



# CATEGORICAL EXEMPTION APPEAL

## 939 Lombard Street

Date: September 1, 2023  
To: Angela Calvillo, Clerk of the Board of Supervisors  
From: Lisa Gibson, Environmental Review Officer – 628.652.7571  
Don Lewis, Senior Planner, [don.lewis@sfgov.org](mailto:don.lewis@sfgov.org), 628.652.7543

RE: **Planning Record No. 2021-007262ENV**  
**Appeal of Categorical Exemption for 939 Lombard Street**

Hearing Date: September 12, 2023

Project Sponsor: Chloe Angelis, Reuben, Junius & Rose, LLP, 415.567.9000  
Appellant: Martin Lee Eng

## Introduction

This memorandum responds to the July 24, 2023 letter of appeal to the board of supervisors (the board) regarding the planning department's (the department) issuance of a categorical exemption under the California Environmental Quality Act (CEQA determination) for the proposed 939 Lombard Street project.

The department, pursuant to Article 19 of the CEQA Guidelines, issued a categorical exemption for the proposed project on April 19, 2023, finding that the proposed project is exempt from CEQA as a Class 1 and 3 exemption.

The decision before the board is whether to uphold the department's decision to issue a categorical exemption and deny the appeal, or to overturn the department's decision to issue a categorical exemption and return the project to department staff for additional environmental review.

## Site Description and Existing Use

The project site is a 3,781-square-foot parcel located on the south side of Lombard Street between Jones and Leavenworth streets in the Russian Hill neighborhood. The project site is occupied by an existing three-story, single-family residence (constructed in 1908) that is approximately 2,844 square feet in size at the rear of the lot and an existing approximately 12-foot-tall, 512-square-foot, two-car parking structure (constructed in 1999) located at the front of

the project site.

Immediately east of the project site is the Yick Wo Alternative Elementary School playground that is approximately 13 feet lower in elevation than the project site. The change in elevation is supported by a retaining wall ranging between 6 to 10 feet that extends the length of the schoolyard. The subject block of Lombard Street consists predominantly of three-story over basement multi-unit residential buildings. The project site is located approximately 290 feet downhill from the famed winding section of Lombard Street, where three to four story single-family homes are common.

## **Project Description**

The proposed project would demolish the parking structure at the front of the lot and construct a new 40-foot-tall, 4,828-gross-square-foot, single-family dwelling with four bedrooms and two off-street parking spaces at the ground-floor level. The project approved at the Planning Commission includes a 5-foot setback from the east property line for the entire fourth floor and eliminates the roof-top elevator and stair penthouses. The project would remove approximately 5 trees from the rear yard and would retain 3 trees, including the street tree in front of the project site. The project would provide a Planning Code-compliant rear yard (equal to 25 percent the depth of the lot) between the proposed home and the existing house at the rear of the property. The proposed roof would include a 5-foot-wide “green” landscaped area along the eastern building wall with a deck located towards the center of the roof. The proposed buildings would be supported on spread footings with drilled piers along the east property line. The project would require approximately 36 cubic yards of excavation to a depth of approximately 3 feet below ground surface. Construction is expected to last approximately 12 months.

## **Background**

The following bullet points provide a chronological summary of the various actions documented in the record related to the proposed project that have occurred since July 9, 2021, when the project sponsor filed for a building permit associated with the proposed project:

- On July 9, 2021, Curtis Hollenback (the architect representing the project sponsor) filed a project application with the department.
- On April 14, 2023, the department determined that the project was categorically exempt under CEQA Class 1 – Existing Facilities and Class 3 – New Construction or Conversion of Small Structures, and that no further environmental review was required.
- On May 4, 2023, Martin Lee Eng (the appellant) and Mark Swartz, representing the Lombard Street Homeowners Association, filed separate Discretionary Review applications.
- On June 29, 2023, the Planning Commission approved the project and did not take discretionary review.
- On July 28, 2023, Martin Lee Eng filed an appeal of the categorical exemption determination.
- On August 3, 2023, the department determined that the appeal was timely filed.

## CEQA Guidelines

### Categorical Exemptions

Pursuant to CEQA Guidelines section 15061, “Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA” [CEQA Guidelines section 15061(a)]. A project is exempt from CEQA if “the project is exempt pursuant to a categorical exemption. . .and the application of that categorical exemption is not barred by one of the exceptions set forth in Section 15300.2.” [CEQA Guidelines section 15061(b)(2).]

In accordance with Public Resources Code section 21084, CEQA Guidelines sections 15301 through 15333 list classes of projects that have been determined *not* to have a significant effect on the environment and are exempt from further environmental review.

Guidelines section 15301, or Class 1, applies to the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency’s determination. Class 1 also includes demolition and removal of individual small structures listed in section 15301(l), such as accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences.

