

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 ANDREW W. SCHWARTZ, State Bar #87699
MARTIN L. GREENMAN, State Bar #189904
3 Deputy City Attorneys
City Hall, Room 234
4 1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-5408
5 Telephone: (415) 554-4620
Facsimile: (415) 554-4757
6 E-Mail: andrew.schwartz@sfgov.org

7 Attorneys for Respondents and Defendants
City and County of San Francisco and
8 Ken Harrington

9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO

12 MYERS NATOMA VENTURE, LLC and
13 MYERS DEVELOPMENT COMPANY,

14 Petitioners/Plaintiffs,

15 vs.

16 CITY AND COUNTY OF SAN
FRANCISCO; THE DEPARTMENT OF
17 BUILDING INSPECTION of the CITY
AND COUNTY OF SAN FRANCISCO;
18 KENNETH J. HARRINGTON; and
DOES 1 through 100,

19 Respondents/Defendants.
20

Case No. 504-378

**DECLARATION OF DBI DIRECTOR
FRANK Y. CHIU IN SUPPORT OF
SPECIAL MOTION TO STRIKE**

Hearing Date: October 26, 2004
Hearing Judge: Hon. Ronald Quidachay
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: July 22, 2004
Trial Date: None

21 I, Frank Y. Chiu, declare:

22 1. I am the Director of the Department of Building Inspection for the City and County of
23 San Francisco ("DBI"). I have held this position for 9 1/2 years. I am the chief of DBI, a
24 Department overseen by a citizen commission, the San Francisco Building Inspection
25 Commission ("BIC"). As Director of DBI, I am responsible for enforcing the California
26 Building Code and San Francisco Building Code (collectively, the "Building Code"). The
27 central function of the Building Code is stated in Section 102 – to insure that buildings are
28 structurally safe. I have sole authority to suspend building permits to protect public safety under

1 Sections 102, 104.2.8, 104.2.8.3, and 106.4.5 of the Building Code. If called as a witness, I
2 could and would testify competently and truthfully to the following. I have personal knowledge
3 of the following.

4 2. As proposed, the 80 Natoma project would be a 52-story Tower supported on a piled
5 mat foundation, surrounded on three sides by a two-level underground garage and a two-story
6 building. Due to the extreme height of the 80 Natoma Tower, the construction cost per square
7 foot of occupiable space for life-safety measures and elevators would be greater than for a
8 structure lower in height. Moreover, the Tower would be thin relative to its height. The
9 necessity to have many elevators to service such a tall structure, coupled with the small floor
10 plates, leaves less room for occupied space to generate income. To reduce these costs, Myers
11 Development Company ("Myers"), the current developer of the project, redesigned the structure
12 to replace steel with concrete. Because concrete is heavier than steel, and the structure will be
13 very high, the 80 Natoma Tower will be an extraordinarily heavy structure. The project will be
14 built on soft soils that are subject to compression. The structure will be supported on short piles
15 that do not reach the bedrock 190 feet below grade. In addition, Myers reduced the underground
16 parking for the project from four levels to two and designed a new piling and mat foundation
17 system. The combination of these factors will result in settlement of the building.

18 3. In March 2004, DBI approved a site permit for the 80 Natoma Tower project. On
19 April 8, 2004, based on the representations of Myers' geotechnical engineers that the new design
20 of the 80 Natoma project was safe, DBI approved an addendum to the site permit (the "2004
21 permit") allowing Myers to commence construction of the foundation for the project. On June 7,
22 2004, a controversy as to the amount of settlement of 80 Natoma was first brought to my
23 attention. A credible geotechnical engineer expressed the opinion that the building could settle
24 an alarming and unacceptable 9-11 inches, substantially more than the 2-3 inches of settlement
25 the project sponsor had claimed in obtaining its permit from DBI. Settlement of this magnitude
26 could cause cracking of the building, displace adjacent structures, and increase the risk of serious
27 damage to the building in the event of an earthquake. Upon receiving this information on June 7,
28

1 and based on other concerns raised by members of the public as to the validity of Myers' site
2 permit, I suspended Myers' 2004 permit.

3 4. DBI does not have geotechnical engineers on its staff. In recognition of the unusual
4 foundation issues presented by the 80 Natoma project, DBI convened a Peer Review Panel
5 ("PRP") of geotechnical and structural engineers to evaluate the project sponsor's design of the
6 piles and mat foundation for the 80 Natoma Tower. The PRP issued a report on April 2, 2004,
7 giving its "provisional approval" of "pile installation only," and noting several unresolved issues
8 concerning the settlement of the Tower, the foundation and pile design, and the design of the
9 connection between the piles and the mat foundation. A true copy of the PRP's letter is attached
10 as Exhibit A. The letter stated that "our review of the overall design is ongoing," and that the
11 project engineers had "committed to make modifications to the design that are deemed
12 appropriate as the balance of the PRP's comments are considered and resolved." Based on this
13 letter, construction began in May 2004.

