NO. S201116

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

BERKELEY HILLSIDE PRESERVATION, ET AL.
Plaintiffs and Appellants,

v.

CITY OF BERKELEY, ET AL.
Defendants and Respondents.

MITCHELL D. KAPOR AND FREADA KAPOR-KLEIN
Real Parties in Interest and Respondents.

After a Published Decision by The Court of Appeal
First Appellate District, Division Four
Civil No. A131254

After an Appeal From The Superior Court of Alameda County
Case No. RG10517314
Honorable FRANK ROESCH

PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA

Respondents City of Berkeley and City Council of the City of Berkeley ("City") and Respondents and Real Parties in Interest Mitchell Kapor and Freada Kapor-Klein (the "Kapors") (collectively "Respondents") respectfully petition for review of the decision of the Court of Appeal (Certified for Publication), First Appellate District, Division 4, filed on February 15, 2012 ("Opinion"). Respondents sought rehearing in the Court of Appeal, which was denied. The Opinion was modified (without any change in judgment) on March 7, 2012. A copy of the Opinion and a copy of the Order Denying Rehearing and Modifying Opinion [No Change In Judgment] are attached hereto as Exhibit A.

I. ISSUES PRESENTED FOR REVIEW

1. For a project that is categorically exempt from review under the California Environmental Quality Act ("CEQA"),[1] does the significant effects exception to the exemption in CEQA Guideline section 15300.2(c)[2] require both a finding that there is a reasonable possibility of a significant environmental effect *and* a finding that the potentially significant effect is due to "unusual circumstances"?

2. What is the appropriate standard of review of whether the significant effects exception to a categorical exemption applies?

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[1] All references to "CEQA" are to Public Resources Code § 21000 *et seq.* Unless otherwise indicated, all further statutory references are to the Public Resources Code.

[2] All references to "CEQA Guidelines" or "Guidelines" are to California Code of Regulation Title 14.

3. When determining whether the significant effect exception applies, must a public agency consider alleged effects of activities that are not included in the project as proposed and approved?

II. WHY REVIEW SHOULD BE GRANTED

California Rule of Court 8.500(b)(1) states that a ground for review is "[w]hen [it is] necessary to secure uniformity of decision or to settle an important question of law." The Court of Appeal's decision creates a need to settle three important questions of law relating to categorical exemptions, and the "significant effects" exception to the categorical exemptions, under CEQA.

The Legislature directed the Secretary of the California Natural Resources Agency to adopt a "list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt" from CEQA. (§ 21084(a).) The Resources Agency has determined that 33 "categorically exempt" classes of projects do not have a significant effect on the environment, and therefore do not require further environmental review. (Guidelines §§ 15301 – 15333.) Activities so exempted include addition of up to ten classrooms to schools, construction of four new commercial buildings of up to 10,000 square feet in urban areas, and construction of single-family houses and accessory structures such as pools, garages, and fences.

The Resources Agency has also established certain *exceptions* to the categorical exemptions, including the "significant effects" exemption in Guidelines section 15300.2(c): "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The focus of the significant effects exception is *not* to revisit whether activities within the exempted classes of projects will have a "significant

effect on the environment." The Resources Agency has already answered that question in the negative. Rather, the focus of the significant effects exception is to provide for further review of projects when *unusual* circumstances would take a particular project out of the exempt category and physical impacts of activities that are *atypical* of the exempt category are potentially significant.

This case concerns questions of when the significant effects exception must be applied. In this case, the City of Berkeley approved the Kapors' plans to construct a single-family home. The City found the project exempt under the categorical exemptions for construction of small structures and urban in-fill projects. In so finding, the City rejected the project opponents' opinion that construction fill which was *not proposed* for the project would be subject to seismic shaking. The trial court upheld the City's decision, holding that that evidence of a potentially significant impact was insufficient to preclude use of a categorical exemption unless the alleged impact was due to "unusual circumstances." The Appellate Court reversed, finding that evidence of a potentially significant impact "is *itself* an unusual circumstance" which precludes reliance on a categorical exemption. (Opinion, p. 13.)

The first issue raised by this case is whether use of a categorical exemption is precluded *whenever* significant impacts are credibly alleged, regardless of whether those impacts are related to circumstances which are "unusual" for the exempted category. Until this case, all courts addressing this issue have conducted the two-part inquiry employed by the trial court. These cases all require both a finding that there is a reasonable possibility of a significant environmental effect *and* a finding that the alleged effect is *due to unusual circumstances* with regard to the exempt category of projects. The Court of Appeal's Opinion, that allegations of significant impacts are *per se* unusual circumstances that preclude use of a categorical

exemption, obviates the need for the second finding, and thereby contradicts a long line of established precedent.

The Court of Appeal's new rule would eviscerate the very concept of categorical exemptions. Under the Opinion, all types of projects would be subject to one, and only one, threshold inquiry – whether there is a credible allegation of a potentially significant impact – *regardless* of whether the project fits into an exempt category. The Opinion would therefore make an agency's consideration of categorical exemptions identical to its consideration of the *non-categorical* "commonsense" exemption in Guidelines section 15061(b)(3), for any project "[w]here it can be seen with certainty that there is no possibility" of a significant impact. It thereby would render all Guidelines defining exempt categories surplusage, and give no meaning to the Resources Agency's finding that those classes of projects will not have a significant impact. In light of the Legislature's direction that the Resources Agency designate just such categories of projects, this cannot be the correct result under CEQA.

The second important issue is the appropriate standard of review for the significant effects exception. The Court of Appeal held that the "fair argument" standard applies, holding that the exception is required whenever there is any credible evidence of a reasonable possibility of a significant effect, regardless of other evidence that no significant effect would occur. (Opinion, p. 16.) There is a long-standing split in authority on this issue, with some courts applying the fair argument standard, and others applying the more deferential substantial evidence standard, under which an agency may rely on evidence showing that there would be no significant impact. This split was most recently acknowledged by the First Appellate District, Division 2, in *Hines v. Coastal Commission* (2010) 186 Cal.App.4th 830, 855-856, and has also been acknowledged in CEQA practice guides. This case presents the standard of review issue directly,

since the Court of Appeal applied the fair argument test to require the significant effects exception, despite substantial evidence showing that the Project would not cause a significant impact.

This issue also merits the Court's consideration, since uncertainty regarding the standard of review for the significant effects exception militates against the use of categorical exemptions, even for projects that plainly fit the categories the Resources Agency has determined will not have significant impacts. Rather than risk judicial reversal, agencies will avoid reliance on categorical exemptions, and instead require EIRs for even the smallest projects, if project opponents so much as assert the potential for significant impacts.

A rule that the fair argument standard applies would also sow confusion among agencies making exemption determinations under CEQA. It is well established that the substantial evidence standard applies to an agency's determination that a project is categorically exempt in the first instance. It is fundamentally inconsistent to apply the non-deferential fair argument standard to the secondary question of whether that exemption determination should be negated because of alleged potential for significant effects, *regardless* of evidence that no significant impact would occur.

Even more confusingly, a rule that the fair argument test applies to the significant effects exception would run counter to the ruling in *Muzzy Ranch Co. v. Solano County Airport Comm.* (2007) 41 Cal.4th 372. In that case, this Court upheld use of the "commonsense exemption" so long as substantial evidence supports a determination that no significant impact will occur. Thus, under the Appellate Court's ruling, if an agency has substantial evidence that no impact will occur, and opponents submit evidence to the contrary, reliance on a categorical exemption would likely be overruled under the significant effects exception, whereas (under *Muzzy*

Ranch) reliance on the commonsense exemption would likely be upheld – *for the very same project.*

Requiring project applicants and public agencies to sort through this myriad of standards of review undermines the whole concept of categorical exemptions for classes of projects that the Resources Agency has determined will not have a significant effect on the environment. The Court of Appeal's decision will have major adverse consequences and far-reaching implications by forcing routine, minor development activities to undergo expensive and unnecessary environmental review without furthering the Legislature's intent in enacting CEQA.

The third issue for the Court's review is whether an agency, in deciding whether an EIR should be prepared for a project, must consider evidence that a potentially significant impact might result from an aspect of a project that is alleged, but is *neither proposed nor approved.* In *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, the court upheld a negative declaration, under the "fair argument" standard of review, despite opponents' claims that it failed to analyze significant impacts of future expansion of the project. The Court rejected those claims, because such expansion was not included in the project as proposed and approved, and therefore the alleged impacts were not impacts of the "project," defined in CEQA as "the activity being approved." (Guidelines § 15378.)

Here, by contrast, the Appellate Court held that opinion evidence of potentially significant seismic impacts of allegedly required "side-hill fill" – which was *not included in either the proposed or approved Project plans* – required the City to prepare an EIR. This holding would allow opponents to defeat categorical exemptions simply by asserting their own *misconception* of a project and asserting that the misconception, rather than

the actual project, may result in significant impacts. This cannot be the rule under CEQA.

The Opinion would cause a sea change, and would tremendously and needlessly burden the processing of minor projects under CEQA. By imposing the significant effects exception even where alleged impacts are not tied to unusual circumstances; where those impacts are unrelated to the Project as proposed and approved; and where evidence shows those impacts would not occur, the Opinion would decimate agencies' use of categorical exemptions as intended by the Legislature. The Opinion, if left to stand, would force agencies to require full-blown EIRs for single-family homes, desperately needed urban in-fill projects, and other minor projects which the Resources Agency, at the behest of the Legislature, has already determined should not require further CEQA review. Therefore, this case presents pressing issues crucial to the proper functioning of CEQA.

This case is the right vehicle for considering these issues. Petitioners concede for purposes of this case that the Project fits within two categorical exemptions, and the dispute whether the significant effects exception applies is clearly presented. The standard of review issue, and the issue of whether evidence of significant impacts must relate to the project proposed and approved, are directly presented by this dispute over applicability of the exception.

