San Francisco Planning

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Categorical Exemption Appeal
1151 Washington Street

Date:	June 16, 2023
To:	Angela Calvillo, Clerk of the Board of Supervisors
From:	Lisa Gibson, Environmental Review Officer – 628.652.7571 Rachel Schuett, Senior Planner, Rachel.schuett@sfgov.org, 628.652.7546
RE:	**Planning Record No. 2022-010833ENV** **Appeal of Categorical Exemption for 1151 Washington Street**
Hearing Date:	June 27, 2023
Project Sponsor:	Dana Manea, MACY Architecture, 415.652.4535
Appellant(s):	Richard Drury of Lozeau Drury, LLP, on behalf of Clayton Timbrell and the Upper Chinatown Neighborhood Association

Introduction

This memorandum is response to the May 17, 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 1151 Washington Street project.

Please Note: On June 16, 2023, as the department was finalizing this appeal response, the Appellant submitted a supplemental letter of appeal dated June 16, 2023. Thus, this appeal response does not address the supplemental appeal letter. The department will review the supplemental appeal letter and consider whether a written response is warranted.

The department, pursuant to Article 19 of the CEQA Guidelines, issued a categorical exemption for the proposed project on April 7, 2023, finding that the proposed project is exempt from CEQA as a Class 32 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 3,571-square-foot parcel in the Nob Hill neighborhood. The project site is occupied by an existing 30-foot-tall, three-story, single-family residence that is approximately 3,050 square feet in size with two off-street parking spaces. Immediately east of the project site is a lower playground area of the Betty Ann Ong Recreation Center that is approximately 6 to 20 feet lower in elevation than the subject property's rear yard. The change in elevation is supported by a retaining wall ranging between 6 to 20 feet that extends the length of the playground.

Project Description

Utilizing the state density bonus program, the project sponsor proposes the demolition of the existing single-family residence and construction of a 40-foot-tall (50-foot-tall with penthouses), four-story over basement residential building containing 10 for-sale townhouses and one off-street van parking space. The proposed building would be approximately 12,300 square feet in size. Each of the 10 residential units would be four stories tall and would include a penthouse and roof deck. The proposed "front unit" along Washington Street would be approximately 2,070 square feet in size with three bedrooms while the nine rear units would each be approximately 940 square feet with two bedrooms. The proposed roof decks would include approximately 7-foot-tall privacy walls and there would be a mini-split heat pump (condenser unit) on the roof of each unit. Access to the proposed units would be from a 5-foot-wide pathway that would step up along the eastern edge of the property, from Washington Street. The proposed pathway would include a bicycle ramp.

The project would include 10 class 1 bicycle parking spaces on the project site; there would be one class 2 bicycle parking space installed on the sidewalk along the project site's Washington Street frontage. The existing 13-foot-wide curb cut on Washington Street would be reduced to a 10-foot-wide curb cut. Six existing trees would be removed and replaced with two trees in front of the project site. Trash, recycling and compost bins would be stored in the shared garage space at the street-level basement and would be rolled out to Washington Street for pick-up. The proposed buildings would likely be supported on micropiles. The project would require approximately 130 cubic yards of excavation to a depth of approximately 12.5 feet below ground surface. Construction is expected to last approximately 15 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 November 2022, when the project sponsor filed for a building permit associated with the proposed project:

- On November 1, 2022, Dana Manea (representing the project sponsor) filed a project application with the department for the project.
- On April 7, 2023, the department determined that the project was categorically exempt under CEQA Class 32 - Infill Development, and that no further environmental review was required.
- On April 20, 2023, the Planning Commission approved the Conditional Use Authorization for the proposed project.
- On May 17, 2023, Richard Drury of Lozeau Drury, LLP, on behalf of Clayton Timbrell, filed an appeal of the categorical exemption determination.

- On May 19, 2023, Hanmin Liu, on behalf of the Upper Chinatown Neighborhood Association (UCNA), filed a memorandum indicating that UCNA is joining the appeal of the exemption determination filed by Richard Dury (on May 17, 2023), and noted that UCNA is not raising any new issues or enlarging the scope of the appeal.
- On May 22, 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.

CEQA Guidelines section 15332 (In-Fill Development Projects), or Class 32, consists of projects characterized as in-fill development, provided they meet various conditions. These conditions include: the project's consistency with applicable general plan designation, general plan policies and applicable zoning designations and regulations; the project's location within city limits on a project site of no more than five acres substantially surrounded by urban uses; the project site having no value as habitat for endangered, rare or threatened species; the project approval not resulting in any significant effects relating to traffic, noise, air quality, or water quality; and the project site being able to be adequately served by all required utilities and public services.

