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CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

FRIENDS OF MONTGOMERY STREET, JOHN LEE, GORDON FRANCIS, and DAN LORIMER,

Petitioners and Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO, and DOES 1 through 100,

Respondents and Defendants,

PAUL D. SCOTT, JULIUS CASTLE REDUX LLC, and DOES 101 through 200,

Real Parties in Interest.

Case No. CPF-17-515902

SAN FRANCISCO'S AND REAL PARTIES' JOINT OPPOSITION BRIEF

Hearing Judge: Hon. Cynthia Ming-mei Lee
Place: Department 503

Date Action Filed: October 17, 2017
Trial Date: August 23, 2018

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INTRODUCTION

The City and County of San Francisco ("San Francisco" or "City") approved Real Parties' proposal to reopen the historic Julius' Castle restaurant, one of the oldest and most famous restaurants in San Francisco. Petitioners are a handful of neighbors residing on Telegraph Hill[1] who seek to prevent Julius' Castle from ever reopening in their neighborhood by asking this Court to set aside San Francisco's approval and compel the City to prepare an Environmental Impact Report (EIR) for the restaurant. But this is the type of small project that the Legislature has determined to not have a significant effect on the environment. Thus, Petitioners attempt to block the reopening to avoid the perceived inconvenience of more traffic and activity in their neighborhood.

With regard to Petitioners' challenge to San Francisco's environmental determination, Petitioners cannot carry their burden to demonstrate that the historic restaurant, which for decades operated successfully in the same building atop Telegraph Hill, now somehow poses "unusual circumstances" that preclude San Francisco's approval.

While Petitioners also attempt to challenge the approval itself, not just the environmental determination, they failed to appeal the project's approval at the administrative level. Accordingly, they have waived many of the arguments they now ask this Court to review.

As the record of proceedings demonstrates, San Francisco engaged in a careful and considered approval process for the project. The exemption determination was reviewed and affirmed by both the Planning Commission and the Board of Supervisors. The City, in its sound discretion, determined that traffic and noise associated with the restaurant would not be so intrusive as to be detrimental to the public's health, safety, convenience, or general welfare. The City's determination is based on its reasonable application of its Planning Code and substantial evidence in the record. San Francisco's findings, in its written approval actions and throughout the record, inform the public of the basis of the City's decision. The Court should therefore uphold both the environmental determination and the City's approval of the project.

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[1] Petitioners have not publicly disclosed the current membership of Friends of Montgomery Street, beyond the named Petitioners in this case.

STATEMENT OF FACTS

Real Party in Interest, Paul Scott, proposes to reopen the Julius' Castle restaurant at 302 Greenwich / 1531 Montgomery Street, on Telegraph Hill, in San Francisco's RH-3 (Residential) zoning district ("Project Site"). Julius' Castle was constructed and first opened at the Project Site in 1923, at a time when there were very few other buildings near the restaurant. (Administrative Record ["AR"] 2, 87.) It continued to operate as one of San Francisco's oldest restaurants until it closed in 2007. (AR 2.) Due to its "special character and special historical, architectural and aesthetic interest and value," its "unique" design quality, and its embodiment of the "history of the local Italian and restaurant communities," the Castle is designated as a City Landmark. (AR 83–84.) Numerous celebrities in politics, entertainment, and business have dined at the Castle, and for decades, countless other San Franciscans have celebrated special events there. (AR 88, 380–381, 4447–4448.[2]) As former Mayor Ed Lee once said, Julius' Castle is an "iconic [San Francisco] restaurant." (AR 1202.)

The prior owner decided to close the restaurant in 2007 and the Real Party purchased the property in 2012 and intends to restore and reopen the neighborhood restaurant in its existing historic building. The project thus seeks to reinstate the only previous use of the site, a "Restaurant" use, which would occupy approximately 4,892 square feet with a maximum occupancy of 152 people, to accommodate approximately 115 guests at a time and 30–35 employees over the course of a day ("Project"). (AR 3, 174.) The Project sponsor will obtain building permits for interior improvements but the Project will not expand the building's envelope. (*Ibid.*) Because the restaurant is less than 5,000 square feet, no onsite parking is required or proposed. (*Ibid.*) San Francisco's approval of the conditional use for the restaurant is subject to a number of standard and unique conditions intended to minimize any inconvenience on neighborhood residents. (See AR 12–15.[3])

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[2] The articles at pages 1448–1449 and 1510–1511 of the Administrative Record provide a more detailed description of the Castle's colorful history.

[3] Though the Real Party contends that Julius' Castle's original conditional use authorization remains valid, following discussions with Aaron Peskin (prior to his most recent election to the Board of Supervisors), Mr. Scott agreed to table his administrative appeal of that issue to allow the neighborhood an opportunity for input through a new conditional use process. (AR 382–383, 4448–4449.)

In February 2017, Real Party filed his application for conditional use authorization for the restaurant. (AR 59–67.) After reviewing the proposal, the Planning Department determined that reopening the restaurant was categorically exempt from environmental review under the California Environmental Quality Act, Pub. Resources Code, §§ 21000, et seq. ("CEQA") and Cal. Code Regs., tit. 14, §§ 15000, et seq. ("CEQA Guidelines"). (AR 21–25.) Because the proposed Project satisfied the criteria for an exemption for conversion of small structures, no environmental review of the Project was required. (*Ibid.*)

On July 6, 2017, the San Francisco Planning Commission held a noticed public hearing to consider the conditional use authorization. At the time of the hearing, the Commission had received 23 letters in support of the Project and 11 in opposition. (AR 3.) At the hearing, members of the public spoke both in favor and opposition to reopening the Julius' Castle restaurant. (AR 4454–4491 [hearing transcript].) Those opposed expressed concerns regarding an increase in traffic and related pedestrian safety, as well as noise that may emanate from the restaurant. (AR 3.) Residents in favor indicated that traffic had not been a substantial problem when Julius' Castle was open, and believed that reopening the Castle would make the neighborhood safer and more vibrant. (See, e.g., AR 117, 118, 140, 389, 4474, 4482, 4490.)

Having considered the proposal and testimony from the public, the Planning Commission unanimously affirmed that the Project was categorically exempt from CEQA and authorized the conditional use to reopen Julius' Castle. (AR 2.) The Planning Commission's approval included certain written findings in support of its decision and informed "aggrieved" persons that they "may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion." (AR 2–9, 10.)

On August 4, 2017, Petitioners Gordon Francis, Norman Laboe, and Dan Lorimer appealed to the San Francisco Board of Supervisors ("Board") the City's determination that the Project was exempt from CEQA. (AR 186 ["CEQA Appeal"].) No party appealed the Planning Commission's approval of the conditional use authorization. (AR 282; see also, 183, 373:16–19.) The Board held a hearing on September 5, 2017, to consider Petitioners' CEQA appeal, and again the City received comments from the public. (AR 348–397.) "[A]fter carefully considering the appeal of the exemption

determination, including the written information submitted … and the public testimony," the Board concluded that "the project qualifies for an exemption determination under CEQA." (AR 19.)

Petitioners then filed their Verified Petition for Wirt of Mandate ("Petition") on October 17, 2017, challenging the exemption determination (first cause of action), the conditional use authorization (second cause of action), and seeking to set aside approval of the Project.

STANDARD OF REVIEW

I. PETITIONERS' CEQA CLAIMS

In evaluating Petitioners' CEQA claims, "the [Court's] inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5; see also, *Protect Telegraph Hill v. City and County of San Francisco* (2017) 16 Cal.App.5th 261, 265.)