Nor is this a case where depublication will make the issues go away. Rather, the Court of Appeal's reasoning on the significant effects exception has been echoed in other court of appeal decisions. Moreover, the long-standing split in the standard of review for the significant effects exception would remain unresolved, subjecting project applicants and public agencies to significant uncertainty in applying categorical exemptions. And the issue whether evidence of a potentially significant impact must relate to the

project as proposed and approved would also remain unresolved. This Court should grant review to consider these important issues.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Project in this case is a request for permits to demolish existing structures and construct a two-story, 6,478 square foot, single-family home, with a 3,394 square foot garage, on a 29,714 square foot parcel at 2707 Rose Street in Berkeley's Single Family Residential District – Hillside Overlay (the "Project").[3] (1 AR 3.)[4] The proposed home covers 16 percent of the property, leaving 84 percent in open space. (1 AR 127.)

On January 28, 2010, the Zoning Adjustment Board ("ZAB") held a public hearing and approved the Project. (1 AR 3, 144-146; 2 AR 516.) The City found that the Project was categorically exempt under Guidelines sections 15303(a) ("New Construction") and 15332 ("In-Fill Development Projects"). (1 AR 5, 30, 34, 40.) The City also found that the Project did not trigger any of the exceptions to the exemptions in Guidelines section 15300.2, and that the Project was exempt from further review under CEQA. (1 AR 5, 34, 40.) Petitioners appealed the ZAB decision to the City Council. (1 AR 3, 193-206.) On April 27, 2010, the City Council affirmed the ZAB's decision and dismissed the appeal. (1 AR 3.)

Appellants filed this action in May 2010. (Appellants' Appendix ("AA"):1.) The Superior Court, the Honorable Frank Roesch presiding,

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[3] Petitioners opposed the demolition of the existing structures, arguing that they were historical resources. The Court of Appeal denied Petitioners' petition for writ of supersedeas, and the Kapors demolished the existing structures. Thus, the only remaining issues relate to the construction of the proposed Project.

[4] Cites to "AR" are to the Administrative Record.

held a hearing on the merits on December 2, 2010, and, in a detailed, 19-page decision, denied the Petition on December 30, 2010. (AA:140-159.) The trial court held that there was substantial evidence of a fair argument that the Project would cause significant environmental impacts. However, the trial court held, the Project did not trigger the significant effects exception in Guidelines section 15300.2(c), because the possible significant impacts were not due to "unusual circumstances."

The Court of Appeal issued its decision, certified for publication, on February 15, 2012. The Court of Appeal disagreed with the trial court's use of the two-step inquiry and held:

> Where there is substantial evidence that proposed activity may have an effect on the environment, an agency is *precluded* from applying a categorical exemption. (*Wildlife Alive*, *supra*, 18 Cal.3d at pp. 205-206.) The trial court concluded that the relevant exception did not apply because it found no "unusual circumstances" present; however, the fact that proposed activity may have an effect on the environment is *itself* an unusual circumstance, because such action would not fall "within a class of activities that does not normally threaten the environment," and thus should be subject to further environmental review. ([*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165], at p. 1206.) (Opinion, p. 13, italics by court.)

In support of this conclusion, the Court of Appeal cited to this Court's decision in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190 ("*Wildlife Alive*"). (Opinion, 11.) The Court of Appeal acknowledged that courts have interpreted the significant effects exception as involving two separate inquiries, the first being whether the Project presents unusual circumstances. (Opinion, p. 12.) The Court of Appeal also acknowledged that the trial court's approach was consistent with the two-step approach applied in those cases. (*Id.* at p. 13.) However, the Court of Appeal tried to distinguish those cases and argue that they "did not actually employ such a

two-step procedure" but instead "streamlined its approach by 'proceeding directly to the question of whether, applying the fair argument standard, there is a reasonable possibility of a significant effect on the environment due to any . . . . purported unusual circumstances." (*Ibid*, citation omitted.)

The Court further acknowledged "that it may be helpful to analyze the applicability of the unusual circumstances exception as part of a two-step inquiry . . ." (*Id.* at p. 15.) However, the Court concluded, "once it is determined that a proposed activity may have a significant effect on the environment, a reviewing agency is precluded from applying a categorical exemption to the activity." (*Ibid.*)

The Court held that the fair argument standard applied to the agency's determination under Guidelines section 15300.2(c). (Opinion, p. 16.) The Court then purported to apply the two-step inquiry for the exception to the facts of this case. The Court held that the proposed single-family residence was unusual, based on its size. (Opinion, p. 17.) In making this determination, the Court held that whether a circumstance is unusual is judged relative to the typically exempt project, as opposed to the typical circumstances in a particular neighborhood. (*Id.* at 17-18.)

Finally, the Court found that there was substantial evidence of a fair argument that the Project would result in significant environmental geotechnical impacts to construction fill for the Project. (Opinion, p. 18.) However, the Court did not determine that any significant effects would result from the "unusual circumstance" of the Project's size. Rather, the Court accepted the opponents' assertion that the Project would require construction fill that was not proposed by the applicant and was not found necessary by the City. (*Ibid.*) It was the alleged potentially significant impacts of "seismic lurching" to this allegedly required construction fill which the Court found to require preparation of an EIR. (*Ibid.*)

Respondents sought a rehearing in the Court of Appeal, which was denied. The Opinion was modified (without any change in judgment) on March 7, 2012.

IV. LEGAL DISCUSSION

A. The Court Should Determine Whether the Significant Effects Exception Requires a Finding That Effects Are Due To Unusual Circumstances

1. A Long Line of Cases Holds That "Unusual Circumstances" Is a Separate Inquiry Under the Exception Based Upon Its Plain Language.

The Court of Appeal's Opinion contradicts a long line of cases holding that whether allegedly significant effects would result from "unusual circumstances" is a separate and necessary inquiry under the exception. These cases rely on the plain language of Guideline section 15300.2(c),which provides:

> A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. (Emphasis added.)

In *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 278, the court explained that:

> The application of Guidelines section 15300.2(c) involves two distinct inquiries. First, we inquire whether the Project presents unusual circumstances. Second, we inquire whether there is a reasonable possibility of a significant effect on the environment *due to* the unusual circumstances. (Italics original.)

The unusual circumstances test set forth in the Guidelines is satisfied "where the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist

for the general class of exempt projects." (*Ibid*, emphasis added; s*ee also Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207; *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1350; *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800 ["[a] negative answer to *either* question means the exception does not apply." (emphasis added)].)

As held by the First Appellate District in *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260-1261, "in the absence of any evidence of unusual circumstances nullifying the grant of categorical exemption, there can be no basis for a claim of exception under Guidelines section 15300.2(c)." As the court explained in *Fairbank*, without the two separate inquires, *no project that satisfies the criteria under the exemption could ever be found to be exempt.* In that case, the court held that a retail/office building was exempt under a categorical exemption for new construction of small commercial structures in urbanized areas. The court rejected an "unusual circumstances" argument based on claims of inadequate parking facilities and increased traffic flows as follows:

> The shortcoming in Fairbank's argument is that she has made no showing whatsoever of any "unusual circumstances" surrounding the construction of this small commercial structure giving rise to any risk of "significant" effects upon the environment. (Guidelines, 15300.2(c).) <u>While the addition of any small building to a fully developed downtown commercial area is likely to cause minor adverse changes in the amount and flow of traffic and in parking patterns in the area, such effects cannot be deemed "significant" without a showing of some feature of the project that distinguishes it from any other small, run-of-the-mill commercial building or use</u>. Otherwise, no project that satisfies the criteria set forth in Guidelines section 15303(c) could ever be found to be exempt. There is nothing about the proposed 5,855-square-foot retail/office building that sets it apart from any other small commercial structure to be built in an urbanized area,

> without the use of hazardous substances and without any showing of environmental sensitivity.

(*Id.* at 1260, emphasis added.)

Thus, the court acknowledged there could be adverse changes to parking and traffic from the project, but rejected the claimed exception because no unusual circumstances were shown.

In *Santa Monica*, the court held there were no unusual circumstances within the meaning of the exception where the project created a large parking district requiring residential parking permits. Rather, the court held there were only the "normal and common considerations" any city might face when deciding best how to allocate its limited parking facilities. (*Santa Monica, supra,* 101 Cal.App.4th at 801-803.)

Similarly, in *Association for Protection of Environmental Values in Ukiah v. City of Ukiah* (1991) 2 Cal.App.4th 720 ("*Ukiah*"), the court held that concerns about height, view obstruction, privacy and water runoff were normal and common considerations in construction of a single-family hillside residence; therefore, these concerns did not amount to "unusual circumstances."

In *Azusa, supra*, 52 Cal.App.4th at 1198, the court found that the board's findings established a reasonable possibility that the project would have a significant adverse effect (*Ibid.*) Under the Court of Appeal's interpretation of the exception at issue in this case, the *Azusa* court would not have needed to make any further inquiry. However, the court in *Azusa* expressly recognized "the second requirement" of the exception, and went on to find that the threat to the environment in that case "[wa]s due to numerous circumstances that are unusual in comparison with existing facilities in general." (*Id.* at 1206-1209.)

Most recently, in *Wollmer, supra*, 193 Cal.App.4th 1329, 1350, the First Appellate District, Division 4, cited the well-established rule for

determining that unusual circumstances exist and compared the circumstances of the project with the exemption for "In-Fill Development Projects" under Guidelines section 15332, which required that a project be substantially surrounded by urban uses and adequately served by public services. The court stated that locating an in-fill project at the intersection of two major city streets is "well within the range of characteristics one would except for class 32 projects and precisely what the law encourages." (*Id.* at 1351.) Accordingly, the court held, the location was not an "unusual circumstance." (*Ibid.*)

Thus, there is a long line of established cases from multiple Appellate Districts, including the District from which this decision was issued, holding that "unusual circumstances" is a separate and necessary inquiry under the exception in Guidelines section 15300.2(c).

