From:	Mansouri, Braeden
To:	Board of Supervisors (BOS); BOS Legislation, (BOS)
Cc:	Jain, Devyani (CPC); Lindsay, Ashley (CPC); Julie P; Guerra, Alicia C.
Subject:	Case No. 2023-002706APL - 72 Harper Street CEQA Categorical Exemption Appeal Applicant Response [IMAN-BN.FID4874305]
Date:	Friday, April 12, 2024 11:03:44 AM
Attachments:	2023-002706APL Appeals (APL) - Applicant Response Letter(81995601.1).pdf

Dear Clerk Calvillo,

Attached, please find the response letter on behalf of the project applicants for the project proposed at 72 Harper Street (Case No. 2023-002706APL). The CEQA exemption decision is also identified as Case No. 2023-002706ENV. Please forward this letter to President Peskin and each of the members of the Board of Supervisors.

Thank you for your attention to this and please do not hesitate to reach out if you have any questions.

Best,
Braeden

Buchalter

Braeden Mansouri he/him/his
Attorney
T 415-227-3516
C 4156532700
bmansouri@buchalter.com

425 Market Street, Suite 2900
San Francisco, CA 94105
www.buchalter.com

Buchalter

425 Market Street
Suite 2900
San Francisco, CA 94105
415.227.0900 Phone
415.227.0770 Fax

415.227.3516 Direct
bmansouri@buchalter.com

April 12, 2024

VIA E-MAIL

President Peskin and Members of the Board of Supervisors
1 Dr. Carlton B. Goodlett Place
Room 244
San Francisco, CA 94102

Re: 72 Harper Street CEQA Categorical Exemption Appeal - Case No. 2023-002706APL

Dear President Peskin and Members of the Board of Supervisors:

Buchalter, a Professional Corporation, represents Julie Park and Tom McDonald (the "Applicants") with respect to their building permit application to renovate their residence at 72 Harper Street (Assessor's Parcel No. 6652/010) (the "Property") in the City of San Francisco ("City") and to establish an accessory dwelling unit ("ADU") on the ground floor of their home (the "Project"). On behalf of our client, the purpose of our letter is to respectfully request that the Board of Supervisors reject the appeal filed by some of the neighbors and uphold the Project's CEQA exemption determination, as further discussed below.

Project Background

We understand that on November 1, 2023, the Applicants' neighbors, David Garofoli, David Rizzoli, Michael Lee and Amy Bricker, and Krishna Ramamurthi requested Discretionary Review of the Project. On December 14, 2023, the Planning Department relied on a Categorical Exemption from the California Environmental Quality Act ("CEQA") for the Project, in its determination that the Project qualifies for a Class 1 exemption for existing facilities. (*See* Pub. Res. Code, § 21084(a); 14 Cal. Code Regs. (the "CEQA Guidelines"), § 15301.) On February 8, 2024, the City Planning Commission held a noticed public hearing at which it declined to take Discretionary Review of the Project. The Planning Commission found that "there are no extraordinary or exceptional circumstances in the case" and that the Project "complies with the Planning Code, the General Plan, and conforms with the Residential Design Guidelines."

As you know, Krishna Ramamurthi, Tusi Chowdhury, and David Garofoli (collectively, the "Appellants"), neighbors of the Applicants, recently appealed the Planning Department's determination, alleging that the Project does not qualify for a CEQA exemption. For the reasons contained herein, the Appellants' assertions are without merit.

The Property does not contain a historic resource.

Appellants incorrectly assert that this Project is ineligible for the Class 1 CEQA exemption because Section 15300.2(f) of the CEQA Guidelines provides an exception to the categorical exemptions for projects that may cause a substantial adverse change to a historical resource.

Appellants claim that our clients' Property is a historic resource but fail to cite CEQA's own definition of what constitutes a historical resource. Section 15064.5(a) of the CEQA Guidelines defines "historical resources" as:

1. A resource listed in, or determined to be eligible by the State Historical Resources Commission, for listing in the California Register of Historical Resources;
2. A resource included in a local register of historical resources or identified as significant in an historical resource survey; or
3. A building which a lead agency determines to be historically significant or significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military, or cultural annals of California, provided such determination is supported by substantial evidence.

These three categories are respectively described as mandatory, presumptive, and discretionary historical resources. (*Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1051.)

The "question whether a building is an 'historical resource' for purposes of CEQA and thus part of the 'environment' can be conceptualized as a threshold question that must be resolved by the lead agency." (*Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 364.) This "determination of historicity would be a foundation," after which the lead agency will then review impacts to a historic resource "after it knew whether the [item in question] was an historical resource and thus part of the 'environment' protected by CEQA." (*Id.* at p. 365.) Accordingly, the lead agency would make this determination "during the first stage of the CEQA review" so that it can determine "whether the proposed activity was a project that might cause a direct physical change in the environment." (*Id.* at p. 368.)

CEQA defers to the lead agency to make the historical resource determination based on the "three analytical categories established by [Public Resources Code] section 21084.1 and [CEQA] Guidelines section 15064.5, subdivision (a)." (*Citizens for the Restoration of L Street*, *supra*, 229 Cal.App.4th at p. 369.) Here, the lead agency is the City's Planning Department.

The historic resource determination, which the Appellants skip over entirely, is critical because if the property is not a historic resource, CEQA does not apply. Here, the Applicants submitted a Historic Resource Evaluation ("HRE") with the Project application to the City. The HRE determined that the residence on the Property is not listed in any historic survey nor is it listed in any national, state, or local register of historic resources. In other words, the residence is unambiguously neither a mandatory nor a presumptive historical resource. Thus, the remaining question is what would be required for the Property to be a discretionary historical resource.

