECORD

Other Listings _____
Review Code _____ Reviewer _____ Date _____

Page 1 of 1

* Resource Name or #: 9461-9465 Wilshire Blvd.

P1. Other Identifier: Wilshire Beverly Center

* P2. Location: Not for Publication Unrestricted a. County Los Angeles

b. USGS 7.5' Quad _____ Date _____ T _____; R _____; _____ 1/4 of _____ 1/4 of Sec _____; _____ B.M.

c. Address 9461-9465 Wilshire Blvd. City Beverly Hills Zip _____

d. UTM: (Give more than one for large and/or linear feature) Zone _____, _____ mE/ _____ mN

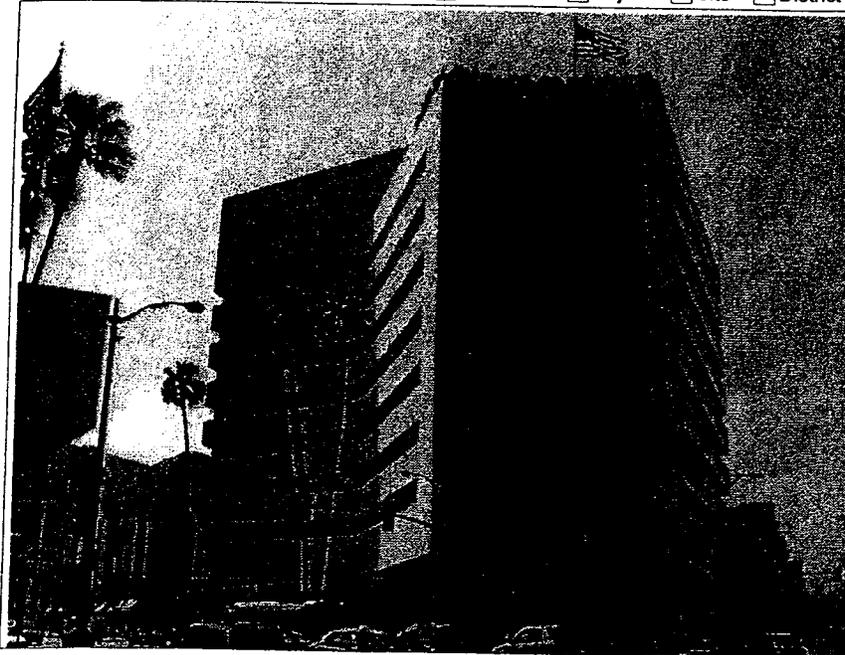
e. Other Locational Data: (e.g. parcel #, legal description, directions to resource, elevation, additional UTM's, etc. as appro

* P3a. Description: (Describe resource and its major elements. Include design, materials, condition, alterations, size, setting, and boundaries.) Contributor to a potential California Register district of (Criterion 3) Post World War II modern office buildings. Architect: Victor Gruen Associates.

Architect: Victor Gruen Assoc.

* P3b. Resource Attributes: (List attributes and codes) _____

* P4. Resources Present: Building Structure Object Site District Element of District Other (Isolates, etc.)



P5b. Description of Photo: (View, date, etc.)
May 2006

* P6. Date Constructed/Age and Sources:
 Prehistoric Historic Both
1960 (Estimated)

* P7. Owner and Address:

* P8. Recorded by: (Name, affiliation, address)
John English & Portia Lee
Jones & Stokes
811 W 7th ST, Suite 800
Los Angeles, CA 90017

* P9. Date Recorded: 6/9/2006

* P10. Survey Type: (Describe)

* P11. Report Citation: (Cite survey report/other sources or "none")

* Attachments: NONE Location Map Sketch Map Continuation Sheet Building, Structure, and Object Record
 Archaeological Record District Record Linear Feature Record Milling Station Record Rock Art Record Artifact Record
 Photograph Record Other: (List) _____