2. The Court of Appeal's Reasoning Does Not Support Its Departure From Established Law.

The Court of Appeal reached its result based on this Court's statement in *Wildlife Alive, supra,* 18 Cal.3d at 205-206 that: "The Secretary [of the California Resources Agency] is empowered to exempt *only* those activities which do not have a significant effect on the environment. [Citation.] It follows that where there is *any reasonable possibility* that a project or activity may have a significant effect on the environment, an exemption would be improper." (Opinion, 11, italics added by Court of Appeal.) The Court of Appeal here relied on this statement to eliminate the use of categorical exemptions whenever there is any credible evidence of a potentially significant impact, *regardless of whether the impact is due to "unusual circumstances."*

However, prior courts have refused to read this Court's statement in *Wildlife Alive* so broadly. In *Communities for a Better Environment v. California Resources Agency ("CBE")* (2002) 103 Cal.App.4th 98, 127, the

court stated that "[t]his admonition from [*Wildlife Alive*] cannot be read so broadly as to defeat the very idea underlying CEQA section 21084 of *classes* or *categories* of projects that do not have a significant environmental effect." (Italics original.)

The Court of Appeal misconstrued the *CBE* case, which involved a challenge to certain revisions to the CEQA Guidelines, including section 15332 which created a categorical exemption for urban in-fill projects. In that case, CBE argued that the environmental impacts listed in the section 15332 categorical exemption "necessarily foreclose the consideration of other effects such as aesthetics, cultural resources, water supply, and health and safety." (*Id.* at 129.) The court responded:

> That is not correct. An important exception to categorical exemptions [is the exception in Guidelines section 15300.2, subdivision (c)]. These other environmental effects that CBE mentions would constitute "unusual circumstances" under this exception for a project that otherwise meets the Guidelines section 15332 criteria. This is because a project that does meet the comprehensive environmentally protective criteria of section 15332 normally would not have other significant environmental effects; if there was a reasonable possibility that the project would have such effects, those effects would be "unusual circumstances" covered by the section 15300.2, subdivision (c) exception. In this way, these other effects would fall within the concept of unusual circumstances set forth in *Azusa*: "unusual circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects." (*Ibid*, emphasis added.)

Thus, the *CBE* court did not hold that "unusual circumstances" in section 15300.2 means nothing different than "significant effects." Rather, as the complete discussion illustrates, the court was responding to a contention by the petitioner that certain types of environmental impacts *that were not typical of the exempt category* would escape review under the

terms of the categorical exemption in section 15332. The court's discussion, viewed in its entire context, provides that "those effects" not typical of the category, and the reasonable possibility that those *atypical* effects would be significant, could be reviewed under the unusual circumstances exception. Moreover, the *CBE* court expressed its agreement with the definition of "unusual circumstances" set forth in *Azusa* and the host of other cases applying the two-pronged inquiry under Guidelines section 15300.2(c). Thus, the Court of Appeal was simply wrong in claiming that *CBE* changed the law set forth in a long line of established cases applying the unusual circumstances exception.

The Court of Appeal's reliance on *Wildlife Alive, supra,* 18 Cal.3d 190, is also wrong. In *Wildlife Alive*, this Court held that CEQA applied to the Fish and Game Commission's setting of hunting and fishing seasons. Amicus in that case argued that the categorical exemption in then-Guideline section 15107 applied. At the time, that section exempted actions taken by regulatory agencies to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. (*Id.* at 204-205.)

The Court observed that this categorical exemption applied to wildlife preservation activities of the State Department of Fish & Game, and that the fixing of hunting seasons by a commission could not fairly be characterized as within the scope of the exemption in the first instance. (*Id.* at 205.) The Court went on to state that, even if the exemption was intended to cover the commission's hunting program, such an exemption would not be authorized under the statute. Here, by contrast, there is no dispute that the Kapor's single-family home falls within two exempt categories designated by the Resources Agency as classes of projects "that have been determined not to have a significant effect on the environment," and whose validity is not at issue in this case. (§ 21084(a).)

Relying on this Court's decision in *Wildlife Alive*, the Resources Agency adopted the significant effects exception in Guidelines section 15300.2(c). That exception states that a categorical exemption shall not be used "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Guidelines § 15300.2(c).) Clearly then, the Resources Agency interpreted the Legislature's directive to designate categories of projects without significant impacts (section 21084), together with the Court's decision in *Wildlife Alive* that such categories not include activities which *would* cause a "significant effect on the environment," to craft an exception where circumstances that are *unusual* with respect to exempt categories would present the reasonable possibility of a significant effect. Nothing in the CEQA statute or *Wildlife Alive* precludes this definition of the exception.

Contrary to the Court of Appeal's assertion, the Opinion is also directly inconsistent with *Banker's Hill, supra* 139 Cal.App.4th at 278. In that case, the court upheld a determination that a 14-story residential building project was categorically exempt and that the significant effects exception did not apply. The court in *Banker's Hill* expressly adopted the two-step inquiry that was determined unnecessary by the Court of Appeal. (*Banker's Hill, supra* 139 Cal.App.4th at 278.)

The Court of Appeal claims that the court in *Banker's Hill* streamlined its approach by proceeding directly to the question of whether there was a reasonable possibility of a significant effect on the environment. (Opinion, p. 13.) However, the court in *Banker's Hill* did not hold that it was unnecessary to determine whether allegedly significant impacts were due to "unusual circumstances" under the exception. Rather, it found that there was no substantial evidence of a reasonable possibility of a significant effect "due to any of those purported unusual circumstances" identified by the project opponents. (*Banker's Hill, supra* 139 Cal.App.4th

at 278.) Thus, the court employed the two-step inquiry required by the Guidelines to find allegedly significant impacts were due to "unusual circumstances." (*Id.* at 279, fn. 26.) Consequently, the Court of Appeal's decision is in direct conflictwith *Banker's Hill.*

3. The Opinion Conflicts With CEQA's Legal Framework for Exemptions.

The fundamental problem with the Opinion is that it has collapsed the legal framework for analyzing categorical exemptions and the exceptions into a one-question inquiry that is duplicative of the framework for analyzing the non-categorical, "commonsense" exemption. In applying the significant effects exception, according to the Court of Appeal, the *only* meaningful question is whether there is substantial evidence that the proposed activity may have an effect on the environment. If that is the case, then an agency is *precluded* from applying a categorical exemption, *regardless* of whether it falls within a class of projects determined by the Resources Agency to not have a significant effect on the environment.

The Court of Appeal's interpretation of the significant effects exception is almost identical to the language of the commonsense exemption:

> In the language of the Guidelines' commonsense exemption: "Where it can be seen with certainty that there is *no possibility* that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (Guidelines, *§ 15061, subd. (b)(3)*, italics added; see *No Oil, supra, 13 Cal.3d at p. 74* [discretionary activity having no possibility of causing significant effect not subject to CEQA].) If, however, there *is* a reasonable possibility that a proposed project will have a significant effect upon the environment, then the lead agency must conduct an initial study. (*Wildlife Alive v. Chickering (1976) 18 Cal.3d 190, 206 [132 Cal. Rptr. 377, 553 P.2d 537]*; *Pistoresi v. City of Madera (1982) 138 Cal. App. 3d 284, 285 [188 Cal. Rptr. 136].*)

(*California Farm Bureau Federation v. California Wildlife Conservation Board* (2006) 143 Cal.App.4th 173, 194.)

Indeed, the cases citing the commonsense exemption rely on the same statement in *Wildlife Alive* that the Court of Appeal did here in construing the significant effects exception (Opinion, p. 11). (See *California Farm Bureau Federation, supra,* 143 Cal.App.4th at 194.) Thus, the Court of Appeal has effectively equated the test for categorical exemptions with the test for the commonsense exception under CEQA. There are several fundamental problems with this holding.

First, it eviscerates the Resources Agency's determination of classes of projects that are categorically exempt. Under the Court of Appeal's decision, there is no longer any purpose in finding that a project fits within a categorical exemption. By removing the inquiry into whether alleged impacts are due to "unusual circumstances," the Court has made the "significant effects" inquiry the only relevant questionand it is effectively the same question that is asked under the commonsense exemption. However, as explained in multiple cases, there is a fundamental difference between the two exemptions:

> A categorical exemption is based on a finding by the Resources Agency that a class or category of projects does not have a significant effect on the environment. (*Pub. Resources Code, § 21083, 21084*; Guidelines, *§ 15354.*) Thus an agency's finding that a particular proposed project comes within one of the exempt classes necessarily includes an implied finding that the project has no significant effect on the environment. (*Ukiah, supra, 2 Cal. App. 4th at p. 732.*)
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> . . .
>
> In [categorical exemption cases], the agency first conducted an environmental review and based its determination that the project was categorically exempt on evidence in the record. It is appropriate under such circumstances for the burden to shift to a challenger seeking to establish one of the exceptions

> to produce substantial evidence to support "a reasonable possibility" that the project will have a significant effect on the environment. (Guidelines, *§ 15300.2, subd. (c)*.)
>
> In the case of the common sense exemption, however, the agency's exemption determination is not supported by an implied finding by the Resources Agency that the project will not have a significant environmental impact. Without the benefit of such an implied finding, the agency must itself provide the support for its decision before the burden shifts to the challenger. Imposing the burden on members of the public in the first instance to prove a possibility for substantial adverse environmental impact would frustrate CEQA's fundamental purpose of ensuring that government officials "make decisions with environmental consequences in mind." (*Bozung v. Local Agency Formation Com. (1975) 13 Cal. 3d 263, 283 [118 Cal.Rptr. 249, 529 P.2d 1017]*.)

(*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115-116. See also *California Farm Bureau Federation, supra,* 143 Cal.App.4th at 184-186.)

Thus, the Court of Appeal's decision ignores the Resources Agency's implied finding that the project will not have a significant environmental impact. Indeed, it essentially vitiates the whole concept of categorical exemptions. Accordingly, the Court should grant review to consider this issue, and clarify the use of categorical exemptions and the significant effects exception under CEQA.

4. The Unusual Circumstances Issue Is an Important Issue with Significant Public Policy Ramifications.

The real-world implications of the Court of Appeal's decision are far-reaching and significant. Under the decision, no single-family house would be found categorically exempt if opponents produced any credible evidence to support a hypothesis under which impacts *typical* of such projects could be construed potentially significant, even if the lead agency had evidence which showed that would not be the case. Under the Opinion,

such evidence, by itself, would be enough to require an EIR for a single-family home. CEQA clearly was not intended to be applied in this manner.