A. Categorical Exemptions from CEQA

The Legislature, through the Secretary of the Natural Resources Agency, has identified classes of projects that do not have a significant effect on the environment and therefore do not require CEQA review. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1124 ["*Berkeley Hillside I*"].) A project that falls within the scope of one of these categorical exemptions, "is not subject to CEQA requirements and 'may be implemented without any CEQA compliance whatsoever.'" (*Association for Protection of Environmental Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 726; see also *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 286 ["A categorically exempt project is not subject to CEQA, and no further environmental review is required."].)

The California Supreme Court recently clarified the inquiry courts apply to a claim that the "unusual circumstances" exception precludes the use of a categorical exemption. (*Berkeley Hillside I*, *supra*, 60 Cal.4th at 1105, 1115–1116; see also CEQA Guidelines, § 15300.2(c) [unusual circumstances exception].) To establish an exception based on unusual circumstances, as Petitioners attempt to do here, the party challenging the exemption must either (i) establish the presence of an unusual circumstance *and* a reasonable possibility of a significant environmental effect due to the

unusual circumstance; or (ii) prove that the challenged project *will* have a significant environmental effect. (*Berkeley Hillside I*, *supra*, 60 Cal.4th at 1105.)

B. A two-part test to determine whether unusual circumstances will produce significant environmental impacts.

Under the first method, a court begins by determining whether substantial evidence supports the agency's finding of no unusual circumstances. This is "essentially [a] factual inquiry" to which a court applies "the traditional substantial evidence standard that section 21168.5 incorporates." (*Berkeley Hillside I*, *supra*, 60 Cal.4th at 1114.) The substantial evidence standard requires a court to determine "whether the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached." (*Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225, 1239.) Substantial evidence includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact. Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous." (*Hines v. Cal. Coastal Com.* (2010) 186 Cal.App.4th 830, 856–857 [citations and internal quotation marks omitted].) The court resolves "all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it." (*Berkeley Hillside I*, *supra*, 60 Cal.4th at 1114.)

If the reviewing court finds substantial evidence supporting the agency's determination of no unusual circumstances, the court's inquiry ends. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943, 958 ["*Berkeley Hillside II*"].) The court must uphold the agency's determination and no further analysis is required. (*Ibid.*)

Only if the court finds that the record contains *no* substantial evidence to support the agency's determination, does the court engage in a second inquiry. In such circumstances, the court reviews whether there is a reasonable possibility that the unusual circumstance will produce a significant environmental effect. (*Berkeley Hillside I*, *supra*, 60 Cal.4th at 1115.) For this second inquiry, while the agency would apply the "fair argument" standard, the court's review "is limited to determining whether the agency applied the standard 'in [the] manner required by law.'" (*Id.* at 1116 [quoting Pub.

Resources Code, § 21168.5].) Accordingly, "to establish the unusual circumstances exception, it is not enough for a challenger merely to provide substantial evidence that the project *may* have a significant effect on the environment, because that is the inquiry CEQA requires absent an exemption." (*Id.* at 1105.) Instead, a petitioner must establish both the reasonable possibility of the significant effect *and* that it is *due to the unusual circumstance.* (*Ibid.*)

C. An alternative method requiring proof that a project will result in significant environmental impacts.

As an alternative to the two-part test described above, the Supreme Court in *Berkeley Hillside I* identified a second method, by which a petitioner can establish unusual circumstances with "evidence that the project *will* have a significant effect." (*Berkeley Hillside I*, *supra*, 60 Cal.4th at 1105 [emphasis in original].) This method "requires that the project challenger provide more than substantial evidence of a fair argument.… A project challenger must *prove* that the project *will* have a significant effect on the environment." (*Citizens for Environmental Responsibility v. State ex rel. 14th District Agricultural Association* (2015) 242 Cal.App.4th 555, 589 [citing *Berkeley Hillside I*, *supra*, 60 Cal.4th at 1105–1106; emphasis added].) Thus, a petitioner "must provide or identify substantial evidence indicating: (1) the project will actually have an effect on the environment and (2) that effect will be significant." (*Citizens*, *supra*, 242 Cal.App.4th at 589.)

Thus, in order to prevail here, Petitioners must provide substantial evidence that either (i) establishes both the presence of unusual circumstances *and* a reasonable possibility of a significant environmental effect *due to* the unusual circumstances; or (ii) proves that the Project *will* have a significant environmental effect. (See *ibid.*) Petitioners cannot carry their burden under either method.

II. PETITIONERS' PLANNING CODE CLAIMS

To the extent the Court reaches the merits of Petitioners' Planning Code claims (see Section II, *post*), the Court also reviews those claims for abuse of discretion, which may be established if San Francisco "has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5.)

While San Francisco's approvals must comply with its laws and municipal codes, the Court must defer to San Francisco's interpretation and application of its own Planning Code, provided its

interpretation is not "clearly erroneous." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193.)

The City must set forth findings "to bridge the analytic gap between the raw evidence and ultimate decision." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) But these findings "need not be stated with judicial formality." (*Craik v. County of Santa Cruz* (2000) 81 Cal.App.4th 880, 891.) The findings "must simply expose the mode of analysis, not expose every minutia." (*Ibid.*) What matters is that the findings inform the public, and any reviewing court, of the basis for the agency's action. (*Topanga*, *supra*, 11 Cal.3d at 514.)

The Court applies the traditional substantial evidence test to determine whether the City's findings are supported by the evidence. (*Id.* at 515.) In applying this test, "the court may not consider evidence outside the administrative record, must consider the entire record, and must deny the writ if there is *any* substantial evidence in the record to support the findings." (*Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 198–99 [citations omitted; emphasis in original].)

"[T]he petitioner in an administrative mandamus proceeding has the burden of proving that the agency's decision was invalid and should be set aside, because it is presumed that the agency regularly performed its official duty." (*Young v. City of Coronado* (2017) 10 Cal.App.5th 408, 419.) Where, as here, the standard of review is the traditional substantial evidence test, "it is presumed that the findings and actions of the administrative agency were supported by substantial evidence." (*Ibid.*)

ARGUMENT

I. THE PROJECT IS CATEGORICALLY EXEMPT FROM CEQA.

Among the classes of projects that the Legislature has determined to not have a significant effect on the environment, and therefore not require CEQA review, is construction or conversion of "small structures," including commercial buildings not exceeding 10,000 square feet in an urbanized area. (CEQA Guidelines, § 15303(c) [commonly known as a "Class 3" exemption].) These small structures may be approved "without any CEQA compliance whatsoever," provided that local zoning permits the use, they do not involve hazardous substances, all necessary public services and facilities

are available, and they are not located in an environmentally sensitive area. (*Ibid.*; *City of Ukiah*, *supra*, 2 Cal.App.4th at 726.)

San Francisco determined that reopening the Julius' Castle restaurant in the building where it operated for 84 years, without any expansion of the building envelope, qualified for a Class 3 categorical exemption. (AR 18, 21–27.) Because Petitioners have failed to satisfy their burden to establish that the Project either does not satisfy the Class 3 criteria or is subject to an exception listed in CEQA Guidelines, section 15300.2, the Court should uphold the City's determination.

A. The City's zoning allows a restaurant use at the Project Site.

The San Francisco Planning Code permits certain nonresidential uses in landmark buildings located in residential zoning districts, such as the Julius' Castle restaurant. Section 186.3, which by its title specifically applies to RH (Residential) districts, provides that in a structure on a designated landmark site, "[a]ny use listed as a principal or conditional use permitted on the ground floor in an NC-1 [Neighborhood Commercial Cluster] District … is permitted with Conditional Use authorization" if the use is "essential to the feasibility of retaining and preserving the landmark." (S.F. Planning Code, § 186.3.) The NC-1 district permits "Retail Sales and Service" uses on the ground floor, which includes "Restaurant" uses. (S.F. Planning Code, § 710; see also, *Id.*, § 102 [definitions of "Restaurant" and "Retail Sales and Service"].)

