S201116

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

BERKELEY HILLSIDE PRESERVATION, ET AL.
Petitioners and Appellants,

v.

CITY OF BERKELEY, ET AL.
Respondents.

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

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

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

RESPONDENTS AND REAL PARTIES IN INTEREST'S OPENING BRIEF ON THE MERITS

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1. For a project that is categorically exempt from review under the California Environmental Quality Act ("CEQA"),[1] does the unusual circumstances exception to the exemption in CEQA Guidelines 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 for whether the unusual circumstances exception to a categorical exemption applies?

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

4. 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?

5. 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?

6. After setting aside an agency's finding that a project is categorically exempt from CEQA, may a court order the agency to prepare

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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 Regulations Title 14.

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?

INTRODUCTION

Forty years ago, this Court issued its landmark decision in *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, holding that CEQA applies to private projects being approved by a public agency. In that case, the Court established that the foremost principle in interpreting CEQA is that "the Legislature intended [CEQA] to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Id.* at 259.) In that same case, however, this Court also stated that:

> [C]ommon 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, <u>in the absence of unusual circumstances</u>, have little or no effect on the public environment. Such projects, accordingly, may be approved exactly as before the enactment of the [C]EQA. (*Id.* at 272, emphasis added.)

Three months later, and in direct response to this Court's decision, the Legislature adopted a comprehensive amendment to CEQA. That amendment made plain that the purpose of CEQA is to protect the environment, in a way that would not cause needless time and expense. That amendment included a directive to the Resources Agency to identify and determine classes of projects that do not have a significant effect on the environment and are exempt from CEQA. Over the years, the Resources Agency adopted 33 so-called "categorical exemptions" from CEQA. Activities so exempted include an addition to schools of up to ten classrooms, construction of four new commercial buildings of up to 10,000 square feet in urban areas, construction of single-family houses and accessory structures such as pools, garages, and fences.

The Resources Agency also adopted several exceptions to the exemptions. At issue in this case is the "unusual circumstances" exception, which mirrors this Court's language in *Friends of Mammoth* and provides that a categorical exemption shall not be used for a project 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).)

In this case, the City of Berkeley ("City") approved an application by Mitchell Kapor and Freada Kapor-Klein (the "Kapors") to build a single-family home. The City found the project exempt from CEQA 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 significant construction fill would be required to construct the project because it was *not proposed* by the Kapors and, therefore, *not approved by the City*. The trial court upheld the City's decision, holding 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.

SUMMARY OF ARGUMENT

The first issue raised by this case is whether use of a categorical exemption is precluded *whenever* the possibility of significant impacts is demonstrated, 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 based upon the plain language of the unusual circumstances exception. These cases all have interpreted the exception as requiring 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 any significant impacts are *per se* unusual circumstances that preclude application of a categorical exemption and obviate the need for the second finding, contradicts this long line of established precedent.

The Court of Appeal's holding is also flatly inconsistent with CEQA, the Legislature's intent and the purposes of CEQA. In response to this Court's decision in *Friends of Mammoth*, the Legislature directed the Resources Agency to identify and determine classes of projects that do not have a significant effect on the environment and are exempt from CEQA. In doing so, the Legislature intended these exemptions to be bright-line, categorical rules that would streamline review of routine and minor projects that occur throughout the State.

The Legislature did not direct or intend that agencies and courts would revisit the question of whether activities falling 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 by promulgating the categorical exemptions. Rather, the unusual circumstances exception is designed to provide for further review of projects when the physical impacts of the project are *atypical* of the exempt category and are potentially significant. This exception is clearly authorized and consistent with the Legislature's directive and intent.

The Court of Appeal's new rule violates the Legislature's directive because it would eviscerate the very concept of categorical exemptions. If "unusual circumstances" is read out of the exception, as the Court of Appeal has done, then the Legislature's authorization would look like this: Identify a class of projects that do not have a significant effect on the environment and are exempt from CEQA, except where an individual project within that class has a significant effect on the environment and is not exempt from CEQA. The inquiry would be circular and meaningless. Thus, the Legislature's entire premise for categorical exemptions would be gutted if the Court of Appeal's reasoning is adopted.

The second issue raised by this case is the appropriate standard of review for the unusual circumstances exception. The Court of Appeal held that the "fair argument" standard applies, holding that the exception is applicable whenever there is any credible evidence of a reasonable possibility of a significant effect, regardless of contrary evidence that no significant effect would occur. 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.

The substantial evidence standard should apply to a determination by the public agency that the exception does not apply. 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 then 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 contrary evidence that no significant impact would occur. Moreover, applying these two standards to one project leads to unduly complicated and time-consuming proceedings for what are supposed to be minor and routine projects under CEQA. If the process for applying categorical exemptions is too cumbersome and uncertain, the Legislature's purpose in creating categorical exemptions is undermined.

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.* This holding by the Court of Appeal is clearly erroneous and contrary to existing law. Not surprisingly, CEQA clearly provides that the project that is reviewed under CEQA is the activity approved by the public agency, not a project variant conjured up by opponents.

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.

Fourth, the Court of Appeal purported to find "unusual circumstances" in this case, but erred in its application of the exception. The Court of Appeal held that, as a matter of law, the size of the proposed home in this case was unusual. This holding is not only wrong, it is meaningless. Under the exception, the relevant inquiry is whether the project differs from the typically exempt project under the categorical exemption. The "new construction" exemption does not specify a size restriction for single family homes, although it does so for other types of development. Indeed, size in the abstract is meaningless. The same size house on a tiny lot clearly presents a different situation than the same size house on a large lot. Thus, public agencies rely on their legislatively adopted zoning and development standards to determine if a particular home is unusual, and courts should defer to this determination if it is supported by substantial evidence. Allowing courts to declare what is "unusual" by way of judicial fiat allows courts to improperly second-guess legislatively-adopted zoning requirements that are within the purview of local agencies. It also means that public agencies applying the exception have no guidance or certainty as to what is "unusual".

Moreover, the Court of Appeal failed to even analyze whether the Project was unusual compared to the typical project under the in-fill categorical exemption. Under that exemption, size is not a factor. Indeed, the same Court of Appeal recently held that a 5-story building with 98 residential units, 7,700 square feet of commercial space, and 114 parking spaces fell within the in-fill categorical exemption and that there was nothing about that project that differed from the typically-exempt in-fill project. Clearly, then, the size of one single-family home does not present anything unusual compared to the typically-exempt in-fill project.

Fifth, the Court of Appeal erred, in applying the unusual circumstances exception, in relying upon evidence that is legally incapable of showing potentially significant CEQA impacts. Specifically, the geotechnical comments of Appellants' expert showed, at most, the potential for an adverse impact *of the existing environment on the Project.* Under CEQA, such impacts of the environment *on a project* are not potentially significant "environmental impacts" that require review under CEQA. Therefore, Appellants' evidence is incapable – as a matter of law – of raising even a "reasonable possibility" that the Project would have a "significant effect on the environment due to unusual circumstances".

Finally, even if the Court were to uphold the decision, the Court of Appeal improperly ordered the trial court to issue a writ of mandate that directs the City to exercise its direction in a certain way, *i.e.*, by preparation of an EIR. This order violates CEQA, and specifically, section 21168.9(c), which provides that "[n]othing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way." A proper writ would require the City to set aside its finding of a categorical exemption, and comply with CEQA, but allow the City to exercise its discretion in the first instance as to how to comply with CEQA in response to the court's order.

In summary, by imposing the unusual circumstances 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 Court of Appeal's Opinion would decimate agencies' use of categorical exemptions as intended by the Legislature. This Court should uphold the clear Legislative directive and intent in authorizing categorical exemptions for single-family homes, desperately needed urban in-fill projects, and the many other minor projects which the Resources Agency has already determined should not require further CEQA review. This Court should also clarify the standards applicable to the exception, so that CEQA functions smoothly and the process is not so cumbersome as to defeat the purpose of categorical exemptions. Finally, Respondents request that the Court reverse the Court of Appeal decision, and uphold the trial court determination denying the petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

The Project in this case is a permit 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.) Appellants 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, 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 that 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".

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

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

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, 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 unusual circumstances exception as requiring two separate inquiries, the first being whether the Project presents unusual circumstances. (Opinion, 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 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' [their] 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 of Appeal 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 15.) However, the Court of Appeal 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 of Appeal held that the fair argument standard applied to the agency's determination under Guidelines section 15300.2(c). (Opinion, 16.) The Court of Appeal then purported to apply the two-step inquiry to the facts of this case, holding that the proposed single-family residence was unusual based on its size. (Opinion, 17.) In making this determination, the Court of Appeal 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 of Appeal found that there was substantial evidence of a fair argument that the Project would result in significant geotechnical impacts to construction fill for the Project. (Opinion, 18.) However, the Court of Appeal did not determine that any significant environmental 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, therefore, not permitted as part of the Project approved by the City. (*Ibid.*) It was the alleged potentially significant impacts of "seismic lurching" to this supposedly 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. This Court granted the City's and the Kapors' timely petition for review.

STANDARD OF REVIEW

The fundamental question presented by the Court of Appeal's Opinion is whether the "unusual circumstances" requirement in Guidelines section 15300.2(c) is consistent with the statutory language in section 21084(a). Accordingly, the Court is reviewing the legality of a regulation adopted pursuant to a delegation of legislative power. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11.)

This Court "has not decided the issue of whether the Guidelines are regulatory mandates or only aids in interpreting CEQA." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2 ["*Laurel Heights I*"].) However, this Court has held that, "[a]t a minimum, . . . courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Ibid*; See also *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123, fn. 4 ["*Laurel Heights II*"]; *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428, fn. 5.) In any event, the Guidelines on categorical exemptions, of course, can only be "regulatory mandates"—the Legislature effectively so provided.

"[N]o regulation is valid if its issuance exceeds the scope of the enabling statute." (*Wildlife Alive, supra*, 18 Cal.3d at 205, citing former Gov. Code § 11374 and *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 757.) Government Code section 11342.2 (former Government Code § 11374) provides:

> Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

Under the first prong of this standard, courts independently review the administrative regulation to determine if it is within the scope of the authority conferred by the statute. (*Yamaha, supra,* 19 Cal.4th at 11 and fn. 4; *Communities for a Better Environment v. California Resources Agency ("CBE")* (2002) 103 Cal.App.4th 98, 108-109.)

"By contrast, the second prong of this standard, reasonable necessity, generally does implicate the agency's expertise; therefore it receives a much more deferential standard of review. The question is whether the agency's action was arbitrary, capricious, or without reasonable or rational basis." (*CBE, supra,* 103 Cal.App.4th at 109, citing *Yamaha, supra,* 19 Cal.4th at 11.)

The standard of review for application of the unusual circumstances exception to the Project in this case is one of the issues to be decided by this Court. It is discussed in detail below.