Moreover, the implications of the Opinion go far beyond single-family homes. The significant effects exception applies to all 33 classes of categorically exempt projects in CEQA Guidelines §§ 15300-15333. Accordingly, when faced with any reasonable possibility of a significant impact—even an impact typical of an exempt class of projects—an agency would have to prepare EIRs for the following classes of projects:

- Operation, repair, maintenance, or minor alteration of existing structures or facilities. (Guidelines § 15301.)
- Replacement or reconstruction of existing schools and hospitals to provide earthquake resistant structures which do not increase capacity by more than 50 percent. (Guidelines § 15302(a).)
- Accessory structures including garages, carports, patios, swimming pools and fences. (Guidelines § 15303.)
- Construction or placement of lifeguard towers, mobile food units, portable restrooms in publicly owned parks, stadiums or other facilities designed for public use. (Guidelines § 15311.)
- Minor additions to schools within existing grounds where they do not increase student capacity by more that 25% or ten classrooms. (Guidelines § 15314.)
- Normal operations of facilities such as racetracks, stadiums, convention centers, auditoriums, amphitheaters, planetariums, swimming pools and amusement parks, for public gatherings. (Guidelines § 15323.)
- Leasing of newly constructed or previously unoccupied privately owned facility by a state or local agency which does not result in a traffic increase of greater than 10% of front access road capacity. (Guidelines § 15327.)

The Court of Appeal's decision allows the significant effects exception to swallow all the categorical exemptions. This Court should grant review to consider this important issue.

B. The Court Should Resolve That The Standard Of Review Applicable To Exceptions To Categorical Exemptions Is The Fair Argument Standard

This Court should also grant review to consider and resolve the long-standing judicial split over the standard of review applicable to the significant effects exception.

The Court of Appeal applied the fair argument standard to the question of whether there is a reasonable possibility that the activity will have a significant effect on the environment under the significant effects exception. (Opinion, p. 16.) However, there is a long-standing split in authority over the correct standard of review for this inquiry. As recently as 2010, Division 2 of the First Appellate District acknowledged that:

> There is a split of authority on the appropriate standard of judicial review of a question of fact when the issue is whether a project that would otherwise be found categorically exempt is subject to one of three general exceptions (significant impacts due to unusual circumstances, significant cumulative impacts, and impacts on a uniquely sensitive environment) to the categorical exemptions set forth in Regulation section 15300.2, subdivisions (a) through (c). (1 Kostka and Zischke, *supra,* § 5.127, p. 297; *San Lorenzo Valley CARE, supra,* 139 Cal.App.4th at p. 1390, 44 Cal.Rptr.3d 128; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1259, 89 Cal.Rptr.2d 233.) "Some courts have relied on cases involving review of a negative declaration, holding that a finding of categorical exemption cannot be sustained if there is a 'fair argument' based on substantial evidence that the project will have significant environmental impacts, even where the agency is presented with substantial evidence to the contrary. [Citation.] Other courts apply an ordinary substantial evidence test ..., deferring to the express or implied findings of the local agency that has found a categorical exemption applicable. [Citation.]" (*Fairbank v. City of Mill Valley,* at pp. 1259-1260, 89 Cal.Rptr.2d 233; accord, *San Lorenzo Valley CARE,* at p. 1390, 44 Cal.Rptr.3d 128; see 1 Kostka and Zischke, § 5.127, pp. 297-299.)

(*Hines v. Coastal Commission, supra,* 186 Cal.App.4th at 855-856.) One of the cases acknowledging the split in authority was a decision by the First District Court of Appeal, Division 4 (*Fairbank, supra,* 75 Cal.App.4th 1259-1260), the same court as the Court of Appeal here. This judicial split is acknowledged in CEQA practice guides. (See 1 Kostka and Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar January 2011) § 5.127, pp. 297-299.

Many of these courts have not resolved this dispute because the petitioner failed to meet the burden of proving the exception applied even under the more liberal "fair argument" standard of review. (*Hines, supra,* 186 Cal.App.4th at 856; *Fairbank, supra,* 75 Cal.App.4th at 1260; *Santa Monica, supra,* 101 Cal.App.4th at 796-797; see also *Ukiah, supra,* 2 Cal.App.4th at 728, fn. 7 [court applied fair argument standard because the parties agreed upon that standard, but observed that "the traditional substantial evidence standard of review may be more appropriate."]; *Committee to Save Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1187 [court recognized split in authority and found evidence that exception applied was sufficient under either standard].)

This Court should consider and resolve this long-standing judicial split over the standard of review, for numerous reasons. First, the standard is critically important for public agencies and applicants processing projects under CEQA. The on-going judicial split regarding the appropriate standard of review leads to uncertainty and confusion about whether use of a categorical exemption would be upheld if subjected to judicial challenge. This uncertainty militates against the use of categorical exemptions even projects in categories the Resources Agency has determined do not have a significant effect on the environment.

Second, application of the fair argument test to the significant effects exception would create conflict with this Court's ruling on the standard of review for the commonsense exemption (*Muzzy Ranch, supra,* 41 Cal.4th at 386-387), raising even more uncertainty during the administrative process. In *Muzzy Ranch*, this Court held that whether a particular activity qualifies for the commonsense exception "presents an issue of fact, and [] the agency invoking the exemption has the burden of demonstrating it applies." (*Muzzy Ranch, supra,* 41 Cal.4th 372, 386.) This Court expounded:

> An agency's duty to provide such factual support "is all the more important where the record shows, as it does here, that opponents of the project have raised arguments regarding possible significant environmental impacts." . . . "[T]he agency's exemption determination must [rely on] evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision."

(*Id.* at 386-387, citing *Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th at p. 117. See also 1 Kostka and Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar January 2011) § 5.129, pp. 302 [Under *Muzzy Ranch*, substantial evidence standard applies to review agency's application of common sense exemption].)

The Court of Appeal's interpretation of the significant effects exception, combined with its application of the fair argument standard, creates an inconsistency for agencies and applicants applying exemptions. Here, under the Court of Appeal's decision, because the Court found substantial evidence of a fair argument of potentially significant seismic impacts, the City was precluded from finding the Project to be categorically exempt. However, because there was also substantial evidence in the record supporting a determination that there was no possibility that the Project would have a significant seismic effect, the City could also have found the Project exempt under the commonsense exemption in Guidelines section 15061(b)(3). Under this Court's decision in *Muzzy Ranch*, such a

determination by the City would be upheld under the substantial evidence standard.

Thus, the Court of Appeal's decision not only collapses the categorical exemptions and exception determinations into one inquiry that is essentially identical to that for the commonsense exemption, it did so in a way that would result in different outcomes under the same set of facts. As such, it is inconsistent with this Court's decision in *Muzzy Ranch* and wrong as a matter of law. It would also create significant confusion and uncertainty for project applicants and public agencies trying to navigate the legal framework for categorical exemptions for what are supposed to be minor projects under CEQA. The result will be expensive and unnecessary environmental review documents and processes for routine, minor development activities, all without furthering the Legislature's intent in enacting CEQA.

Third, it is well established that the substantial evidence standard applies to the determination of whether a project is categorically exempt in the first instance. It is fundamentally inconsistent with the legal framework for categorical exemptions to apply the substantial evidence standard to the exemption determination, and then turn around and review the same facts under the fair argument standard when deciding if the exception applies. Project applicants and agencies are subjected to an inconsistent and confusing mix of standards in trying to determine if minor projects are even subject to CEQA.

Fourth, courts have also applied the substantial evidence standard to another exception in Guideline section 15300.2; specifically, the historical resources exception in subsection (f). (See *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1071-1074.) Thus, there is an inconsistency in the standards of review being applied to the exceptions to the categorical exemptions.

For all of these reasons, this Court should grant review to resolve this long-standing dispute.

C. The Court Should Resolve Whether Alleged Impacts of Project Elements Which Are Neither Proposed Nor Approved May Trigger A Requirement to Prepare an EIR

The Court should also grant review to resolve whether an agency must prepare an EIR based on evidence of potential significant impacts related to elements of a project that are neither proposed by an applicant, nor approved by an agency.

Under CEQA, a "project" refers "to the activity which is being approved . . ." (Guidelines § 15378(c); See also *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 164 ["We have emphasized that the focus must be on the use, as approved, and not the feared or anticipated abuse."].) A "project" means the whole of an action and, in this case, is "[a]n activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Guidelines § 15378(a)(3); § 21065(c).)

Courts have held that evidence of potentially significant impacts which does not relate to the project proposed or approved is not capable of supporting a "fair argument" that an EIR must be prepared. In *Lucas Valley Homeowners Assn., supra,* the First Appellate District, Division 4, upheld the county's approval of a negative declaration and conditional use permit to convert a single-family home into a synagogue. The court rejected claims by project opponents that the synagogue would be larger than what was approved, holding that such claims "ignored the reality of the permit as approved and accepted." (*Lucas Valley Homeowners Assn., supra,* 233 Cal.App.3d. at 162.) The court held that "the focus must be on the use, as approved, and not the feared or anticipated abuse." (*Id.* at 162-164; see also *Citizens for Responsible Development in West Hollywood v.*

City of West Hollywood (1995) 39 Cal.App.4th 490, 501 (evidence of historical significance of two buildings not included in the proposed project to demolish and restore structures was not substantial evidence to support a fair argument of a potentially significant impact.)

The Court of Appeal departed from this established precedent. The Opinion found that letters submitted by Lawrence Karp "amounted to substantial evidence of a fair argument that the proposed construction would result in significant environmental impacts." (Opinion, p. 18.) The Opinion held that where there is a disagreement among experts over the significance of an effect of the project, the agency is to treat the effect as significant. (Opinion, p. 19.) However, there was no disagreement over the significance of an effect *of the project* or the proposed construction of the project. Rather, Mr. Karp's letters presented his misconception over *what the project was* in the first instance.