CEQA Guidelines section 15303 (New Construction or Conversion of Small Structures), or Class 3, applies to construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. The structures described in this section include up to three single-family residences in a residential zone.

As noted above, a categorical exemption may not be used when an exception listed in CEQA Guidelines section 15300.2 applies. Among these exceptions are projects located on a site that is included on any list compiled pursuant to Section 65962.5 of the Government Code (known as the “Cortese list”) [CEQA Guidelines section 15300.2(e)] and projects where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances [CEQA Guidelines section 15300.2(c)].

Pursuant to CEQA Guidelines section 15300.2(c), lead agencies must apply a two-pronged analysis in determining whether the “unusual circumstances” exception applies. First, an unusual circumstance must exist, and second, the unusual circumstance must give rise to “a reasonable possibility that the activity will have a significant effect on the environment.” It is important to note that it is not enough for an Appellant to claim the project – *as a whole* – will have a substantial effect on the environment. Rather, an Appellant must show that the specific unusual circumstances themselves will potentially cause that substantial effect.

### Standards of Review

The standard of judicial review of lead agency decisions on a project’s qualification for a given class of exemption is the “substantial evidence” standard of Public Resources Code section 21168.5. Under this substantial evidence standard, courts will defer to the agency

decision as long it is supported by substantial evidence, even if there is conflicting evidence.

The standards of judicial review for the “unusual circumstance” exception are two-pronged, as follows: An agency’s determination as to whether (or not) there are “unusual circumstances” [CEQA Guidelines section 15300.2 (c)] is reviewed under the substantial evidence standard. On the other hand, an agency’s determination as to whether unusual circumstances result in “a reasonable possibility that the activity will have a significant effect on the environment” is reviewed under the non-deferential “fair argument” standard. Under the “fair argument” standard, the exception to the exemption would apply, and would require additional environmental analysis under CEQA, if the record contains evidence that supports a fair argument that the unusual circumstances may produce a significant effect on the environment.

## **Substantial Evidence**

In determining the significance of environmental effects caused by a project, CEQA Guidelines section 15064(f) states that “the decision as to whether a project may have one or more significant effects shall be based on substantial evidence in the record of the lead agency.” CEQA Guidelines section 15064(f)(5) offers the following guidance: “Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial evidence. Substantial evidence shall include facts, reasonable assumption predicated upon facts, and expert opinion supported by facts.”

## **Planning Department Responses**

The responses, below, address the environmental concerns raised by the Appellant, organized by environmental topic. Each response confirms that the project meets the eligibility criteria for both a Class 1 and Class 3 exemption pursuant to CEQA Guidelines sections 15301 and 15303 and issuance of an exemption is not barred by one of the exceptions identified in CEQA Guidelines section 15300.2. The Appellant has not met the legal burden of proof to demonstrate that the project is not exempt and that an initial study must be prepared.

### **Categorically Exempt from Environmental Review**

**Response 1: For informational purposes, the proposed project qualifies for a Class 1 and Class 3 categorical exemption.**

CEQA Guidelines section 15301(l)(3), or Class 1, provides an exemption from environmental review for the demolition of accessory structures such as garages and carports. The project involves the demolition of an existing 2-car garage structure and thus the demolition is exempt under Class 1. CEQA Guidelines section 15303(a), or Class 3, allows for the construction of up to three single-family residences in an urbanized area. The project involves the construction of one single-family residence and thus the new construction is also exempt under Class 3.

When a lead agency determines that a project fits within a class of exemption, that determination will be upheld if it is supported by substantial evidence. CEQA Guidelines define substantial evidence as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” The department’s determination is supported by substantial evidence as set forth above.

### No Unusual Circumstances

#### Response 2: None of the exceptions for categorical exemptions apply to the proposed project.

The Appellant raises a variety of impacts that he asserts disqualify the project for a categorical exemption. These include geology and soils, shadow, hazardous materials, aesthetics, air quality, noise, public safety, and biological resources. Each of these topics is addressed in individual responses below. However, for context, this response explains the legal framework established by CEQA and the CEQA Guidelines for exceptions that would defeat a lead agency's ability to issue a categorical exemption.

CEQA Guidelines section 15300.2 identifies exceptions to the applicability of categorical exemptions. When any of the exceptions apply, a project that otherwise fits within a categorical exemption must undergo a higher level of environmental review. None of the exceptions to CEQA's categorical exemptions apply to the proposed project, including the unusual circumstances exception, which is discussed below.

#### *Significant Effect Due to Unusual Circumstances*

Pursuant to CEQA, the department applies a two-part analysis to determine whether there is a reasonable possibility of having a significant effect on the environment due to unusual circumstances. The following describes the two-parts, or questions, and their applicability to the project.