ARGUMENT

I. THE APPELLATE COURT ERRED BY APPLYING THE "UNUSUAL CIRCUMSTANCES" EXCEPTION WITHOUT REQUIRING A SHOWING OF SIGNIFICANT IMPACTS DUE TO UNUSUAL CIRCUMSTANCES

A. CEQA's Purposes and Structure

The purposes of CEQA are well established, and were recently reiterated by this Court:

> The California Environmental Quality Act (*Pub. Resources Code, § 21000 et seq.*) (CEQA) and the regulations implementing it (*Cal. Code Regs., tit. 14, § 15000 et seq.*) embody California's strong public policy of protecting the environment. "The basic purposes of CEQA are to: [¶] (1) Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities. [¶] (2) Identify ways that environmental damage can be avoided or significantly reduced. [¶] (3) Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds

> the changes to be feasible. [¶] (4) Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved." (*Cal. Code Regs., tit. 14, § 15002.*)

(*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 285-286.)

In addition, the Legislature, Resources Agency and the courts have all explained that CEQA should be implemented in a manner that reduces delay and paperwork. (§ 21003; Guidelines § 15006; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 567.) The Legislature has directed that courts, in interpreting CEQA, shall not interpret CEQA or the Guidelines "in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or the [G]uidelines." (§ 21083.1) This Court has also cautioned that "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Goleta, supra*, 52 Cal.3d at 576.)

As also recently explained by this Court, to achieve these goals, CEQA and the implementing regulations provide for a three-step process:

> In the first step, the public agency must determine whether the proposed development is a "project," that is, "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" undertaken, supported, or approved by a public agency. (*§ 21065.*)
>
> The second step of the process is required if the proposed activity is a "project." The public agency must then decide whether it is exempt from compliance with CEQA under either a statutory exemption (*§ 21080*) or a categorical exemption set forth in the regulations (*§ 21084, subd. (a)*; *Cal. Code Regs., tit. 14, § 15300*). A categorically exempt project is not subject to CEQA, and no further environmental review is required. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com. (2007) 41 Cal.4th 372, 380 [60 Cal. Rptr. 3d 247, 160 P.3d 116]*; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley*

> *Unified School Dist. (2006) 139 Cal.App.4th 1356, 1373 [44 Cal. Rptr. 3d 128].)* If the project is not exempt, the agency must determine whether the project may have a significant effect on the environment. If the agency decides the project will not have such an effect, it must "adopt a negative declaration to that effect." (*§ 21080, subd. (c)*; see *Cal. Code Regs., tit. 14, § 15070*; *Muzzy Ranch Co. v. Solano County Airport Land Use Com., supra, at pp. 380-381.*) Otherwise, the agency must proceed to the third step, which entails preparation of an environmental impact report before approval of the project. (*§§ 21100, subd. (a), 21151, subd. (a).*)

(*Tomlinson, supra,* 54 Cal.4th at 286.)

By its terms, then, CEQA only requires an EIR for a project "which may have a significant effect on the environment." (§ 21151; *Friends of Mammoth, supra,* 8 Cal.3d at 271.) Thus, "a public agency pursuing or approving a project need not prepare an EIR unless the project may result in a 'significant effect on the environment' (*§§ 21100, subd. (a), 21151, subd. (a)*), defined as a 'substantial, or potentially substantial, adverse change in the environment' (*§ 21068*)." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 171.)

This case deals with the second step in this three-step process—a determination that a project is categorically exempt from CEQA and not subject to an exception to the categorical exemption.

B. Overview of Categorical Exemptions

1. Legislative Direction for Categorical Exemptions

The Legislature directed the Office of Planning and Research to prepare and develop guidelines for the implementation of CEQA by public agencies, and transmit them immediately to the Secretary of the Resources Agency. (§ 21083(a), (e).) The Legislature directed the Secretary of the Resources Agency to certify and adopt the Guidelines pursuant to the California Administrative Procedures Act ("APA"), Government Code sections 11340-11528. (§ 21083(e).) The Legislature further directed that the Resources Agency must adopt the Guidelines in compliance with Government Code sections 11346.4, 11346.5, and 11346.8, which provide notice and hearing requirements for the adoption of regulations. (§ 21083(e).)

As part of the Guidelines, the Legislature specifically directed the Resources Agency to designate categorical exemptions from CEQA. (§ 21084(a).) The Legislature also set up a process for public agencies to request that the Resources Agency add or delete classes of projects to and from the list designated pursuant to section 21084. (§ 21086; Guidelines § 15300.3.) Any such request must be supported by information supporting the public agency's position that the class of projects does, or does not, have a significant impact on the environment. (§ 21086(a).)

2. History of Categorical Exemptions

In response to the legislative mandate in section 21084, the Resources Agency has adopted 33 categorical exemptions. (Guidelines §§ 15301–15333.) In doing so, the Secretary of the Resources Agency expressly "found that [these] classes of projects listed in this article do not have a significant effect on the environment, and they are declared to be categorically exempt from the requirement for the preparation of environmental documents." (Guidelines § 15300.)

The Resources Agency also adopted six exceptions to the categorical exemptions. (Guidelines § 15300.2.) The unusual circumstances exception at issue in this case 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. (Guidelines § 15300.2(c).)

Following notice and a public hearing, the Resources Agency adopted the unusual circumstances exception in 1980. (Appellants'

Request for Judicial Notice filed in Court of Appeal, Exh. 3, pp. 8-11; Exh. 4, pp. 12-21.) The Resources Agency's 1982 "Statement of Reasons" for amendments to the Guidelines provides that the "exemptions are all necessary for avoiding the time and expense of going through the CEQA process where it can be determined in advance that a class of projects will not have a significant effect on the environment." (*Id.* at Exh. 7, p. 32.)

3. Process for Categorical Exemptions

As set forth above, public agencies employ a three-step process to implement CEQA, and the second step of that process is to review for exemptions. Once an agency has determined that an activity is a project subject to CEQA, it then determines whether the project is exempt from CEQA. (Guidelines § 15061(a).) A project is exempt from CEQA if:

> (1) The project is exempt by statute (see, e.g., Article 18, commencing with Section 15260).
>
> (2) The project is exempt pursuant to a categorical exemption (see Article 19, commencing with Section 15300) and the application of that categorical exemption is not barred by one of the exceptions set forth in Section 15300.2.
>
> (3) The activity is covered by the general rule that CEQA applies only to projects, which have the potential for causing a significant effect on the environment. 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(b).)

In judicial review of an agency's determination that a project is categorically exempt from CEQA, "the substantial evidence test governs [the court's] review of the city's factual determination that a project falls within a categorical exemption." (*Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251. See also *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1173, 1175.) Once an agency determines that a project is categorically exempt, the burden then shifts to the challenging party to produce evidence showing that one of the exceptions applies to take the project out of the exempt category. (*Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 796.)

C. The Long-Standing Judicial Construction of Guidelines § 15300.2 Requires a Separate Showing of "Unusual Circumstances"

There is a long line of established Court of Appeal cases holding that whether or not "unusual circumstances" are present is a separate inquiry under the exception in Guidelines § 15300.2. Again, that exception provides 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."

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 <u>two distinct inquiries</u>. 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, underlining added.)

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, <u>and</u> (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, supra,* 101 Cal.App.4th at 800 ["[a] negative answer to <u>either</u> question means the exception does not apply." (emphasis added)].

The court in *Banker's Hill* acknowledged the direction by this Court that "courts should afford great weight to the Guidelines," noting that this exception requires not only that environmental risks be present, but that those risks be the result of unusual circumstances not generally at issue with most projects within the scope of the exemption. (*Banker's Hill, supra,* 139 Cal.App.4th at 254, fn. 2, citing *Laurel Heights I, supra* 47 Cal.3d at 391, fn. 2.)

The court in *Fairbank, supra*, 75 Cal.App.4th at 1260-1261, held that "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)." The court explained that without the two separate inquires, no project that satisfies the criteria under the categorical exemption could ever be found to be exempt. (*Id.* at 1260.) In that case, the court held that a 5,855 square foot retail/office building was exempt under the then-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 that 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, supra,* 101 Cal.App.4th at 801-803, the court held that 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 that there were only the "normal and common considerations" that any city might face when operating its public parking facilities and deciding best how to allocate its limited parking facilities. (*Ibid.*)

Similarly, in *Association for Protection of Environmental Values in City of Ukiah* (1991) 2 Cal.App.4th 720, 734 ("*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, as a matter of law, the board's findings established not just a reasonable possibility that the project would have a significant adverse effect, but that the project was causing a significant adverse effect. (*Ibid.*) The court then 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 court rejected the petitioner's claim that the location of the project at two major thoroughfares and petitioner's view of the city's traffic modeling qualified as substantial evidence of an unusual circumstance within the meaning of Guidelines section 15300.2(c). (*Id.* at 1350-1352.) In reaching this conclusion, the court compared the circumstances of the project with the general class of exempt projects. Specifically, the exemption in that case was for "In-Fill Development Projects" under Guidelines section 15332, which required that the 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 expect for class 32 projects and precisely what the law encourages." (*Id.* at 1351.) Accordingly, the court held, the location was not an "unusual circumstance" that did not generally exist for other in-fill projects. (*Ibid.*)

Thus, there is a long line of established Court of Appeal decisions holding that "unusual circumstances" is a necessary separate inquiry under the exception in Guidelines section 15300.2(c). The leading CEQA practice guide sets forth the same rule. (1 Kostka and Zischke, <u>Practice Under the California Environmental Quality Act</u> (Cont.Ed.Bar March 2012) § 5.72, p. 248 [application of Guidelines § 15300.2(c) "involves two distinct inquiries," with the first being "whether the project presents unusual circumstances."].)

D. Under *Yamaha* Prong One, the "Unusual Circumstances" Requirement in Guidelines § 15300.2 Is Within the Scope of Authority Conferred by the Legislature in Section 21084

The fundamental question presented by the Court of Appeal's Opinion is whether "unusual circumstances" as a required separate inquiry is consistent with the statutory language in section 21084(a). Or, as stated in the words of the Court of Appeal, does the statutory language in section 21084(a) mean that "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"? (Opinion, 15.) This Court reviews the Guideline to determine whether it is within the scope of the authority conferred by the statute. (*Yamaha, supra,* 19 Cal.4th at 11 and fn. 4.)

1. The "Unusual Circumstances" Requirement in Guidelines § 15300.2 Is Consistent with the Plain Meaning of § 21084

The court's first task in interpreting a statute is to "examine the statutory language, giving it a plain and commonsense meaning." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) "If the language is clear, courts must generally follow its plain meaning, unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Ibid.*) If the plain meaning of the statute is unclear or ambiguous, "courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*)

Section 21084(a) provides:

> The guidelines prepared and adopted pursuant to Section 21083 shall include 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 this division. In adopting the guidelines, the Secretary of the Natural Resources Agency shall make a finding that the listed classes of projects referred to in this section do not have a significant effect on the environment.