As the Court of Appeal noted, Mr. Karp asserted that the Project would not be constructed as proposed and approved by the City, but would instead require additional construction activities, including the placement of "side-hill fills." (Opinion, p. 4-5.) Mr. Karp further opined that the allegedly required side-hill fills would be subject to "seismic lurching" impacts. Mr. Karp's opinion was contradicted by the applicant's geotechnical engineer, Mr. Kropp, who explained that Mr. Karp had misread the project plans, and that the Project would maintain the existing ground surface, and would not require any side-hill fill. (Opinion, p. 5.) Mr. Kropp also explained that because the Project did not call for side-hill fill, none of the concerns raised by Mr. Karp applied to the Project proposed for approval. (*Ibid.*) The seismic impacts to the allegedly required side-hill fills were the only potentially significant impacts which the Appellate Court identified as triggering the "significant effects" exception. (Opinion, p. 18.)

Under the Appellate Court's holding, agencies must consider evidence purporting to show that the project will not be constructed in the manner proposed for approval, but rather will be constructed in a manner that raises the specter of potentially significant impacts. The Court should grant review to resolve this issue, raised by this case, whether evidence that is not related to any element of the Project as proposed and approved, but rather to elements which Project opponents "fear or anticipate" may occur, is capable of triggering a requirement to prepare an EIR.

D. In The Event That The Court Grants Review On The Three Issues, The Court Of Appeal Also Erred In Application Of These Rules To This Case

In the event that the Court grants review on these three important issues, the Court of Appeal also committed several errors in the application of the significant effects exception to the facts of this case. Although these sub-issues are fairly included in the three issues addressed above, they are briefly listed herein:

First, in determining whether there are unusual circumstances relating to a project, may a court consider the particular neighborhood in which it is proposed to be located or should it be judged relative to a "typical exempt project" statewide?

Second, does evidence of a potential adverse impact of the existing environment on the project constitute evidence of potentially significant "environmental impacts" that require review under CEQA?

Third, after setting aside an agency's finding that a project is categorically exempt from CEQA, may a court order the agency to prepare an EIR instead of ordering the agency to exercise its discretion to determine how to comply with CEQA in light of the court's opinion?

V. CONCLUSION

Respondents respectfully request that the Court grant review of the Court of Appeal Opinion.

DATED: March 26, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: _____
Amrit S. Kulkarni
Attorneys for Respondents and Real Parties in Interest Mitchell Kapor and Freada Kapor-Klein

DATED: March 26, 2012

ZACH COWAN, City Attorney

By: _____
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Attorneys for Respondents CITY OF BERKELEY

WORD CERTIFICATION

I hereby certify that, as counted by my MS Word word-processing system, this brief contains 8349 words exclusive of the tables, signature block and this certification.

Executed this 26 day of March, 2012 at Oakland, California.

Amrit S. Kulkarni

Filed 02/15/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BERKELEY HILLSIDE PRESERVATION et al.,

Plaintiffs and Appellants,

v.

CITY OF BERKELEY et al.,

Defendants and Respondents;

DONN LOGAN et al.,

Real Parties in Interest and Respondents.

A131254

(Alameda County
Super. Ct. No. RG10517314)

Appellants Berkeley Hillside Preservation and Susan Nunes Fadley challenge the denial of their petition for a writ of mandate to set aside the approval of use permits to construct a large residence in the Berkeley hills. They claim that the proposed construction was not categorically exempt under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.),[1] and that environmental concerns should be reviewed in an environmental impact report (EIR). We agree and reverse.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Real parties in interest and respondents Mitchell Kapor and Freada Kapor-Klein own a 29,714 square-foot lot on Rose Street in Berkeley. The lot is on a steep slope (approximately 50 percent grade) in a heavily wooded area. On May 19, 2009, Donn

[1] All statutory references are to the Public Resources Code unless otherwise specified.

Logan of Wong-Logan Architects filed an application for a use permit to demolish the existing two-story, single-family dwelling on the lot, and to construct a 6,478 square-foot home with an attached 3,394 square-foot, 10-car garage designed to address lack of street parking in the area (the proposed construction). The residence would be built on two floors, plus an open-air lower level, and would cover about 16 percent of the lot (less than the 40 percent lot coverage permitted by respondent City of Berkeley (City) rules, according to an architect involved with the proposed construction). The application stated that the immediate neighbors of the affected lot supported the proposed construction, and the record reveals that those neighbors, as well as other Berkeley residents (including those who live in the surrounding neighborhood), supported the proposed construction throughout proceedings below. The application stated that the proposed construction would provide a turnaround for vehicles at the end of the dead-end street where the lot was located, an addition that was welcomed by the neighbors. A revised application was submitted on October 13, 2009.

After providing notice, Berkeley's Zoning Adjustment Board (Board) held a public hearing on January 28, 2010, received comment about the proposed construction, and approved the use permit for the proposed construction by a vote of seven to zero, with one Board member absent and one abstaining. The Board found, consistent with a Board staff report, that the proposed construction was categorically exempt from the provisions of CEQA pursuant to Guidelines sections 15332[2] ("In-Fill Development Projects") and 15303, subdivision (a) ("New Construction or Conversion of Small Structures," single-family residence). The Board also determined that the proposed construction did not trigger any of the exceptions to exemptions, as set forth in Guidelines, section 15300.2. In particular, the Board concluded that the proposed construction would not have any significant effects on the environment due to unusual

[2] "Guidelines" refers to the Guidelines for Implementation of CEQA, which are found in California Code of Regulations, title 14, section 15000 et sequitur. All subsequent regulatory citations to the Guidelines are to title 14 of the Code of Regulations.

circumstances.[3] (Guidelines, § 15300.2, subd. (c).) The Board approved (1) a use permit to demolish the existing dwelling on the lot, (2) a use permit to construct the proposed unit, (3) an administrative use permit to allow a 35-foot average height limit for the main building (with 28 feet being the maximum), and (4) an administrative use permit to reduce the setback of the front yard to 16 feet (with 20 feet usually required). The Board imposed various "standard conditions" on the proposed construction, including requiring the permit applicant to secure a construction traffic management plan, comply with storm water regulations for small construction activities, and take steps to minimize erosion and landslides when construction takes place during the wet season.

Appellant Susan Nunes Fadley, a Berkeley resident, filed an appeal to the City Council on February 19, 2010. Thirty-three other Berkeley residents also signed the appeal. Appellants stressed that the proposed dwelling and attached 10-car garage would result in a single structure of 9,872 square feet, which would make it "one of the largest houses in Berkeley, four times the average house size in its vicinity, and situated in a canyon where the existing houses are of a much smaller scale." They submitted evidence that, of more than 17,000 single-family residences in Berkeley, only 17 are larger than 6,000 square feet, only 10 exceed 6,400 square feet, and only one other residence exceeds 9,000 square feet. In a response to the appeal, the City's director of planning and development stated that 68 Berkeley "dwellings" are larger than 6,000 square feet, nine are larger than 9,000 square feet, and five are larger than 10,000 square feet, and that 16 parcels within 300 feet of the proposed construction had a greater floor-area-to-lot-area ratio than the proposed dwelling.

An addendum to the appeal dated April 18, 2010, first challenged the Board's declaration that the proposed construction was categorically exempt from CEQA, arguing

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[3] The Board also found that the proposed construction would not have any cumulatively significant impacts (Guidelines, § 15300.2, subd. (b)), and that it would not adversely impact any designated historical resources (Guidelines, § 15300.2, subd. (f)), findings that were later affirmed by respondent Berkeley City Council (City Council) and the trial court. Because appellants do not challenge these findings, we do not address them further.

that "the project's unusual size, location, nature and scope may have significant impact on its surroundings." The addendum stated that the proposed construction exceeded the maximum allowable height under Berkeley's municipal code, and was inconsistent with the policies of the City's general plan, and that an EIR was appropriate to evaluate the proposed construction's potential impact on noise, air quality, and neighborhood safety.

The City Council received numerous letters and e-mails both supporting and opposing the appeal. Among the submissions in support of the appeal were letters from Lawrence Karp, a geotechnical engineer specializing in foundation engineering and construction, who had more than 50 years of experience with design and construction in Berkeley, and who had previously prepared feasibility studies and provided engineering services during construction of "unusual projects." Karp first submitted a one-page letter to the City Council dated April 16, 2010, stating that he was familiar with the site of the proposed construction, and had been involved with new residences in the area for 50 years. Based on a review of the architectural plans and topographical survey filed with the Board, as well as visits to the proposed construction site, Karp stated that portions of the "major fill for the project are shown to be placed on an existing slope inclined at about 42° (~1.1h:1v) to create a new slope more than 50° (~0.8h:1v)." He opined that "[t]hese slopes cannot be constructed by earthwork and all fill must be benched and keyed into the slope which is not shown in the sections or accounted for in the earthwork quantities. To accomplish elevations shown on the architectural plans, shoring and major retaining walls not shown will have to be constructed resulting in much larger earthwork quantities than now expected." Karp further opined that the "massive grading" necessary would involve "extensive trucking operations," and that such work "has never before been accomplished in the greater area of the project outside of reservoirs or construction on the University of California campus and Tilden Park." He also emphasized that the project site was "located alongside the major trace of the Hayward fault and it is mapped within a state designated earthquake-induced landslide hazard zone." It was Karp's opinion that "the project as proposed is likely to have very significant environmental

impacts not only during construction but in service due to the probability of seismic lurching of the oversteepened side-hill fills."

Karp submitted another one-page letter dated April 18, 2010, stating that after he wrote his April 16 letter, he had the opportunity to review a geotechnical investigation done by geotechnical engineer Alan Kropp, dated July 31, 2009. Karp stated that no "fill slopes" were shown in Kropp's plan, and that "the recommendations for retaining walls do not include lateral earth pressures for slopes with inclinations of more than 2h:1v (~27°) or for wall heights more than 12 feet." Karp also noted that the architectural plans he reviewed "include cross-sections and elevations that are inconsistent with the Site Plan and limitations in the 7/31/09 report (there have been significant changes)." He stated that "all vegetation will have to be removed for grading, and retaining walls totaling 27 feet in height will be necessary to achieve grades. Vertical cuts for grading and retaining walls will total about 43 feet (17 feet for bench cutting and 26 feet for wall cutting). [¶] A drawing in the report depicts site drainage to be collected and discharged into an energy dissipater dug into the slope, which is inconsistent with the intended very steep fill slopes." Karp reiterated that it was his opinion that "the project as proposed is likely to have very significant environmental impacts not only during construction, but in service due to the probability of seismic lurching of the oversteepened side-hill fills."

