



AGENDA REPORT


TO: Jestin D. Johnson
City Administrator

FROM: William Gilchrist
Director, Planning and
Building Department

SUBJECT: Appeal of the Environmental
Determination for PLN22189,
Childcare Center At 5315 College
Avenue

DATE: June 3, 2024

City Administrator Approval


Jestin Johnson (Jun 21, 2024 06:45 PDT)

Date: Jun 21, 2024

RECOMMENDATION

Conduct A Public Hearing For Appeal No. PLN22189-A01-A01, Challenging The Planning Commission's California Environmental Quality Act Exemption For An Addition And Alteration To An Existing Commercial Structure For Childcare Activities, And Upon Conclusion, Act Upon The Appeal and Direct The City Administrator To Prepare A Resolution For City Council Adoption Memorializing The Council's Supportive Findings And Final Action On The Appeal.

EXECUTIVE SUMMARY

The City of Oakland (City) General Plan identifies the need for and encourages the appropriate siting and design of high-quality childcare and daycare facilities throughout the City. On November 18, 2022, the applicant applied for a Minor Conditional Use Permit (CUP) and Regular Design Review approval for a proposed childcare center and addition and alteration to an existing building located at 5315 College Avenue (Project). On October 12, 2023, the Bureau of Planning staff approved the proposal with project-specific conditions requiring a pick-up/drop-off transportation plan and window details and determined that the Project is exempt from California Environmental Quality Act (CEQA) review under Sections 15301 and 15183 of the State CEQA Guidelines.

The owner of the property surrounding the site (Appellant), submitted an appeal of staff's approval and CEQA determination, which appeal was denied by the Planning Commission on February 24, 2024. Appellant now appeals to the City Council to vacate the Planning Commission's approval of the CEQA determination and direct staff to prepare an Environmental Impact Report (EIR) for the Project (see **Attachment A** for the City Council appeal). If the City Council grants the appeal, the Planning Commission's decision to approve the Project would be held in abeyance until additional environmental review is completed. Staff recommends that the City Council deny the appeal and uphold the determination that the Project is exempt from CEQA.

City Council
July 2, 2024

BACKGROUND / LEGISLATIVE HISTORY

History

On November 18, 2022, the applicant applied for a Minor CUP and Regular Design Review approval for the Project, a proposed childcare center and addition and alteration to an existing building on 5315 College Avenue. On October 12, 2023, after several discussions with Historic Preservation staff that resulted in the approved design (see **Attachment B** for plans) and preparation of a traffic study, Bureau of Planning staff approved the proposal with project specific conditions requiring a pick-up/drop-off transportation plan and window. Planning staff also determined that the Project is exempt from further CEQA review under State CEQA Guidelines Sections 15301 (existing facilities) and 15183 (projects consistent with general plan or zoning).

Appellant submitted an appeal of the Project to the Planning Commission on October 20, 2023, which was based on alleged “Erroneous Determinations and Findings of City Staff” (see **Attachment B** for the Planning Commission appeal). The appeal was heard by the Planning Commission on February 24, 2024. At that meeting, the Planning Commission unanimously denied the appeal and upheld staff’s determination that the Project is exempt from CEQA. The Planning Commission added two conditions to the approval related to construction noise and a sound fence to reduce playground noise, respectively. The sound fence was added as a condition to assure compliance with the required CUP findings contained in Section 17.134.050 of the Planning Code.

On March 7, 2024, Appellant appealed the CEQA Determination for the Project (see **Attachment A** for the City Council appeal). Because the Planning Code allows no further appeals for staff approval of the Project, this appeal is solely of staff’s CEQA determination, as Section 21151(c) of the State Public Resource Code states that determinations that a project is exempt from CEQA may be appealed to the agency’s elected decision-making body. Therefore, the appeal in front of the City Council relates specifically to the environmental determination and not to the merits of the Minor CUP or Regular Design Review.

Project Location

The proposed childcare center is on a 3,733 square-foot, flat lot fronting College Avenue in the Rockridge Commercial District in North Oakland. The ornate building on the site was originally constructed in the 1890’s as a home, last used as a law office, and is a Potentially Designated Historic Property (PDHP) with a “C” historic rating from the Oakland Cultural Heritage Survey. These historic designations are described further below.

The property is surrounded by 5295 College Avenue, which is owned by Appellant and contains a clothing store, restaurant, and several offices for mental health professionals. An existing building on this neighboring site is also a PDHP and has a “Dc” historic rating from the Oakland Cultural Heritage Survey.

Project Description

The Project would provide for a new childcare center along College Avenue. To accommodate the Project, the proposal would: 1) lift an existing 2,429 square-foot building with a main floor and a basement 8'-3" to create two stories over a basement; 2) build a 2,270 square-foot rear addition; 3) rotate the building to be perpendicular to College Avenue, and 4) establish a childcare center with no more than 48 students and 10 employees.