Here, the Julius' Castle site is a designated City Landmark for its "special character and special historical, architectural and aesthetic interest and value." (AR 83.) Therefore, while the RH-3 district does not typically allow Restaurant uses, the Planning Code permits a Restaurant use at the Julius' Castle site, provided the use meets the criteria for a conditional use authorization and is essential to the feasibility of retaining and preserving the landmark building. (S.F. Planning Code, § 186.3.)

Petitioners do not dispute any of these facts. They agree that Planning Code section 186.3 allows nonresidential uses on landmark sites (OB, 14:22–23) and do not challenge the City's finding that, "restoring a restaurant use at Julius' Castle is essential[] to retain and preserve the landmark." (AR 4.) Instead, Petitioners argue that because the Project's RH-3 zoning district does not explicitly allow restaurants, San Francisco may never rely on a Class 3 categorical exemption for a restaurant use in a RH-3 district. But the RH-3 controls, set forth in Table 209.1 of the Planning Code, are not an

exhaustive list of permitted uses in the district. (S.F. Planning Code, § 202(b) [uses also include those "not specifically listed," but which are determined to be permitted uses by the Zoning Administrator].) Indeed, there are a number of exceptions in the Planning Code that allow uses not otherwise permitted by a district's zoning controls; the exception for landmark sites is just one such example. (See, e.g., S.F. Planning Code, § 180 [nonconforming uses]; § 187.1 [gas stations]; § 207 [accessory dwellings exceeding density].)

Petitioners further argue that even if permitted by the Planning Code, a Restaurant must meet the criteria for a conditional use authorization set forth in section 303. (OB, 14:22–15:2.) For the reasons explained in Section III, below, the proposal to reopen Julius' Castle satisfies this criteria. Accordingly, San Francisco's zoning regulations permit the Project.

B. All necessary public services and facilities are available at the Project Site.

The Class 3 categorical exemption applies to activities on sites "where all necessary public services and facilities are available." (CEQA Guidelines, § 15303(c).) Petitioners argue that the Project Site does not comply with this requirement because the Project Site does not provide adequate "vehicular access and parking facilities." (OB, 15:24–26.) But these are not the type of "necessary public services and facilities" that disqualify a project from a Class 3 CEQA exemption. (See CEQA Guidelines, § 15303(c).)

CEQA does not define "necessary public services and facilities" for purposes of a Class 3 exemption, though these terms are generally understood in related contexts to mean public improvements and other community amenities, such as water, sewer, utility, or police and fire services. (See Gov. Code, §§ 65302(h)(4)(B) [general plans], 66000(d) [development fees].) In the instant case, the Project Site continues to be fully served by necessary public services and facilities, just as it was for decades when Julius' Castle was operational.

Though CEQA does not require access from a public road, in this case, Montgomery Street provides vehicle access to the front door of the restaurant. Moreover, off-street parking, provided and maintained by a private property owner, could not reasonably be considered the type of public improvement or community amenity called for by the categorical exemption.

But even if these improvements could be considered public improvements or community amenities, they are not "necessary." (See CEQA Guidelines, § 15303(c).) As matter of common knowledge, many restaurants in San Francisco provide *no* vehicular access or parking. Therefore, even if these were amenities provided by the City to the public, such access and facilities, would not be "necessary." Indeed, the Planning Code does not require any parking for the Project. (See Section III.B.3, *post*.)

C. The Project will not have a significant impact on the environment due to unusual circumstances, or otherwise.

Substantial evidence supports San Francisco's determination that the Project meets the criteria for a categorical exemption. Therefore, Petitioners have the burden to provide or identify substantial evidence that either (i) establishes a reasonable possibility of a significant environmental effect *due to* unusual circumstances; or (ii) proves that the Project *will* have a significant environmental effect. (See *Berkeley Hillside I*, *supra*, 60 Cal.4th at 1115–1116.) Petitioners have done neither here.

1. There are no unusual circumstances.

That the site successfully operated as a restaurant for nearly a century belies any claim of "unusual circumstances." Nevertheless, Petitioners contend that a restaurant located on a terminating street in a residential neighborhood, constitutes "unusual circumstances." This contention is incorrect.

A project opponent may establish unusual circumstances "by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location." (*Berkeley Hillside I*, *supra*, 60 Cal.4th at 1105.) However, "[t]he presence of comparable facilities in the immediate area adequately supports [an agency's] implied finding that there were no 'unusual circumstances' precluding a categorical exemption." (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1316.) Even more persuasive than comparable uses in the area, is a site returning to its previous use. (See *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 821.)

In *Walters v. City of Redondo Beach*, for example, the Court of Appeal dismissed neighbors' objection that the unusual circumstances exception precluded a Class 3 exemption for a carwash in their residential neighborhood. (*Ibid.*) The court relied on the facts that there were other carwashes less

than two miles away and that the project site itself had previously operated as a carwash for nearly 40 years, "strongly suggesting that the circumstances are not the least bit unusual." (*Ibid.*[4])

Until the early 2000s, there were two restaurants in this neighborhood—Julius' Castle and Dalla Torre (formally The Shadows), just a block from the Project Site. (AR 134, 386–387.) Thus, even in a predominately residential area, reopening a restaurant at the site where it operated for 84 years, is not the least bit unusual for CEQA purposes. (See *Walters*, *supra*, 1 Cal.App.5th at 821.)

Nor does the configuration of the Project Site or surrounding streets constitute an unusual circumstance under CEQA. As city planners testified before the Board, "[o]ne-way streets and streets that dead-end, coupled with steep slopes, are not unusual in San Francisco." (AR 376; see also, *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 205, fn. 11 [city may rely on "the opinion of a city's 'expert planning personnel' on matters within their expertise" as substantial evidence of no CEQA impact].) At a little less than 80 feet, the width of the area in front of Julius' Castle is "common in San Francisco, particularly in areas that were developed in the earlier part of the last century," like Telegraph Hill. (AR 182.)

Petitioners argue that valet parking is an unusual circumstance resulting in a significant environmental impact. (OB, 17:5–19.) But "[v]alet service is not proposed as part of the project." (AR 179.) Petitioners presume that the restaurant will offer valet service in the future and speculate that there will be impacts associated with such service.[5] However, "a finding of environmental impacts must be based on the proposed project *as actually approved* and may not be based on unapproved activities that opponents assert will be necessary" or may be desirable. (*Berkeley Hillside I*, *supra*, 60 Cal.4th at 1119 [emphasis added]; see also, Pub. Resources Code, § 21082.2 ["speculation … is not substantial evidence" of a significant CEQA impact].) In any event, Petitioners have failed to establish

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[4] In *Walters*, the project sponsor has demolished the prior car wash and was proposing to build an entirely new facility. Thus, to the extent there can be anything "unusual" about returning to a prior use, any impacts due to such unusual circumstances would be much less significant here, where the project sponsor is also reusing the existing facility without expanding the building envelope. (See *Walters*, *supra*, 1 Cal.App.5th at 814.)

[5] If the restaurant were to ever propose valet service in the future, it would be subject to review and approval by the San Francisco Municipal Transportation Agency and the Police Department. (AR 177–178.) Subsequent environmental review could be considered as part of any future proposal for valet parking, at which time the environmental impacts, if any, could potentially be analyzed based on the scope of the proposal, rather than opponents' premature speculation.

that valet parking—a common service at many San Francisco restaurants—is somehow an unusual circumstance.