Designating the Property a discretionary historical resource is a determination for the Planning Department to make, which must be supported by substantial evidence.

For potential historic resources that are not listed in a federal, state, or local register, the City may evaluate whether the residence on Property is a discretionary historical resource. (*Valley Advocates*, *supra*, 160 Cal.App.4th at p. 1060.[1]) CEQA Guidelines section 15064.5(a)(3) provides that a lead agency's discretionary historical resource determination must be "supported by substantial evidence in light of the whole record." CEQA defines "substantial evidence" as "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact," but "is not argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous." (Pub. Res. Code, § 21080(e).)

It is important to note that "[d]uring the preliminary review stage of a CEQA review, ***the fair argument standard does not apply*** to the question of whether a building or other object qualifies as an historical resource for purposes of CEQA." (*Citizens for the Restoration of L Street*, *supra*, 229 Cal.App.4th at p. 369; *Valley Advocates*, *supra*, 160 Cal.App.4th at p. 1072.)

While substantial evidence would be required for the City to designate the Property a discretionary historic resource, CEQA does not require the City to furnish substantial evidence supporting its conclusion that the Property is not historic. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1043-44.) Instead, the burden is on an appellant to provide a body of evidence that substantially supports their allegations. (*See id.* at p. 1044; *Citizens' Com. to Save our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, 1167.[2]) In *Taxpayers*, the Court of Appeal rejected the appellant's argument that the lead agency "should have expanded that description to include a discussion of

[1] The Court of Appeal explains that Public Resources Code section 21084.1 and CEQA Guidelines section 15064.5 "make clear that lead agencies have discretionary authority to determine that buildings that have been denied listing or simply have not been listed on a local register are nonetheless historical resources for purposes of CEQA."
[2] The Court of Appeal explained in *City of Claremont* that "the project opponent must demonstrate by substantial evidence . . . that the project as revised and/or mitigated may have a significant adverse effect on the environment." There, the court rejected evidence proffered by the opponents that the subject project would affect some alleged historic resource. (*City of Claremont*, *supra*, 37 Cal.App.4th at p. 1171.)

the neighborhood's [the alleged resource] historic characteristics." (*Id.* at p. 1043.) Rather, the court accepted the lead agency's conclusion, without substantial evidence, that the resource is non-historic.

CEQA requires substantial evidence to support a finding that the Property constitutes a historical resource. Nothing Appellants provide constitutes substantial evidence demonstrating that the residence is historic. Appellants' March 8, 2024 letter is devoid of facts or expert opinion, and composed entirely of argument, speculation, and unsubstantiated opinion and narrative. Accordingly, the City's CEQA Exemption Determination checklist, addressing the potential for presumptive or discretionary historic resources outlined in CEQA Guidelines section 15064.5, is sufficient for its conclusion that the Property does not contain a historical resource. The Appellants failed to provide any substantial evidence that the Property contains a historical resource, thus CEQA does not permit the conclusion that the residence is a historical resource.

The City is not required to analyze the Project's impacts to a non-historical resource.

The lead agency's review of impacts to a historic resource occurs *after* it knows that the item in question is an historical resource and, thus, part of the environment protected by CEQA. (*See Citizens for the Restoration of L Street, supra*, 229 Cal.App.4th at p. 365.) Thus, evaluation of whether a project will cause a "substantial adverse change in the significance of an historical resource" in not required in the absence of a historical resource.

Because the City Planning Department did not find that the Property was historical resource, the City was not required to evaluate the potential impacts of the Project to some alleged historic resource, or whether the Project adheres to the Secretary of the Interior's Standards for the Treatment of Historic Properties.

Nonetheless, in their Appeal letter, the Appellants jump to a conclusion that the City failed to study the Project's impacts to a historical resource. Appellant's argument is misplaced because, as explained above, CEQA does not require the City to analyze a project's impacts to a structure that is **NOT** historic. (*See* CEQA Guidelines, § 15064.5(b).[3]) Nevertheless, the City Preservation Planner evaluated the Project's compatibility with the existing structure and any "potential" character-defining features, and the Preservation Planner concluded that the addition and outside appearance of the building and its roof are "compatible with the existing structure." Again, while this level of analysis was not required, the City's finding that the project would not have an adverse impact on the Property further supports the City's use of a categorical CEQA

[3] CEQA requires evaluations of projects "that may cause a substantial adverse change in the significance of an historical resource," not an ahistorical resource.

exemption for the Project.

Conclusion

The City Planning Department complied with CEQA's requirements. No substantial evidence exists supporting the conclusion that the residence is a historical resource. Therefore, the City cannot determine the residence to be historic for the purposes of CEQA. Thus, the Property does not contain a mandatory, presumptive, or discretionary historical resource and CEQA does not require the City to evaluate the Project's impacts to nonexistent historic resource. Accordingly, no exception applies to the categorical exemption and the City's categorical exemption determination conforms to CEQA's requirements. The appeal is without merit, and we respectfully request that the Board of Supervisors reject the appeal and sustain the Planning Department's determination that the Project is categorically exempt from CEQA.

We appreciate your attention to this matter. Do not hesitate to reach out with any additional questions.

Sincerely,

BUCHALTER
A Professional Corporation

Braeden Mansouri

BM:vs

cc: Angela Calvillo
Devyani Jain
Ashley Lindsay
Julie Park
Tom McDonald
Alicia Guerra