CITY OF SALINAS
COUNCIL STAFF REPORT

DATE: **MAY 1, 2018**

DEPARTMENT: **COMMUNITY DEVELOPMENT**

FROM: **MEGAN HUNTER, COMMUNITY DEVELOPMENT DIRECTOR**
JOSEPH DESANTE, BUILDING OFFICIAL
LORENZO SANCHEZ, SR. CODE ENFORCEMENT OFFICER
JOHN FALKENBERG, SR. BUILDING INSPECTOR

TITLE: **AN APPEAL OF A NOTICE AND ORDER TO REPAIR OR ABATE DATED APRIL 12, 2018 RELATED TO 241 MAIN STREET, SALINAS, CALIFORNIA 93901 (APN 002-234-031-000).**

RECOMMENDED MOTION:

Council should deny the appeal of the April 12, 2018 Order to Repair or Abate real property commonly known as 241 Main Street in the City of Salinas (the "Property").

RECOMMENDATION:

Staff recommends denial of the appeal. The April 12, 2018 Order is a compliance order. A compliance order is a means used by the City to enforce compliance deadlines of previously identified and noticed defects, including the life safety defects that render the Property presently unsafe for occupancy. The property was not designated a URM structure in the April 12, 2018 Order, but rather was designated a URM structure in the May 1, 2013 Certificate of URM status recorded in the Property's line of title. Appeal of the URM designation has long since expired.

Granting Anthony Lane's ("Appellant") appeal is tantamount to instructing the Building Official and Sr. Code Enforcement Officer that the deadline for retrofit or demolition of the Property should return to the February 6, 2018 compliance date, thereby instructing those officials to immediately begin the process of abatement. Denial of Appellant's appeal is the only means the Council has of preserving the June 11, 2018 compliance date and avoiding the immediate initiation of the abatement process.

EXECUTIVE SUMMARY:

Appellant seeks appeal of paragraphs 5 and 6 of a Notice and Order to Repair or Abate the Property served and posted on April 12, 2018 (the "Order"). Appellant fails to realize that removal of the seismic retrofit issues from the April 12, 2018 Order will render the already expired deadline set forth in the April 30, 2013 Compliance Order presently effective. The April 30, 2013 Compliance Order set a deadline, in accordance with the applicable section of the City Code, of February 6, 2018 for the property to either be seismically retrofit or demolished. This deadline has already passed, and proceedings for abatement should have been instituted by the City.

In an attempt to avoid demolition, the Building Official and Sr. Code Enforcement Officer issued the April 12, 2018 Order to extend the already expired deadline to retrofit or demolish the building. These officials are attempting to give Appellant more time to undertake the necessary seismic retrofit to ensure that the building is safe for patrons, residents, and adjacent property owners. Absent this extra time, the Property faces imminent abetment at significant cost to the City. Granting Appellant's appeal would indicate that these officials overstepped their authority in extending the retrofit deadline.

The designation of the Property as an unreinforced masonry structure occurred no later than May 1, 2013 and therefore cannot be appealed to this Council. The only issue before the Council is whether the Building Official and Sr. Code Enforcement Officer exceeded the scope of their authority in extending the otherwise expired compliance deadline.

It is recommended that the Council find that the Building Official and Sr. Code Enforcement Officer were acting within the powers of their discretion in extending the compliance deadline to June 11, 2018.

BACKGROUND:

The Council is sitting as the Appeals Board pursuant to Building code section 1.8.8.1 and Health and Safety Code section 17920.5. Identical Rules of Order and Open Meeting Laws apply to the Appeals Board as apply to a regular meeting of the Council. The Board's consideration is limited to those matters that have been noticed in the meeting agenda. This is an especially important consideration with regard to the present matter before the Council. The only issue agendized and over which the Council can assert jurisdiction is the inclusion of the non-compliance for seismic retrofit in the April 12, 2018 Order. If the Council finds that the officers who issued that order acted within their discretionary power, then they successfully extended the compliance deadline to June 11, 2018. If the Council finds that the officers acted outside of their discretionary power, then the compliance date reverts to February 6, 2018, and the officials must immediately initiate the procedure for abatement. No order the Council is empowered to make during the present hearing can change the 2103 Unreinforced Masonry ("URM") Construction designation of the Property, as the time to appeal that order has long since expired. Appellant cannot revive a long-expired appeal on the unrelated 2013 URM Construction designation. This Council, sitting as the Appeals Board, does not have the jurisdiction to grant relief sought.