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 a Class 32 exemption pursuant to CEQA Guidelines section 15332 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.

In addition to environmental concerns, the Appellant disputes the project's eligibility for concessions and waivers pursuant to State Density Bonus Law. Such concerns are not material to the CEQA determination and are not addressed below. Please refer to Response 6 in the department's response to the appeal of the Conditional Use Authorization for this project, which discusses this matter (see Board of Supervisors File No. 230630).

Hazardous Materials

Response 1: The presence of subsurface contaminants on a residential infill development site in San Francisco is not an unusual circumstance. Even if it were, compliance with the Maher Ordinance would ensure that the project would not result in significant impacts related to exposure to contaminated soils or soil vapors. The Site Mitigation Plan and other regulatory requirements do not constitute mitigation measures under CEQA.

As noted above, the eligibility criteria for a Class 32 infill categorical exemption include that the project may not have a significant impact on traffic, noise, air quality or water quality. Hazardous materials is not among the topics in these criteria; therefore, CEQA does not preclude a project where hazardous materials are present from

relying on a Class 32 categorical exemption if other requirements are met. However, there are exceptions to categorical exemptions where hazardous materials impacts must be considered.

One exception specifies that 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.[1] Here, the project site is not included on such a list and thus this exception does not apply to the project. Also, under CEQA, there is no exception to categorical exemptions for projects on contaminated sites that are *not* listed on the Cortese List.

Therefore, it stands to reason that the presence of contamination on a property alone does not preclude use of a categorical exemption. What remains to be considered regarding the presence of contamination on a property is whether it triggers another exception to the use of a categorical exemption, namely the exception for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. As described below, the department has substantial evidence in the record to support the conclusion that the presence of contamination on the project site is not an unusual circumstance and, even if it were, it would not give rise to a significant impact on the environment. The Appellant has not met the legal burden of proof to successfully challenge this determination.

Contaminated Residential Infill Development Sites in San Francisco Are Not Unusual

The contaminants present on the property are commonly found on sites within San Francisco that are underlain by undocumented fill material and/or located near historically commercial and industrial areas. San Francisco is a built-out city that has a long history of diverse uses, including industrial and commercial uses interspersed with residential uses. In addition, much of the city is underlain by undocumented fill, including rubble from earthquakes, sunken ships, and sand dredged from the Bay. As such, it is not uncommon to encounter subsurface contamination. In fact, the routine nature of such encounters is part of why San Francisco has its own dedicated program (Maher program, discussed in more detail below) to manage the investigation and remediation of soil/groundwater contaminants. According to Planning Department estimates, approximately 24.2 percent of City's geographical area (or 13.7 percent of all parcels) within San Francisco is located in the Maher area.[2] This equates to almost a quarter of the City's geography being potentially underlain by contaminants associated with undocumented fill, present or former hazardous uses, or other reasons that require projects proposed on those sites to undergo additional regulatory process to ensure the safety of workers and future occupants, as discussed below.

Even If the Site's Contamination Presented Unusual Circumstances, the Maher Ordinance Ensures That Significant Impacts Would Not Occur

The project site is located within the city's Maher Area, which includes sites with known or suspected soil and/or groundwater contamination.[3] This is because the project site is within 100 feet of a nearby site that previously contained an underground storage tank (1140 Clay Street, Geotracker Case Number T0607565888), which itself is

[1] https://calepa.ca.gov/sitecleanup/corteselist/Background/
[2] Mike Wynne, San Francisco Planning Department, personal communication to Tania Sheyner, Planning Department, March 13, 2023.
[3] https://sf.gov/information/frequently-asked-questions-about-maher-ordinance.

a property on the Cortese List.[4] As such, the proposed project is subject to San Francisco Health Code Chapter 22A (the Maher Ordinance, or Maher program), a unique and robust local regulatory program overseen by the San Francisco Department of Public Health (DPH) which provides for the characterization and mitigation[5] of hazardous substances found in soil, soil vapor, and groundwater within the Maher area.[6] This ordinance was crafted as a good government measure to require cleanup of contaminated sites to State standards tied to the proposed use of a development project, prior to building occupancy, and in a manner that is protective of public health and safety.