Part 1 Question: Do unusual circumstances exist?

Part 1 Answer: There are no unusual circumstances surrounding the project.

The lead agency must determine if unusual circumstances are present. If a lead agency determines that a project does not present unusual circumstances, that determination will be upheld if it is supported by substantial evidence, as defined above.

The circumstances surrounding the project and the project site are not unusual. It is not unusual for a residential development to occur adjacent to a school on a steeply sloped lot in San Francisco. There are approximately 14 public elementary schools in San Francisco that share similar characteristics with the Yick Wo Elementary School, as they are located in residential area on steeply sloping lots.<sup>1,2#</sup>

The issues alleged by the Appellant do not rise to the level of "unusual circumstances," as similar conditions are encountered throughout San Francisco, as discussed in this appeal response. For the above reasons, the department's determination that unusual circumstances are not present is supported by substantial evidence; the Appellant has not demonstrated otherwise.

Part 2 Question: Would the project result in significant effects due to unusual circumstances?

Part 2 Answer: This question is not applicable, given that no unusual circumstances are present.

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<sup>1</sup> The list of 14 elementary schools can be located here: <https://citypln-m-extnl.sfgov.org/SharedLinks.aspx?accesskey=a57baceb37c75dbe237d9d867240af80643ad8e889f282b6be05f3a8b4840a0d&VaultGUID=A4A7DACD-B0DC-4322-BD29-F6F07103C6E0>, accessed August 29, 2023.

<sup>2</sup> Pursuant to Ordinance No. 121-18: Slope and Seismic Hazard Protection Zone Act (effective 6/23/2018), a steep slope is defined as a property with an average slope that exceeds 25 percent grade.

If the lead agency determines that a project presents unusual circumstances, then the lead agency must determine if a fair argument has been made supported by substantial evidence in the record that the project may result in significant effects.

As stated above, there are no unusual circumstances surrounding the project, so the answer to this question is moot.

For informational purposes, however, even if unusual circumstances were present, the proposed project would not result in a significant effect on the environment. This includes effects addressed in the exceptions to a categorical exemption discussed in this response, as well as the topics discussed in the Responses 3 to 10, below.

#### *Conclusion regarding Exceptions to Categorical Exemption*

Considering the above, the proposed project clearly fits within the Class 1 and 3 categorical exemptions and none of the exceptions are triggered. As such, the project is not required to undergo further environmental review. Moreover, since the proposed project qualifies for an exemption, mitigation measures cannot be applied to the project. The Appellant has not demonstrated that the department's CEQA determination for the proposed project is not supported by substantial evidence in the record.

#### **Geology and Soils**

##### **Response 3: Construction on steep slopes is common in San Francisco.**

The Appellant claims, without evidence, that the project site is not suitable for construction, the project poses a potential hazard to the safety and stability of the adjacent school, and there would be a serious risk of damage from earthquakes, landslides, mudslides, or mudflows.

Even if the project's construction presented unusual circumstances, the Department of Building Inspection (DBI's) building permit review process, discussed below, which includes provisions for construction on hillsides, would ensure the project's structural integrity during construction and operations. Moreover, a geotechnical report prepared for the proposed project concluded that the subject property is suitable for the planned development and provides recommendations for ensuring that construction of the project does not undermine the adjacent properties, including the school.<sup>3</sup> The unsubstantiated concerns raised by the Appellant about the existing retaining wall between the school and the project site are unfounded. Consistent with the findings of the geotechnical report, the project architect met with the principal of Yick Wo Alternative Elementary School and has conveyed that the project's proposed retaining wall design would not surcharge<sup>4</sup> the existing neighboring retaining wall.

The proposed project includes drilled piers that would extend 15 feet below the bottom of the neighboring retaining wall. The weight of the new building would be supported by the drilled piers and any resulting surcharge loads would occur below the bottom of the adjacent retaining wall. Furthermore, some of the soil pressure currently imposed onto the existing retaining wall would bear onto the side of

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<sup>3</sup> H. Allen Gruen, Geotechnical Engineer, Geotechnical Investigation, Plan Improvements at 939 Lombard Street, San Francisco, California, October 8, 2022

<sup>4</sup> When a vertical load is imposed onto soil, there is a resulting horizontal load that is also imposed. Typically, this horizontal load is equal to about one-third of the vertical loading (depending on the soil characteristics). This horizontal load is called surcharge.

the new drilled piers. By adding the new piers, the project would unload the existing retaining wall incrementally.<sup>5</sup>

It is important to note both that geology and soils are not among the exceptions to the use of a categorical exemption, and the proposed project would not present unusual circumstances that could cause a significant impact to geology and soils given the prevalence of construction on slopes throughout the city (“a city of 49 hills”). Instead, the proposed project would be consistent with the density, height, and bulk limitations for its designated RM-1 (Residential, Mixed, Low Density) zoning district and its size and construction type would be within the range of structures that predominate in the neighborhood.