Petitioners' cited authority, *Lewis v. Seventeenth District Agricultural Association* (1985) 165 Cal.App.3d 823, is easily distinguishable for two reasons. (OB, 16:16–18.) First, "the unusual circumstances prong of the exception was neither disputed nor analyzed in *Lewis*." (*Walters*, *supra*, 1 Cal.App.5th at 822.) Rather, the court's analysis focused entirely on the significant environmental effects of the project. (*Lewis*, *supra*, 165 Cal.App.3d at 829–831.) "[C]ases are not authority for propositions not considered." (*In re Marriage of Cornejo* (1996) 13 Cal.4th 381, 388.) Second, the project in *Lewis*—a racetrack for high-powered, modified stock cars, located next to residential neighborhoods—is not remotely analogous to reopening a historic restaurant in its same location. (See *Lewis*, *supra*, 165 Cal.App.3d at 826.) "[I]t is axiomatic that a car racetrack is far more unusual next to a residential neighborhood than the continuation of a long-standing [use]." (*Walters*, *supra*, 1 Cal.App.5th at 822 [distinguishing *Lewis*, *supra*, 165 Cal.App.3d 823].)

None of Petitioners' stated conditions are unusual in an urban environment like San Francisco. That the proposed use operated in the same building on the same site for 84 years simply underscores this conclusion. Therefore, Petitioners have failed to satisfy *Berkeley Hillside I's* first method, as they cannot meet their burden to show that San Francisco's determination of "no unusual circumstances" is not supported by substantial evidence in the record. The Court's inquiry should end here. (*Berkeley Hillside II*, *supra*, 241 Cal.App.4th at 958 [where there are no unusual circumstances, a court "need not consider [petitioners'] contention … that there is a fair argument of a reasonable possibility of a significant effect on the environment due to unusual circumstances."].)

2. There is no substantial evidence of any significant environmental impact.

Even if this Court were inclined to consider the rest of Petitioners' arguments, Petitioners' claims must fail, because they have not provided or identified any substantial evidence of a significant CEQA impact. Petitioners' complaints are limited to the inconvenience that they may *personally* incur. But "[u]nder CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons." (*Clews Land and Livestock, LLC v. City*

of San Diego (2017) 19 Cal.App.5th 161, 196 [neighbors' complaints of traffic and noise that would be generated by a proposed school was "insignificant in the context of the environment as a whole"].)

Further, many of the neighbors' complaints do not implicate CEQA impacts *at all*. Traffic congestion from an increase in vehicle trips to and from the Project, for example, is not a CEQA issue. (AR 179 ["impacts related to traffic congestion are outside the scope of CEQA"]; see also, Pub. Resources Code, § 21099(b)(2) ["automobile delay … or traffic congestion shall not be considered a significant impact on the environment pursuant to [CEQA]"]; *Covina Residents for Responsible Development v. City of Covina* (2018) 21 Cal.App.5th 712, 726 [same].)

Thus, here, Petitioners have not established a reasonable possibility of a significant effect *due to* unusual circumstances, much less *proven* that the Project *will* result in a significant environmental impact. (See *Citizens*, *supra*, 242 Cal.App.4th at 589.)

a. There is no substantial evidence of significant health or safety impacts.

Petitioners' purported evidence of a significant health and safety impact consists of neighbors' statements that cars may "speed down narrow and fragile Montgomery Street," patrons unfamiliar with the neighborhood will injure residents who "often walk 'in the middle of the street,'" and a bar at the restaurant "could drastically increase drunk driving incidents." (OB, 18:3–8, 17–18.) These statements are not substantial evidence of anything, but rather pure speculation and unsubstantiated opinion, unworthy of any serious analysis from this Court. (See Pub. Resources Code, § 21082.2 ["speculation … is not substantial evidence."].) "Opinions which state nothing more than 'it is reasonable to assume' that something 'potentially … may occur' do not constitute substantial evidence necessary to invoke an exception to a categorical exemption." (*Hines*, supra, 186 Cal.App.4th at 857 [quoting *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 477; internal quotations omitted].)

Petitioners' cited authority in support of the neighbors' statements is of no help to them here. (See OB, 18:10–16; *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.) First, *Keep Our Mountains Quiet* involved a negative declaration and therefore the court applied the fair argument standard. (*Keep Our Mountains Quiet*, *supra*, 236 Cal.App.4th at 719.) "The fair argument standard is a 'low threshold' test." (*Taxpayers for Accountable School Bond Spending v. San*

Diego Unified School District (2013) 215 Cal.App.4th 1013, 1035.) Traditionally, and with rare exceptions, "the 'fair argument' test has been applied *only* to the decision whether to prepare an original EIR or a negative declaration" for a *nonexempt* project. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1135.) Here, the Court must apply the substantial evidence standard unless it first finds that the record contains *no* substantial evidence to support San Francisco's application of the Class 3 categorical exemption. (See *Berkeley Hillside I*, *supra*, 60 Cal.4th at 1115.)

Second, even under the lower standard applied in *Keep Our Mountains Quiet*, factual statements about road conditions from neighbors with personal knowledge "can *form the basis for* substantial evidence supporting a *fair argument*," but without more, such testimony "is not proof of what impacts a future project will have." (*Keep Our Mountains Quiet*, *supra*, 236 Cal.App.4th at 740 , fn. 9.) Therefore, by themselves, factual statements from neighbors are of limited value to establish a reasonable possibility of significant effects due to unusual circumstances—the first method described in *Berkeley Hillside I*—and *cannot* be relied upon to satisfy the second method: proof that the project will result in a significant environmental effect. (See *Berkeley Hillside I*, *supra*, 60 Cal.4th at 1105; *Citizens*, *supra*, 242 Cal.App.4th at 574–576.)

In *Keep Our Mountains Quiet*, for example, neighbors' statements about existing and dangerous road conditions were relevant, but insufficient. The court relied on expert analysis that the proposed project would double the traffic volumes, exacerbating the existing hazards, as well as a review by the Department of Transportation concluding that there would be "significant impacts to the operations and traffic movements" that "might impede … in both directions" a road with an accident rate that was already twice the state average. (*Id.* at 725, 735.)

Here, in contrast, Petitioners offer *only* statements and unsubstantiated opinions from the neighbors, without any corroborating evidence or expert analysis. These statements and opinions, therefore, do not establish a reasonable possibility that the Project will significantly exacerbate the problems they describe, nor can they, as a matter of law, prove that the Project *will* have a significant

environmental effect.[6] Moreover, they are in conflict with testimony from many other neighbors who stated that traffic from the neighborhood's restaurants has never been intolerable and would not be substantially exacerbated by reopening Julius' Castle. (E.g., AR 140, 4474, 4490.)

Petitioners incorrectly claim that "no traffic analysis has been done" and criticize San Francisco for not preparing a "professional traffic study." (OB, 19:2–10.) First, CEQA does not require a traffic study for this Project. Second, the Planning Department utilized its standard methodology to evaluate the Project's traffic impacts against the screening criteria recommended by the Office of Planning and Research, in accordance with CEQA section 21099(b). (AR 179; see also, Pub. Resources Code, § 21099(b).) Because the proposed Project satisfied the screening criteria, a more detailed traffic analysis was not required. (AR 179.) The screening analysis constitutes substantial evidence, as does "the opinion of [San Francisco's] 'expert planning personnel' on matters within their expertise, even in the absence of 'additional evidence or consultation.'" (*Latinos Unidos*, *supra*, 221 Cal.App.4th at 205, fn. 11.) Therefore, once San Francisco's expert planners concluded the proposed Project qualified for an exemption, a detailed traffic study was unnecessary—indeed, "no further environmental review [was] required." (*Tomlinson*, *supra*, 54 Cal.4th at 286.) The Board of Supervisors was free to rely on the opinion and conclusion of San Francisco's expert planners without requiring any additional studies or analysis.