It is clear from the plain meaning of this section that the Legislature is not directing each public agency reviewing a project to determine if that individual project may have a significant effect on the environment. Indeed, the Legislature imposes that requirement directly in section 21080, subsections (c) and (d), where it requires public agencies to determine whether projects "not otherwise exempt from this division" (§ 21080(c)) may have a significant effect on the environment. (See also §§ 21100(a); 21151(a); 21082.2(d) [all requiring agencies to prepare an EIR for projects that may have a significant effect on the environment].) Under section 21080, if there is no substantial evidence that the project "may have a significant effect on the environment" then the Legislature directs that the public agency shall adopt a negative declaration. (§ 21080(c)(1).) On the other hand, if there is substantial evidence that the project "may have a significant effect on the environment" then the Legislature directs the public agency to prepare an EIR. (§ 21080(d).)

Accordingly, reading section 21084(a) to mean that the only inquiry for application of a categorical exemption is whether the project "may have a significant effect on the environment" would render it meaningless. Such an interpretation would render section 21084(a) simply duplicative of the Legislature's directive in sections 21080(c) and (d), 21100(a), 21151(a), and 21082.2(d). This violates the well-established rule of statutory construction that "every part of a statute serves a purpose and that nothing is superfluous." (*In re H.E.* (2008) 169 Cal.App.4th 710, 721, citation omitted.)

Another well-established rule of statutory construction is that "[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117.) Here, it is clear from the language in section 21084(a) that the Legislature meant much more than directing each public agency to determine if every project "may have a significant effect on the environment". Rather, the statutory language clearly directs the Resources Agency to identify a class of projects and determine, through a specific finding, that these classes of projects do not have a significant effect on the environment. As set forth above, the Legislature established a process for the Resources Agency to accomplish this, including compliance with the procedures in the APA and notice and hearing requirements. (§ 21083(e).) Thus, the plain meaning of the statute is that the Legislature delegated to the Resources Agency the authority to identify and find that classes of projects do not have a significant effect on the environment and are therefore exempt from CEQA.

In doing so, the Legislature did not authorize every public agency in the State to second-guess the Resource Agency's determination on a case-by-case basis, by asking if each otherwise exempt project may have a significant effect on the environment. That assessment has already been made by the Resources Agency. For the 33 classes of projects identified by the Resources Agency, the Agency has determined that those classes of projects do not have a significant effect on the environment. Thus, in reviewing a project for a categorical exemption, the inquiry for the public agency and the reviewing court is no longer whether the project may have a significant effect on the environment. Rather, the only remaining inquiries are whether the project at issue falls within the scope of a categorical exemption, and, if so, whether under Guidelines section 15300.2, one of the exceptions to the categorical exemptions applies. For the unusual circumstances exception, that inquiry is whether there is something unusual or different about that project that takes it outside of its class of typically exempt projects.

Indeed, without the requirement of a two-step inquiry, it could be argued that the unusual circumstances exception itself violates the plain meaning of section 21084, because it requires review of individual projects for more than whether they fall within the exempt class. Under the plain language in section 21084, once the Resources Agency makes its finding that a class of projects does not have a significant effect on the environment, the *only* inquiry left for the public agency is whether the project fits within the class. Since the Legislature did not contemplate any exception or individual review of projects to second-guess the Resources Agency's decision, it is only the inclusion of the language "due to unusual circumstances" that renders the exception consistent with the statutory language.

This interpretation is supported by the "critical role" that determining whether a project may have a significant effect plays in the CEQA process. (Guidelines § 15064(a).) Whether a project may have a significant effect is the threshold jurisdictional question as to whether CEQA applies in the first instance. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 76.) However, "significant" is "not a term of precision but encompasses a range of meaning." (*Ibid.*) The Legislature has defined "significant effect on the environment" as "a substantial, or potentially substantial, adverse change in the environment" (§ 21068), and directs that the Guidelines shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a significant effect on the environment (§ 21083(b)).

The Guidelines conclude that "[a]n ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting." (Guidelines § 15064(b).) Thus, the determination of whether a project may have a significant effect on the environment "calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data." (*Ibid.*) Accordingly, the lead agency has the discretion to determine whether to classify an impact as significant, depending on the nature of the area affected. (*Ibid*; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 243.) "In exercising its discretion, a lead agency must necessarily make a policy decision in distinguishing between substantial and insubstantial adverse environmental impacts based, in part, on the setting." (*Ibid*, citation omitted. See also *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 375-376.)

Here, pursuant to the Legislature's directive, the Resources Agency determined that the physical changes to the environment typically associated with developing the classes of projects listed in the categorical exemptions do not constitute a significant effect on the environment. The Legislature clearly intended this to be a uniform determination that applies state-wide. Necessarily, then, the focus of the unusual circumstances exception is whether there is something *unusual* or *different* about the circumstances associated with the project that would take it outside of the normal physical changes associated with the typically exempt project. That is why case after case has employed the two-part test and held that the exception *only* applies "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 1207, emphasis added.)

Thus, the Court of Appeal's holding violates section 21084(a) because it reinstates the initial inquiry of whether a project "may have a significant effect on the environment" that the Legislature specifically delegated to the Resources Agency. By requiring the public agency to repeat this analysis for individual projects, and then allowing courts to judicially review this question, the Court of Appeal renders null and void the Legislature's language in section 21084(a).

The Court of Appeal's Opinion places every project at the third step of the three-step process described above, by going directly to the inquiry of whether each project "may have a significant effect on the environment."

The Opinion nullifies the Resources Agency's determination that 33 classes of projects do not have a significant effect on the environment and, by doing so, contravenes the plain meaning of section 21084(a). The "unusual circumstances" requirement in Guidelines section 15300.2(c) is clearly within the scope of the authority conferred by the Legislature in section 21084.

2. The "Unusual Circumstances" Requirement in Guidelines § 15300.2 Is Consistent with the Legislative History of § 21084

The plain meaning of section 21084(a) is clear, and therefore there is no need for the Court to resort to legislative history to construe the statute. If the Court were to do so, however, the legislative history unmistakably demonstrates that the "unusual circumstances" requirement in Guidelines section 15300.2(c) is consistent with section 21084(a). Notably, the Legislature's directive to the Resources Agency to adopt categorical exemptions was part of the legislatively-crafted compromise in response to this Court's decision in *Friends of Mammoth, supra,* 8 Cal.3d 247. Moreover, it was this Court, in the *Friends of Mammoth* decision, that first used the "unusual circumstances" language that is at issue in this case, and the Legislature adopted the statute with clear knowledge of this language.

Following its adoption in 1970, CEQA was initially understood to apply only to public projects actually carried out by a public agency. In *Friends of Mammoth, supra,* 8 Cal.3d at 259, this Court held that CEQA also applied to private projects for which a permit or other entitlement is approved by a public agency. In response to this decision, the Legislature enacted section 21065 to codify the decision and define "project" to include private activities that require an approval by a public agency.

This Court's decision in *Friends of Mammoth* caused confusion for public agencies and the construction industry. As set forth in a leading CEQA practice guide:

> In response to reports that previously approved projects were being stopped in progress, the legislature crafted a compromise within three months that was the first significant amendment of the statute. In tandem with enacting Pub Res C § 21065 to confirm the holding in *Friends of Mammoth*, the legislature enacted short statutes of limitation on CEQA-based challenges to project approvals and a 120-day moratorium on the application of CEQA to private projects.

(1 Kostka and Zischke, *supra*, § 1.22, p. 20.)

The legislative history of the statute confirms this history.[5] The Legislature added section 21084(a) to CEQA in Assembly Bill 889 ("AB 889") in 1972. (RJN, Exh. A, Legislative History Report and Analysis, p. 1.) AB 889 was first introduced in March 1972. (RJN, Exh. A.1.) This Court decided the *Friends of Mammoth* decision midway through the legislative consideration of AB 889, on September 21, 1972. (RJN, Exh. A, Legislative History Report and Analysis, p. 2.)

According to the legislative history, "[a]s a result and because there are no standards for [EIRs] for private projects, a great deal of confusion has arisen as to what projects can or cannot be authorized and built without an [EIR]." (RJN, Exh. A.5, p. 4 ["Comments" section of analysis prepared for Senate Committee on Governmental Organization]. See also Exh. A.5, p. SP-40 [claiming that as a result of the *Friends of Mammoth* decision,

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[5] The City and Kapors have provided this Court with the legislative history of section 21084, subdivision (a), prepared by Legislative Intent Services. (See City's and Kapors' Motion Requesting Judicial Notice ["RJN"], filed concurrently herewith, Exhibit A.)

"[m]any construction projects already under way have been stopped, new projects are frozen, [it] is creating unemployment, chaos in local government, and unfair hardship within the construction, banking and savings and loan industry"].)

The legislative history also describes the two divergent groups of commentators that developed in response to the decision, with one group supporting it and the other predicting "massive statewide economic disruptions within weeks." (RJN, Exh. A.5, p. SP-47-SP-51.) According to the history, "the Mammoth question has become a question of the larger future of the Environmental Quality Act and the Legislature's total regard for environmental planning as a prerequisite to public and private development actions." (*Id.* at SP-50.)

On November 13, 1972, AB 889 was substantially rewritten with the *Friends of Mammoth* decision in mind. (*Ibid*; Exh. A.1, November 13, 1972 version of AB 889.) The analysis prepared for the Senate Committee on Governmental Organization provides that "[a]mendments dated on November 13, 1972 are intended by the author to clarify the questions which have arisen as a result of the Supreme Court's decision." (RJN, Exh. A.5, p. 4.)

This history is relevant here, because the Legislature's directive to the Resources Agency to designate categorical exemptions was part of the amendments on November 13, 1972 to clarify the statute in response to the *Friends of Mammoth* decision. (RJN, Exh. A, Legislative History Report and Analysis, p. 3; Exh. A.1e.).

Significantly, it was this Court that first used the "unusual circumstances" language that is at issue in this case. Specifically, this Court stated that:

> [C]ommon 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. Such projects, accordingly, may be approved exactly as before the enactment of the [C]EQA. (8 Cal.3d at 272, emphasis added.)

The Legislature then added the language of section 21084 as part of the amendments on November 13, 1972 to clarify the statute in response to the *Friends of Mammoth* decision. (RJN, Exh. A, Legislative History Report and Analysis, p. 3; Exh. 1.) The proposed language was amended once, and then enacted into law. (RJN, Exh. A, Legislative History Report and Analysis, p. 3-4; Exh. A.1.) The Senate Committee analysis of AB 889 provided that section 21084:

> Requires the above guidelines to include a list, to be determined by the Secretary of the Resources Agency, of categorical "classes" of projects to be exempted which the Secretary determines do not have a significant effect on the environment either cumulatively or individually and with provisions for adding or deleting from such list the same as may be requested by public agencies. (RJN, Exh. A.5, p. 2.)