Any effects of the project related to geology and soils would be addressed by state and local law. To ensure that the potential for adverse effects related to geology and soils are adequately addressed, San Francisco relies on the state and local regulatory processes for review and approval of building permits pursuant to the California Building Code and the San Francisco Building Code, which is the state building code plus local amendments that supplement the state code, including the building department’s administrative bulletins.

During the building department’s review of the building permit, the building department would review the construction plans for conformance with recommendations in the project-specific geotechnical report. The building permit would be reviewed pursuant to the building department’s implementation of the building code, including administrative bulletins, local implementing procedures such as the building department information sheets, and state laws, regulations, and guidelines to ensure that the proposed project would have no significant impacts related to soils, seismic, or other geological hazards.

In general, if the scope of a proposed project requires a preliminary geotechnical report for environmental review purposes, the planning department reviews this report to understand geotechnical issues and recommendations. Through its building permit review process, DBI requires the sponsor to incorporate such recommendations into the project. For environmental review purposes, department staff confirm that the preliminary geotechnical report finds that the proposed project is feasible either as proposed, or with additional construction requirements recommended by the report preparer. During environmental review, department staff confirm that the project sponsor would incorporate foundation design recommendations (and/or other recommendations) into the project design, upon approval. DBI, during its review of site and building permits (after CEQA review is completed/project approvals are issued), reviews construction documents for conformance with the preliminary and, ultimately, the final geotechnical report.

The geotechnical report prepared for the proposed project confirmed that the project site has a 25 percent slope and concluded that there was no observed evidence of active slope instability at the subject site.<sup>6,7</sup> Taking the site characteristics into consideration, the geotechnical report made recommendations regarding foundations that could be supported on the site and

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<sup>5</sup> Email communication from the project sponsor, August 22, 2023.

<sup>6</sup> H. Allen Gruen, Geotechnical Engineer, *Geotechnical Investigation, Plan Improvements at 939 Lombard Street, San Francisco, CA*, October 8, 2022.

<sup>7</sup> The project site does not lie within a liquefaction potential zone.

recommendations pertaining to retaining walls, temporary slopes and excavation, surface draining, and various other geotechnical issues. Whether or not the project is subject to the Slope and Seismic Hazard Zone Protection Act<sup>8</sup> (San Francisco Building Code section 106A.4.1.4) would be determined by DBI as part of their building permit review process.

As described in DBI's Information Sheet S19,<sup>9</sup> the slope conditions at the site *as well as the scope of the project* are used to determine if a project is subject to the Slope and Seismic Hazard Zone Protection Act. If the building department determines a project is subject to this act, the project will require additional geotechnical and structural review, which may include a third-party peer review and/or assignment to a Structural Advisory Committee, as determined by the building department. The three-member Structural Advisory Committee will advise the building department on matters pertaining to the building's design and construction.<sup>10</sup>

The site's topography and geology present no unusual circumstances. The slope of the project site (25 percent) is not unusual for San Francisco. By department estimates, approximately 12.8 percent of San Francisco is on slopes of this percent or greater (which works out to be approximately 38.6 percent of parcels where at least a portion includes a slope of 25 percent or more).<sup>11</sup> Similarly, the project site is underlain with clayey sand and bedrock which is a common occurrence in San Francisco. Additionally, the project's potential for seismic activity would not comprise an unusual circumstance since San Francisco and the San Francisco Bay Area region are prone to earthquakes. As with all projects, the San Francisco Building Code and the California Building Code appropriately address geotechnical considerations and compliance with the building codes is ensured through DBI's building permit review process.

CEQA caselaw recognizes that it is routine in the development process to rely on these and other regulatory requirements when reviewing a project's impacts under CEQA. Requiring additional environmental review where a project satisfies the requirements for a categorical exemption would be contrary to the City's adopted Housing Element, which calls for the City to practice CEQA in an efficient manner to reduce constraints to housing production.

### **Shadow**

**Response 4: The project does not present any unusual circumstances that would give rise to a significant shadow impact.**

As discussed above, the project clearly meets the definitions of both a class 1 and class 3 exemption. Shadow impacts is not one of the exceptions that preclude the use of a categorical exemption, nor are they included in the Appendix G checklist of the CEQA Guidelines, which includes a list of environmental factors that lead agencies may consider in preparing an initial study for non-exempt projects. Therefore, shadow impacts are not among the topics that must be considered in assessing a project's eligibility for a categorical exemption. Further, the proposed

<sup>8</sup> Enacted by Ordinance No. 12118, effective June 23, 2018.