In any event, as the party with the burden to establish a significant impact, Petitioners could have presented expert opinion. Presumably, if Petitioners had been able to find a traffic expert who could corroborate their allegations, they would have submitted such a report. Their decision to instead rely solely on unsubstantiated opinions from nonexperts means they have failed to carry their burden to produce substantial evidence. (See *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1417 ["dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence."].)

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[6] Traffic congestion, which seems to be at the core of the neighbors' complaints here, is not a CEQA impact. (AR 179 [automobile delay is not a threshold of significance in CEQA]; see also, Pub. Resources Code, § 21099(b)(2) [automobile delay and traffic congestion are not significant impacts under CEQA]; *Covina Residents*, *supra*, 21 Cal.App.5th at 726 [same].)

The substantial evidence that *is* in the record, indicates that San Francisco correctly determined that the Project would not result in significant health or safety impacts due to traffic. In addition to passing the screening criteria, conditions of project approval ensure that the neighbors' concerns will be adequately managed, if not avoided. (See AR 13–15; see also, AR 178–180 [discussion of project elements and surrounding that will minimize vehicle trips]; Section III.B.2, *post*.) Further, recent changes to the road conditions—completed since the restaurant was last open—suggest that many of the neighbors' fears may no longer be relevant. (AR 119, 181, 4450 [testimony from Planning Department and neighbor regarding traffic calming improvements to Montgomery Street].) Petitioners have failed to provide or identify any substantial evidence to rebut San Francisco's conclusions.

b. There is no substantial evidence of significant air quality impacts.

Petitioners' allegations regarding air quality impacts suffer from the same deficiencies as their claims regarding health and safety impacts. Petitioners rely solely on statements from the neighbors. (OB, 19:17–27.) Specifically, a real estate developer and local resident who claimed that the Project could generate 450 daily vehicle trips. (OB, 19:21 [citing AR 147–148].) This neighbor, however, provided no verifiable credentials to support his calculation or his technical opinion on the number of vehicle trips. (*Ibid.*[7]) Nor is his opinion based on any evidence in the record, other than the size of the building. Rather, his analysis was predicated on unsupported assumptions about the means of transportation patrons would use to arrive at the restaurant. (*Ibid.*)

To constitute substantial evidence, testimony, even from an expert, must be based on facts in the record and may not be speculative, remote, or conjectural. (See e.g., *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135–36; see also, *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 157 [vague generalizations, even from an expert, do not constitute substantial evidence].) Neighbors' speculation regarding the behavior of the restaurants patrons is not substantial evidence of a significant air quality impact and as discussed above, the Project is not projected to generate a significant volume of vehicle trips. (AR 5, 178–180.)

[7] Where evidence of a purported expert's credentials are not submitted during the administrative proceedings, a court may not permit admission of the credentials as extra-record evidence. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th. 559.)

c. There is no substantial evidence of significant noise impacts.

Similar to their previous arguments, Petitioners rely on anecdotes and unsubstituted opinions from neighbors, rather than any substantial evidence that noise from the Project will exceed significance thresholds. (OB, 20:5–13.)

Again citing *Keep Our Mountains Quiet*, Petitioners assert that compliance with the San Francisco's Noise Ordinance is not sufficient. (OB, 20:25–27.) But the court in *Keep Our Mountains Quiet* analyzed a negative declaration and applied the fair argument standard, which does not apply here. Under the correct standard—the substantial evidence standard—San Francisco may condition project approval on compliance with codified and enforceable noise limits to support a CEQA exemption. (See *Walters*, *supra*, 1 Cal.App.5th at 823.)

Further, CEQA vests public agencies with substantial discretion to evaluate environmental impacts in their locality because "an activity which may not be significant in an urban area may be significant in a rural area." (CEQA Guidelines, § 15064(b).) Therefore, in *Keep Our Mountains Quiet*, crowd noise may exceed a level of significance for those residents, who each live on "heavily wooded lots that are over two acres in size," surrounding a nature preserve. (See *Keep Our Mountains Quiet*, *supra*, 236 Cal.App.4th at 719.) But the same is not true in the "dense urban environment" of the northeast corner of San Francisco. (See AR 183 [noises associated with a restaurant are typical here; thus, "the proposed project would not result in a substantial increase in ambient noise levels."].)

Petitioners' noise argument fails for the additional reason that any alleged impact is not conceivably attributable to any unusual circumstance. There is nothing unusual about a restaurant in San Francisco, particularly one that operated in this neighborhood, just a block away from another restaurant, for much of the last century. (See *Walters*, *supra*, 1 Cal.App.5th at 821.) Nor is the noise associated with operating the restaurant due to the configuration of Montgomery Street. While Petitioners may object to noise in their neighborhood, they have made no attempt to argue that any alleged noise impact from the restaurant is "due to unusual circumstances." (See OB, 20–21; *Berkeley Hillside I*, *supra*, 60 Cal.4th at 1105.)

d. There is no significant CEQA impact arising from the Project's consistency or inconsistency with the Planning Code.

Finally, while the Project is, in fact, consistent with the Planning Code (see Section III, *post*), even if Petitioners could identify an actual inconsistency, any alleged inconsistency would not constitute a significant environmental effect. (OB, 21:16–22.) CEQA defines a significant effect on the environmental as "a substantial, or potentially substantial, adverse change in any of the *physical conditions* within the area affected by the project." (CEQA Guidelines, § 15382 [emphasis added]; see also, Pub. Resources Code, § 21151(b) ["For purposes of [CEQA] any significant effect on the environment shall be limited to … adverse changes in physical conditions"].) An alleged inconsistency that amounts to a procedural error—that is, insufficient findings to support a conditional use authorization—is not an adverse change to the physical conditions surrounding the Project. Moreover, inconsistencies are only relevant to CEQA to the extent the inconsistency is with a "land use plan, policy, or regulation … *adopted for the purpose of avoiding or mitigating an environmental effect.* (See OB, 21:18–19; CEQA Guidelines, Appen. G, § X [emphasis added].) The Planning Code's process and criteria for approval of conditional uses is not such a plan, policy, or regulation.

* * *

Petitioners have not established any unusual circumstance of the Project and have not provided substantial evidence that the Project may have a significant environmental impact *due to* an identified unusual circumstance. Nor have Petitioners *proven* that the Project *will* have a significant effect on the environment. (See *Berkeley Hillside I*, *supra*, 60 Cal.4th at 1115–1116; *Citizens*, *supra*, 242 Cal.App.4th at 589.) Accordingly, Petitioners have failed to meet their burden under either of the methods set forth by the Supreme Court in *Berkeley Hillside I*. The Court should uphold San Francisco's determination that the Project is categorically exempt from CEQA.

II. BECAUSE PETITIONERS FAILED TO ADMINISTRATIVELY APPEAL THE CONDITIONAL USE AUTHORIZATION, THE COURT NEED NOT CONSIDER PETITIONERS' PLANNING CODE ARGUMENTS.

Though Petitioners administratively appealed San Francisco's CEQA determination, they did not file an administrative appeal of the conditional use authorization. (AR 186 ["CEQA Appeal"]; AR 282 [Appeal Timeliness Determination from the Clerk of the Board].) As a consequence of their

failure to exhaust their administrative remedies, Petitioners have waived their challenge to the approval's consistency with the Planning Code. (See Petition, 16:1–21:14 [second cause of action to set aside approval as contrary to the Planning Code]; OB, 21:23–29:16 [argument in support of second cause of action].)

"Under the doctrine of exhaustion of administrative remedies, 'where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.'" (*Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447.) The doctrine is intended to prevent judicial interference in matters within agencies' areas of expertise, prior to an agency's final administrative decision, and to lighten the burden of overworked courts in cases where administrative remedies are able to provide the desired relief. (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874.) "Consequently, the requirement of exhaustion is a jurisdictional prerequisite, not a matter of judicial discretion." (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 589.)