APPEAL OF THE URM DESIGNATION IS UNTIMELY AND OUTSIDE OF THE JURISDICTION OF THE COUNCIL

Under the California Building Code ("CBC"), an affected person or entity has 10 days from the service of an order to appeal. (CBC § 15.02.060.) Under the International Property Maintenance Code ("IPMC"), an affected person or entity has 20 days from the service of an order to appeal. (IPMC § 111.1.) The City served Appellant with a compliance order including a determination that the Property is a URM structure on April 30, 2013. That order, requires that the Property receive retrofit or be demolished by February 6, 2018. The following day, on May 1, 2013, the City caused to be recorded by the County Recorder a Certificate of Unreinforced Masonry Construction Status in the line of title for the Property. The recording of the Certificate of Unreinforced Masonry Construction Status is the means the City uses to publically identify for all

purposes that a building is subject to the applicable State and Local URM laws. A true and correct copy of the April 30, 2013 Compliance Order is attached as Exhibit 1. A true and correct copy of the Certificate of Unreinforced Masonry Construction Status is attached as Exhibit 2. Assuming, *arguendo*, the URM designation occurred upon recordation of the URM certificate on May 1, 2013, Appellant's written appeal under the CBC would have had to have been received by the Building Official by May 11, 2013. Appellant's written appeal under the IPMC would have had to have been received by the Sr, Code Enforcement Officer by May 21, 2013. Appellant's appeal, given the interpretation most charitable to him, is 4 years, 11 months, and 4 days too late to challenge the URM designation. It the absence of a timely appeal, the Council does lacks jurisdiction to rule regarding the Property's URM designation. To the extent that Appellant's appeal is an untimely collateral attack on rights he let expire, the Council is not empowered to act on it.

Appellant argues that the council should consider his untimely appeal of the URM designation because the City did not give him a report conducted by the redevelopment agency in the 1970s. Assuming, *arguendo*, that the report says what Appellant contends it says, which, as discussed below, it does not, Appellant's appeal is still untimely. Appellant acknowledges that he received a copy of the report on or about April 6, 2015 in response to a Public Records Act Request. Moreover, Appellant could have made a Public Records Act Request at any time prior to 2015. Appellant does not explain why he sat on his rights between April 6, 2015 and April 24, 2018. A person cannot claim equitable tolling of an appeal a when that person was in possession of all evidence necessary to bring the appeal by 2015 but failed to bring take action the for the next three years. Even if Appellant's interpretation of the rules regarding timely appeals were true, Appellant is not entitled to a hearing on an appeal that should have been filed 3 years prior.

The only timely appeal made by Appellant is whether the officials acted within their discretion in extending the seismic retrofit compliance deadline to June 11, 2018.

IT IS APPROPRIATE TO DESIGNATE THE PROPERTY AS URM

While the issue of the URM designation is not an issue before the Council, it is still appropriate that the Council be made aware of the circumstances that support the validity of the designation. The Building Official designated the Property a URM structure pursuant to authority granted by Ordinance Number 2106 N.C.S. (the "URM Ordinance"), a true and correct copy of which is attached as Exhibit 3. According to that ordinance a building is appropriately designated a URM structure if an unreinforced masonry wall provides vertical support for a floor or roof. Once the owner receives notice of the designation, the owner of that building is obligated to cause a licensed engineer or architect to undertake a structural analysis of the building to determine what, if any, seismic retrofit is necessary to conform to the applicable standards, after which, the building shall either be structurally retrofitted or demolished.