Geotechnical engineer Kropp, who had conducted the 2009 geotechnical investigation, submitted a response to Karp's environmental concerns. According to Kropp, opponents had misread the project plans, because the proposed construction would not involve "side-hill fill," and the current ground surface, along with the vegetation, would be maintained on the downhill portion of the lot. According to Kropp, "the only fill placed by the downhill portion of the home will be backfill for backyard retaining walls and there will be no side-hill fill placed for the project. The current ground surface, along with the vegetation, will be maintained on the downhill portion of the lot." Because there would be no steep, side-hill fill constructed as Karp claimed, none of the concerns Karp raised in his letter applied to the proposed construction, according to Kropp.

As for claims that the project site fell within the boundaries of an area that requires investigation for possible earthquake-induced landslides, Kropp stated that although the site was in an area where an *investigation* was required to evaluate whether there was a potential for a landslide, Kropp's investigation revealed that no such landslide hazard was in fact present at the site. Another engineer (Jim Toby) also submitted a letter in support of the proposed construction, and opined that no fills would be placed directly on steep slopes, as Karp claimed.

The director of the City's planning and development department filed a supplemental report to the City Council, in part to respond to Karp's letters. According to the director, "A geotechnical report was prepared and signed by a licensed Geotechnical Engineer and a Certified Engineering Geologist. This report concluded that the site was suitable for the proposed dwelling from a geotechnical standpoint and that no landslide risk was present at the site. Should this project proceed, the design of the dwelling will require site-specific engineering to obtain a building permit."[4]

The City Council considered the appeal on April 27, 2010, and allowed each side 10 minutes to speak.[5] Geotechnical engineers Karp and Kropp made statements consistent with their written submissions. The City Council adopted the findings made by the Board, affirmed the decision to approve the use permit, adopted the conditions enumerated by the Board, and dismissed the appeal by a vote of six to two, with one councilmember absent. The City Planning Department thereafter filed a notice of

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[4] At the hearing on appellants' writ petition in the trial court, counsel for respondent City represented that if inspections during construction revealed the geotechnical concerns that Karp raised, the City would issue a stop-work notice and investigate those issues. Appellants' counsel objected that the assertion was outside the scope of the record, and the trial court apparently agreed that it was impossible to know what the City would do under such circumstances.

[5] Appellants repeatedly emphasize that, although certain people were allowed to address the City Council for 10 minutes, the council did not hold a public hearing on the appeal. However, no public hearing is required before an agency decides a project is categorically exempt under CEQA. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1385.)

exemption, stating that the proposed construction was categorically exempt from the provisions of CEQA (Guidelines §§ 15332, 15303, subd. (a)), and that the proposed construction did not trigger any of the exceptions to the exemptions (Guidelines, § 15300.2).

Appellants Fadley and Berkeley Hillside Preservation[6] sought judicial review of the decision by filing a petition for a writ of mandate in the trial court on May 27, 2010. Following a hearing, the trial court denied the petition by written order dated December 30, 2010. The trial court first concluded that there was substantial evidence in the administrative record to support the City's determination that the in-fill and new construction categorical exemptions applied to the proposed construction (Guidelines, §§ 15332, 15303, subd. (a)). (*Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251.) As for whether appellants had established any exceptions to the exemptions, the trial court concluded that there was substantial evidence of a fair argument that the proposed construction would cause significant environmental impacts. The court nonetheless concluded that the proposed construction did not trigger the exception to the exemptions set forth in Guidelines section 15300.2, subdivision (c), because the possible significant impacts were not due to "unusual circumstances."

Appellants timely appealed from the subsequent judgment. They filed a motion for a temporary stay and a petition for a writ of supersedeas in this court, seeking to prevent the demolition of the existing structure and the commencement of construction of the new home during the pendency of the appeal. This court denied both the request for a temporary stay and petition for writ of supersedeas by orders dated March 28 and

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[6] According to the petition, "Berkeley Hillside Preservation is an unincorporated association formed in the public interest in May 2010," after the City approved the proposed construction on Rose Street. The association includes "City residents and concerned citizens who enjoy and appreciate the Berkeley hills and their environs and desire to protect the City's historic, cultural, architectural, and natural resources." Association members filed the petition "on behalf of all others similarly situated that are too numerous to be named and brought before" the court. Appellant Fadley is a "founding member" of the association, whose members include Berkeley resident Lesley Emmington Jones (the only other association member to be named in the petition).

April 26, 2011. Appellants represent that the existing cottage on the relevant site has been demolished, and they seek no further relief relating to the demolition.[7] Respondents Kapor, Kapor-Klein, City, and City Council have filed a single respondents' brief.

II.
DISCUSSION

Appellants ask this court to order the trial court to issue a writ of mandate directing City to set aside its determination that the proposed construction is exempt from CEQA. "In considering a petition for a writ of mandate in a CEQA case, '[o]ur task on appeal is "the same as the trial court's." [Citation.] Thus, we conduct our review independent of the trial court's findings.' [Citation.] Accordingly, we examine the City's decision, not the trial court's." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 257 (*Banker's Hill*).)

A. Overview of CEQA Process and Consideration of "Unusual Circumstances."

1. Purpose of CEQA

"The Supreme Court has repeatedly observed that the Legislature intended CEQA to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. [Citation.] Central to CEQA is the EIR, which has as its purpose informing the public and government officials of the environmental consequences of decisions before they are made. [Citation.]" (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1315.) "An EIR must be prepared on any 'project' a local agency intends to approve or carry out which 'may have a

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[7] Although the denial of the request for a temporary stay and a petition for a writ of supersedeas enabled respondent owners to demolish the existing structure and to proceed with construction at their own risk, they later voluntarily agreed to suspend any construction activity when they requested a continuance of oral argument from December 6, 2011, to January 10, 2012. By order dated January 5, 2012, this court on its own motion ordered that any and all construction be stayed pending further order of the court, or until the filing of the remittitur in this case.

significant effect on the environment.' (§§ 21100, 21151; Guidelines, § 15002, subd. (f)(1).) The term 'project' is broadly defined and includes any activities which have a potential for resulting in physical changes in the environment, directly or ultimately. (§ 21065; Guidelines, § 15002, subd. (d), 15378, subd. (a); [citation].)" (*Ibid.*, fn. omitted.) A " 'significant effect on the environment' " is defined as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." (Guidelines, § 15382.)

2. Categorical exemptions

Not all proposed activity is subject to environmental review, however. "CEQA authorizes the resources agency to adopt guidelines that list classes of exempt projects, namely projects 'which have been determined not to have a significant effect on the environment and which shall be exempt from this division.' (Pub. Resources Code, § 21084, subd. (a).) These classes of projects are called 'categorical exemptions' and are detailed in Guidelines section 15300 et seq. Guidelines section 15300.2 in turn specifies *exceptions and qualifications* to the categorical exemptions." (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1347 (*Wollmer*), original italics.) Where a public agency decides that proposed activity is exempt and that no exceptions apply, a notice of exemption is filed, and no further environmental review is necessary. (Guidelines, § 15062, subd. (a); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74; *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1171.)

Here, the Board found, and the City agreed, that the proposed construction was subject to two categorical exemptions. They found that the proposed construction satisfied the elements of the urban in-fill development exemption (Guidelines, § 15332), because (1) it was consistent with the applicable general plan designation and applicable general plan policies, as well as with the applicable zoning designation and regulations, (2) the proposed construction was within City limits on a project site of no more than five acres, surrounded by urban uses, (3) the site had no value as a habitat for endangered,

rare, or threatened species, (4) the proposed construction would not result in any significant effects relating to traffic, noise, air quality, or water quality, and (5) the site was already served by required utilities and public services, which also would serve the proposed construction. The Board and City also found that the proposed construction was exempt because it involved the construction of one single-family residence (Guidelines, § 15303, subd. (a)). Acknowledging that the relatively deferential substantial evidence standard of review applies to the City's conclusion that the proposed construction was categorically exempt (e.g., *Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at p. 1251), appellants concede, for purposes of this appeal, that the proposed construction is subject to the two CEQA categorical exemptions.

3. Exceptions to exemptions

Appellants claim that the "unusual circumstances" *exception* to the CEQA exemptions applies here. (Guidelines § 15300.2, subd. (c).[8]) " 'In categorical exemption cases, where the agency establishes that the project is within an exempt class, the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2. The most commonly raised exception is subdivision (c) of section 15300.2, which provides that an activity which would otherwise be categorically exempt is not exempt if there are "unusual circumstances" which create a "reasonable possibility" that the activity will have a significant effect on the environment. A challenger must therefore produce substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the project from the categorically exempt class. [Citations.]' [Citations.]" (*Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at p. 1259.)

Where, as here, a proposed activity meets "the comprehensive environmentally protective criteria of [Guidelines] section 15332," the project "normally would not have other significant environmental effects." (*Communities for a Better Environment v.*

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[8] The Guidelines provide in full: "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

California Resources Agency (2002) 103 Cal.App.4th 98, 129.) The requirement that unusual circumstances be present in order to satisfy the exception to the exemption "was presumably adopted to enable agencies to determine which specific activities—within a class of activities that does not normally threaten the environment—should be given further environmental evaluation and hence excepted from the exemption." (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1206 (*Azusa*).) The concept apparently was first mentioned in *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, where our Supreme Court observed that "common sense tells us that the majority of private projects for which a government permit or similar entitlement is necessary are minor in scope—e.g., relating only to the construction, improvement, or operation of an individual dwelling or small business—and hence, in the absence of unusual circumstances, have little or no effect on the public environment." (*Id.* at p. 272, disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888; see also *Azusa, supra*, at pp. 1206-1207.)