The history further shows that the Sierra Club opposed the new language in section 21084, asserting that the "legislature should make the ultimate decision as to which classes of projects, if any, should be exempted from the provisions of the Act." (RJN, Exh. A.6, document SP-21; Legislative History Report and Analysis, p. 4.) On the other hand, the League of California Cities objected that there "should be greater flexibility for local government to adopt categorical exemptions consistent with the guidelines but necessary to meet local circumstances." (RJN, Exh. A.10, p. A-66.) The League further argued that "cities and counties should be given express authority to make such categorical exemptions" and that the Supreme Court in *Friends of Mammoth* "makes it clear that such a list of exemptions may be adopted." (*Ibid.*) The Legislature did not follow either suggested approach, but instead directed the Resources Agency to designate the classes of projects that would be exempt from CEQA.

When statutory language includes words or terms that courts have previously construed, the presumption is that the Legislature intended the statute to have the same meaning given by the courts. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1046.) Here, it is clear that the Legislature amended the statute and added section 21084 with clear knowledge and in direct response to this Court's decision in *Friends of Mammoth.* Accordingly, as the *Friends of Mammoth* decision identified the role of categorical exemptions from CEQA "in the absence of unusual circumstances," it can be presumed that the Legislature intended that classes of minor projects be exempt from CEQA, in the absence of unusual circumstances.

Finally, it is significant that section 21084 was part of a compromise adopted by the Legislature, to codify the *Friends of Mammoth* holding, while at the same time imposing measures such as short statute of limitations to alleviate concerns regarding CEQA unduly interfering with economic development in the State. Identifying "classes" of projects that are exempt was part of that compromise.

If the Legislature simply wanted to confirm the general rule that only projects that may have a significant effect on the environment are subject to CEQA, it accomplished that in section 21080. However, the Legislature wanted to establish uniform classes of projects throughout the State that could easily be identified as being exempt from CEQA. The obvious purpose of this was to allow minor projects to proceed without undue delay and expense such as those specifically called out in the *Friends of Mammoth* decision including "construction . . . of an individual dwelling". (8 Cal.3d at 272.) Allowing an exception to these exempt classes only when there is something unusual about the individual project is consistent with this intent.

Thus, the legislative history of section 21084(a) supports the conclusion that the "unusual circumstances" requirement in Guidelines section 15300.2(c) is consistent with the plain meaning and intent of section 21084(a), and is within the scope of the authority conferred by that statute.

3. The Legislature's Subsequent Amendment of § 21084 Confirms that the "Unusual Circumstances" Requirement Is Consistent with the Legislative Intent in § 21084

A well-established rule of statutory construction is that if, in amending a statute, the Legislature makes no substantial modification of a preexisting and long-standing administrative practice or regulation, there is a strong indication that the administrative practice or regulation was consistent with the Legislature's intent. (*Horn v. Swoap* (1974) 41 Cal.App.3d 375, 382.)

Here, the Legislature amended section 21084 in 2011, to make minor modifications to subsection (a) and add the following new subsection (b):

> A project's greenhouse gas emissions shall not, in and of themselves, be deemed to cause an exemption adopted pursuant to subdivision (a) to be inapplicable if the project complies with all applicable regulations or requirements adopted to implement statewide, regional, or local plans consistent with Section 15183.5 of Title 14 of the California Code of Regulations.

(RJN, Exh. B.1.)

There is no question that the "unusual circumstances" language in Guidelines section 15300.2(c) was preexisting and longstanding, as was the long line of cases holding that "unusual circumstances" was a separate requirement under the exception. In amending section 21084, the Legislature made no attempt to change the "unusual circumstances" requirement. The legislative history demonstrates that the Legislature was well aware of the existing law that "CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA guidelines." (RJN, Exh. B.3, p. LIS-3.)

Moreover, the nature of the amendment in subsection (b) was to prohibit a project's greenhouse gas emissions from being used as an exception to a categorical exemption. Thus, the Legislature clearly knew of the exceptions in the Guidelines. This legislative amendment is a strong indication that the "unusual circumstances" requirement in Guidelines section 15300.2(c) was consistent with the Legislature's intent.

E. Nothing in this Court's Decision in *Wildlife Alive* or Any Other Authority Supports the Court of Appeal's Opinion

1. The Court of Appeal's Reliance on *Wildlife Alive* Is Misplaced

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 for a project 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 declined to read this Court's statement in *Wildlife Alive* so broadly. In *CBE, supra,* 103 Cal.App.4th at 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's reliance on *Wildlife Alive, supra,* 18 Cal.3d 190, is misplaced. This Court decided *Wildlife Alive* in 1976, four years after it decided *Friends of Mammoth* and the Legislature adopted section 21084. The Court in *Wildlife Alive* was addressing the first question analyzed in applying a categorical exemption—whether the project at issue fell within the scope of a categorical exemption. The Court was not addressing the unusual circumstances language it previously set forth in its *Friends of Mammoth* decision.

In *Wildlife Alive*, the issue was whether the setting of hunting and fishing seasons by a commission of the Department of Fish and Game was categorically exempt from CEQA under then-Guideline section 15107, which exempted actions taken by regulatory agencies to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involved procedures for protection of the environment. (*Id.* at 204-205.) Thus, the question was whether the project at issue fit within the scope of the exemption.

The Court first 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, "it is doubtful that such a categorical exemption is authorized under the statute." (*Ibid.*) The Court explained:

> We have held that no regulation is valid if its issuance exceeds the scope of the enabling statute. (See *Gov. Code, § 11374*; *Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal.2d 753, 757 [151 P.2d 133, 155 A.L.R. 405].*) The

> secretary is empowered to exempt only those activities which do not have a significant effect on the environment. (*Pub. Resources Code, § 21084.*) 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 205-206.)

Thus, the issue before the Court was not whether a given project was properly exempt under former section 15107, but the *scope* of that exemption, and its discussion related to the authority of the Secretary to adopt categorical exemptions in the first instance. This is made clear by the Court's conclusion that:

> [W]e have consistently held that CEQA must be interpreted so as to afford the "fullest possible protection" to the environment. (*Bozung v. Local Agency Formation Com., supra, 13 Cal.3d 263, 274*; *Friends of Mammoth v. Board of Supervisors, supra, 8 Cal.3d 247, 259.*) We will not abandon that principle by unreasonably expanding statutory and regulatory language to imply an exemption for the commission when it enacts hunting regulations. We cannot conclude that the Legislature so intended. (*Id.* at 206.)

Clearly, the Resources Agency's authority to identify classes of projects that are exempt from CEQA is limited by section 21084 to classes of projects that do not have a significant effect on the environment. If the Resources Agency adopts a categorical exemption for a *class* of projects that has the potential for significant environmental effects, that adoption would exceed the Agency's statutory authority. For example, if the Agency found that permits approving construction of all large shopping malls or football stadiums were categorically exempt from CEQA, such a finding would exceed the Agency's statutory authority. Such a determination could be challenged in court and set aside.

It follows then, that the scope of the exemptions must be construed in light of the statutory authority and the principle of interpretation that CEQA affords the fullest protection to the environment within the statutory language. This rule of law was established by this Court in *Wildlife Alive*, and is frequently applied by courts in determining whether certain types of activities fall within a particular categorical exemption. (See *Azusa, supra*, 52 Cal.App.4th at 1192-1193 [applying these principles in deciding whether landfill was existing "facility" within scope of categorical exemption].) Indeed, because many categorical exemptions only include a general description of the category or activity covered by the exemption, agencies and courts frequently have to determine whether similar activities also fall within the exemption. (See 1 Kostka and Zischke, *supra*, § 5.3, p. 195.)

However, once it is determined that a project properly falls within the scope of a categorical exemption, as was the case here, different considerations apply to the exception. The purpose of categorical exemptions is to provide a bright-line rule so that routine and minor projects that do not typically have a significant effect on the environment do not have to go through the time and expense of environmental analysis. That purpose is completely undermined if every routine and minor project that falls within the scope of an exemption cannot rely on the exemption, but instead must go through the analysis of whether it may have a significant effect on the environment in the first instance and is therefore subject to CEQA.

In the words of this Court in *Friends of Mammoth*, "common sense tells us that the majority of private projects for which a government permit or similar entitlement is necessary are minor in scope . . . and hence, <u>in the absence of unusual circumstances</u>, have little or no effect on the public environment." (8 Cal.3d at 272, emphasis added.) In using this Court's phrase "unusual circumstances", the Resources Agency crafted an exception where circumstances that are *unusual* with respect to exempt categories would present the reasonable possibility of a significant effect.

Not only is this language entirely consistent with section 21084, any other rule would "defeat the very idea underlying CEQA section 21084 of *classes* or *categories* of projects that do not have a significant environmental effect." (*CBE, supra*, 103 Cal.App.4th at 127, italics original.)

Thus, this Court's decision in *Wildlife Alive* does not support reading "unusual circumstances" out of the Guideline.

2. No Other Authority Supports the Court of Appeal's Opinion

The Court of Appeal also misconstrued the *CBE* case (Opinion, 14-15), which involved a challenge to certain revisions to the Guidelines, including section 15332 which created a categorical exemption for urban in-fill projects. In order to fall within this exemption, the agency has to determine that approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality. The petitioner argued that by listing these types of impacts, the exemption "necessarily foreclose[d] the consideration of other effects such as aesthetics, cultural resources, water supply, and health and safety." (103 Cal.App.4th 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)]. <u>These other environmental effects that CBE mentions</u> 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) <u>those circumstances create an environmental risk that does not exist for the general class of exempt projects</u>." (*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 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.

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 unusual circumstances 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. (*Ibid.*)

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, 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.)

3. Appellants' Authorities Do Not Support the Court of Appeal's Opinion

Appellants' additional arguments in support of reading "unusual circumstances" out of the Guideline are also wrong.

Appellants cite to this Court's decision in *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, and specifically the statement in that case that a "categorical exemption represents a determination by [an agency] that a particular project does not have a significant effect on the environment. (§ 21084.) It follows that an activity that may have a significant effect on the environment cannot be categorically exempt." (*Id.* at 124.)

However, as in *Wildlife Alive*, the issue in that case was whether the project at issue fell within the scope of a categorical exemption, not whether the unusual circumstances exception applied. The project in that case was a decision by the Fish & Game Commission to remove the Mojave ground squirrel from the threatened species list. The Court rejected the argument that there was an implied exemption from CEQA for this delisting action, and further held that the delisting action could not be fairly included within a class of projects determined by the Resources Agency to be exempt. (*Id.* at 124-125.) Consistent with *Wildlife Alive*, the Court held that "[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language." (*Id.* at 125.)

Thus, the issue in that case was the scope of the categorical exemption itself, and whether the project fit within that exemption. The case does not address the situation where a project fits within the scope of the categorical exemption and the issue is whether the exception applies. "[L]anguage contained in a judicial opinion is to be understood in light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered." (*Dyer v. Superior Court* (1997) 56 Cal.App.4th 61, 66, citing *People v. Banks* (1993) 6 Cal.4th 926, 945.)