<sup>9</sup> Department of Building Inspection Information Sheet No. S-19, Properties Subject to the Slope and Seismic Hazard Zone Protection Act (SSPA) Ordinance, October 2, 2018. Available at <https://sfdbi.org/sites/default/files/IS%20S-19.pdf>.

<sup>10</sup> San Francisco Building Code Section 105A.6 establishes and defines the process and requirements for identifying the members of the Structural Advisory Committee. The three committee members must be selected from a list of qualified engineers submitted by the Structural Engineers Association of Northern California and approved by the building department.

<sup>11</sup> Mike Wynne, San Francisco Planning Department, personal communication to Tania Sheyner, Planning Department, June 15, 2023.



project would not present unusual circumstances that could cause a significant shadow impact. Specifically, 40-foot-high buildings are common in San Francisco, as are the shadows caused by such buildings.

Pursuant to Planning Code Section 295, the department conducts a shadow impact analysis for any project that would (a) be over 40 feet in height and (b) cast net new shadow on any property under the jurisdiction of the Recreation and Park Commission.<sup>12</sup> The 939 Lombard Street project would not exceed 40 feet in height and, therefore, no shadow impact analysis is required under Planning Code 295.<sup>13</sup> Additionally, the school playground is not considered public open space as the Yick Wo Alternative Elementary School property is not under the jurisdiction of the Recreation and Park Commission and the school does not participate in the Shared Schoolyard Program.<sup>14</sup>

Moreover, most of the city is zoned to allow 40-foot-tall buildings. Section 295 reflects the city's policy that shadows from buildings below the Section 295 applicability threshold of 40 feet are to be tolerated, regardless of where that shadow falls. The Appellant has provided no substantial evidence to support the argument that shadow from the proposed project would be a significant impact on the environment.

The project site and Yick Wo Alternative Elementary School are on adjoining parcels along Lombard Street, on the east-facing slope of Russian Hill. The 900 block of Lombard Street has a steep slope, oriented east. The project site is located directly uphill and west of the approximately 6,000-square-foot schoolyard. There are existing structures (the school, etc.) on the eastern and southern portions of the school site. The nearest off-site structures to the east are about 80 feet from the school, downslope, across Jones Street.

As the sun rises in the east, structures cast their shadows to the west. The schoolyard is likely to be largely unshaded in the morning, with shadow cast from the on-site school district building being the largest source of shade and minimal shade cast from buildings east of Jones Street. Shadows are the smallest around noon when the sun is at its highest point. As the sun descends west in the early afternoon, shadows on the schoolyard are cast by structures uphill and to the west, including the existing 4-story residential building (owned by the Appellant) and the two-car garage structure on the project site (proposed for demolition), and all the existing buildings further west and uphill. As the sun becomes lower in the sky and eventually descends behind Russian Hill, shadows cast to the east, across the schoolyard, become longer. As such, the proposed 4-story (40-foot-tall) building would cast more shadow on a portion of the schoolyard than the existing two-car garage structure on the project site, particularly in the late afternoon.

According to the school's website, the Yick Wo Alternative Elementary School schoolyard is used throughout the school day from morning circle time through multiple recesses and gym classes; it is also used for afterschool programming. The elementary school opens at 9:00 am, playground supervision begins at 9:10 am, and school begins for all grades at 9:30 am. Kindergarten dismissal is at 3:20

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<sup>12</sup> San Francisco Planning Code, Section 295. Height Restrictions on Structures Shadowing Property Under the Jurisdiction of the Recreation and Park Commission, [https://codelibrary.amlegal.com/codes/san\\_francisco/latest/sf\\_planning/0-0-0-21861](https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_planning/0-0-0-21861).

<sup>13</sup> The 40-foot height threshold is calculated based on the measurement from the curb level at the centerline of the building to the finished roof, per Planning Code Section 260.

<sup>14</sup> The Shared Schoolyard Program increases public space for San Francisco families to get out into the community on weekends in this post-pandemic recovery time by opening the schoolyard gates for public use. [Shared Schoolyard Program | SFUSD](#).

pm, while dismissal for 1st through 5th grades is at 3:30 pm. Afterschool programming is from 3:30 to 6:30pm.

Based on the current school programming and the uphill orientation of the project site to schoolyard, the area of shadow from the proposed project would quickly increase from the time school is dismissed through the end of afterschool programming. Based on the project sponsor's conversations with the school principal, there is no evidence to suggest that this additional shadow would substantially disrupt or alter the school's outdoor afternoon programming.

Please see Response 6 for the consideration of aesthetics and visual quality impacts.