San Francisco's municipal codes provide separate and distinct rights of appeal for CEQA determinations and conditional use authorizations. Section 31.16 of the Administrative Code authorizes an appeal of a CEQA exemption by submitting a letter to the Clerk of the Board stating the specific grounds for appeal. (S.F. Admin. Code, § 31.16(a)–(b).) Planning Code section 308.1 authorizes an appeal of a conditional use authorization by timely filing a notice of appeal subscribed by either (i) the owners of at least 20% of the property affected by the conditional use, as defined in the Planning Code, or (ii) five members of the Board of Supervisors. (S.F. Planning Code, § 308.1.)

Here, Petitioners timely filed a letter to appeal the CEQA exemption in accordance with section 31.16 of the Administrative Code (AR 186, 282), but did not appeal the conditional use authorization, despite the Planning Commission approval that *expressly* notified Petitioners of their opportunity to appeal. (AR 10 ["Any aggrieved person may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion No. 19958."].) Thus, the Board of Supervisors considered an appeal of the environmental determination, but not the Project approval. (AR 282 [memo from the Clerk of the Board]; AR 178, 183 ["The Conditional Use Authorization for the project is not before the Board."].)

Because San Francisco provided Petitioners an administrative remedy that they failed to exhaust, Petitioners have waived their argument that the conditional use authorization and its supporting findings do not comply with the Planning Code.

The recent opinion in *Clews Land and Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, is instructive. Like here, San Diego's municipal code provided a bifurcated appeals procedure for project approvals and CEQA determinations. (*Id.* at 186.) The petitioner in *Clews* filed an administrative appeal of the project approval, but failed to also check the box to appeal the CEQA determination; thus, the city treated petitioner's appeal as limited to the project approval. (*Id.* at 180.) The Court of Appeal blessed the bifurcated procedure and held that petitioner had not availed itself of an administrative appeal available to challenge the CEQA determination. (*Id.* at 187.) Consequently, the petitioner did not exhaust its administrative remedies regarding the CEQA determination and was now precluded from judicially challenging it. (*Id.* at 187.)

Though here Petitioners did the opposite—they appealed the CEQA determination, but not the project approval—the principle set forth in *Clews* still applies to preclude judicial review of an administrative determination for which Petitioners failed to exhaust their administrative remedies. That Petitioners now focus their challenge on the specific findings in support of the conditional use authorization makes no difference—they still seek to set aside an approval that they failed to administratively appeal. (See *Park Area Neighbors*, *supra*, 29 Cal.App.4th at 1447 [failure to administratively appeal project approval precluded judicial challenge to project's consistency with zoning ordinances].)

Whether Petitioners intended their CEQA appeal to also operate as an appeal of the conditional use authorization is irrelevant. (See OB, fn. 2 [citing AR 4065–4067 as clarification of Petitioners' intent]; see also, *Clews*, *supra*, 19 Cal.App.5th at 187.) Notably, their appeal letter characterized their action as a "CEQA Appeal," which Petitioners confirmed in subsequent correspondence. (AR 186 ["CEQA Appeal" letter], 4065 ["Appeal of Determination of Exemption from Environmental Review"].) But more importantly, Petitioners did not submit the necessary signatures from the affected

property owners or members of the Board of Supervisors to perfect an appeal of the Project approval.[8] (See Planning Code, § 308.1.) Therefore, the City rightly treated the Project approval as unchallenged.

Because exhaustion is a jurisdictional prerequisite, Petitioners' failure to exhaust their administrative remedies precludes the Court from reviewing their challenge to the conditional use approval, as set forth in their second cause of action and Opening Brief. (See Petition, 16:1–21:14; OB, 21:23–29:16.) The Court should reject the arguments offered in support of this challenge as waived.

III. SAN FRANCISCO'S APPROVAL OF THE PROJECT COMPLIES WITH THE CITY'S PLANNING CODE.

Even if Petitioners had preserved their Planning Code arguments with a timely administrative appeal, their claim lacks merit. Substantial evidence throughout the record of proceedings supports San Francisco's discretionary determination that the Project fully complies with the Planning Code.

The evidence in support of this conclusion is primarily set forth in the Planning Commission's findings and motion approving the conditional use (AR 2–9), but the evidence need not be confined to written findings, as Petitioners imply. (See, e.g., OB, 27:16.) In fact, "[t]here is no merit in [Petitioners'] contention that only written findings of fact, labeled as such, are sufficient to comply with the requirements of *Topanga*." (*City of Carmel-By-The-Sea v. Board of Supervisors* (1977) 71 Cal.App.3d 84, 91.) *Topanga* "does not preclude a reviewing court from looking to the record to determine the findings upon which the decision is based." (*Ibid.*)

San Francisco's "findings are presumed to be supported by the administrative record" and must be "liberally construed to *support* rather than defeat the decision under review." (*Donley v. Davi* (2009) 180 Cal.App.4th 447 at 456 [presumption]; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1356 [construction of findings, emphasis added].)

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[8] Page 258 of the Administrative Record (also reproduced at AR 3388) is a "Petition" regarding the conditional use authorization, which contains eight signatures. (AR 258.) However, this petition urges the *Planning Commission* to disapprove the Project, it is not an appeal of the Commission's approval to the Board of Supervisors. It could not operate as an appeal because it both predates the Planning Commission's approval decision and does not include, or even purport to include, signatures from 20% of the property owners within 300 feet of all exterior boundaries of the Project Site. (See *ibid.*; see also, AR 4486–4487 [presenting petition to Planning Commission; S.F. Planning Code, § 308.1.)

Petitioners, therefore, bear the burden "to show there is no substantial evidence whatsoever to support the findings." (*Young*, *supra*, 10 Cal.App.5th at 419.) They have failed to meet their burden.

A. Zoning permits the Project.

As explained in Section I.A, above, the Planning Code permits a Restaurant use at the Project Site. Accordingly, the proposal is consistent with the applicable zoning provisions.

B. The Project meets the criteria for a conditional use authorization.

San Francisco's Planning Code directs the Planning Commission to approve conditional uses that the Commission finds "will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity, or injurious to property." (S.F. Planning Code, § 303(c)(2).) As relevant to this matter, the Planning Code further instructs the Commission to consider "accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading and of proposed alternatives to off-street parking," as well as the "safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor." (*Id.*, § 303(c)(2(B)–(C); see also, OB, 23:5–10.) A conditional use authorization is an adjudicative decision reserved to the discretion of the San Francisco Planning Commission. (*San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 695 [citing Planning Code, § 303].)

Because the Planning Commission ultimately concluded that the Project "will not result in undesirable consequences" and that the conditional use authorization "would *promote* the health, safety and welfare of the City," the Commission approved the conditional use authorization as required by the Planning Code. (AR 7, 9 [emphasis added].) Substantial evidence in the record supports the Commission's findings that any noise, traffic, parking, or safety impacts from the Project will not be "detrimental" to the health, safety, convenience, or general welfare.

First and foremost, the site successfully operated as a restaurant for 84 years, with another restaurant just a block away for much of that period. (AR 134, 386–387.) It is reasonable to presume that the same use in the same building would continue to operate successfully, particularly with the new conditions of approval that further minimize inconvenience to the neighborhood. Second, as discussed in more detail below, the record of proceedings is replete with substantial and specific

evidence that the Project will not result in any "detrimental" impacts, and further, includes safeguards to adequately manage neighbors' concerns.

Petitioners have not met—or even attempted to meet—their burden to refute this substantial evidence. Instead, Petitioners wholly ignore the evidence supporting San Francisco's findings, and urge the Court to consider only the unsubstantiated opinions and anecdotes of the neighbors who oppose the Project. (OB, 23:22–26:2.) But this testimony, even collectively, is not substantial evidence that the Project will be detrimental to the health, safety, convenience, or general welfare.