Appellants also requested judicial notice in the Court of Appeal of the legislative history materials for Guidelines section 15300.2(c). Appellants argue that the title of the exception is somehow relevant because it is titled "Significant Effect" rather than "Unusual Circumstances." Not so. "[T]he law is clear that the title of legislation may not be used to control or enlarge the positive provisions of the statute." (*City of Berkeley v. Cukierman* (1993) 14 Cal.App.4th 1331, 1340.)

Appellants also cite to the "Note" following the Guideline, which states:

> Authority cited: Section 21083, Public Resources Code; Reference: Sections 21084 and 21085, Public Resources Code; Wildlife Alive v. Chickering, 18 Cal.3d 190.

(Appellants' RJN in Court of Appeal, p. 11.)

However, Appellants ignore the larger statutory scheme and history of the exemptions discussed above, including this Court's express use of the "unusual circumstances" language in *Friends of Mammoth*. Moreover, the *Wildlife Alive* decision is simply cited as a reference, and does not deal directly with the "unusual circumstances" requirement.

Appellants also claimed that no case has upheld a categorical exemption where evidence has been presented of a potentially significant environmental effect. However, up until this case, all of the cases applying the unusual circumstances exception applied the two-prong inquiry discussed above, and many did not need to go beyond the first prong, i.e., that the petitioners failed to show unusual circumstances. If the Court of Appeal here had correctly applied the law, the court would not have needed to go beyond this step either. Moreover, as discussed below, there was no credible evidence of a potentially significant environmental effect presented in this case in any event.

F. Under *Yamaha* Prong Two, the "Unusual Circumstances" Requirement in Guidelines § 15300.2 Is Reasonably Necessary to Effectuate the Purpose of Section 21084

Under the second prong of the standard for review of administrative regulations, the "unusual circumstances" requirement is reasonably necessary to effectuate the purpose of section 21084. (*Yamaha, supra,* 19 Cal.4th at 11.) Indeed, it is essential to effectuate section 21084. The Court reviews this question under a deferential arbitrary or capricious standard. (*Ibid.*) For the reasons set forth above, the "unusual circumstances" language easily meets this deferential standard.

As discussed above, the Legislature clearly directed that the Resources Agency determine that classes of projects did not have a significant effect on the environment and were exempt from CEQA. Nothing in the statutory language indicated that the Legislature intended that there be exceptions to this rule for individual projects within those classes that may have a significant effect on the environment. Moreover, the Resources Agency had the benefit of this Court's decision in *Friends of Mammoth*, where the Court stated the common sense principle that certain classes of projects are minor in scope (*i.e.*, "construction … of an individual dwelling") and "in the absence of unusual circumstances", have little or no effect on the environment. (8 Cal.3d at 272.)

Thus, it was reasonably necessary to effectuate the purpose of section 21084 to craft an exception that would not simply re-weigh the determination of the Resources Agency, but, rather, would ask whether there was anything unusual or different about the project that would result in a significant effect on the environment. The apparent purpose of the "unusual circumstances" requirement was 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, supra*, 52 Cal.App.4th at 1206.)

This requirement is also consistent with the purpose of CEQA in general. This Court has consistently stated that the "foremost principle" in interpreting CEQA is that "the Legislature intended [CEQA] to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth, supra*, 8 Cal.3d at 259; *CBE, supra*, 103 Cal.App.4th at 110.) However, it was in that same decision that this Court affirmed the common sense principle that certain classes of projects are minor in scope and "in the absence of unusual circumstances", have little or no effect on the environment. (8 Cal.3d at 272.) This Court also recently held that "[c]ommon sense in the CEQA domain is not restricted to the [common sense exemption]. It is an important consideration at all levels of CEQA review." (*Save the Plastic Bag Coalition, supra*, 52 Cal.4th at 175.)

Here, it is consistent with the purpose of CEQA for the Resources Agency to make a determination that classes of minor projects do not have a significant effect on the environment and are therefore exempt from CEQA, and to only allow an exception to this where there is something unusual or different about the project at issue from the remainder of the class. Moreover, common sense dictates that categorical exemptions for minor projects should be easily distinguished from non-exempt projects.

For these reasons, the Resources Agency's careful construction of the exception in Guidelines section 15300.2(c) is not arbitrary or capricious, and should be upheld.

G. The "Unusual Circumstances" Requirement in Guidelines § 15300.2 Is Consistent with CEQA's Structure for Exemptions

The separate "unusual circumstances" requirement is further supported by the structure of CEQA with respect to the "common-sense" exemption.

The "common sense" exemption applies "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment" (CEQA Guidelines, § 15061, subd. (b)(3))." (*Muzzy Ranch, supra*, 41 Cal.4th at 380.) The purpose of the common sense exemption is "[t]o guard against the possibility that some obviously exempt type of project, which was not listed in compiling the categorical exemptions, might be required needlessly to comply with the requirements of CEQA." (*Myers v. Board of Supervisors* (1976) 58 Cal.App.3d 413, 425.) The basis for the exemption is that, by its terms, CEQA only applies to projects that have the potential for having a significant effect on the environment. (*No Oil, supra*, 13 Cal.3d at 76.)

The problem with the Opinion here is that it collapses the legal framework for analyzing categorical exemptions and the exceptions into a one-question inquiry that is duplicative of the framework for analyzing the "common sense" exemption. The result is that the Opinion does away with categorical exemptions altogether and replaces them with the "common sense" exemption.

In applying the unusual circumstances exception, according to the Court of Appeal, the *only* meaningful question is whether there is substantial evidence that the proposed activity may have a significant 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. However, this interpretation of the unusual circumstances exception by the Court of Appeal is almost identical to the language of the common sense 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 common sense exemption rely on the same statement in *Wildlife Alive* that the Court of Appeal did here in construing the unusual circumstances exception (Opinion, 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 common sense exception under CEQA.

This improperly eviscerates the Resources Agency's determination of classes of projects that are categorically exempt. By removing the inquiry into whether alleged impacts are due to "unusual circumstances", the Court has made the "significant effects" inquiry the only relevant question and it is effectively the same question that is asked under the common sense exemption. However, the categorical exemptions have to mean something different than the common sense exemption. 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.*)
>
> . . .
>
> 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.

H. The "Unusual Circumstances" Requirement in Guidelines § 15300.2 Is Consistent with Public Policy

Finally, it cannot be overlooked that 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.

Indeed, the danger of this happening is represented by this case. In the trial court, Appellants argued that any one of the following opinions would be enough alleged "evidence" to trigger the exception and require an EIR for this single-family home:

> Resident Dawn Hawk found the project to be a breathtaking and radical departure from the style of the neighborhood.
>
> Berkeley resident Elaine Chan is of the opinion that this large, office-like structure will change the character of the neighborhood in a negative way.
>
> Rose Street resident Rick Carr explained that a project of this size with the proposed amount of parking will in fact invite commercial level use in terms of traffic, not consistent with the current zoning.

(AA 54-55, 58.)

Thus, Appellants' own arguments in the trial court demonstrate why the effect of the Court of Appeal's interpretation of the exception is so far-reaching. Under Appellants' view and the Opinion, any one of the above statements would be enough alleged "evidence" to defeat the use of a categorical exemption for a single-family home, regardless of whether it was a completely typical home with no unusual circumstances associated with its development, and regardless of the fact that these statements do not even constitute substantial evidence.

Moreover, the implications of the Opinion go far beyond single-family homes. The unusual circumstances exception applies to all 33 classes of categorically exempt projects in CEQA Guidelines §§ 15300-15333. Accordingly, when faced with any alleged "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 than 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 unusual circumstances exception to swallow all the categorical exemptions. The Legislature clearly did not intend such a result. This is particularly true in light of the Legislature's 2011 amendments to CEQA discussed above, which were to address harm caused by the severe economic recession in the State.

II. THE PROPER STANDARD OF REVIEW APPLICABLE TO THE UNUSUAL CIRCUMSTANCES EXCEPTION IS THE SUBSTANTIAL EVIDENCE STANDARD

A. Overview of Standards of Review

CEQA sets forth the standard of review for reviewing an agency's decision. (§§ 21168; 21168.5.) This Court has held that the standard of review is essentially the same whether the action is one of traditional mandamus governed by section 21168.5 or one of administrative mandamus governed by section 21168. (*Laurel Heights I, supra,* 47 Cal.3d at p. 392, fn. 5; *Laurel Heights II, supra,* 6 Cal.4th at 1133 fn. 17.) Under either statute, the questions are whether the agency has not proceeded in a manner required by law or if the decision is not supported by substantial evidence. (*Vineyard, supra,* 40 Cal.4th at 426.)

Under the substantial evidence test, "the reviewing court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable, for, on factual questions, our task is not to weigh conflicting evidence and determine who has the better argument." (*Id.* at 435, citation omitted.) The court does not review the correctness of an agency's ultimate environmental conclusions, but only whether its findings and decisions are supported by substantial evidence in the record. (*Citizens for Goleta Valley, supra,* 52 Cal.3d at 564; *Laurel Heights I, supra*, 47 Cal.3d at 392.)

This substantial evidence test is the same as applied by an appellate court in reviewing the factual findings of a lower tribunal. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) All conflicts in the evidence must be resolved in favor of the agency's decision. (*Ibid.*) The reviewing court does not reweigh the evidence considered by the agency, and all reasonable doubts must be resolved in favor of the agency's decision. (*Laurel Heights I, supra*, 47 Cal.3d at 393, 407-408.)

Under the substantial evidence prong, courts have applied the "fair argument" standard to the question of whether to prepare an EIR in the first instance. (*No Oil, Inc., supra,* 13 Cal.3d at 75, 82; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002.) One of the bases for this rule is that there is a strong presumption in CEQA in favor of requiring preparation of an EIR in the first instance.

Under the fair argument test, if substantial evidence supports a "fair argument" that a project may have a significant effect on the environment, the public agency must prepare an EIR even if there is also other substantial evidence showing that the project will not have a significant effect. (*No Oil, Inc., supra*, 13 Cal.3d at 75.) The fair argument standard applies both to the public agency's decision whether to prepare an EIR or a negative declaration, and to judicial review of an agency's decision to adopt a negative declaration. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1399.)

B. The Long-Standing Split in Court of Appeal Decisions on the Applicable Standard of Review for the Unusual Circumstances 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 unusual circumstances exception. (Opinion, 16.) However, there is a long-standing split in authority over the correct standard of review for this inquiry. As recently as 2010, one Court of Appeal 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* (2010) 186 Cal.App.4th 830, 855-856.) This judicial split is acknowledged in CEQA practice guides. (See 1 Kostka and Zischke, *supra,* § 5.127, pp. 298-301.)

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].)

C. The Standard of Review Should Be the Substantial Evidence Standard

For the reasons set forth below, this Court should hold that the proper standard of review for the unusual circumstances exception is the substantial evidence standard, not the fair argument standard.