The daycare would operate from 8:00am to 6:00pm, Monday through Friday, and the enrollees would age from one to five years old. As conditioned, the applicant will submit a plan to limit traffic disruption along College Avenue and assure the safety of students for review and approval of the Bureau of Planning and the Department of Transportation. The plan will include:

1. Two passenger loading areas in front of the parcel for the use of dropping off and pickup up students during peak hours;
2. A requirement to stagger drop-off times during morning peak hours to reduce congestion in front of the site;
3. An advertised carpool program to be included in literature for parent and guardians;
4. A crossing guard at the intersection of College and Bryant Avenues during peak hours to assist in street crossing and assure that drop-off is not creating double parking on College Avenue; and
5. A requirement for a review and inspection by the Bureau of Planning and the Department of Transportation after six and twelve months of operation to assure the center is adhering to the transportation plan.

With the exception of the wrought iron porch railing, the front façade of the new ground floor would contain a porch, bay window, materials and detailing that match the existing building. The lifted ground-floor porch would be converted to a second-floor balcony with wood railing. The rear addition would be two-stories above a partially underground basement, have a flat roof, and cover the rear 24 feet of the site. The applicant proposes to install horizontal wood siding on the exterior of the building to match the existing building.

The Project also includes a 1,336 square-foot landscaped yard at the southern side and a 446 square-foot landscaped yard at the northern side of the parcel, respectively. As conditioned by the Planning Commission, a wood sound wall will be installed at the southern side of the property.

CEQA Exemption Determination

During the application review process, staff determined the proposal is exempt from CEQA per Section 15301 of the State CEQA Guidelines: Minor alterations to existing facilities; and Section 15183: Projects Consistent with a Community Plan, General Plan, or Zoning. Therefore, an EIR is not required for approval of the Project. These two CEQA exemptions act on a separate and independent basis: if the City Council finds that either of these exemptions applies to the Project, then an EIR does not need to be prepared.

The State CEQA Guidelines lay out a three-tiered review process to ensure that cities take environmental considerations into account as part of the decision-making process. Under the first tier, the City determines whether an activity is a “project” under CEQA. Discretionary permitting actions by the City generally meet the definition of a project under the first tier of review. Under the second tier, the City looks at whether a project is exempt from CEQA. This takes place prior to any formal environmental evaluation. Categorical exemptions from CEQA, such as Section 15301, are established for classes of projects that the Secretary of the California Natural Resources Agency has found not to have a significant effect on the environment. Statutory exemptions, such as 15183 (codified under Public Resources Code Section 21083.3), are established by state legislature based on determinations that each exemption promotes an interest important enough to justify forgoing the benefits of environmental review. (See generally *Napa Valley Wine Train Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370.)

If a project is categorically exempt, it is not subject to CEQA requirements, and the City does not undertake any further evaluation of whether the project may have impacts using City thresholds. The City does not proceed to the third tier of preparing an environmental review document such as an initial study, negative declaration, or EIR. Therefore, no further environmental review is necessary.

Once the City establishes that a project is within a categorical exemption, the burden shifts to the party challenging the exemption to show that it falls within an exception to the exemption. (See *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1186.) Here, Appellant has not asserted that any exception to the exemption applies. Instead, Appellant argues that the City’s use of an exemption in the first place is not appropriate. Staff’s response to those claims follows.

ANALYSIS AND POLICY ALTERNATIVES

Advancement of Citywide Priorities

The Project would advance the following Citywide priorities:¹

Housing, economic, and cultural security: The development of more childcare centers throughout Oakland provides benefits to children and working parents alike and alleviates existing pressures on the availability of childcare services. Quality daycare also provides economic benefits by allowing parents to work and assures more children will be prepared for educational opportunities.

¹ FY 2023-25 Budget Priorities:

https://stories.opengov.com/oaklandca/published/zNUGW_vwMd.

The following discussion provides an analysis of the issues raised on appeal. Appellant's full appeal letter to City Council is included as **Attachment A** to this report. The headings below reference the page number on which the relevant arguments can be found in Appellant's appeal letter. As previously described, the issues on appeal to City Council are solely regarding the CEQA determination, and arguments related to the Minor CUP and Regular Design Review approvals will not be comprehensively addressed in this report.

A summary of Appellant arguments are in *italics*, and Staff responses are in normal font.

1. *Appellant alleges the Planning Commission erroneously upheld the use of CEQA exemptions for the Project based on false or misleading information provided by City staff with respect to the environmental review of the Project. (Page 1)*

A. *Appellant alleges that the Planning Commission decision to uphold the use of a CEQA exemption for the Project was erroneous because the Planning Commission relied upon the Staff Planner's false statement that the Project condition to require a wooden soundwall was not mitigation for a significant noise impact.*

Appellant Argument: *Appellant states the staff planner erroneously informed the Planning Commission that the sound wall indicated in the sound report was just a "suggestion" and that, while it could be imposed as a condition of approval, it was not mitigation for a significant noise impact. Appellant further states that the wall is a mitigation under CEQA because without it noise from the daycare has the potential to exceed the applicable City noise standards at two locations in the Project vicinity.*

Staff Response:

The City Council has authority to independently review staff's environmental determination on this appeal. Therefore, this report responds to the substantive allegations of Appellant's claims.