The Supreme Court expanded on the concept of exceptions to categorical exemptions in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190 (*Wildlife Alive*), which held that CEQA applies to the Fish and Game Commission's setting of hunting and fishing seasons. (*Wildlife Alive* at pp. 194-195, 204.) The court rejected the argument that the commission's activity was included within one of CEQA's categorical exemptions. (*Wildlife Alive* at p. 204.) Even if a regulation was intended to exempt the activity at issue in *Wildlife Alive*, however, such a regulation would be invalid, because "[t]he Secretary [of the California Resources Agency] is empowered to exempt *only* those activities which do not have a significant effect on the environment. [Citation.] It follows that where there is *any reasonable possibility* that a project or activity may have a significant effect on the environment, an exemption would be improper." (*Id.* at pp. 205-206, italics added.) In other words, a categorical exemption does not apply where there is any reasonable possibility that proposed activity may have a significant effect on the environment.

Relying on *Wildlife Alive, supra,* 18 Cal.3d 190 as authority, the secretary for the Resources Agency adopted the unusual circumstances exception that is now set forth in Guidelines, section 15300.2, subdivision (c).[9] (See Note and Authority cited, foll. Guidelines, § 15300.2.) Courts have interpreted that section of the Guidelines as applying "where the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects." (*Azusa, supra,* 52 Cal.App.4th at p. 1207; see also *Wollmer, supra,* 193 Cal.App.4th at p. 1350.) Effects on aesthetics, cultural resources, water supply, health, and safety are among the effects that fall within the concept of " 'unusual circumstances.' " (*Communities for a Better Environment v. California Resources Agency, supra,* 103 Cal.App.4th at p. 129.) "[W]hether a circumstance is '*unusual*' is judged relative to the *typical* circumstances related to an otherwise typically exempt project." (*Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 801, original italics.)

In *Banker's Hill,* the court held that the application of Guidelines, section 15300.2, subdivision (c), involves "two distinct inquiries. First, we inquire whether the Project presents unusual circumstances. Second, we inquire whether there is a reasonable possibility of a significant effect on the environment *due to* the unusual circumstances. [Citation.] 'A negative answer to either question means the exception does not apply.' [Citation.]" (*Banker's Hill, supra,* 139 Cal.App.4th at p. 278, original italics.) Here, the

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[9] We hereby grant appellants' unopposed request for judicial notice of materials surrounding the implementation of Guidelines, section 15300.2, subdivision (c). However, "[e]ven though we will grant motions for judicial notice of legislative history materials without a showing of statutory ambiguity, we do so with the understanding that the panel ultimately adjudicating the case may determine that the subject statute is unambiguous, so that resort to legislative history is inappropriate." (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30.) Our understanding of the relevant section of the Guidelines is based primarily on the unambiguous language of the Guidelines and judicial interpretation of CEQA. Accordingly, we need not resort to documents underlying its implementation in reaching our conclusion that it applies to the proposed construction.

trial court found that there was substantial evidence of a fair argument that the proposed construction could have a significant environmental impact. Because there was a " 'negative answer' " to the question of whether the project presented unusual circumstances (*ibid.*), however, the trial court concluded that the unusual circumstances exception did not apply here. Respondents argue that this conclusion was appropriate under the two-step approach of *Banker's Hill.*

We disagree with the trial court's approach. Where there is substantial evidence that proposed activity may have an effect on the environment, an agency is *precluded* from applying a categorical exemption. (*Wildlife Alive*, *supra*, 18 Cal.3d at pp. 205-206.) The trial court concluded that the relevant exception did not apply because it found no "unusual circumstances" present; however, the fact that proposed activity may have an effect on the environment is *itself* an unusual circumstance, because such action would not fall "within a class of activities that does not normally threaten the environment," and thus should be subject to further environmental review. (*Azusa*, *supra*, 52 Cal.App.4th at p. 1206.)

Although the trial court's conclusion arguably is consistent with the two-step approach set forth in *Banker's Hill*, we note that the *Banker's Hill* court did not actually employ such a two-step procedure. Instead, it "streamlined" its approach by "proceed[ing] directly to the question of whether, applying the fair argument standard, there is a *reasonable possibility of a significant effect on the environment* due to any . . . purported unusual circumstances." (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 278, italics added.) Indeed, much of the court's opinion focused on all the reasons an agency must apply the fair argument approach in determining whether there is no reasonable possibility of a significant effect on the environment due to unusual circumstances (Guidelines, § 15300.2, subd. (c)). (*Banker's Hill*, *supra*, 139 Cal.App.4th at pp. 264-265.) Relying on *Wildlife Alive*, *supra*, 18 Cal.3d at pages 205-206, the *Banker's Hill* court emphasized that an agency is precluded under the Guidelines from "relying on a categorical exemption when there is a fair argument that a project will have a significant effect on the environment." (*Banker's Hill*, *supra*, at p. 266.) In other words, the court

acknowledged " 'that where there is *any reasonable possibility* that a project or activity may have a significant effect on the environment, an exemption would be improper.' " (*Ibid.*, italics added by *Banker's Hill.*) Our conclusion that the unusual circumstances exception does not apply whenever there is substantial evidence of a fair argument of a significant environmental impact is thus not inconsistent with *Banker's Hill.*

Other courts likewise have addressed the Supreme Court's statement in *Wildlife Alive, supra,* 18 Cal.3d at pages 205-206, that projects may not be categorically exempt where there is any reasonable possibility that the project may have a significant environmental effect. For example, in upholding a challenge to the categorical exemption for in-fill development projects (Guidelines, § 15332), the court in *Communities for a Better Environment v. California Resources Agency, supra,* 103 Cal.App.4th 98, summarized the relevant history of the unusual circumstances exception to the exemption: "This admonition from *Chickering* cannot be read so broadly as to defeat the very idea underlying CEQA section 21084 of *classes* or *categories* of projects that do not have a significant environmental effect. So subsequent case law has stated that '[t]o implement th[is] rule laid out in *Chickering*, Guidelines section 15300.2, subdivision (c), was adopted . . . .' [¶] Thus, a categorical exemption authorized by CEQA section 21084 is an exemption from CEQA for a *class* of projects that the Resources Agency determines will *generally* not have a significant effect on the environment." (*Id.* at p. 127, original italics, fns. omitted.)

Respondents apparently would have this court read the forgoing excerpt from *Communities* as cautioning against applying the unusual circumstances exception too " 'broadly.' " In fact, the quoted passage simply sets forth the relevant history of the unusual circumstances exception. The *Communities* court went on to emphasize that effects on aesthetics, cultural resources, water supply, health, and safety "would constitute 'unusual circumstances' under this exception for a project that otherwise meets the Guidelines 15332 [in-fill development] criteria. This is because a project that does meet the comprehensive environmentally protective criteria of section 15332 normally would not have other significant environmental effects; if there was a reasonable

possibility that the project would have such effects, *those effects would be 'unusual circumstances' covered by the section 15300.2, subdivision (c) exception.*" (*Communities for a Better Environment v. California Resources Agency, supra,* 103 Cal.App.4th at p. 129, italics added.) We recognize that the proposed construction here fell within two categorical exemptions, meaning that it belonged to classes of projects that generally do not have a significant effect on the environment. (*Id.* at p. 127.) However, once it is determined that there is a reasonable possibility that a specific activity may have significant effects on aesthetics, cultural resources, or other areas not covered by the in-fill exemption (such as geotechnical impacts), application of a categorical exemption no longer is appropriate, because such a project is different from activity that generally does not have environmental effects. (*Ibid.*)

In sum, the trial court erred insofar as it concluded that appellants had provided substantial evidence of a fair argument of a significant environmental impact, yet declined to apply the unusual circumstances exception. We acknowledge that it may be helpful to analyze the applicability of the unusual circumstances exception as part of a two-step inquiry (as we do below), separately inquiring as to whether unusual circumstances exist, and whether there is a risk of significant environmental impact due to those unusual circumstances. (*Banker's Hill, supra,* 139 Cal.App.4th at p. 278.) This approach assists with the determination of whether the circumstances surrounding a proposed activity "differ from the general circumstances of the projects covered by a particular categorical exemption." (*Azusa, supra,* 52 Cal.App.4th at p. 1207.) However, once it is determined that a proposed activity may have a significant effect on the environment, a reviewing agency is precluded from applying a categorical exemption to the activity.

4. Standard of review

"[A]ny factual determination relating to the existence of a certain circumstance is reviewed as a question of fact under the substantial evidence standard, but 'the question whether that circumstance is "unusual" within the meaning of the significant effect exception would normally be an issue of law that this court would review de novo.'

[Citations.]" (*Banker's Hill, supra*, 139 Cal.App.4th at p. 261-262, fn. 11; see also *Azusa, supra*, 52 Cal.App.4th at p. 1207.) "[A]n agency must apply a fair argument approach in determining whether, under Guidelines section 15300.2(c), there is no reasonable possibility of a significant effect on the environment due to unusual circumstances. Accordingly, as a reviewing court we independently review the agency's determination under Guidelines section 15300.2(c) to determine whether the record contains evidence of a fair argument of a significant effect on the environment."[10] (*Banker's Hill* at p. 264; see also *Wollmer, supra*, 193 Cal.App.4th at p. 1350.)

With these general principles in mind, we analyze whether the unusual circumstances exception applies to the facts of this case.

B. Appellants Established Fair Argument of Significant Effect on Environment Due to Unusual Circumstances.

1. Proposed construction presents "unusual circumstances"

As set forth above, the proposed construction is concededly subject to two categorical exemptions (the single-family residence exemption and the in-fill exemption, Guidelines, §§ 15303, subd. (a), 15332). As for the single-family residence exemption, the Guidelines provide that this categorical exemption applies to the "construction and location of limited numbers of new, small facilities or structures; . . . . The numbers of structures described in this section are the maximum allowable on any legal parcel. Examples of this exemption include but are not limited to: [¶] (a) One single-family residence, or a second dwelling unit in a residential zone. In urbanized areas, up to three single-family residences may be constructed or converted under this exemption." (Guidelines, § 15303, subd. (a).)

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[10] Respondents contend that there is a "split in authority" over whether we apply the fair argument or substantial evidence standard of review to an agency's finding that there was no reasonable possibility of a significant effect on the environment, but that appellants have not shown error under either standard. Our reliance on the fair argument standard is consistent with our recent decision in *Wollmer, supra*, 193 Cal.App.4th at page 1350, citing *Banker's Hill, supra*, 139 Cal.App.4th at page 261.