It is uncontested that the property contains roof trusses that are seated within an unreinforced masonry wall (the "URM Trusses"). True and correct copies of pictures of the URM Trusses are attached as Exhibit 4. Upon seeing the URM Trusses, which are hidden from plain view in a crawl space, the City determined that the Property is subject to the URM Ordinance. The Building URM determination is neither arbitrary nor capricious because it is supported by the fact that these

trusses are seated within an unreinforced masonry wall. Additionally, the URM determination, in and of itself, does not give rise to the need to undertake a seismic retrofit of the Property. The designation merely triggers the need for a seismic analysis, to determine whether retrofit is necessary. The immediate need for a retrofit depends on the findings set forth in the structural analysis. Appellant never provided a stamped, signed analysis, but provided stamped, wet signed, plans for retrofit.

Appellant will argue that mortared trusses bear on an interior wood wall, rather than the exterior URM wall, such that no retrofit is necessary. The trouble with Appellant's contention is that no licensed architect or engineer has done a structural analysis to show that (1) the mortared trusses actually bear on the interior wood wall, or (2) that the interior wood wall complies with the applicable earthquake standards such that it will can support the lateral loading of the trusses when the mortar wall fails in a seismic event. Appellant's engineer will say things like, "It is obvious that the building was constructed with the intention of the wood wall bearing the trusses," and "I constructed timber bridges in the manner that this wall was constructed when I was in the army core of engineers, and those bridges were strong enough to carry tanks." But, Appellant's engineer will not stamp and wet sign a structural analysis backing up these claims. It is informative that Appellant's engineer will make claims about the seismic soundness of the Property, but will not put his license on the line in support of those claims.

Appellant's engineer was asked at his deposition whether he had ever undertaken a structural analysis of the Property as it stands today. The engineer admitted, under penalty of perjury, that he had not undertaken a structural analysis of the property or done the calculations necessary to establish seismic stability. Until such time as Appellant submits a structural analysis as is required by the URM Ordinance, his claims related to seismic stability are, much like his roof trusses, unsupported and liable to fail.

In an effort to assist Appellant, the City offered him $10,000 in nearly no interest loans to pay for a structural analysis of the property. True and correct copies of the loan documents are attached as Exhibit 5. In the application form, Appellant acknowledges that the "funds will be used for the structural analize[sic] and structural plans required by the building department to fix a newly determined URM wall." In the loan document, Appellant explicitly acknowledges the existence of the URM bearing wall.

It is telling that instead of a structural analysis to the City, Appellant submitted plans for an earthquake retrofit. The fact that Appellant's engineer created, stamped, and wet signed plans for a retrofit, though not a structural analysis, provides substantial evidence that the engineer believes seismic retrofit is necessary. The City reviewed and approved Appellant's plans, though to date, Appellant has failed to pull the permit for the retrofit. A true and correct copy of Plaintiff's accepted retrofit plans are available for review as Exhibit 6.

The City has offered, on various occasions, to review any stamped, wet signed, structural analysis undertaken by a licensed architect or engineer, even in case that structural analysis indicates that no retrofit is necessary. To date, Appellant has not provided an analysis in support of his otherwise unsupported contention of seismic safety.

Appellant also argues against the URM designation based on a 1976 report issued on the letterhead of an architect, engineering and planning firm known as Ruth, Goings, and Curtis, Inc. The report is not signed, stamped, or attributed to a licensed architect or engineer. The report is not a City document, but rather a document that was created for the sole benefit of the Redevelopment Agency prior to its dissolution in 2011. Even if the report were probative, which it is not, it would not bind the City or the Building Official, or satisfy the requirement for structural analysis set forth in the URM Ordinance.