1. The Substantial Evidence Standard Is Consistent with the Concept of and Purpose for Categorical Exemptions

As this Court has explained, the fair argument test was derived from the statutory language in section 21151 and, for that reason, should only be applied to the decision whether to prepare an original EIR or a negative declaration:

> *[S]ection 21151* commands that an EIR must be prepared whenever a project "*may* have a significant effect on the environment." (Italics added.) In *No Oil, Inc. v. City of Los Angeles, supra, 13 Cal.3d at pages 68, 75, 83-85*, we interpreted *section 21151* to require preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. (See also *Friends of "B" Street v. City of Hayward (1980) 106 Cal.App.3d 988, 1002 [165 Cal.Rptr. 514]*

> [applying "fair argument" test to affirm judgment invalidating decision not to prepare an EIR].) Our decision, however, expressly acknowledged that *judicial review* of agency decisions under CEQA is governed by *sections 21168* (administrative mandamus) and *21168.5* (traditional mandamus) and, of course, did not purport to alter the standard of review set forth in those statutes. Rather, the "fair argument" test was derived from an interpretation of the language of, and policies underlying, *section 21151* itself. For this reason, the "fair argument" test has been applied *only* to the decision whether to prepare an original EIR or a negative declaration. (E.g., *Benton v. Board of Supervisors (1991) 226 Cal.App.3d 1467, 1481-1483 [277 Cal.Rptr. 481]* [rejecting use of test to review decision of whether second negative declaration proper for modified project]; *Bowman v. City of Petaluma (1986) 185 Cal.App.3d 1065, 1071-1072 [230 Cal.Rptr. 413]* [rejecting use of test to review decision under *section 21166*].)

(*Laurel Heights II, supra,* 6 Cal.4th at 1134-1135 [holding that substantial evidence standard, not fair argument, applied to agency's decision not to recirculate EIR under section 21092.1].)

Pursuant to this Court's reasoning, the "fair argument" test should be limited to the decision of whether to prepare an EIR in the first instance.

In applying the fair argument test to the unusual circumstances exception, the court in *Banker's Hill, supra*, 139 Cal.App.4th at 548-549, reasoned that the focus in section 21151(a) on whether a project "may have a significant effect on the environment" was similar to the language in Guidelines section 15300.2(c) of whether there is a "reasonable possibility that the activity will have a significant effect on the environment." However, there is a significant difference between the decision to prepare an EIR in the first instance and the application of an exception to a categorical exemption—the Legislature directed the Resources Agency to designate classes of projects that did not have a significant effect on the environment and are exempt from CEQA.

Thus, an activity that falls within a categorically exempt class is in a substantially different position that an activity that has had no prior CEQA review or similar determination. Accordingly, it makes sense for courts to apply the more deferential standard of review to the exception.

Moreover, the court in *Banker's Hill* left out the phrase "due to unusual circumstances" from its analysis. The question posed by Guidelines section 15300.2(c) is whether there is a "reasonable possibility that the activity will have a significant effect on the environment *due to unusual circumstances*." (Emphasis added.) This is clearly a different inquiry than that posed by section 21151, i.e., whether a project "may have a significant effect on the environment."

In addition, it is well established that courts review an agency's determination that a project is categorically exempt from CEQA under the substantial evidence standard.[6] (*Fairbank, supra,* 75 Cal.App.4th at 1251.) 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. Applying

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[6] Courts have also applied the substantial evidence standard to another exception in Guidelines 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. Moreover, there is also confusion over what standard of review applies to the exceptions in Guidelines section 15300.2(a) and (b) for significant cumulative impacts and impacts on a uniquely sensitive environment. (See 1 Kostka & Zischke, *supra*, section 5.127, p. 298.) Thus, the Court's decision in this case will likely inform the standard of review for these other exceptions.

these two different standards is inconsistent with and undermines the Legislature's directive that there be classes of exempt projects.

Making the process for applying a categorical exemption too complicated and cumbersome would defeat the Legislature's intent in having categorical exemptions in the first place. The complexity, and, indeed, almost absurdity, of applying two different standards to the same project, is demonstrated by the *Banker's Hill* case.

In that case, the court reviewed the city's determination that the urban in-fill categorical exemption applied under the substantial evidence standard. One of the determinations under review was the city's determination that the project would not result in any significant effects relating to traffic. (139 Cal.App.4th at 273.) The court first found that there was substantial evidence in the record supporting the city's determination. (*Id.* at 274-276.) The court then "consciously appl[ied] a different standard," *i.e.*, the fair argument standard, to the exact same question under the unusual circumstances exception, that is, whether the project would result in any significant effects relating to traffic. (*Id.* at 280-281.)

At this point, any benefit the project may have gained from falling within categorical exemption is lost by the complexity of the process to make that determination. Again, the standard is applied both by the public agency in determining whether the exemption applies, and by courts in reviewing that determination. "Common sense . . . . is an important consideration at all levels of CEQA review." (*Save the Plastic Bag Coalition, supra*, 52 Cal.4th at 175.) The Court should employ that common sense here. CEQA compliance is resource-intensive, and public agencies today are facing tight budgets and limited resources. Application of the substantial evidence standard to the exception would ensure that CEQA functions smoothly and does not become so burdensome in its application as to unduly hinder development of thousands of minor and routine projects.

2. The Substantial Evidence Standard Is Consistent with this Court's Treatment of the Common-Sense Exemption

There is another reason the Court should apply the substantial evidence standard to the exception. The 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, *supra*, § 5.129, pp. 302.1 [Under *Muzzy Ranch*, substantial evidence standard applies to review agency's application of common sense exemption].)[7]

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[7] In their Answer to the Petition for Review, Appellants argued that this Court modified its decision in *Muzzy Ranch* "following a request by the undersigned counsel and other non-parties regarding its references to the substantial evidence standard inapplicable to categorical exemptions."

The Court should apply a consistent standard to both situations. Otherwise, the Court of Appeal's interpretation of the unusual circumstances exception, combined with its application of the fair argument standard, creates an inconsistency for agencies and applicants applying exemptions. For example, in this case, because the Court of Appeal found substantial evidence of a fair argument of potentially significant geotechnical 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 effect, the City could also have found the Project exempt under the common sense 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 common sense 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

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(Answer, p. 11.) Appellants appear to suggest that this Court backed away from the substantial evidence standard in *Muzzy Ranch*. However, although there is some uncertainty following *Muzzy Ranch*, that decision has been interpreted as applying the substantial evidence standard of review to the common sense exemption. (1 Kostka and Zischke, *supra*, § 5.129, pp. 302.1.)

minor, exempt 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.

III. UNDER THE CORRECT INTERPRETATION OF GUIDELINES § 15300.2, THE COURT SHOULD UPHOLD THE CITY'S DETERMINATION THAT THE PROJECT IS CATEGORICALLY EXEMPT FROM CEQA

A. It Is Undisputed that Substantial Evidence Supports the City's Determination that the Categorical Exemptions Apply to the Project

There is no dispute in this case that the Project falls within two categorical exemptions. The City determined that the Project was categorically exempt from CEQA pursuant to Guidelines Sections 15303(a) ("New Construction") and 15332 ("In-Fill Development Projects"). There is substantial evidence in the record supporting the City's determination that the Project is categorically exempt from CEQA pursuant to both these exemptions. Specifically, the staff reports and staff testimony in the record constitute substantial evidence supporting the City's determination on these points. (1 AR 30-39, 147-152; 2 AR 463-468.) As discussed above, the Court reviews the City's determination that the project is categorically exempt from CEQA under the substantial evidence standard. (*Fairbank, supra,* 75 Cal.App.4th at 1251.) Appellants concede that there is substantial evidence in the record supporting the City's findings that the Project fits within these categorical exemptions.

The burden then shifts to Appellants to show that an exception to the categorical exemption applies.

B. The Appellate Court Erred in Finding that Appellants Met Their Burden of Showing Unusual Circumstances

Appellants did not meet their burden of demonstrating that unusual circumstances exist in this case, and the Appellate Court erred in finding unusual circumstances. Even though the Court of Appeal concluded that a finding of unusual circumstances was unnecessary, it then purported to find unusual circumstances present based solely on the size of the proposed home. (Opinion, 17-18.) This conclusion is wrong.

To meet their burden under the exception, Appellants must show that the circumstances of the Project (i) differ from the general circumstances of the projects covered by Guidelines sections 15303(a) for New Construction and 15332 for In-Fill Development Projects, and (ii) those circumstances create an environmental risk that does not exist for the general class of these exempt projects. (*Wollmer, supra*, 193 Cal.App.4th at 1350.) Accordingly, in assessing the exception, it is necessary to understand what the classes of projects are that are covered by the exemptions relied upon by the City.

1. The Proposed Home Is Not Unusual Compared to Typical New Construction Projects Under Guidelines § 15303

Appellants argued and the Appellate Court found that the Kapors' home is "unusual" because of the size of the home. However, the issue is whether the circumstances of the Project differs from that of the typical project under the class of exempt projects.

The categorical exemption in Guidelines section 15303(a) applies to construction and location of new, small facilities or structures, including one single-family residence. This categorical exemption also applies, in urbanized areas, to up to three single-family residences and apartments, duplexes, and similar structures for not more than six dwelling units on any one legal parcel. (Guidelines § 15303(a) and (b).) The exemption also applies to, in urbanized areas, up to four commercial buildings, not exceeding 10,000 square feet in floor area. (Guidelines § 15303(c).)

Here, the proposed home is well within the range of characteristics for the class of exempt projects under this exemption. The exemption on its face applies to one single-family residence, and, indeed, up to three single-family residences in urbanized areas like Berkeley. Thus, one single-family residence is the least intensive structure encompassed in the exemption. Notably, there is no square foot limitation on single family residences or multi-family residences. (*Id.* at (a), (b).) Thus, the proposed home is well within the range of characteristics for the class of exempt projects under this exemption. (See *Ukiah, supra*, 2 Cal.App.4th 720 [construction of single-family residence within Guidelines § 15303 exemption; unusual circumstances exception did not apply because height, privacy and soils issues were "normal and common considerations" in the construction of a single-family residence]; *Hines v. California Coastal Commission, supra*, 186 Cal.App.4th 830 [upholding application of § 15303 exemption to single-family residence].)

2. The Court of Appeal Erred in Ignoring the City's Legislatively-Adopted Development Standards Regarding the Allowable Size of a Home on this Property

The Court of Appeal erred in concluding "as a matter of law" that the home is "unusual" because the circumstances of the home differ from the circumstances of an "otherwise typically exempt single-family residence" because of its size. (Opinion, 17-18.) The fundamental problem with the Court's decision is that it replaced the City's determination that the size of the home was normal and typical under its development standards with its own arbitrary opinion that the home was "too big".