14 5. The controversy leading to the suspension of the permits for 80 Natoma began with a
15 letter dated May 25, 2004, addressed to me and the City's Planning Director from the
16 Transportation Solution Defense & Education Fund ("TRANSDEF"). A true copy of the letter is
17 attached as Exhibit B. The TRANSDEF letter stated that the City's approval of the 2004 permit
18 for 80 Natoma violated Proposition "H," passed by the voters in 1999, and that the permit was
19 improperly issued because it was a revision of a 1999 site permit, which had expired in 2002.

20 6. The TRANSDEF letter was calendared as item 12(g) for discussion at the June 7,
21 2004, meeting of the BIC. When item 12(g) was called, the BIC indicated that they would hear
22 public testimony on the matter and take action at its next regularly scheduled meeting. At the
23 hearing, concerns as to the settlement of the 80 Natoma Tower first came to my attention.
24 Engineers for the 80 Natoma project had claimed that the likely settlement of the mat foundation
25 would be 2-3 inches. Another expert, however, provided dramatically higher estimates of the
26 probable settlement.

27 7. At the hearing, witnesses presented to the BIC and the staff a June 2, 2004, report by
28 MIT Professor Charles C. Ladd. Professor Ladd appears to be an internationally recognized and

1 highly regarded expert on building settlement. A true copy of Professor Ladd's report is attached
2 as Exhibit C. Professor Ladd's biography indicates that he is the Edmund K. Turner Professor of
3 Civil and Environmental Engineering, Emeritus, at the Massachusetts Institute of Technology
4 ("MIT"). He received his B.A. in Math and Physics from Bowdoin College, a B.S. from MIT in
5 Building Engineering and Construction, an M.S. from MIT in Civil Engineering, and a Ph.D.
6 from MIT in Soil Engineering. He is an expert in the analysis of soil settlement caused by large
7 construction projects. In addition to his extensive teaching, research, and publications, he has
8 been retained as a Geotechnical Consultant on 90 construction projects, 65 in the United States,
9 and 25 outside the United States. A copy of his biography is attached to his report. (Ex. C.)

10 8. To assess the likely settlement of the 80 Natoma Tower due to the proposed
11 construction, Professor Ladd consulted another MIT Professor of Engineering, Andrew Whittle,
12 whose expertise is in theoretical soil mechanics and numerical techniques. Professors Ladd and
13 Whittle conducted an assessment of the likely settlement of the mat foundation of the 80 Natoma
14 Tower as outlined in Professor Ladd's report. Based on his own tests and the work of Professor
15 Whittle, Professor Ladd's opinion is that the likely settlement under the center of the mat
16 foundation would be 9 inches ± 2.5 inches, hence a potential settlement of 11.5 inches. (The
17 reference to 8.5 inches on page 4 of Professor Ladd's report appears to be an arithmetic error.
18 Professor Ladd estimated the Tower's settlement at 7.5 inches, plus 1.5 inches added settlement
19 from unloading during excavation and reloading, for a total of 9 inches.) Professor Ladd also
20 concluded that the settlement under the edges of the mat will be significantly smaller than the
21 settlement at the center, resulting in differential settlement. Professor Ladd expressed surprise in
22 his report that the project sponsor made only a single deep borehole to test the soil and had
23 performed no consolidation tests on the soil.

24 9. During the course of the June 7 hearing, the president of the BIC, Rodrigo Santos, a
25 structural engineer, expressed surprise that the project sponsor of 80 Natoma – for a 52-story
26 Tower – had taken only a single soil sample boring on the site. Mr. Santos stated that he had
27 been the structural engineer for a 4-story building recently constructed across the street from 80
28 Natoma, and that the builder had made 11 borings for soils analysis.

1 10. In view of TRANSDEF's allegations that the 80 Natoma project failed to comply
2 with Proposition "H," that the 2004 permit was invalid, and the disturbing questions regarding
3 the settlement of the Tower, I issued a Stop Work Order suspending 80 Natoma's 2004 permit
4 for two weeks to give DBI staff the time to investigate these questions and decide whether DBI
5 could permit the project to continue. A true copy of my letter suspending the 2004 permit is
6 attached as Exhibit D. Following my suspension of the building permit for the 80 Natoma
7 project on June 7, I assigned Kenneth J. Harrington, Special Assistant to the Director of DBI, to
8 handle all matters concerning the 80 Natoma project for DBI. While I authorized Mr. Harrington
9 to be responsible on behalf of DBI for the 80 Natoma project, I did not delegate to him my
10 authority to revoke and/or suspend building permits.