The court should therefore, disregard the neighbors' unsubstantiated opinions and anecdotes, and reject Petitioners' claim for its failure to set forth the evidence supporting the administrative decision and demonstrate why it is insufficient. (See *Young*, *supra*, 10 Cal.App.5th at 419)

But to the extent the Court gives the opponents' testimony any credence, it must also consider the numerous letters and testimony from neighbors that *support* the Project and would like to see this historic restaurant reopen in their neighborhood.[9] Indeed, neighborhood support for the project *outnumbered* the opposition. (AR 3.) Much of this testimony directly rebuts the opponents' claims and

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[9] Many area residents enthusiastically supported reopening Julius' Castle and looked forward to once again having a neighbored spot to gather. (See AR 112–142.) They described the restaurant and its "iconic structure" as "an asset for [their] urban area." (AR 112, 113.)

The "neighborhood embraced [Julius' Castle] for decades" (AR 127) and neighbors stated that they would again. They believed it would "add even more interest and life in a positive sense to [their] cherished neighborhood." (AR 115.) Specifically, some neighbors remarked that they had "felt much safer when there was more activity on the streets at night" (AR 113) and hoped that renewed activity would deter a recent spate of car break-ins. (AR 135, 4482.) Neighbors in support of the Project were not terribly concerned about traffic and parking. One noted that recent changes to Montgomery Street had reduced speeding in the neighborhood. (AR 119.) Others did not recall traffic or congestion being a significant problem when the restaurant was open previously, and did not believe it would be significant problem going forward. (AR 4474, 4490.) They testified that "most customers would arrive by taxi or foot" and that traffic, parking, and noise could be sufficiently managed. (AR 117, 140, 4471.) The owner of the buildings directly across Montgomery Street from Julius' Castle testified the Project "will add value to the neighborhood" and that noise and traffic "will probably be less than expected." (AR 118.)

Neighbors also lauded the Project sponsor for having "taken pains to address the concerns of the community throughout his planning process." (AR 126; see also, AR 134 [sponsor "has spent the last few years meeting with neighbors and agreeing to a list of operating rules designed to protect neighborhood interests"].) The Telegraph Hill Neighborhood Center offered their "whole hearted support" for the Project. (AR 142.)

reinforces the substantial evidence supporting the City's findings, as detailed in the following subsections.

1. Substantial evidence supports San Francisco's finding regarding noise.

San Francisco found that the City's standard conditions of approval for Restaurants would sufficiently prevent noxious or offensive noise from the Project. (AR 5.) Substantial evidence in support of this finding includes enforceable requirements that the restaurant (i) close the roof terrace no later than 9:00 p.m., daily; (ii) prohibit any amplified, live entertainment; (iii) restrict garbage collection to after 6:30 a.m., and deliveries to between 8:00 a.m. and 5:00 p.m.; and (iv) appoint a community liaison to address concerns from the neighbors and report directly to the City's Zoning Administrator. (AR 14–15.) The City can enforce these requirements through section 176 of its Planning Code and unresolved complaints could result in the revocation of the conditional use authorization. (AR 14.) Additionally, the restaurant must comply with San Francisco's Noise Ordinance, which includes its own enforcement mechanisms. (S.F. Police Code, § 2900, et seq.; AR 184 [violations of Noise Ordinance are enforced by the Department of Public Health and the Police Department].) After six months of operation, the Planning Commission will hold a follow-up hearing to evaluate the restaurant's adherence to these conditions of approval and to review any recorded complaints and feedback from the neighbors. (AR 14.)

The Project sponsor also agreed to additional conditions, including not accepting new patrons after 10:00 p.m., as requested by the Telegraph Hill Dwellers neighborhood association. (AR 61 [agreement to conditions], 67 [proposed conditions].)

Section 303 does not prohibit any new noise or require the project sponsor guarantee a problem-free environment. Neither is a realistic objective in an urban environment, particularly one as dense and popular as Telegraph Hill. Instead, section 303 requires "safeguards." The Project requirements and restrictions, coupled with on-going monitoring and enforcement, provide these safeguards. Petitioners presented no evidence, either in the administrative process or this litigation, that the conditions of approval and other restrictions would be ineffective or otherwise fail to avoid "detrimental" impacts. The Commission therefore, reasonably relied on substantial evidence of these safeguards in finding that the Project complied with section 303(c)(2).

2. Substantial evidence supports San Francisco's finding regarding traffic.

As with noise, substantial evidence supports San Francisco's finding that Project traffic will not be detrimental to the health, safety, convenience, or general welfare. (See AR 5.) Many neighbors testified that traffic simply was not a significant concern during the period that Julius' Castle was last open, even with Dalla Torre open just a block away. (AR 134, 4490.) Nonetheless, enforceable conditions of approval obligate the restaurant to provide an operations plan to address traffic and parking concerns, provide bicycle parking, and restrict deliveries to the site. (AR 13–15.) The project sponsor reached a separate agreement with the neighborhood to restrict hours of operation, prohibit non-resident employees from parking on the street, and limit the size of delivery trucks that access the site. (AR 61, 67.) The project sponsor testified that he remains committed to abiding by the agreed upon conditions, which will become part of the operations plan. (AR 4448–4450.)

These measures will minimize vehicle trips to the restaurant, as will the Project Site's proximity to public transportation. (AR 5, 178.) The Project Site is located in a "transit priority area," meaning it is well served by at least one major transit stop. (AR 178.) Specifically, the site is within walking distance of *eight* Muni lines with service intervals of 15 minutes or less. (*Ibid.*) While Petitioners complain that public transportation will be underutilized due to the slopes and stairs on Telegraph Hill, many residents and tourists routinely walk up and down Telegraph Hill every day and the Castle can also be accessed by public transportation without use of the steps. (AR 385, 387, 388). Some described access to their neighborhood via public transit as "pretty easy." (AR 389.) Indeed, one member of the Board of Supervisors stated that he had used public transportation to visit the restaurant. (AR 395.)

In light of these measures, the Commission reasonably found that Project traffic would not be detrimental to the health, safety, convenience, or general welfare.

3. Substantial evidence supports San Francisco's finding regarding parking.

Substantial evidence also supports San Francisco's finding that parking impacts from the Project will not be detrimental to the health, safety, convenience, or general welfare. (AR 5.) The City reasonably relied on the Project's compliance with the Planning Code's parking requirements to find that the Project provided adequate parking. (*Ibid.*) Planning Code section 151 provides that a

Restaurant use under 5,000 square feet, such as Julius' Castle, only requires Class 2 bicycle parking, but does not require any vehicle parking or loading spaces. (S.F. Planning Code, § 151.) Contrary to Petitioners' assertion, the conditional use criteria need not specifically reference Planning Code section 151 for the City to rely on it. (See OB, 26:13–14; *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1033 [agency may rely on generally applicable regulations to find no impact].)

San Francisco also noted that the Project is not expected to generate substantial vehicle trips or require excessive parking. (See AR 5, 30.) The Project is located in a transit priority area. (AR 178.) Moreover, as part of the sponsor's agreement with the Telegraph Hill Dwellers, the restaurant may not allow its employees to park in the neighborhood and will discourage its patrons from doing the same. (AR 67, 178.) The proliferation of ride sharing will also reduce the parking demand. (AR 30; see also, AR 4492 [commissioner testimony].)

Petitioners' belief that parking in their neighborhood is "already inadequate" and sure to become "much more unbearable" is hardly substantial evidence of a "detrimental" impact, and certainly not enough to overcome San Francisco's reasoned and supported conclusion to the contrary. (See *Gentry*, *supra*, 36 Cal.App.4th at 1417.)