Staff response to 2B and 2C below describes how the sound barrier is not a CEQA mitigation, but a Condition of Approval that assures the City can make the required findings for approval under Chapter 17.134 of the Oakland Planning Code. Notably, the sound study does not mention CEQA requirements.

B. *Appellant alleges that the Planning Commission decision to uphold the use of a CEQA exemption was erroneous because it was based on false information provided by the Staff Planner that an EIR would not provide much additional information beyond what had already been studied with respect to the Project.*

Appellant Argument: *During the Planning Commission hearing, a Commissioner asked the staff planner if an EIR would provide additional information beyond what the City already had. Staff planner responded that there would not be much additional information because noise and traffic analyses have already been done for the Project. Appellant alleges that that statement is false because an EIR would thoroughly go through each of the 21 environmental issue areas contained in the Initial Study checklist, require additional noticing, allow more public comment, and require more staff response to public comments.*

Staff Response:

The City Council has authority to independently review staff's environmental determination on this appeal. The Council is not bound by the Planning Commission's decision and is not tasked with identifying an error committed by the Planning Commission.

Staff responded that an EIR would not provide much additional information than already provided because the germane issues in terms of the appropriateness of the proposal at the site had been studied. Staff did not claim that there would be no more information gained and contends that the additional information would be negligible and unnecessary for a categorically exempt project.

Preparation of an EIR, essentially by definition, will always result in the production of more studies and more analysis of potential impacts of a City action. However, CEQA requires that where an exemption applies, the City shall not subject a development to additional analysis. As explained above, staff concluded that the proposed Project falls within several exemptions. Further analysis of the exemptions is provided below.

2. Appellant alleges that the Planning Commission decision to uphold the use of a Class 1 CEQA exemption under CEQA Guidelines Section 15301 (Existing Facilities) for the Project was erroneous, was not supported by substantial evidence, and constituted an abuse of discretion. (Page 4)

Appellant Argument: Appellant argues that the Planning Commission and Bureau of Planning staff improperly applied a Class 1 CEQA exemption under Section 15301 of the CEQA Guidelines. This categorical exemption is for projects involving "negligible or no expansion" to an existing use, as described in the following language from the CEQA Guidelines:

Class 1 consists of 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 existing or former use. The types of existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. The key consideration is whether the project" involves negligible or no expansion of use.

(CEQA Guidelines §15301.) As noted in the italicized language, "[t]he key consideration is whether the project involves negligible or no expansion of use." Appellant argues that, based on the condition of the basement, and real estate and tax listings, the Project requires substantial expansion to the existing building at 5315 College Avenue. Appellant further argues that the proposed use is substantially different than the past office use.

Staff Response:

The Class 1 exemption applies to minor alterations of existing buildings. The CEQA Guidelines state that Section 15301 "consists of 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 existing or former use." Appellant here argues that the proposed expansion is not "negligible." However, the

CEQA guidelines provide illustrations of what should be treated as negligible expansion and this proposal fits within that illustration.

This section provides examples of the types of projects that fall under this exemption. Subsection (e) includes: additions to existing structures provided that the addition will not result in an increase of more than 10,000 square feet if a project is in an area where all public services and facilities are available to allow for maximum development permissible in the General Plan and the area in which a project is located is not environmentally sensitive.

The proposed additional floor area, including the basement, is 2,270 square feet, which is far below the 10,000 square-foot threshold described in the CEQA Guidelines; the site is in a highly urbanized area where all public services and facilities are available for the maximum development permissible under the General Plan; and the Project is not located in an environmentally sensitive location. Therefore, the Section 15301 exemption is appropriate for this Project. The total floor area after completion of the Project will be 4,699 square feet, also well below the 10,000 square-foot threshold. Further, Appellant cites tax and real estate records, which define floor area differently than the City's Planning Code.

Appellant argues that the Project proposal cannot be categorized as a negligible expansion due to the percent increase in size. But the CEQA Guidelines make clear that percent increase in size is not the appropriate way to assess the applicability of this exemption for projects in highly urbanized areas where public services and facilities can accommodate the development. The CEQA Guidelines provide that additions not resulting in an increase of more than 50 percent of the floor area of the structure before the addition, or 2,500 square feet, whichever is less, is the appropriate metric *unless* the project is in an area where all public services and facilities are available and the area is not environmental sensitive (such as habitat for endangered species, wetland habitat, etc.). In those circumstances, the CEQA Guidelines provide that any addition up to 10,000 square feet, regardless of floor area percent increase, is unlikely to have impacts on the environment and is therefore categorically exempt from CEQA.

College Avenue in Oakland is currently filled with vibrant, mixed-use development with buildings ranging in age and size. Many of these buildings have minimal front or side setbacks, taking advantage of the full lot, to provide a seamless, pedestrian-oriented experience. The proposed addition is consistent with that land use setting.