The Court of Appeal's focus on size in the abstract is meaningless. Whether the size of a home is "unusual" depends on the circumstances of the proposal. Obviously, a house on a small lot that needs a variance from local zoning presents different issues than the same-size house on a large lot that complies with local zoning. A local agency's zoning and General Plan standards define what is an appropriate size of development for each property.

A general plan is the "constitution for future development located at the top of the hierarchy of local government law regulating land use." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773, citation omitted.) The State Planning and Zoning Law, Government Code section 65000 *et seq*. authorizes the legislative body of cities to adopt zoning ordinances that regulate the use of buildings, structures and lands as between various purposes; the location, height, bulk, number of stories, and size of buildings and structures; and the size and use of lots. (Govt. Code § 65850(a), (c).) A governing body's conclusion that a particular project is consistent with its general plan and zoning "carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion." (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816-817, citation omitted.) Moreover, "[r]eview is highly deferential to the local agency, recognizing that the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity." (*Ibid*, citation omitted.)

Here, the size of the Kapors' proposed new home is not unusual for the area or exceptional for the property under the City's regulations. (1 AR 127.) Notably, the home will cover only 16 percent of the property, leaving 84 percent of the property in open space. (1 AR 127.) The City's Code allows 40 percent lot coverage, and thus would actually allow a much larger structure for a lot of this size, or even several structures. (1 AR 127.) City staff provided evidence in the hearings on the Project that, regarding size, and using floor area to lot area (FAR) as a guide, 16 parcels within 300 feet of the Project site are developed with a FAR that exceeds the Project. (2 AR 468.)

Moreover, even if size in the abstract was relevant, the evidence demonstrates that the size of the single-family home is consistent with other homes in the area. The proposed single-family dwelling would be approximately 6,478 square feet on two floors plus an open-air lower level, with a 3,394 square foot, 10 car garage beneath the main floor level of the house. (1 AR 36.) There are more than 20 houses in the neighborhood, five of them immediately surrounding the property, that range in size from 4,000 to 6,000 square feet. (4 AR 1041.) During Project review, City staff also showed that 68 single-family dwellings in the City have more than 6,000 square feet of floor area and, of these, nine are larger than 9,000 square feet, and five are larger than 10,000 square feet.[8] (1 AR 157.) Moreover, the Kapors got the idea for the 10-car garage from the immediate neighbors, who have 8 off-street parking spaces at their house. (1 AR 84, 126.)

Based on these undisputed facts, City staff concluded that the "proposed dwelling is by no means the largest in the City nor among the most intensely developed parcels citywide or within 300-feet of the proposed dwelling." (1 AR 157.) Thus, the evidence in the record abundantly supports the conclusion that there is nothing unusual about the circumstances surrounding this Project that differs from other single-family homes under the City's regulations.

The Court of Appeal essentially imposed an arbitrary square-foot limitation on what is a typical or atypical house. There must be some

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[8] The Court of Appeal questioned the City's evidence of other similar sized homes in the City, because the City used the word "dwelling" in its brief instead of "single-family dwellings." (Opinion, 17.) The record is clear that the City was referring to single-family dwellings. (1 AR 157.)

consideration of what is typical for the particular environment in which the home is to be located, such as the size and location of the property. Under the Court of Appeal's ruling, any house in the State approaching 10,000 square feet (including the garage) would automatically be "unusual" for purposes of the exception. However, pursuant to the State Planning and Zoning Law, the local agency's development standards already regulate what is typical and normal size for development in its jurisdiction. Here, the City already set development standards determining what is normal and typical for single-family homes in Berkeley. Because the Kapors' proposed home meets all of those standards, it cannot be considered unusual.

The Court of Appeal's decision fails to give deference to the City's finding that the proposed home complies with the local general plan and zoning requirements, and is therefore not unusual. This improperly supplants the deferential abuse of discretion standard with the court's independent judgment. Not only is this contrary to the authorities cited above, it sets a dangerous precedent. If courts could simply rule by judicial fiat that a particular project is unusual, without reference to what is normal and typical under the agency's development standards, then agencies will have no guidance or certainty in applying the unusual circumstances exception. A project that is normal and typical in all respects under the agency's development standards runs the risk of a court arbitrarily deciding that some aspect of it makes it "unusual". Indeed, that is exactly what happened here.

3. The Proposed Home Is Not Unusual Compared to Typical In-Fill Projects Under Guidelines § 15332

As discussed above, the City concluded that the Project was categorically exempt under two separate exemptions. The Court of Appeal only conducted its analysis as an exception to the New Construction exemption. It failed to even look at whether the exception took the Project out of the In-fill exemption. A project only needs to fall within one categorical exemption to be exempt from CEQA. Thus, Appellants must also show that the circumstances of the Project differ from the general circumstances of the projects covered by the In-Fill exemption.

The categorical exemption in Guidelines section 15332 applies to projects characterized as in-fill development meeting the following conditions:

> (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
>
> (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
>
> (c) The project site has no value as habitat for endangered, rare or threatened species.
>
> (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
>
> (e) The site can be adequately served by all required utilities and public services.

Appellants concede there is substantial evidence in the record supporting the City's findings on all of these points.

Notably, the In-Fill exemption does not address the size of the building falling within the exemption. It does provide that the project be consistent with the applicable general plan and zoning designations. (Guidelines § 15332(a).) Here, the Kapors' home conforms to all of the applicable development standards and designations. (1 AR 6.) In setting these standards, the City has defined what is typical for a single-family home in Berkeley's urban environment. Since the Kapors' proposed home meets these standards, it is difficult to see how its size could give rise to any unusual circumstances.

Moreover, cases applying the In-fill exemption have held that the size of a project is not an unusual circumstance taking a project out of the In-fill exemption. Indeed, this same Court of Appeal recently held that a 5-story building with 98 residential units, 7,700 square feet of commercial space and 114 parking spaces fell within the In-fill categorical exemption, and that there was nothing about that project that differed from the typically-exempt In-fill project. (*Wollmer, supra*, 193 Cal.App.4th 1329, 1351.) Similarly, in *Banker's Hill, supra*, 139 Cal.App.4th 249, the court upheld application of this exemption to a 14-unit, 14-story high-rise condominium project, with underground parking. It further found that there was no reasonable possibility of a significant effect on the environment due to any unusual circumstances surrounding the project. (*Id.* at 278.)

Clearly, then, the size of one single-family home does not present anything unusual compared to the typically-exempt In-fill project. Moreover, the size of the Project does not create an environmental risk that does not exist for the general class of In-fill projects. Accordingly, there are no "unusual circumstances" based on the size of the home.

C. The Appellate Court Erred in Finding a Reasonable Possibility of a Significant Environmental Impact Resulting From Unusual Circumstances

The Court of Appeal also erred in finding a reasonable possibility of a significant impact resulting from the allegedly unusual circumstance of the size of the home. The sole basis of the Court's decision was alleged geotechnical impacts.

The Opinion found that letters submitted by Appellants' expert Lawrence Karp "amounted to substantial evidence of a fair argument that the proposed construction would result in significant environmental impacts." (Opinion, 18.) 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, 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. (Opinion, 5.) However, Mr. Kropp did not differ with Mr. Karp as to whether the "side-hill fill" would be subject to this "seismic lurching"—there is no "disagreement among experts" on this issue. Rather, he explained that Mr. Karp had misread the project plans, and that in fact, *no "side-hill fill" was proposed.* As a consequence, none would be constructed, so there would be nothing to "seismically lurch". Thus, 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 unusual circumstances exception. (Opinion, 18.)

If the Court applies the substantial evidence standard, it should uphold the City's determination because there is substantial evidence in the record supporting the City's conclusion that the Project would not have any geotechnical impacts. Even if the Court applies the fair argument test, however, it should uphold the City's determination because Appellants did not meet their burden of presenting substantial evidence of a fair argument that the Project may have significant geotechnical effects on the environment. Moreover, the Court of Appeal made several incorrect holdings as a matter of law on this issue.

1. There Is No Substantial Evidence Raising a Fair Argument of Any Significant Geotechnical Impacts

In the CEQA context, substantial evidence is "fact, a reasonable assumption predicated upon fact, or expert opinion *supported by fact.*" (§

21080(e)(1), emphasis added; 21082.2(c).) Substantial evidence does not include "argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous . . ." (§ 21080(e)(2); 21082.2(c).) "Mere argument, speculation, and unsubstantiated opinion, even expert opinion, is not substantial evidence for a fair argument." (*Pocket Protectors v. City Of Sacramento* (2004) 124 Cal.App.4th 903, 928-929. See also § 21082.2(c); Guidelines § 15384(a); *Santa Monica, supra,* 101 Cal.App.4th at 797; *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026, 1059.)

In this case, Appellants provided the City with an opinion by an expert regarding alleged geological impacts of the Project resulting from allegedly massive excavation and topographical changes to the property. Specifically, Lawrence Karp submitted an opinion that the Project would have a significant environmental impact because of fill, landslide, truck traffic and slope issues. (2 AR 448, 449.) However, Mr. Karp's entire opinion was based on the premise that the Project would not be built as proposed, but, rather, would require additional construction activities, including the placement of "side-hill fills." (*Ibid.*)

In response, the applicant submitted two expert opinions stating that the project could be constructed as proposed and that the massive excavation feared by Mr. Karp may have been a result of his misreading of the plans. (4 AR 961, 963-966, 1064-1067.) There is a detailed summary of the evidence in the record explaining how, contrary to Mr. Karp's contention, the Project would not require "side-hill fills":

> Contrary to Mr. Karp's Opinion, there will be no "Side Hill" Fill
>
> What Mr. Karp calls a large, side-hill fill is in fact "the current ground surface where the east wing of the new building will be located." (Kropp letter, April 21, 2010, [4 AR 1061]) There is "no evidence ...in the plans" of what

Karp calls "fills are placed directly on very steep existing slopes". (Letter Jim Toby, [4 AR 1065]) An accurate reading [of] the submitted plans shows that the 'the only fill placed by the downhill portion of the home will be backfill for backyard retaining walls***The current ground surface, along with the vegetation, will be maintained on the downhill portion of the lot." [4 AR 1061]

Most of Mr. Karp's letter relates to unsubstantiated concerns related to the non-existent fact of 'a large side-hill fill':

- Removal of vegetation on the lower slopes,
- Massive grading on a steep slope, including deep keyways and benches into the hill,
- Construction of a new, very steep fill slope,'
- Extensive trucking to stockpile excavated materials to re-use in the fill slope,
- Future seismic lurching on the steep side-hill fill.

"[Since] there will be no steep, side-hill fill constructed, none of these assumptions, concerns or 'facts' relied on for those opinions apply to the proposed project." [4 AR 1061-1062]

(4 AR 934-935, emphasis original, citing 4 AR 1061-1062, 1064-1067. See also 2 AR 537-538.)

Thus the fundamental question posed by Appellants' geotechnical argument is: does the project approved by the City involve "side-hill fill"?