11 11. During the next two weeks, additional geotechnical and structural information came
12 to light indicating that Myers' engineers had understated the likely settlement of the Tower. I
13 received a report dated June 2, 2004, by Youssef Hashash, Ph.D, PE., an Assistant Professor of
14 Civil and Environmental Engineering at the University of Illinois at Urbana-Champaign,
15 commenting on the 80 Natoma Tower. A true copy of Professor Hashash's report is attached as
16 Exhibit E. Professor Hashash stated in his report that the "Natoma Tower will experience large
17 settlements" that "may approach 9 inches." I also reviewed a report prepared by Professor
18 Whittle, the MIT professor with whom Professor Ladd consulted, dated June 11, 2004. A true
19 copy of Professor Whittle's report is attached as Exhibit F. Professor Whittle states in his report:
20 "The center of the mat (F) settles 7.8" at the end of construction with a long-term settlement of
21 11". This is comparable to the upper limit of mat deformations predicted by Prof. Ladd (9.0
22 ± 2.5 ".) Professor Whittle also predicted differential settlement of the mat foundation. I
23 concluded after receiving this additional information that more information on the soils
24 underlying the site was necessary. On June 18, 2004, I notified Myers that I was continuing the
25 suspension of the 2004 permit because, among other reasons, "it has come to my attention that
26 there is a conflict in the evidence as to certain geotechnical issues that cause me to be concerned
27 about the Department of Building Inspection's preliminary approval of the current pile design."
28 A true copy of my June 18, 2004 letter is attached as Exhibit G. I also attached to my June 18

1 letter a copy of my June 7 letter, the April 2, 2004 PRP letter, and Professor Ladd's report.

2 Finally, I notified Myers that it could appeal the suspension to the Board of Appeals.

3 12. On June 22, 2004, the BIC received a letter from TRANSDEF urging the BIC to
4 revoke 80 Natoma's 2004 building permit and declare it null and void. A true copy of the letter
5 is attached as Exhibit H.

6 13. On June 24, 2004, DBI received a copy of a memorandum from Shah Vahdani, a
7 member of the PRP, to the other PRP members. A true copy of the memorandum is attached as
8 Exhibit I. In the memo, Mr. Vahdani states that he estimated that settlement of the mat
9 foundation would be "on the order of 5 inches." Mr. Vahdani also states: "The current
10 foundation design is appropriate from a geotechnical engineering stand point provided that the
11 design issues discussed in this section are fully addressed." Mr. Vahdani proceeded to discuss a
12 series of design issues that, according to my knowledge, have not yet been addressed. Finally,
13 Mr. Vahdani stated: "Significant differential settlement may occur between the tower and the
14 parking structure. The magnitude of differential settlement should be carefully evaluated, and
15 the differential settlement be accommodated at the connection points." Mr. Vahdani's letter
16 heightened my concern about the settlement of the 80 Natoma Tower.

17 14. On June 28, 2004, I wrote to Myers authorizing further soil borings on the 80
18 Natoma site to provide more information on settlement and the pile design. A true copy of my
19 letter is attached as Exhibit J.

20 15. On June 30 and July 1, 2004, TRANSDEF filed an appeal to the BIC of my decision
21 declining to revoke Myers' permit. True copies of the appeal letters are attached as Exhibit K.
22 TRANSDEF's appeal was calendared at the BIC for hearing on August 16, 2004.

23 16. On July 2, 2004, Myers filed an appeal to the Board of Appeals of my June 18
24 decision to continue the suspension of Myers' 2004 permit. True copies of the appeal letter is
25 attached as Exhibit L.

26 17. On July 5, 2004, Jack Moehle, a member of the PRP, wrote to Professor Whittle
27 requesting that he review and comment upon Mr. Vahdani's July 24, 2004 memo. A true copy
28 of the July 5 letter is attached as Exhibit M.

1 18. On July 6, 2004, I wrote to Michael J. Coffino, an attorney representing Myers, to
2 inform him that I could not release the hold on Myers' 2004 permit until the troubling issues
3 related to the soils analysis and foundation design were resolved. A true copy of my July 6, 2004
4 letter is attached as Exhibit N.

5 19. On July 8, 2004, Mr. Coffino wrote to the BIC to point out that Myers' appeal of my
6 June 18 order continuing the suspension would be to the BIC rather than to the Board of
7 Appeals. A true copy of Mr. Coffino's July 8 letter to the BIC is attached as Exhibit O. The BIC
8 calendared the hearing on the appeal for August 16, 2004.

9 20. On July 8, 2004, Mr. Coffino also wrote to me requesting that I lift the suspension of
10 Myers' permit and identify my concerns regarding the pile and foundation design. A true copy
11 of Mr. Coffino's July 8 letter to me is attached as Exhibit P.