### **Hazardous Materials**

**Response 5: The proposed project does not present any unusual circumstances that would give rise to a significant impact related to hazardous materials.**

A categorical exemption may not be issued for a proposed project on a project site that is listed on the Cortese List (Government Code section 65962.5), which consists of a series of lists or databases maintained by state regulatory agencies containing information about contaminated properties.<sup>15</sup> Here, the project site is not included on such a list and thus this exception does not apply to the project. There are no other exceptions related to hazardous materials related to the project site, and the Appellant has provided no substantial evidence to support the argument that hazardous materials could result in a significant impact on the environment resulting from an unusual circumstance of the project.

The Appellant states that "children can suffer from IQ mental retardation due to lead poisoning" but does not provide any substantial evidence indicating how the project could result in potential lead poisoning. The Appellant also states that there is a building materials shortage worldwide which could cause delay and create "bad fumes and traps" if the construction site is left empty. Again, the Appellant provides no evidence to support this speculative claim.

The existing garage that is proposed for demolition was constructed in 1999. Since the existing garage was constructed after 1980, it is unlikely that the project would release lead-based paint into the environment.<sup>16</sup> Nonetheless, project demolition would be subject to the Cal OSHA Lead in Construction Standard (8 CCR Section 1532.1). This standard requires development and implementation of a lead compliance plan when materials containing lead would be disturbed during construction. The plan must describe activities that could emit lead, methods that will be used to comply with the standard, safe work practices, and a plan to protect workers from exposure to lead during construction activities. Compliance with these regulations would ensure the proposed project would not result in significant impacts from a potential release of lead.

Additionally, the proposed project is not subject to San Francisco Health Code Chapter 22A (the Maher Ordinance, or Maher program) as the project site is not located in the Maher area. The project would result in less than 50 cubic yards of soil disturbance, and based on a review of historic Sanborn maps, the project site has always been residential.

<sup>15</sup> <https://calepa.ca.gov/sitecleanup/corteselist/Background/>

<sup>16</sup> The U.S. Consumer Product Safety Commission banned lead paint in 1977 in residential properties and public buildings (16 CFR 1303).

In summary, the proposed project would not result in unusual circumstances or a significant hazard to the public or the environment involving the release of hazardous materials into the environment. Project mitigation would not be required. The Appellant has not met the legal burden of proof to successfully challenge this determination.

### **Aesthetics**

**Response 6: The aesthetic impacts of this project shall not be considered to be significant impacts on the environment pursuant to CEQA.**

The Appellant provides an opinion that the project would result in potential negative impacts on the overall character and livability of the neighborhood, that the project does not align with the scale and architectural style of the surrounding area; and that the project would create an eyesore that would negatively affect the aesthetics of the neighborhood.

In accordance with CEQA section 21099 – Modernization of Transportation Analysis for Transit Oriented Projects – aesthetics and parking shall not be considered in determining if a project has the potential to result in significant environmental effects, provided the project meets the following three criteria: a) the project is in a transit priority area; b) the project is on an infill site; and c) the project is residential, mixed-use residential, or an employment center. The proposed project meets each of the above three criteria and thus, the CEQA analysis should not consider aesthetics or parking in determining the significance of project impacts under CEQA. Furthermore, per CEQA case law, even when aesthetics must be considered, “community character” itself is not a physical environmental effect.<sup>17</sup>

For informational purposes, the proposed project is consistent with the Planning Code and the Residential Design Guidelines. Forty feet is the principally permitted height limit, and the project is consistent with the character and scale of the neighborhood. The subject property and all the nearby properties are subject to a 40-foot height limit. The immediately adjacent property to the west (the Appellant’s property) is also 40 feet tall and includes a rooftop penthouse. The proposed project is consistent with the scale and design of other buildings in the vicinity. The proposed project is appropriate for the mixed character of the block and the proposed scale of the proposed building matches the massing of the Appellant’s property next door at 949-953 Lombard Street and is appropriate for the range of three- to four-story buildings in the vicinity. On the subject block of Lombard Street, properties also range from three to four stories.

Please see Response 3 for the consideration of shadow impacts.

### **Air Quality**

**Response 7: The project does not present any unusual circumstances that would give rise to a significant air quality impact during project construction or operations.**

CEQA does not require that the department consider whether significant air quality impacts in general would occur when issuing a Class 1 or 3 categorical exemption, as air quality by itself is not an exception to the use of a categorical exemption. Further, there is nothing unusual about the project that would give rise

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<sup>17</sup> Preserve Poway v. City of Poway, 245 Cal.App.4th 560.

to a potential significant air quality impact. Thus, the following discussion of air quality is provided for informational purposes.