Additionally, staff notes that a separate categorical exemption, Class 3, exempts new construction of up to four commercial buildings not exceeding 10,000 square feet on sites zoned for such uses if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available, and the surrounding area is not environmentally sensitive. Staff have concluded that Class 1 more appropriately applies in this circumstance where the proposal does not demolish the existing building (which the Oakland General Plan and Planning Code generally encourages); nonetheless, the Class 3 exemption provides context to show that construction of the size and nature proposed here is well within categorical exemptions that the state has found to apply to projects that do not have a significant effect on the environment.

Further, there is substantial evidence that there is no unusual circumstance related to the

proposal that would preclude a Categorical Exemption under CEQA. The site is not on the Cortese List of contaminated sites and does not contain any endangered or rare species. It is not unusual to site a moderately-sized childcare center in a busy Commercial Zone.

3. Appellant alleges that the Planning Commission's decision to uphold the decision to find the Project exempt from CEQA under Section 15183 of the CEQA Guidelines (projects consistent with general plan or zoning) is erroneous, not supported by substantial evidence, and constitutes an abuse of discretion. (Page 5)

Appellant Argument: *The Planning Commission upheld the Zoning Manager's determination that the Project qualified for a CEQA exemption under Section 15183 of the CEQA Guidelines. This provision allows for projects that are consistent with a community plan or zoning to rely on the prior EIR that was certified by the lead agency for a zoning action, community plan, or general plan. Appellant argues that this section cannot be applied because there will be impacts related to cultural resources, traffic, parking, and land use that are peculiar to the parcel that were not addressed in the prior EIR.*

Staff Response:

CEQA mandates that projects that are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified shall not require additional environmental review. The purpose of this exemption is to streamline the review of projects and reduce the need to prepare repetitive environmental studies. (*Lucas v. City of Pomona* (2023) 92 Cal.App.5th 508, 536.) Such projects shall not require further environmental review except only as necessary to examine whether there are project-specific effects which are peculiar to the project or its site. This is a statutory exemption from CEQA, provided under California Public Resources Code Section 21083.3 and CEQA Guidelines Section 15183, which means that no further CEQA analysis may occur if the exemption applies.

The City certified an EIR for its General Plan Land Use and Transportation Element (LUTE) in 1998. The LUTE identifies policies for utilizing Oakland's land as changes occur and sets forth an action program to implement the land use policy through development controls and other strategies. As described in the "General Plan Analysis" section of the Planning Commission staff report (see **Attachment B**), the proposal is consistent with the LUTE, including several of the LUTE objectives and policies. Among those is Policy N12.3, stating that high quality day care should be available throughout Oakland, appropriately sited, and designed based on its capacity and attributes. The current proposal does not require any modification to existing land use and zoning provisions and thus is consistent with the LUTE, for which an EIR was prepared.

Appellant does not appear to argue that this exemption does not apply in the first place due to a general plan and zoning inconsistency, but instead argues that there are impacts peculiar to the parcel or site-specific impacts of the Project that were not previously analyzed. City staff disagree that there are any types of impacts not analyzed in the LUTE EIR that present particularly unique issues with this property. The LUTE EIR analyzed the environmental impacts of implementation of the LUTE, including issues pertaining to noise and transportation. Among other things, the EIR identified that proposed general plan map changes would allow a mix of commercial and residential uses that could pose noise compatibility problems. The LUTE EIR

found this to be a less than significant impact due to proposed policies in place as part of the LUTE as well as additional measures identified in the EIR.

The mitigation measures identified in the LUTE EIR that would apply to the proposed Project are implemented through the City's Standard Conditions of Approval. These uniformly applied development standards substantially mitigate environmental effects under CEQA and were included in the approval letter for this Project. Appellant's specific claims regarding particular categories of impacts are discussed further below, but it is important to note here that all of these categories of impacts were previously analyzed in the LUTE EIR.

Traffic impacts for the Project are analyzed in **Attachment B**, which shows that there are no CEQA-related impacts anticipated related to traffic during operation of the facility. Established California case law states that parking is not considered an impact under CEQA and State Law (AB 2097) does not allow the City to require parking spaces for the proposal. The Project's transportation plan requires 2 loading spaces on College Avenue.

Staff addresses the land use issue in 4, below.

A. Appellant argues that the Planning Commission's decision to uphold the City's use of CEQA exemptions was erroneous, not supported by substantial evidence, and constituted an abuse of discretion, because the Project requires mitigation measures to reduce significant noise impacts.

Appellant Argument: *Appellant argues that the City cannot use a CEQA exemption for the Project, because a noise mitigation is required to ensure that the Project does not result in a significant effect on the environment.*

Staff Response:

Because the permitted use in this proposal would remain subject to existing standards set forth in the LUTE, including the City's operational noise standard requirements, the Project would not have noise impacts that differ from those studied in the LUTE EIR.

The City's Standard Conditions of Approval #24, #25, and #27 in the approval letter (See **Attachment C**) reduce the effects of construction-related noise to less than significant, while Standard Condition of Approval #26 requiring the activity to comply with noise performance standards contained in Chapter 17.120 of the Oakland Planning Code and Chapter 8.18 of the Oakland Municipal Code, reduces the effects of operation-related noise to less than significant.