4. Substantial evidence supports San Francisco's finding regarding safety and pedestrian hazards.

Petitioners' complaints regarding "safety and pedestrian hazards" are limited to the speed that traffic traveled through the neighborhood during Julius' Castle's previous incarnation. (OB, 25:24–26:2 ["fast moving traffic;" "dangerously fast traffic;" "speeding cars"].) However, since the restaurant was last open, San Francisco has reconfigured the stretch of Montgomery Street approaching Julius' Castle. (AR 119.) The road now includes a grade-separation and sidewalk bulb that force cars to reduce speed through the neighborhood. (AR 119, 181, 4450.) According to one neighbor, cars are no longer able to speed down Montgomery Street like they used to. (AR 119; see also, AR 3 ["the Project Sponsor has agreed to implement certain traffic calming measures and operations measures … so that customers will not adversely affect traffic flow or pedestrian safety."].)

Thus, San Francisco reasonably concluded that the speed of traffic would not be detrimental to the health, safety, convenience, or general welfare.

C. Planning Code § 303(c)(4) does not preclude approval of the Project.

While San Francisco found that a restaurant use differed from the predominant uses in RH-3 districts, the City concluded that the Planning Code permits a restaurant at this particular site due to its landmark status and that the Project "conforms to the applicable provisions of Section 303," including section 303(c)(4). (AR 6; Section I.A, *ante*.) Thus, the City appropriately determined that, "[o]n balance," the project complies with the section 303 criteria. (AR 4; see also, *San Francisco Tomorrow v. City and County of San Francisco* (2014) 228 Cal.App.4th 1239, 517 [in determining project consistency with General Plan and Planning Code, San Francisco may "balance" its priority policies].)

Petitioners do not challenge the City's balancing of the conditional use criteria, nor do they dispute that the Planning Code permits restaurant uses on RH-3 sites designated as landmarks. (OB, 14:22–24, 28:8–24.) Instead, Petitioners' inconsistency argument relies solely on the stated purpose for *general* residential (RH) districts. (OB, 28:13–14.) But Petitioners ignore the stated purpose specific to the Project Site's RH-3 district, which acknowledges that in these denser residential districts, "[n]onresidential uses are more common." (S.F. Planning Code, § 209.1.)

The Planning Code plainly permits a restaurant use at the Project Site and substantial evidence in the record establishes that the proposed restaurant satisfies the applicable criteria for a conditional use authorization. (See Section III.B, *ante*.) Thus, section 303(c)(4) does not, as Petitioners' claim, "void" San Francisco's approval.

D. Planning Code § 303(o) does not preclude approval of the Project.

Applying a reasoned and supported interpretation of its Planning Code, San Francisco concluded that section 303(o) does not preclude approval of the Project. Though Petitioners prefer an alternative interpretation of section 303(o), because San Francisco's interpretation of its code is not "clearly erroneous," it is entitled to deference from this Court. (See *Anderson*, *supra*, 130 Cal.App.4th at 1193.) Thus, the City's finding should be upheld.

Planning Code section 303(o) requires that when considering a conditional use application for a Restaurant use, in addition to the standard conditional use criteria set forth in section 303(c):

> the Planning Commission shall consider … the existing concentration of eating and drinking uses in the area. Such concentration should not exceed 25% of the total commercial frontage as measured in linear feet within the immediate area of the subject site except as otherwise provided in this subsection (o).

(S.F. Planning Code, § 303(o).)

Petitioners argue that as the only commercial use in the immediate area, Julius' Castle necessarily exceeds the 25% threshold, and therefore, San Francisco was required to deny the conditional use. (OB, 29:6–16.) But section 303(o) is plainly intended to prevent bars and restaurants from monopolizing the available commercial space in a particular neighborhood, not to prevent a single restaurant from operating, as Petitioners suggest.

Accordingly, San Francisco reasonably determined that as the only restaurant—indeed, commercial space—in the immediate area, reopening Julius' Castle would not contribute to an over-concentration of eating and drinking uses in conflict with section 303(o). (AR 6, 7 [project area "is not over concentrated by restaurants"].) Moreover, use of the structure as a restaurant "is a character-defining feature of the property … essential to … the preservation of the landmark." (AR 29.) Therefore, the restaurant does not occupy space that has ever been, or otherwise could be, available to other commercial use types. (See AR 6 [Project will not upset the historical balance of commercial uses in the area]; AR 7 [Project will not displace a commercial tenant nor prevent optimal diversity in the types of goods and services available to the neighborhood].)

Petitioners' interpretation would lead to the absurd result of prohibiting *any* new restaurant in neighborhoods not already populated by substantial commercial use. That may well be Petitioners' objective, but it is not reflective of San Francisco's mixed urban environment nor the Project Site's dense residential district. In contrast to RH-1 districts, which "are occupied almost entirely by single-family houses," in the Project Site's RH-3 district, "[n]onresidential uses are more common." (S.F. Planning Code, § 209.1.) Thus, the City's reasonable and practical interpretation of section 303(o) is also consistent with intended character of the Project's designated zoning district.

In any event, section 303(o) is directory, not mandatory. It identifies a factor for the Planning Commission to consider, but does not compel the Commission to deny an application for a project that cannot satisfy a strict interpretation of the numerical threshold. Rather, the language of section 303(o) preserves the Commission's discretion by expressly stating that "the Planning Commission shall

consider" the concentration of eating and drinking uses. (S.F. Planning Code, § 303(o) [emphasis added].) Further, section 303(o) provides only that the concentration "*should* not exceed 25% of the total commercial frontage," but does not prohibit approval of eating and drinking uses in excess of this threshold. (*Ibid.* [emphasis added].)

San Francisco applied a reasonable interpretation of its Planning Code and explained the basis for its conclusion. (AR 6.) Nothing more is required to affirm the City's determination.[10]

CONCLUSION

For the reasons more fully explained above, Petitioners have failed to carry their burden to establish that the Project does not qualify for an exemption from CEQA. Petitioners waived their challenge to the Project's conditional use authorization, but in any case, that claim lacks merit as well. Accordingly, San Francisco respectfully requests that the Court deny the Petition.

Dated: July 9, 2018

DENNIS J. HERRERA
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By:/s/ BRIAN F. CROSSMAN
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[10] Petitioners make a third and final argument that the Project approvals violate section 1094.5 of the Code of Civil Procedure. (OB, 29:18–20.) Because this claim is entirely predicated on Petitioners' CEQA and Planning Code causes of action, which each fail for the reasons already set forth in this Opposition Brief, Petitioners' third claim requires no further response.

Dated: July 9, 2018

LAW OFFICES OF PAUL D. SCOTT, P.C.

By:/s/ PAUL D. SCOTT
PAUL D. SCOTT

Attorneys for Real Parties in Interest
PAUL D. SCOTT, JULIUS CASTLE REDUX LLC

PROOF OF SERVICE

Friends of Montgomery Street, et al. v. CCSF, et al
San Francisco Superior Court Case Number CPF-17-515902

I, REYNA LOPEZ, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102.

On July 9, 2018, I served the following document(s):

SAN FRANCISCO'S AND REAL PARTY'S JOINT OPPOSITION BRIEF

on the following persons at the locations specified:

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in the manner indicated below:

☐ **BY UNITED STATES MAIL**: Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

☒ **BY ELECTRONIC MAIL:** Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the person(s) at the electronic service address(es) listed above. Such document(s) were transmitted *via* electronic mail from the electronic address: reyna.lopez@sfcityatty.org ☒ in portable document format ("PDF") Adobe Acrobat or ☐ in Word document format.

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

Executed July 9, 2018, at San Francisco, California.

Reyna Lopez
REYNA LOPEZ