Appellants presented substantial, and virtually uncontradicted, evidence that the proposed single-family residence to be constructed was unusual, based on its size. (*Banker's Hill, supra*, 139 Cal.App.4th at p. 261, fn. 11 [determination relating to existence of certain circumstance reviewed as question of fact under substantial evidence standard].) Of more than 17,000 single-family residences in Berkeley, only 17—or a tenth of a percent—are larger than 6,000 square feet, whereas the proposed construction will result in a residence that is more than 9,800 square feet. On appeal, respondents highlight evidence that 68 City "dwellings" are larger than 6,000 square feet. First, it is unclear whether all 68 "dwellings" are single-family residences. Second, even assuming arguendo that they are, that still means that less than a half percent (or 0.4 percent) of all Berkeley residences are more than 6,000 square feet, an indication that the approximately 9,800 square-foot proposed residence " 'differ[s] from the general circumstances of the projects covered by a particular categorical exemption.' " (*Wollmer, supra*, 193 Cal.App.4th at p. 1350.)

The trial court found that there were no unusual circumstances present here, because the proposed construction was "not so unusual for a single family residence, *particularly in this vicinity*, as to constitute . . . unusual circumstances . . . ." (Italics added.) Respondents likewise highlight evidence that 20 houses in the area, including five "immediately surrounding the property," range in size from 4,000 to 6,000 square feet. Again, however, whether a circumstance is unusual "is judged relative to the *typical* circumstances related to an otherwise *typically exempt project*," as opposed to the typical circumstances in one particular neighborhood. (*Santa Monica Chamber of Commerce v. City of Santa Monica, supra*, 101 Cal.App.4th at p. 801, second italics added; but see *Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 736 (*Ukiah*) [size and height of house not unusual "in the vicinity"].) Reviewing de novo the question of whether the circumstance is " ' "unusual" ' " within the meaning of the significant effect exception (*Banker's Hill, supra*, 139 Cal.App.4th at p. 261, fn. 11), we conclude as a matter of law that the proposed construction, which would result in a 6,478 square-foot home with an attached 3,394 square-foot, 10-car garage, is "unusual" within

the meaning of the applicable exception, because the circumstances of the project differ from the general circumstances of projects covered by the single-family residence exemption, and it is thus unusual when judged relative to the typical circumstances related to an otherwise typically exempt single-family residence. (*Wollmer*, *supra*, 193 Cal.App.4th at p. 1350; *Santa Monica Chamber of Commerce v. City of Santa Monica*, *supra*, 101 Cal.App.4th at p. 801.)

2. Fair argument of significant effect on the environment

We next inquire whether there is a reasonable possibility that the proposed construction will have a significant effect on the environment due to the unusual circumstance of its size. (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 278.) We agree with the trial court that Karp's letters submitted to the City Counsel amounted to substantial evidence of a fair argument that the proposed construction would result in significant environmental impacts.

As set forth above, Karp opined that the proposed construction would (1) require the excavation of all vegetation and extensive trucking of earthwork in order to achieve grading, (2) result in steepening of the already existing steep slope, (3) necessitate 27-foot retaining walls, and (4) impact the environment because of the probability of "seismic lurching of the oversteepened side-hill fills" in a landslide hazard zone. These were certainly potential "direct physical change[s] in the environment," which justified Karp's opinion that the construction would result in a significant impact to the environment. (Guidelines, § 15378, subd. (a) [definition of "project"]; see also *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 277-278, fn. 16.) Stated differently, Karp's opinion provided substantial evidence upon which it could be fairly argued that the proposed construction may have significant environmental impact. (*Sierra Club v. County of Sonoma*, *supra*, 6 Cal.App.4th at p. 1316.)

Two engineers opined that Karp's conclusion that geotechnical issues were present at the site was based on a misreading of the relevant plans, and the director of the City's planning and development department likewise concluded that the site was suitable for the proposed dwelling from a geotechnical standpoint, and that no landslide risk was

present at the site. However, where there is substantial evidence of a significant environmental impact, "*contrary evidence is not adequate* to support a decision to dispense with an EIR. [Citations.] Section 21151 creates a low threshold requirement for initial preparation and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. [Citations.] For example, *if there is a disagreement among experts* over the significance of an effect, *the agency is to treat the effect as significant and prepare an EIR.* [Citations.]" (*Sierra Club v. County of Sonoma, supra*, 6 Cal.App.4th at pp. 1316-1317, italics added; see also Guidelines, § 15064, subd. (g) [where there is disagreement in marginal case over significance of environmental effect, lead agency shall treat effect as significant and prepare EIR].)

Ukiah, supra, 2 Cal.App.4th 720, upon which respondents rely, is distinguishable. In *Ukiah*, an environmental association challenged the construction of a single residence on the last undeveloped lot in a single subdivision. (*Id.* at p. 724.) The court rejected appellant's argument that the unusual circumstances exception applied, concluding that "[n]either the size of the house (2,700 square feet), nor its height, nor its hillside site is so unusual in the vicinity as to constitute the type of unusual circumstance required to support application of this exception." (*Id.* at pp. 736.) The court emphasized that "[t]he potential environmental impacts which [appellant] posits seems to us to be *normal and common considerations in the construction of a single-family residence* and are in no way due to 'unusual circumstances.' " (*Ibid.*, italics added.) Here, by contrast, we do not consider the potential massive grading and seismic lurching associated with the proposed construction to be "normal and common considerations" associated with the construction of a new home.

Because there was substantial evidence in the record to support a fair argument that the proposed construction will have a significant effect on the environment (Guidelines, § 15300.2, subd. (c)), the application of a categorical exemption was

inappropriate here, and the trial court erred in denying appellants' petition for a writ of mandate.[11]

III.
DISPOSITION

Appellants' request for judicial notice is granted. The judgment is reversed, and the trial court is ordered to issue a writ of mandate directing the City to set aside the approval of use permits and its finding of a categorical exemption, and to order the preparation of an EIR. Appellants shall recover their costs on appeal.

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[11] In light of our conclusion, we need not consider appellants' argument that the Board's adoption of a traffic management plan was a "mitigation measure[]" that precluded a finding of a categorical exemption. (*Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108.)

Sepulveda, J.

We concur:

Ruvolo, P.J.

Reardon, J.

Berkeley Hillside Preservation v. City of Berkeley (A131254)

Trial Court:	Alameda County Superior Court
Trial Judge:	Honorable Frank Roesch
Counsel for Appellants:	Susan Brandt-Hawley
Counsel for Respondents City of Berkeley and Real Parties in Interest City of Berkeley and City Council of City of Berkeley:	Zach Cowan, City Attorney, Laura McKinney, Deputy City Attorney
Counsel for Respondents and Real Parties in Interest Mitchell Kapor, Freada Kapor-Klein, and Donn Logan:	Myers, Nave, Riback, Silver & Wilson, Amrit S. Kulkarni, Julia L. Bond

Filed 3/7/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BERKELEY HILLSIDE PRESERVATION et al., Plaintiffs and Appellants, v. CITY OF BERKELEY et al., Defendants and Respondents; DONN LOGAN et al., Real Parties in Interest and Respondents.	A131254 (Alameda County Super. Ct. No. RG10517314) ORDER DENYING REHEARING AND MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

Respondent and real parties in interest's petition for rehearing is denied. The opinion filed February 15, 2012, is modified by deleting the seventh paragraph under part II.A.3. and replacing it as follows:

> Although the trial court's conclusion arguably is consistent with the two-step approach set forth in *Banker's Hill*, we note that the *Banker's Hill* court did not actually employ such a two-step procedure. Instead, it "streamlined" its approach by "proceed[ing] directly to the question of whether, applying the fair argument standard, there is a *reasonable possibility of a significant effect on the environment* due to any . . . purported unusual circumstances." (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 278, italics added.) Indeed, much of the court's opinion focused on all the reasons an agency must apply the fair argument approach in determining whether there is no reasonable possibility of a significant effect on the environment due to unusual circumstances (Guidelines, § 15300.2, subd. (c)). (*Banker's Hill*, *supra*, 139 Cal.App.4th at pp. 264-265.) Relying on *Wildlife Alive*, *supra*, 18 Cal.3d at pages 205-206, the *Banker's Hill* court emphasized that an agency is precluded under the Guidelines from "relying on a categorical exemption when there is a fair argument that

a project will have a significant effect on the environment." (*Banker's Hill, supra*, at p. 266.) In other words, the court acknowledged " 'that where there is *any reasonable possibility* that a project or activity may have a significant effect on the environment, an exemption would be improper.' " (*Ibid.*, italics added by *Banker's Hill.*) Our conclusion that the unusual circumstances exception applies whenever there is substantial evidence of a fair argument of a significant environmental impact is thus not inconsistent with *Banker's Hill.*

The above modification does not effect any change in the judgment.

Trial Court:	Alameda County Superior Court
Trial Judge:	Honorable Frank Roesch
Counsel for Appellants:	Susan Brandt-Hawley
Counsel for Respondents City of Berkeley and Real Parties in Interest City of Berkeley and City Council of City of Berkeley:	Zach Cowan, City Attorney, Laura McKinney, Deputy City Attorney
Counsel for Respondents and Real Parties in Interest Mitchell Kapor, Freada Kapor-Klein, and Donn Logan:	Myers, Nave, Riback, Silver & Wilson, Amrit S. Kulkarni, Julia L. Bond

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On March 26, 2012, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

Susan Brandt-Hawley Esq.
Brandt-Hawley Law Group
13760 Arnold Drive
Glen Ellen, CA 95442

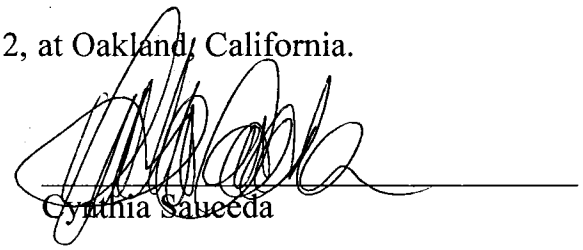
Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

Court of Appeal
First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on March 26, 2012, at Oakland, California.



Cynthia Saucedá

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