Condition of Approval #26 states:

26. Operational Noise

Requirement: Noise levels from the project site after completion of the project (i.e., during project operation) shall comply with the performance standards of chapter 17.120 of the Oakland Planning Code and chapter 8.18 of the Oakland Municipal Code. If noise levels exceed these standards, the activity causing the noise shall

be abated until appropriate noise reduction measures have been installed and compliance verified by the City.

When Required: Ongoing

Initial Approval: N/A

Monitoring/Inspection: Bureau of Building

Approval of the Project is conditioned, through the City's uniformly applied standard conditions of approval, upon Applicant's adherence to the City's interior and exterior noise limits. In other words, the Project is prohibited from operating above noise performance standards and if exceedances are identified must alter operations until noise reduction measures have been installed.

The use of CEQA exemptions with conditions requiring compliance with noise performance standards have been upheld in court. See *Walter v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, where neighbors unsuccessfully challenged the city's reliance on categorical exemption under CEQA for the issuance of a CUP for a carwash adjacent to residential uses. The challengers in that case similarly argued that a condition of approval requiring adherence to City noise limits violated CEQA's requirement that environmental impacts, if any, be reviewed and mitigated before approval of the land use project. The court rejected the argument, finding that the imposition of the condition was appropriate to ensure that any violation of the noise ordinance would be corrected.

After Appellant first filed an appeal of this case to the Planning Commission raising concerns about noise, the City requested that a noise study be prepared for purposes of staff analyzing the Project's CUP findings. The noise study shows that a small area in the parking lot behind the neighboring retail building, at the southern property line at the edge of the playground, may reach a noise level of 66 dB when the maximum allowable receiving sound level limit over 20 cumulative minutes in a 1-hour time period is 65 dB in a commercial zone and 60 dB in a commercial zone for simple tone noises, including noise primarily consisting of speech (see Figure 10 of the noise study in **Attachment B**). Note that the receiving noise level at the adjacent office buildings is well below the maximum. Staff has informed the applicant that the City's Code Compliance Division will monitor this area if complaints are submitted to the City to assure the noise does not exceed noise standards.

Further, as part of their motion to approve the Project, the Planning Commission required that the applicant install an eight-foot tall, approximately 25-foot-long sound barrier at the location and the design described in the noise study (see **Attachment B**). As staff described in the meeting, this was to assure that the operations of the Project meet the CUP Findings contained in Chapter 17.134 the Planning Code, not CEQA requirements. However, Figure 11 of the study indicates that installation of the sound barrier will bring the noise well below the maximum permitted under the City's performance standards contained in Chapter 17.120 of the Planning Code.

Even without the sound barrier, the potential for noise exceedances identified in the noise study is not of a significant degree, or of a certain level of certainty, to conclude that the Project will

have a significant environmental effect such that a categorical exemption does not apply. The majority of receiver locations shown in the noise study showed that sound levels were predicted to be between 42 and 50 dB, well below Oakland's noise performance standards. The locations showing potential for noise exceedances (parking lot areas near the rear exits of commercial buildings) are not areas where it is anticipated persons would be exposed to excess noise such that a significant impact is identified as a certainty. Again, the City's existing conditions of approval prohibit such exceedances from occurring and it is the applicant's obligation to ensure compliance for the life of the Project.

4. Appellant argues that the proposal could have a significant effect on the environment. Therefore, the Planning Commission should have directed City staff to prepare an EIR for the Project. (Page 14)

Appellant Argument: *If there is a fair argument that a project may have a significant effect on the environment, the lead agency must prepare an EIR for that project. (Cal. Public Resources Code § 21151(a).) As discussed in Appellant's appeal letter, the Project may cause a significant effect with respect to historical resources, noise, traffic, land use, and aesthetics. Therefore, the Planning Commission should have directed City staff to prepare an EIR for the Project. Its failure to do so was erroneous, not supported by substantial evidence, and constituted an abuse of discretion.*

Staff Response:

Appellant cites to the wrong standard. The Public Resources Code section appellant cites provides the standard for when an EIR must be prepared, absent the availability of an applicable categorical or statutory exemption. Section 21151(a) provides that where a project may have a significant effect on the environment, it is not appropriate to prepare a negative declaration.

When applying both the 15301 categorical exemption and the 15183 statutory exemption, the City's application of the exemption is appropriate where "substantial evidence" supports use of the exemption. As stated by the California Supreme Court, where a project meets a categorical exemption, the potential for a significant environmental effect is not alone sufficient to trigger the unusual circumstances exception and thus require further environmental review. (See *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097-98.) "[A]ny project that comes within a class 1 categorical exemption has been inherently determined by the Secretary of Natural Resources Agency not to have significant environmental impacts." (*Arcadians for Environmental Protection v. City of Arcadia* (2023) 88 Cal.App.5th 418, 432.) If an agency properly determines that an exemption applies, the project is excused from environmental review. (Guidelines Sec. 15002(k)(1).)