Pursuant to the Maher program requirements, the project sponsor submitted a Site Assessment and Mitigation Application to DPH on October 15, 2019. DPH's Environmental Health Branch, Contaminated Sites Assessment and Mitigation Program (EHB-SAM), which administers the Maher program, has been coordinating with the project sponsor to ensure that the site is properly investigated and remediated. The following discussion highlights some of the key facts demonstrating the adequacy of the Maher requirements to avoid significant impacts.

The sponsor submitted a Phase I Environmental Site Assessment (Phase I ESA) report,[7] which described the current and historical uses of the property, to DPH. As documented in the Phase I ESA, the project site has been either vacant or developed with residential use since records were kept (circa late 1800s). The Phase I noted the presence of undocumented fill (i.e., fill of unknown origin) on the project site as a recognized environmental condition. Following this, a Phase II Environmental Site Assessment (Phase II ESA) report[8] was prepared to obtain additional information concerning potential soil contamination underneath the site. As part of the Phase II ESA, soil and soil vapor borings were performed. The Phase II identified a number of contaminants at concentrations above applicable screening levels[9]. These contaminants included: (1) metals, such as arsenic,[10] chromium, and thallium[11] and (2) volatile organic compounds (VOCs), such as perchloroethylene (PCE) and chloroform. As noted above, these contaminants are commonly found in development project sites within San Francisco that are underlain by undocumented fill material and/or located near historically commercial and industrial areas.

Consistent with Maher Ordinance procedures, state-based screening levels were used to determine that the project site requires further investigation by DPH. As discussed in the Phase II report, "analytical results were compared to Regional Water Quality Control Board (RWQCB) Environmental Screening Levels (ESLs) for residential land use and construction worker health, where established. ESLs are guidelines established by the RWQCB and by definition, any detected concentration below its applicable ESL can be assumed to not pose a significant threat to human health, water resources, or the environment. Similarly, *the presence of a chemical at*

[4] https://geotracker.waterboards.ca.gov/profile_report.asp?global_id=T0607565888.
[5] The term "mitigation" within the context of hazardous materials regulation sector (such as the Maher program) refers to methods of controlling contamination for the protection of human health and environmental concerns. This use of the term in has a different meaning from "mitigation" in the context of CEQA, in which context mitigation refers to are feasible measures that would avoid, lessen, or reduce significant impacts, and would be required to be implemented if a project is approved. A "Site Mitigation Plan (SMP)" is a plan to reduce or avoid environmental impacts resulting from exposure to contaminated soils and/or ground water, similar to a "mitigation measure" under CEQA.
[6] https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_health/0-0-0-4093.
[7] EIS, 2019. Phase I Environmental Site Assessment, 1151 Washington Street, San Francisco, California. 18 December.
[8] EIS, 2020. Limited Soil and Soil Vapor Investigation, 1151 Washington Street, San Francisco, California. 11 March.
[9] See Regional Water Quality Control Board Environmental Screening Levels (https://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/esl.html).
[10] Arsenic was shown as being above environmental screening levels but still within the regional Bay Area background of 11 mg/kg.
[11] Chromium and thallium are commonly found in undocumented fill material.

concentrations in excess of an ESL does not necessarily indicate adverse effects on human health or the environment, rather that additional evaluation is warranted." [Emphasis added.]

The sponsor submitted a Site Mitigation Plan (SMP), which is the plan that will be used to manage chemical contaminants during project construction and operations. In their most recent letter issued on January 10, 2023, DPH approved the SMP as being in compliance with SFHC Article 22A.10, which among other provisions, requires that the applicant "assure that the intended use will not result in public health of safety hazards in excess of the acceptable public health risk levels…" Requirements within the SMP to ensure public health and safety included entry/exit restrictions, soil and stockpile management protocols, material segregation and disposal, dust controls, contingency procedures when encountering unexpected conditions, and general worker health and safety procedures. DPH required installation of a vapor intrusion mitigation system (VIMS) to mitigate the potential vapor intrusion risk to indoor air from VOCs (specifically PCE and chloroform). DPH will oversee post-construction vapor sampling and, if required, indoor air samples to confirm the effectiveness of the VIMS prior to approving any occupancy permits for the proposed new housing units. In addition, all activities conducted at the site would be subject to current California Occupational Safety and Health Administration (Cal/OSHA) rules and regulations to protect construction workers (some of which are detailed in the SMP).