The Appellant makes unsubstantiated claims that the project's construction dust and fumes would impact the school. The proposed project's construction would be subject to the Dust Control Ordinance (Article 22B of the Health Code). The intent of the dust control ordinance is to reduce the quantity of fugitive dust generated during site preparation, demolition, and construction work to protect the health of the general public and of construction workers, minimize public nuisance complaints, and to avoid orders to stop work in response to dust complaints. Project-related construction activities would result in construction dust, primarily from ground-disturbing activities. In compliance with the dust control ordinance, the project sponsor and contractor responsible for construction activities at the project site would be required to control construction dust on the site through a combination of watering disturbed areas, covering stockpiled materials, street and sidewalk sweeping, and other measures. The regulations and procedures set forth by the San Francisco Dust Control Ordinance would ensure that construction dust impacts would not be significant. Compliance with the dust control ordinance would ensure that the proposed project would not result in substantial amounts of fugitive dust, including particulate matter, during construction activities.

Additionally, the project site is not located within an air pollutant exposure zone and would not add new stationary sources of toxic air contaminants. In particular, the project would not involve construction over 75 feet in height; as such, no backup generators would be required.

In summary, the proposed project would not result in unusual circumstances that could give rise to a significant air quality impact. Project mitigation would not be required. The Appellant has not met the legal burden of proof to successfully challenge this determination.

### **Noise**

**Response 8: For informational purposes, the project would not result in any significant noise impacts during project construction or operations.**

CEQA does not require that the department consider whether significant noise impacts in general would occur when issuing a Class 1 or 3 categorical exemption, as noise by itself is not an exception to the use of a categorical exemption. Further, there is nothing unusual about the project that would give rise to a potential significant noise impact. Thus, the following discussion of the project's noise impacts is provided for informational purposes.

The Appellant states that the project's construction noise would impact students and makes unsubstantiated claims that the school would not be able to function at full capacity due to construction activities. It is true that project construction could be perceived as an annoyance to the students and teachers of the school, as well as to immediate adjacent neighborhoods. But construction noise from construction of an infill single-family residential home in the urban setting of San Francisco would not constitute an unusual circumstance, and even if it were, this noise would not be significant.

The proposed project would involve demolition of a 512-square-foot parking structure on-site and

construction of a four-story residence with no underground levels. The proposed building would be supported by a spread footing foundation with drilled piers along the east property line. The project would require limited excavation as the project proposes approximately 35 cubic yards of excavation. Construction of the proposed project would be temporary in nature, with a limited duration of 12 months, and would not include pile driving or an excessive amount of excavation.

The proposed project would use typical construction equipment that would be regulated by Article 29 of the Police Code (section 2907, Construction Equipment). No impact pile driving or nighttime construction is required. Construction vibration would not be anticipated to affect adjacent structures. The proposed project would not generate sufficient vehicle trips to noticeably increase ambient noise levels, and the project's fixed noise sources, such as heating, ventilation, and air conditioning systems, would be subject to noise limits in Article 29 of the Police Code (section 2909, Noise Limits).

In summary, the proposed project would not result in unusual circumstances or a significant noise impact on adjacent properties, including the school. Project mitigation would not be required. The Appellant has not met the legal burden of proof to successfully challenge this determination.

### **Public Safety**

**Response 9: For informational purposes, the proposed project would not result in a significant environmental impact related to public safety.**

CEQA does not require that the department consider whether significant impacts associated with public safety in general would occur when issuing a Class 1 or 3 categorical exemption, as public safety by itself is not an exception to the use of a categorical exemption. Further, there is nothing unusual about the project that would give rise to a potential significant public safety impact. Thus, the following discussion of public safety is provided for informational purposes.

The Appellant makes unsubstantiated claims stating that large project delivery trucks could create unsafe and hazardous conditions for parents and students at the elementary school, as well as for tourists that are visiting the famed section of Lombard Street (which is located about 290 feet away). There is no evidence that the project would introduce a geometric design feature (e.g., sharp curves or dangerous intersections) or incompatible uses, present potentially hazardous traffic conditions or accessibility impacts. Yick Wo Alternative Elementary School has approximately 200 feet of passenger loading space on Jones Street in front of the school; there are no passenger loading zones on Lombard Street near the project site. In summary, the project would not impact the school's loading operations.

The project would be subject to the San Francisco Municipal Transportation Agency (SFMTA's) Regulations for Working in San Francisco Streets (the blue book). The blue book establishes rules and guidance so that construction work can be done safely and with the least possible interference with pedestrian, bicycle, transit, and vehicular traffic. Prior to construction of the proposed project, the project sponsor and construction contractor(s) would be required to meet with SFMTA and public works staff to develop and review the project's construction plans in preparation for obtaining relevant construction permits. In addition, the project would be subject to San Francisco Public Works Code section 724, which addresses temporary occupation of the public right-of-way. Section 724 requires, among other things,

that the project contractor provide a minimum clear width of four feet to provide a continuous pedestrian access route.

Because the project would be required to comply with these applicable regulatory requirements, the project would not create potentially hazardous conditions for people walking, bicycling, driving, or public transit operations, and there are no unusual circumstances related to the proposed or project site. The Appellant has not met the legal burden of proof to successfully challenge this determination.