A city can rely on a CEQA exemption where substantial evidence supports the application of the exemption, and substantial evidence supports that an exception to the exemption does not apply. As discussed above, substantial evidence supports application of the class 1 categorical exemption since the project consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing private structures involving negligible or no expansion of

existing or former uses. The class 1 exemption specifically includes interior alterations involving interior partitions as well as additions to existing structures provided that the expansion not exceed 10,000 square feet in areas where the project is served by public services. While not originally identified, the proposal also meets the class 3 exemption for the conversion of small structures.

No unusual circumstances that would except application of the exemption has been identified. A potentially significant environmental effect itself does not constitute an unusual circumstance. The siting of a childcare center in a commercial district is also not an unusual circumstance. An unusual circumstance exists where there is a showing that the project has some feature that distinguishes it from others in the exempt class. No such feature exists here. Similar daycare facilities exist throughout the City and are often located inside repurposed single-family homes. In many circumstances these daycare facilities are in residential zones as well.

The City also relies on Public Resources Code Section 21083.3(b)/CEQA Guidelines Section 15183, which state that a certified EIR for a general plan may be used to eliminate environmental review for later development projects that are consistent with that general plan. The proposed project is consistent with the Oakland LUTE. Under Section 21083.3, CEQA review of a later project is limited to significant environmental impacts that are “peculiar to” the affected project that were not addressed as significant impacts in the previous EIRs. (See *Lucas v. City of Pomona* (2023) 92 Cal.App.5th 508, applying substantial evidence standard, not fair argument standard.) No such circumstance is present here: both noise and transportation related impacts were studied extensively in a systemic manner in the LUTE EIR, and identified impacts were used to develop the City’s Standard Conditions of Approval. The impacts of siting a childcare center in a lively commercial district are not peculiar to the project site.

A. *Appellant argues the Project has the potential to cause a significant impact to a historical resource.*

Appellant Argument: *The Project could have a significant impact on the existing building, which is a historical resource. This is confirmed by an email from Bureau of Planning staff.*

Staff Response:

The Project will not have a CEQA impact on a cultural resource. According to the Oakland Cultural Heritage Survey, the building proposed to be altered has a historic rating of “C” (Secondary Importance) and does not contribute to an Area of Primary Importance (API).

While a “C”-rated building has some historic architectural value, it does not rise to the level of a CEQA historic resource. The Oakland Historic Preservation Element provides the following policy for identification of historic resources for CEQA purposes:

Policy 3.8: Definition of “Local Register of Historical Resources” and the Historic Preservation “Significant Effects” for Environmental Review purposes: For purposes of environmental review under CEQA, the following properties will constitute the City’s Local Register of Historic Resources:

- All Designated Historic Properties

- Those Potential Designated Historic Properties that have an existing rating of “A” or “B” or are located within an Area of Primary Importance.
- Until complete implementation of Action 2.1.2 (Re-designation), the “Local Register” will also include the following designated properties: Oakland Landmarks, S-7 Preservation Combining Zone properties, and Preservation Study List properties.

The subject property does not fit into any of these categories and, therefore, is not a historic resource under CEQA.

The email from Bureau of Planning staff Betty Marvin, cited to by Appellant in their appeal letter, does not claim the building is a CEQA historic resource and is a common communication during staff’s back-and-forth discussion of a project. In the correspondence, Ms. Marvin confirms that the building is “C”-rated.

B. Appellant argues the Project could result in significant noise impacts that are not analyzed.

Appellant Argument: *Appellant argues that the noise study contains errors, and the Project could impact the surrounding neighborhood, which is characterized as “relatively quiet”.*

Staff Response:

The exemptions that are applicable to this proposal do not require noise issues to be studied in order to qualify for the exemptions. Nonetheless, because the permitted use in this proposal would remain subject to existing standards set forth in LUTE and Standard Conditions of Approval for the Project, including the City’s operational noise standard requirements, the Project would not have noise impacts that differ from those studied in the LUTE EIR (see staff responses to Appellant argument 3, including 3A).

The appeal also makes several misstatements, which are summarized in the following:

- The appeal states: “... *the buildings surrounding the Project site are designed and have been used for more than 30 years for mental health treatment/psychotherapy.*” However, 5295 College Avenue contains a Victorian style home that, according to the Oakland Cultural Heritage Survey, was constructed in 1927. Regardless, the original use intended for the buildings on the site is not a relevant CEQA issue.
- The appeal states: “*These adjacent uses were appropriately categorized as “sensitive receptors” by the City Attorney during the Planning Commission’s appeal hearing.*” The attorney’s comment at the Planning Commission was regarding the application of the City’s standard condition of approval that serves to address construction-related noises. The designation of “sensitive receptors or businesses” as used in the City’s construction noise standard condition of approval is merely a generalized means of identifying neighbors that might need to be included in the analysis of potential project impact, as has been done in the noise study. This designation does not confer any adjustment to the exterior noise standard or other sort of preferential consideration.