DPH has been appropriately overseeing the additional evaluation of the site to ensure it meets applicable protective standards for intended uses. As part of standard Maher Ordinance protocol, as discussed above, DPH staff has reviewed and approved all submitted documents prepared for the proposed project, including a geotechnical report, Phase I report, Phase II report, and the SMP. Presently, the project is in compliance with SFHC Article 22A and no other submittals are required by the project sponsor prior to the start of the proposed development activities.

The Appellant asserts that the SMP constitutes mitigation under CEQA and that this measure is inadequate to reduce risks to a less-than-significant level. To support this claim, the Appellant provides a memorandum authored by Matt Hageman, P.G., C.Hg. and Dr. Paul E. Rosenfeld, Ph.D. This document asserts that further CEQA review is required but does not provide substantial evidence demonstrating that the project presents unusual circumstances, in the context of San Francisco. Further, it does not provide substantial evidence to support a fair argument that the project would have a significant impact in light of the regulatory requirements imposed by the Maher Ordinance. Indeed, the main objective of the Maher program is to ensure that any exposure to hazardous materials by workers or future residents as part of new development is avoided. DPH will not sign off on the occupancy permit until and unless the final report submitted by the sponsor following completion of construction and installation of VIMS documents that any pollution from subsurface contaminants do not exceed health-protective standards applicable to residential uses, which would also protect users of the adjacent park. This regulatory process will ensure that any impacts related to release of hazardous materials during construction or operations do not rise to a significant level. The appellant does not present substantial evidence that implementation of the Maher program – which is required by law – would be insufficient to avoid significant impacts related to hazards.

The Site Mitigation Plan and Other Maher Program Requirements Are Not CEQA Mitigation Measures

The Appellant conflates the regulatory requirements of the Maher program with mitigation measures under CEQA. In assessing whether a project would result in a significant impact, the lead agency must take into account regulatory requirements that apply to the project, because these are background norms that apply regardless

and independent of the CEQA process. Some of those regulatory requirements may avoid or lessen potential environmental impacts altogether; others may serve other purposes. There are many examples of this in San Francisco, including the Noise Ordinance, the Clean Construction Ordinance, the Maher Ordinance, and the building permit review process under the purview of the Department of Building Inspection (DBI), the latter of which is explained in further detail in Response 4 below. CEQA mitigation measures are not required where there are other regulatory processes in place to mitigate environmental impacts, including the SMP process under DPH's jurisdiction. It is routine in the development process to rely on these and other regulatory requirements when reviewing a project's impacts under CEQA, and courts have upheld this approach.

If, after considering the proposed project's compliance with all applicable regulatory requirements, there is still a potentially significant environmental impact, then the lead agency must identify mitigation measures to address that impact. The regulatory requirements themselves do not constitute mitigation, because, as stated above, they apply regardless and independent of the CEQA process. Moreover, treating these regulatory requirements as mitigation measures under CEQA would effectively preclude use of a categorical exemption, while resulting in no greater environmental protection. Stated another way, if the department were to ignore the Maher program requirements (which would be an improper analytical approach under CEQA) and find the impact to be significant, the mitigation measures that would be drafted for this project would be equivalent to the requirements of San Francisco Health Code Article 22A and San Francisco Building Code Section 106.3.2.4), which must be satisfied prior to occupancy permit issuance. Furthermore, ignoring regulatory requirements and requiring higher levels of environmental review than required by CEQA 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.[12]

Thus, given that the EHB-SAM is a local program operated by the DPH, whose express purpose is to ensure that impacts from hazardous materials are mitigated/remediated during project construction in a manner that is protective of public and worker health, the proposed project would not result in significant effects associated with hazardous materials due to unusual circumstances.

Emergency Access

Response 2: Public services and utilities (including emergency access) are currently provided to the project site. The proposed project would not create unusual circumstances that could lead to a significant environmental impact.

As noted under response 1, above, the eligibility criteria for a Class 32 categorical exemption stipulates that the project may not have a significant impact on traffic, noise, air quality or water quality. Emergency access is not among the topics in the eligibility criteria. Also, the project site is and would be adequately served by utilities and public services as required under CEQA Guidelines section 15332(e).