The Ruth, Goings, and Curtis, Inc. report indicates, on the first page, that "It should be noted that this is a preliminary investigation and that additional detailed investigations would be required to positively establish the status of the elements." Moreover, the report pre-dates the URM Ordinance, under which the citations was issued, by 14 years. The report is based on minimum requirements as set forth in the 1973 Uniform Building Code, not the updated requirements adopted by the URM Ordinance in 1990. There is no question that the 1976 Ruth, Goings, and Curtis, Inc. report is not probative as to whether the Property satisfies the requirements of the 1990 URM Ordinance, as no evaluation could be undertaken based on standards that would not exist for another 14 years. The report is not material to the URM designation of the Property 37 years after it was created by an unknown author using antiquated minimum standards. The discretion to designate a property subject to the URM Ordinance lies entirely with the Building Official, not some unknown, likely unpaid, intern who worked for an architect or engineer 37 years in the past. A true and correct copy of the report, for what it is worth, is attached as Exhibit 7.

CENTRAL BUILDING RETROFIT

Appellant contends that the retrofit to the building that shares the adjoining masonry wall offers some proof that he does not need to retrofit the Property. In 1999, 247 Main was retrofitted with minute frames designed to bear the load of the upper floors and roof in case of a seismic event as required by the URM Ordinance. That 247 Main's retrofit is not designed to support the Theater Property's roof merely means that 247 Main is seismically safe while the Theater Property was not made safe by that retrofit. The owner of 247 Main is not responsible for ensuring the seismic stability of Appellant's property. The City is not responsible for the seismic stability of Appellant's property. Only Appellant is responsible for the upkeep on his property, including any necessary structural analysis and seismic retrofit. True and correct copies of the 247 Main retrofit plans are attached as Exhibit 8.

GIFT OF PUBLIC FUNDS FOR PRIVATE BENEFIT

Article XVI of the California Constitution expressly prohibits the gift of public funds for private benefit. But, that is precisely what Appellant is requesting of this Council. The URM Ordinance explicitly requires the owner of a URM structure to cause a licensed architect or engineer to undertake a structural analysis of the property. In light of this explicit requirement, the use of public funds to undertake the structural analysis, as Appellant requests, would be a gift of public funds for private benefit in violation of the California Constitution.

Despite the fact that paying for a structural analysis of the Property would be a gift of public funds for private benefit, the City already attempted to assist Appellant in paying for a structural analysis.

The City offered Appellant $10,000 in no interest loans that Appellant agreed to use to undertake a structural analysis. Appellant received $10,000, but he did not use it for a structural analysis that supports his otherwise entirely unsupported claims regarding the URM designation. It is, however, notable that Appellant is the only one of the microloan recipients who has not made a single payment on his loan. All of the other downtown businesses who participated in the program have paid off some or all of the money borrowed.

CEQA CONSIDERATION:

Not a Project. The City of Salinas has determined that the proposed action is not a project as defined by the California Environmental Quality Act (CEQA) (CEQA Guidelines Section 15378). In addition, CEQA Guidelines Section 15061 includes the general rule that CEQA applies only to activities which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA. Because the proposed action and this matter have no potential to cause any effect on the environment, or because it falls within a category of activities excluded as projects pursuant to CEQA Guidelines section 15378, this matter is not a project. Because the matter does not cause a direct or foreseeable indirect physical change on or in the environment, this matter is not a project. Any subsequent discretionary projects resulting from this action will be assessed for CEQA applicability.

STRATEGIC PLAN INITIATIVE:

This item does not specifically relate to one of the Council's Strategic Plan or Goal. The Council is hearing this appeal pursuant to its obligations under CBC section 1.8.8.1 and Health & Saf. Code section 17920.5.

FISCAL AND SUSTAINABILITY IMPACT:

Granting the appeal will result in the immediate need to abate and demolish the Property. The City will bear significant costs related to this abatement, but will be able to assess those costs to the property in the future. Denying the appeal will postpone and hopefully eliminate the need for the City to bear the costs of abatement.

ATTACHMENTS:

Exhibits as stated.
Deposition of Anthony Lane, Volumes 1 and 2
Deposition of Michael Martin
Deposition of William Jespersen
The March 24, 2015 Public Records Act Request, Response, and Reciept