- The appeal states: "*Written testimony from mental health professionals with adjacent practices testified to the need for a calm and quiet environment in which to conduct therapy.*" However, the acoustic quality of building interiors does not fall under authority of the Planning Bureau. It is the responsibility of the property owner to provide a building envelop (i.e., window glazing) with sufficient noise reduction to meet tenants' particular needs, whatever environmental noise is present at the building exterior. The neighbors, as directed by the Planning Bureau, are only required to comply with the established exterior noise level limits.
- The appeal states: "... *the City's noise analysis conducted for the Project by Krause Acoustics concluded that the Project could result in noise levels in excess of City standards at several locations in the vicinity of the Project.*" Staff's response to issues 3 and 3A above addresses this point.
- The appeal states that "*the City's noise report's conclusions were based on a maximum enrollment of 36 students*" despite the Project that is the subject of this appeal proposing a maximum enrollment of 48 students. However, the noise predictions in the noise study are based on a maximum play yard usage of 24 students at a time, similar to the conditions found during the existing play yard sound level survey at another childcare center operated by the applicant. This assumes that the play yard use is in split sessions with only one-half of the total enrollment present at each session. The Wilson Ihrig peer review does not find any significant faults in the method and results of the existing play yard sound level survey or the play yard noise prediction analysis. The peer review's assertion of noise under-prediction is based on speculative assumptions of play yard occupancy and sound propagation paths that are not realistic.
- Appellant states that *the Project could result in a substantial increase (up to 13 dBA) from the current background ambient noise levels of approximately 48 dBA.* Appellant's submitted peer review suggests several interpretations of the study data using alternative noise descriptors that are not part of the City Planning Code. The noise study prepared for the Project follows the methodology prescribed by existing City standards and guidance.
- Appellant states that *the Project could result in significant and unavoidable impacts associated with construction noise that were not addressed on the Krause Acoustics Analysis.* Staff response to issues 3 and 3A above addresses this point.
- Appellant states that *the recommended mitigation of sound barrier would not be sufficient to mitigate the sound of children at play. Therefore, operational noise impacts of the Project would also be significant and unavoidable.* However, staff's responses to 3 and 3A above demonstrate that the wall is not a mitigation, but Figure 11 of the study indicates that installation of the sound barrier will bring the noise well below the maximum permitted under the City's performance standards contained in Chapter 17.120 of the Planning Code. Peer review comments to the contrary are based on faulty assumptions regarding play yard usage and do not invalidate findings of the noise study. Even without the sound barrier, the potential for noise exceedances identified in the noise study is not of a significant degree, or of a certain level of certainty, to conclude that the Project will have a significant environmental effect such that a categorical exemption does not apply.

- Appellant states that the *analysis conducted by Wilson Ihrig concludes that the Project could have significant and unavoidable noise impacts. Therefore, the City should prepare an EIR for the Project that analyzes the full extent of the Project's noise impacts.* The study performed for the Project by Krause Acoustics utilizes methodical analysis, under City direction, consistent with the practices accepted by the City for development projects. The full extent of the Project's noise impacts has already been analyzed by the Krause study. Staff's response to issues 3 and 3A above clearly demonstrates that an EIR is not required for this Project.

C. Applicant argues that the Project could result in significant traffic impacts that are not analyzed.

Appellant Argument: Appellant argues that the Project could have significant traffic impacts that are not addressed. He states that the City relied upon a traffic impact study prepared by Fuad Sweiss, PE, in support of its conclusion that the Project would not have a significant traffic impact but Appellants' reports from PHA Transportation Consultants (PHA) states that the City's traffic report was inadequate.

Staff Response:

Pursuant to State law, automobile-delay and parking-related traffic concerns are not CEQA-related impacts.

The Project site is within one-half mile of an existing major transit stop and therefore considered to be a "transit priority area." Under Public Resources Code 21099(d)(1), "aesthetic and parking impacts of a residential, mixed-use residential, or employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment." This Project meets the definition of an employment center project located on property zoned for commercial uses with a floor area ratio of no less than 0.75 within a transit priority area. This section clearly states that adequate parking is not a CEQA issue.

Also pursuant to Public Resources Code Section 21099(b)(2), automobile delay, as described solely by level of service (LOS) or similar measures of vehicular capacity or traffic congestion, shall not be considered a significant impact on the environment under CEQA. In compliance with this requirement, and in alignment with Oakland's greenhouse gas reduction goals, the City assesses transportation-related impacts utilizing a vehicle miles traveled (VMT) methodology.

Additionally, on September 22, 2022, Governor Gavin Newsom signed into law Assembly Bill 2097, which became effective on January 1, 2023. This bill prohibits public agencies or cities from imposing a minimum automobile parking requirement on most developments, including residential, commercial, and industrial projects, located within a half-mile radius of a major transit stop. This Project is within ½ mile of the Rockridge BART station.

Further, the traffic study estimates trip generation utilizing the appropriate guidelines adopted by the City to establish CEQA thresholds for measuring traffic impacts as outlined in the City's

Transportation Impact Review Guidelines (TIRG). Meanwhile, PHA's peer review analysis substitutes its own standards for the TIRG, is based on an alternate set of assumptions, and did not complete its own complete survey of site-specific concerns.