12 21. On July 9, 2004, I wrote to Mr. Coffino setting forth in detail nine separate issues of
13 concern related to the soils analysis and foundation design. A true copy of my July 9, 2004 letter
14 is attached as Exhibit Q. In the letter I indicated that more testing of the soil would be necessary.
15 I also indicated that there were "a number of other unanswered questions" concerning the
16 project, including a new proposal by Myers to revise the pile design to remove most of the rebar
17 from the interiors of the piles, and instead weld steel caps to the top of the piles for attachment
18 to the foundation mat. I indicated that before I could release the hold on the permit, Myers
19 would have to provide an adequate design for the caps in question.

20 22. On July 12, 2004, the Secretary of the BIC notified Myers and TRANSDEF that their
21 appeals of my decisions would be consolidated and heard on August 16, 2004. True copies of
22 the BIC notices are attached as Exhibit R.

23 23. On July 14, 2004, Mr. Coffino responded to my July 9, 2004 letter. A true copy of
24 Mr. Coffino's July 14 letter to me is attached as Exhibit S. Mr. Coffino disputed the statements
25 in my July 9 letter. On July 22, Kenneth J. Harrington, the DBI employee I assigned to handle
26 the 80 Natoma project following my suspension of the building permit on June 7, responded to
27 Mr. Coffino. A true copy of Mr. Harrington's July 22 letter is attached as Exhibit T. Mr.
28 Harrington's letter indicated that DBI continued to have serious safety concerns with respect to

1 the 80 Natoma project and would require an independent geotechnical engineer to resolve the
2 differences between the parties. The letter stated that DBI was seeking to retain Juan Pestana, a
3 Professor of Engineering at the University of California at Berkeley to advise DBI. The letter
4 also requested that Myers provide to DBI the test results of the recent borings at 80 Natoma to
5 forward to Professor Pestana. I authorized Mr. Harrington to send the July 22 letter to Mr.
6 Coffino and I approve of its contents.

7 24. On July 22, 2004, Deputy City Attorney Judy Boyajian sent an email to Steve
8 Atkinson, Myers' attorney and Mr. Coffino's partner, requesting that Myers provide DBI with
9 the result of Myers' recent soil borings at the 80 Natoma site. A true copy of Ms. Boyajian's
10 July 22 email is attached as Exhibit U.

11 25. On July 27, 2004, Mr. Coffino responded to Mr. Harrington's July 22 letter. A true
12 copy of Mr. Coffino's July 27 letter is attached as Exhibit V. Mr. Coffino's letter questioned Mr.
13 Harrington's authority to write the July 22 letter. Mr. Coffino did not address any of the
14 substantive concerns with respect to the foundation of the 80 Natoma Tower, nor did he agree to
15 provide DBI with Myers' soils test results.

16 26. Nine to eleven and one-half inches of settlement in this project, coupled with the
17 likely differential settlement, was cause for considerable concern on the part of Professors Ladd
18 and Whittle. As they are recognized experts in this field, I could not ignore their opinions, but
19 rather was required to consider them as credible unless and until it was determined that their
20 opinions are inaccurate.

21 27. Attached hereto as Exhibit W is a true and correct copy of a letter dated August 6,
22 2004 from Timothy A. Tosta, counsel for Myers, to City Attorney Dennis Herrera, in which Mr.
23 Tosta requested that Mr. Harrington be relieved of his duties regarding the 80 Natoma project,
24 based on an asserted conflict of interest created by Myers naming him as a defendant in Myers'
25 First Amended Petition. I received a copy of this letter.

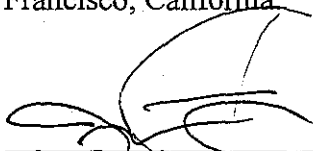
26 28. After conducting a hearing on August 16, 2004 on the consolidated appeals of my
27 suspension of Myers' 2004 permit, the BIC continued the hearing to September 20, 2004. At the
28 hearing on September 20, the BIC voted 5-2 that it intended to lift the suspension of the permit to

1 allow Myers to resume pile driving, subject to the approval of findings. The BIC conditioned the
2 resumption of pile driving, however, on DBI's approval of further permits for the entire project
3 in a single addendum to allow DBI and the BIC to more accurately assess the potential for
4 settlement of the Tower. The BIC also conditioned the resumption of pile driving on the
5 assurances of Myers' geotechnical and structural engineers that additional piles could be driven
6 if, following DBI's review of the Tower project addendum application and the receipt by DBI of
7 further information, additional piles were required to avoid undue settlement. The BIC also
8 found that my concerns regarding undue settlement of the Tower, the expiration of the 1999
9 permits, and Proposition H were reasonable and legitimate.

10 29. As of August 5, 2004, I have been on leave from my position as DBI Director for
11 reasons unrelated to 80 Natoma.

12 I declare under penalty of perjury under the laws of the State of California that the
13 foregoing is true and correct.

14 Executed on October 4, 2004, at San Francisco, California

15
16 
17 _____
FRANK Y. CHIU