The appellant asserts that the project would not meet state and local requirements for San Francisco Fire Department ("fire department") emergency access because sole access to 9 of 10 proposed units would be via a 5-foot-wide pathway which steps up from Washington Street, at the eastern edge of the project site. This issue

[12] For example, Housing Element Implementation Program 8 is titled, "Reducing Constraints on Housing Development, Maintenance, and Improvement." Action 8.5.6 states that the City will amend local codes and update requirements that go beyond the CEQA statute and state guidelines. The Housing Element's Implementing Programs can be found at: https://generalplan.sfplanning.org/I1_Housing_Implementing_Programs.htm.

was raised and addressed prior to the Planning Commission hearing on April 17, 2023. At that time, the San Francisco Fire Marshal confirmed that the project does not present any unresolvable life and safety concerns.

As with all new construction, minor adjustments to improve emergency access may be identified and resolved during the building permit review process. Specifically, the fire department will conduct a more detailed review of the fire alarm and sprinkler system design, Emergency Escape Rescue Openings, and all other relevant project components prior to signing off on the occupancy permit. The appellant does not present any evidence that the standard building permit review process, including fire department review, would be insufficient to resolve any issues related to fire department access or preclude development of the proposed project.

In addition, no other issues related to the provision of public services or utilities were identified, including "unusual circumstances" that could lead to a significant environmental impact.

Given the city's age, topography, and development standards, such as the absence of side setbacks (and presence of "party walls") in much of the city, the fire department must be prepared to access buildings in a variety of different circumstances. In some neighborhoods the fire department uses smaller ladders and apparatus that are more easily accommodated on narrow streets and steep slopes, or hand carries hoses and equipment where buildings cannot be reached by fire engines and ladder trucks. Although fire department access to 9 of 10 units at 1151 Washington Street might be somewhat atypical for newer development projects, the fire department has reviewed the proposal and has confirmed that adequate access would be provided in case of fire or other emergency situations.

In summary, the fire department has reviewed the site plan for the proposed project and has determined that adequate fire department access would be available. As such, pursuant to CEQA Guidelines section 15300.2(c), there is no reasonable possibility that the proposed project would have a significant effect on the environment due to unusual circumstances related to emergency access. Further, the project site is and would be adequately served by utilities and public services as required under CEQA Guidelines section 15332(e).

Shadow

Response 3: Forty-foot-tall buildings are common in San Francisco. As such, this aspect of the project does not present unusual circumstances, and no shadow impact analysis is required.

As noted under responses 1 and 2, above, the eligibility criteria for a Class 32 categorical exemption stipulate that the project may not have a significant impact on traffic, noise, air quality or water quality. Shadow impacts are not among the topics in the eligibility criteria, 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 Class 32 categorical exemption. Further, the proposed 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.[13] 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.[14] Permitted rooftop appurtenances such as stair overruns, elevator penthouses and mechanical equipment, etc. are not counted toward the building height if they meet the criteria in Planning Code Section 260(b).[15] The 1151 Washington Street project would not exceed 40 feet in height and, therefore, no shadow impact analysis is required under Planning Code 295.

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 resulting from an unusual circumstance.

For informational purposes, the department notes that the shadow memorandum provided by the appellant (Exhibit G of the appeal letter) was based on a prior iteration of the project. In addition, the memorandum does not follow the department's standard methodology for conducting shadow analysis, as acknowledged in the memorandum.

Geology and Soils

Response 4: Construction on steep slopes is common in San Francisco. Even if such construction presented unusual circumstances, DBI's building permit review process, which includes provisions for construction on hillsides, would ensure the project's structural integrity during construction and operations.

As discussed in the responses above, the eligibility criteria for a Class 32 categorical exemption stipulate that the project may not have a significant impact on traffic, noise, air quality or water quality. Impacts to geology and soils are not among the topics in the eligibility criteria. Therefore, impacts related to geology and soils are not among the topics that must be considered in assessing a project's eligibility for a Class 32 categorical exemption. Further, 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"). The proposed project would be consistent with the density, height, and bulk limitations for its designated RM-3 (Residential, Mixed, Medium Density) zoning district and its size and construction type would be within the range of structures that predominate in the neighborhood.

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 process 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

[13] 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
[14] San Francisco Planning Code, Section 260. Height Limits: Measurement. https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_planning/0-0-0-21453
[15] San Francisco Planning Code, Section 260. Height Limits: Measurement. https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_planning/0-0-0-21453

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 would 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.

A geotechnical report prepared for the proposed project confirmed that the project site has a 25 percent slope and the underlying soil exhibit a potential for liquefaction.[16] Taking these site characteristics into consideration, the geotechnical report made recommendations regarding foundations that could be supported on the site and 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[17] (San Francisco Building Code section 106A.4.1.4) would be determined by the San Francisco Department of Building Inspection (DBI) as part of their building permit review process.