### **Biological Resources**

**Response 10:** For informational purposes, the proposed project would not result in a significant environmental impact related to biological resources.

CEQA does not require that the department consider whether significant impacts associated with biological resources in general would occur when issuing a Class 1 or Class 3 categorical exemption, as biological resources by itself is not an exception to the use of a categorical exemption. Further, there is nothing unusual about the project that would give rise to a potential significant impact on biological resources. Thus, the following discussion of the project's impacts on biological resources is provided for informational purposes.

The Appellant speculates that the proposed project would have the potential to impact the city's wild parrots, raccoons and coyotes, and that the project's removal of trees in the rear yard would be detrimental to the local ecosystem.

The project site, which contains a residential structure in the rear and an accessory parking structure in the front with seven trees in the rear yard, is located within a developed urban area. The project site has no significant riparian corridors, estuaries, marshes, wetlands, or any other potential wildlife habitat that might contain endangered, rare or threatened species. Thus, the project site has no value as habitat for rare, threatened, or endangered species.

The Urban Forestry Ordinance requires a permit from Public Works to remove any protected trees (landmark<sup>18</sup>, significant<sup>19</sup>, and street trees<sup>20</sup>). The proposed project, however, does not involve the removal of a protected tree. There are no landmark or significant trees on the project site and the proposed project would retain the existing street tree in front of the project site. The project would remove five trees that are located in the rear yard. The removal of trees and other vegetation growing on private property is not an unusual circumstance for projects in San Francisco. The removal of trees on private property is a daily occurrence in San Francisco and is not considered an unusual circumstance.

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18 A landmark tree is designated by the board of supervisors following nomination of a tree by the urban forestry council. The urban forestry council determines whether a nominated tree meets the qualification for landmark designation by using established criteria set forth in section 810(f)(4)(A)-(E) of the public works code. Special permits are required to remove a landmark tree.

19 A significant tree is defined either on property under the jurisdiction of public works, or on privately-owned property with any portion of its trunk within 10 feet of the public right-of-way and that satisfies at least one of the following criteria: (a) diameter at breast height in excess of 12 inches, (b) a height in excess of 20 feet, or (c) a canopy in excess of 15 feet.<sup>29</sup> The director of public works may authorize removal of a significant tree.

20 Street trees are trees within the public right-of-way or on land within the jurisdiction of public works. Their removal by abutting property owners requires a permit (section 806(b)(3)).

In summary, the proposed project would not result in unusual circumstances or a significant impact on biological resources. Project mitigation would not be required. The Appellant has not met the legal burden of proof to successfully challenge this determination.

### **Compliance with Regulations**

**Response 11: The issuance of the CEQA categorical exemption determination compiled with the CEQA Guidelines and Chapter 31 of the San Francisco Administrative Code.**

The Appellant lists several legal citations but does not provide evidence that the planning department's issuance of the categorical exemption violated any regulation. The Appellant further states the project violates the planning code which is factually incorrect as the proposed project is code-complying. The Appellant also states that the project violates the building code, but again does not provide any evidence to support that claim.

The Appellant states that the CEQA exemption determination process lacked public participation. Per the CEQA Guidelines and Chapter 31, a lead agency is not required to notify the public prior to issuance when a project qualifies for class 1 and class 3 categorical exemption. Instead, as required by Chapter 31, the categorical exemption determination for the 939 Lombard Street project was posted on the planning department website upon issuance. Additionally, as part of the permit review process, the planning department mailed out a Section 311 notice to the neighborhood which informed the public that the project qualified for a categorical exemption and a subsequent discretionary review hearing took place at the planning commission on June 29, 2023. The issuance of the CEQA determination for the 939 Lombard Street project compiled with the CEQA Guidelines and Chapter 31.

### **Conclusion**

The department has determined, based on substantial evidence in the record, that the proposed project is categorically exempt from environmental review under CEQA on the basis that: (1) the project meets the definition of one or more of the classes of projects that the Secretary of Resources has found do not have a significant effect on the environment, and (2) none of the exceptions specified in CEQA Guidelines section 15300.2 prohibiting the use of a categorical exemption are applicable to the project. Specifically, as documented above, the Class 1 and Class 3 categorical exemption was appropriately issued because the proposed project would demolish an accessory parking structure and construct a single-family residence. In addition, there are no unusual circumstances that would exclude the project from qualifying from a categorical exemption and no mitigation measures are required under CEQA.

The Appellant has not met the legal burden of proof to demonstrate that the project does not qualify for a Class 1 and Class 3 categorical exemption. The department therefore respectfully recommends that the board uphold the CEQA categorical exemption determination and deny the appeal of the CEQA determination.