Contrary to Appellant's assertions, the traffic study applies the relevant guidelines correctly and completely, including by relying upon the standards implemented by the Institute of Transportation Engineers to calculate trip generation from the Project, as required by the TIRG. Appellant's opinions regarding the adequacy of those guidelines or what they "ignore" is not relevant, as the TIRG were adopted by the City specifically to alleviate ambiguity in such situations.

D. Appellant argues the Project could result in significant land use impacts that are not analyzed.

Appellant Argument: Appellant argues that CEQA land use issues related to an easement, trash pickup, and play area have not been sufficiently studied.

Staff Response:

Land Use is not a pertinent CEQA issue here because it does not need to be studied to qualify for the exemptions applied to the Project. Easements are not a CEQA issue and, therefore, cannot be not subject to this appeal. Nonetheless, the plans for the proposed development consistently indicate the location of the easement along the south edge of the property and the Project does not propose any alterations to it. Any claims regarding the diminution of the right to enjoyment of that easement is beyond the purview of the City. Trash pickup and property line disputes are also not CEQA issues and, therefore, cannot be relevant to this appeal. Similarly, sufficient play area for the childcare enrollees is not a CEQA issue and is regulated by the State of California Community Care Licensing Division during the licensing process.

E. Appellant argues the Project could result in significant aesthetics impacts that are not analyzed.

Appellant Argument: Appellant argues that the Project would essentially quadruple the size of the existing historic structure at 5315 College Avenue, which could be considered an adverse aesthetic change that can be seen from the right of way that warrants the preparation of an EIR. Appellant also excerpts a letter from Staff Planner Betty Marvin that criticizes the proposed design.

Staff Response:

Although staff disagrees with the assessment that the design would have a negative aesthetic effect on College Avenue and the building calculation, the issue is irrelevant because it does not need to be studied to qualify for the CEQA exemptions applied to the Project.

5. Appellant argues that because the Planning Commission decision to uphold the use of a CEQA exemption for the Project was erroneous, not supported by substantial

evidence, and constituted an abuse of discretion, its decision to uphold the approval of the Project based on that determination should be voided. (Page 14.)

Appellant Argument: In summary, the Planning Commission decision to uphold the use of a CEQA exemption was erroneous, not supported by substantial evidence, and constituted an abuse of discretion for the reasons stated above. Because the City has not complied with CEQA with respect to the Project and must prepare an EIR to assess the environmental impacts of the Project. Moreover, because the Planning Commission's decision to uphold the Zoning Manager's approval of the Project was based on that environmental determination, that decision is also invalid and should be reversed by the City Council. Therefore, the City Council should grant the appeal, reverse the Planning Commission's decision to find the Project exempt from CEQA, vacate the Planning Commission's decision to uphold the approval of a minor CUP for the Project that relied upon that environmental determination, and direct staff to prepare an EIR for the Project.

Staff Response:

As described above, the Project clearly qualifies for exemptions under Sections 15301 of the State CEQA Guidelines: Minor alterations to existing facilities and 15183 – Projects Consistent with a Community Plan, General Plan, or Zoning; and Appellant has not made any valid arguments contradicting this determination. Therefore, further environmental review is not required and the decision is valid.

FISCAL IMPACT

Improvement of the parcel will increase business and property taxes, and the childcare facility will increase sales taxes by attracting customers to the Rockridge Commercial District.

PUBLIC OUTREACH / INTEREST

The applicant met with the Rockridge Community Planning Council and neighbors regarding the proposal; and on February 24, 2024, the Planning Commission held a public hearing on the Appellant's appeal of staff's Project approval and CEQA determination.

COORDINATION

Bureau of Planning staff has coordinated with the Oakland Department of Transportation regarding the childcare proposal.

SUSTAINABLE OPPORTUNITIES

Economic: Quality daycare provides economic benefits by allowing parents to work and assuring more children will be prepared for educational opportunities.

Environmental: *The proposal will reduce car trips because it is near a residential neighborhood that will allow parents to walk and bike their children to the childcare facility.*

Race & Equity: *The development of more childcare centers throughout Oakland provides benefits to children and working parents alike and alleviates existing pressures on the availability of childcare services. While not within the Planning Bureau's purview, staff note that the applicant has offered to provide scholarships to lower income students.*

ACTION REQUESTED OF THE CITY COUNCIL

Staff recommends that the City Council conduct a public hearing for Appeal No. PLN22189-A01-A01, challenging the Planning Commission's California Environmental Quality Act Exemption for an addition and alteration to an existing commercial structure for Childcare Activities, and upon conclusion, act upon the appeal and direct the City Administrator to prepare a Resolution for City Council adoption memorializing the Council's Supportive Findings and final action on the appeal.

For questions regarding this report, please contact Neil Gray, Planner IV, at (510)238-3878.

Respectfully submitted,



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Department

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Attachments (3):

- A. *Appeal of Environmental Determination to City Council*
- B. *February 21, 2024, Planning Commission Appeal Staff Report, with Attachments*
- C. *October 12, 2023, Decision Letter*