As described in DBI's Information Sheet S19,[18] 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.[19]

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 of it has a slope of 25 percent or more).[20] Although there are certain geotechnical complexities associated with the project site, including the slope, underlying soils and potential for seismic activity, none of them comprise unusual circumstances in San Francisco or the San Francisco Bay Area. As with all projects, the

[16] Romig Engineers, *Geotechnical Investigation, David Townhome Development, 1151 Washington Street, San Francisco, California 94109*, November 2022.
[17] Enacted by Ordinance No. 12118, effective June 23, 2018.
[18] 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.
[19] 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.
[20] Mike Wynne, San Francisco Planning Department, personal communication to Tania Sheyner, Planning Department , June 15, 2023.

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.

As explained in Response 1, it is routine in the development process to rely on these and other regulatory requirements when reviewing a project's impacts under CEQA, and courts have upheld this approach. Furthermore, ignoring regulatory requirements and requiring higher levels of environmental review than required by CEQA 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.

Air Quality

Response 5: The project would not result in any significant air quality impacts during project construction or operations.

In the appeal letter, the appellant asserts that, "The Planning Department's draft categorical exemption admitted the Project has the 'potential to emit substantial pollutant concentrations from the use of diesel construction equipment, backup diesel generators, heavy industry, diesel trucks.' Thus, the Infill Exemption is improper under Section 15332(d)."

The Appellant misrepresents the department's analysis by cherry-picking this passage from the department's documentation without providing context and failing to acknowledge that the categorical exemption includes further analysis explaining that these emission sources would not result in a significant impact.

The quoted text is from a *screening question* in the department's standard CEQA Exemption Determination checklist. The question asks:

> "Would the project add new sensitive receptors (specifically, schools, day care facilities, hospitals, residential dwellings, and senior-care facilities within an Air Pollution Exposure Zone? Does the project have the potential to emit substantial pollutant concentrations (e.g. use of diesel construction equipment, backup diesel generators, heavy industry, diesel trucks, etc.)?"

The department checked the box for this item, indicating that comments are required to explain why the project still qualifies for the exemption despite this "potential." Further below in the checklist is a comments box that states, "Please see attached." This refers to an attachment that was included in the document that the Appellant attached to their appeal letter, which includes "Step 2: Environmental Screening Comments." Those comments include the following text addressing the air quality screening box that was checked:

> "Air Quality: The proposed project's construction would be subject to the Dust Control Ordinance (Article 22B of the Health Code). The proposed land uses are below the Bay Area Air Quality Management District's construction and operational screening levels for requiring further quantitative criteria air pollutant analysis. The project site is located within an air pollutant exposure zone but would not add new stationary sources of toxic air contaminants. Pursuant to Director's Bulletin No. 2 for Type 3, Clean Construction projects, the project sponsor has committed to using Tier 4 engines on all diesel-fueled construction equipment. Thus, no significant construction or operational air quality impacts would occur."

The discussion, below, elaborates on the above comments from the checklist.

Construction. The proposed project's construction would be subject to the Dust Control Ordinance (Article 22B of the Health Code). In addition, pursuant to Director's Bulletin No. 2 for Type 3, Clean Construction projects, the project sponsor has committed to using Tier 4 engines on all diesel-fueled construction equipment; this includes cranes and diesel trucks. It should be noted that the construction period would be limited to 15 months and the use of diesel-fueled construction equipment would be temporary and intermittent.

Operations. The project site is located within an air pollutant exposure zone but 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. The proposed operational equipment (i.e., rooftop condensers and lifts) would not be diesel-operated; therefore, no air quality emissions would result from the proposed mechanical equipment. Lastly, the project would result in a small number of vehicle and delivery trips, which would also not result in operational air quality impacts.

For the above reasons, the department's finding that significant construction or operational air quality impacts would not occur is supported by substantial evidence in the record. In addition, the Appellant's argument that the department's Class 32 categorical exemption determination "admitted" that the project could have a significant effect on air quality is without merit and does not meet the fair argument standard.

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 32 categorical exemption was appropriately issued because the proposed project would not have any significant environmental impacts related to traffic, noise, air quality, water or water quality and the project site can be adequately served by all required utilities and public services. Moreover, 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 32 categorical exemption. The department therefore respectfully recommends that the board uphold the CEQA categorical exemption determination and deny the appeal of the CEQA determination.