2. The City's Determination Regarding the Scope of the Proposed Project Per the Approved Plans is Not Subject to Expert Dispute

The fundamental purpose of the land use permit process is to enable a public agency to determine what may and what may not be built, and how. It follows that the City is entitled to determine for itself the scope of a project that it approves. In this case, the application proposed and the City approved[9] a project that it determined would involve excavation of approximately 1,500 cubic yards of soil, of which approximately 800 cubic yards would be retained on site, on a slope of approximately 50%. (1 AR 34, 63.) The geotechnical impact of *that* proposal is potentially subject to dispute among experts. What is *not* subject to dispute is the proposal itself.

Appellants argue that a purported disagreement among experts as to the geotechnical effects of the project constitutes substantial evidence supporting a fair argument that the project has the potential for a significant adverse impact on the environment. But they ignore the fact that the project *as approved* will, by all accounts, *not* have the impacts they allege. To the contrary, the impacts their expert foresees could result only from a differently designed project. But that differently designed project is not what the City approved.

When Appellants argued to the City Council that staff did "not mention the impact of the massive excavation and topographical changes to the property", City planning staff stated unequivocally that "[t]his appeal point is factually incorrect" and reiterated that *as approved*, the excavation would involve approximately 1500 cubic yards, of which approximately 800 cubic yards would be retained on site. (1 AR 149.)

In reviewing a City's interpretation of its own laws, contemporaneous construction given a statute by the officials charged with administering and following it, including their construction of the authority vested in them by it, is entitled to great weight.[10] One reason for this rule is

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[9] Representations in the application defined the proposal before the City and became conditions of project approval. (1 AR 8.)

[10] *Harrott v. County of Kings* (2001) 25 Cal. 4th 1138, 1154-55; *Reno v. Baird* (1998) 18 Cal.4th 640, 660; *Highland Ranch v. Agricultural Labor*

that agencies will often have "a comparative interpretive advantage over the courts." (*Yamaha, supra,* 19 Cal.4th at 12, quoting Cal. Law Revision Com., Tent. Recommendation, Judicial Review of Agency Action (Aug. 1995) p. 11 (Tentative Recommendation).) In considering the deference to be accorded an agency interpretation, courts are "more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another." (*Ibid.*) Courts will also consider "indications of careful consideration by senior agency officials." (*Id.* at 13.)

The same rule applies to agencies' interpretations of their own permits, and for the same reasons. "Deference is particularly appropriate where, as here, the agency is interpreting its own language, drafted to suit a particular circumstance, rather than language drafted by the legislature." (*Bello v. ABA Energy* (2004) 121 Cal.App.4th 301, 318 [county interpretation of its own encroachment permit entitled to deference].)

For example, in *Stone v. Board of Supervisors* (1988) 205 Cal.App.3d 927, the Tuolumne County Board of Supervisors considered whether a mining company was in compliance with a use permit condition that required it to have a $25 million liability insurance policy. The company had only a $12.5 million policy, plus a $3 million pollution liability policy, and had agreed to fund an environmental monitor to prevent pollution. Despite the contrary opinion of county counsel, the Board

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Relations Bd. (1981) 29 Cal.3d 848, 859; *Whitcomb Hotel, Inc., supra,* 24 Cal.2d 753, 756-757; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 142; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021.

determined that the company was in compliance. In doing so, it relied on the facts that: (1) an environmental monitor could substitute for insurance coverage by preventing pollution from occurring; (2) the parties were likely aware when the permit originally issued that environmental liability would probably be excluded from any insurance policy; (3) the cost of the additional $12.5 million in coverage was very high; and (4) $12.5 million in coverage was generally regarded as adequate in the industry. (*Id.* at 933-937.) The court upheld this decision, using a "reasonableness" standard of review, under which the plaintiff had the burden of proving the nonexistence of the facts on which the decision was based. (*Id.* at 933-934.)

Similarly, in *North Gualala Water Company v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, the court gave "considerable deference" and "great weight" to the Board's interpretation of the term "bypass" in a permit condition, noting that the condition was "awkwardly worded" and could no longer be interpreted literally due to changed circumstances. (*Id.* at 1607 & 1581, fn. 3.)

So, to answer the question posed by Appellants' geotechnical argument, no, the project approved by the City does *not* involve "side-hill fill".

3. CEQA's Requirement to Prepare an EIR Cannot Be Triggered by Alleged Impacts of Project Elements Which Are Neither Proposed Nor Approved

Under CEQA, a "project" refers "to the activity which is being approved . . ." (Guidelines § 15378(c).) 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. v. County of Marin* (1991) 233 Cal.App.3d 130, the court 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." (*Id.* at 162.) The court held that "the focus must be on the use, as approved, and not the feared or anticipated abuse." (*Id.* at 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, 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, 19.) This glossed over the threshold question noted above of whether the effect in question was actually an effect of the project or was in contrast the effect of a consultant's mistaken reading of the plans. In fact, there was no disagreement over the significance of an effect *of the project* or the proposed construction of the project: Mr. Karp never said that the project as described by the application and as approved—i.e., without the "side-hill fill"—would have a significant impact on the environment. Rather, his letters were limited to presenting his misconception as to *what the project was* in the first instance.

Under the Appellate Court's holding, agencies must accept as conclusive evidence from project opponents purporting to show that the project will not be constructed in the manner proposed for approval, but rather will be constructed in a manner contrary to their entitlements and that raises the specter of potentially significant impacts. According to the Opinion, 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, may trigger the requirement to prepare an EIR.

Here, the Project does not include a "side-hill fill." The Kapors may only construct the Project as shown on the plans approved by the City. The City approved the Project by adopting Resolution No. 64,860-N.S. (1 AR 3-29.) Resolution No. 64,860-N.S. affirmatively adopted the project plans attached as Exhibit B to the Resolution and made construction in compliance with those plans a condition of approval. (1 AR 3.) The approved Project plans attached as Exhibit B to the Resolution do not include the "side-hill fill" that Mr. Karp opined was part of the project. Rather, the approved project plans contained in Exhibit B to Resolution No. 64,860-N.S. contain the *only* approved grading plan for the Project. (1 AR 13-29.) And that approved grading plan only allows 1500 cubic yards of cut and 800 cubic yards of fill. (1 AR 28.) The approved grading plan is the *only* approved document that allows cut and fill for the Project. As stated above, Condition Number 5 of the approved Use Permit provides that all approved plans and representations submitted by the applicant are deemed conditions of approval of the Use Permit. (1 AR 8.)

It is neither Appellants' nor a court's role to decide whether or not the approval should be different than what is specified on the approved plans. The purpose of CEQA is to review the environmental impacts *of the project*, which is defined as the activity that is approved by the public agency. If the Opinion is allowed to stand, no project subject to the fair argument standard could ever withstand judicial review. Such a result would impose significant delay and expense on what was intended to be exempt projects and is, thus, in contravention of CEQA.

Here, Appellants' expert asserted that the "project grading ... will ... be much more extensive *than represented to the City*." (Emphasis added) (2 AR 532.) Thus, he *acknowledged* that the City-approved plans *did not represent* the "extensive grading" he feared would actually occur. As a result, Appellants' expert *admits* that the "extensive grading" could only actually take place pursuant to *a modified permit* (which would be subject to further review under CEQA). Consequently, there is absolutely no disagreement among experts regarding what the plans depict, what the City authorized and, thus, the impacts of the Project. Rather, Appellants' expert only offered testimony regarding what he feared might happen *in contravention* of the City's approval. This cannot, and does not, form the basis of a significant environmental impact under CEQA.

As a result, the evidence submitted by Appellants is not substantial evidence because it is not based on facts, is clearly erroneous, and is misleading. Even an expert cannot manufacture a significant impact by ignoring the reality of the project.[11] "Unsubstantiated opinions, concerns, and suspicions about a project, though sincere and deeply felt, do not rise to the level of substantial evidence." (*Leonoff v. Monterey County Bd. of*

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[11] The fact that a Ph.D. in mathematics may testify that 2+2=5 is not substantial evidence for that proposition.

Supervisors (1990) 222 Cal.App.3d 1337, 1352 [erroneous information that is corrected by other evidence in record may be disregarded].)

4. Even Assuming a Reasonable Possibility of Significant Geotechnical Impacts, Appellants Failed to Show that Such Impacts Were Due to Unusual Circumstances

Another problem with the Court of Appeal's decision is that, under the unusual circumstances exception, it is not enough for Appellants to show a reasonable possibility of a significant impact. Rather, Appellants must show that such an impact is "due to unusual circumstances." (Guidelines § 15300.2.) No such showing was made in this case, and the Court of Appeal failed to address this issue.

The only purportedly unusual circumstance here was the size of the proposed home. However, there is no evidence that the alleged geotechnical impacts discussed above are due to the size of the home in a way that differs from the typical new construction or in-fill project. Accordingly, the Court of Appeal decision is wrong on this ground as well.

5. The Court of Appeal Erred By Holding that the Unusual Circumstances Exception Was Triggered By Allegations of an Impact of the Environment on the Project

The Court of Appeal further erred when it held that the geotechnical comments of Mr. Karp required the City to apply the unusual circumstances exception. The Court held that Mr. Karp's assertion that "seismic lurching of oversteepened side-hill fills" would occur was substantial evidence upon which it could be fairly argued that the Project "may have [a] significant environmental impact," and that therefore categorical exemptions were inapplicable. (Opinion, 18.) This conclusion is wrong, as a matter of law.

Any "seismic lurching" that might conceivably occur would be an effect of Berkeley's existing earthquake-prone environment on an alleged "side-hill fill" element of the Project. Case law makes clear that CEQA does not require agencies to analyze the significance of impacts of the existing environment on a proposed project, and furthermore establishes that evidence of such impacts is not capable of raising even a "reasonable possibility" that the Project would have a "significant effect on the environment" that requires application of the unusual circumstances exception.

Under CEQA, a "significant effect on the environment" is a substantial, or potentially substantial, adverse change in the environment. (§ 21068.) Under the Guidelines, this means "an 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.)

Numerous cases have made clear, however, that potentially adverse effects of the existing environment *on a project* cannot constitute significant environmental effects that require CEQA review. In *Baird v. Court of Appeal* (1995) 32 Cal.App.4th 1464, 1468, the court held that evidence of existing soil contamination, at the site of proposed construction of a drug and alcohol treatment facility, could not support a fair argument of a potentially significant environmental impact. The court held that such evidence at most indicated that preexisting site conditions might have an adverse effect *on the proposed facility*. (*Ibid.*) Such effects, the court held, are "beyond the scope of CEQA, since "[t]he purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the environment." (*Ibid.*)

A similar result was reached in *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604 ("*SOCWA*"). In that case, the court held that evidence that a proposed residential development would experience odor impacts from a nearby sewage treatment plant was incapable of supporting a fair argument of a potentially significant environmental impact. "SOCWA's objection," the court wrote, "essentially turns CEQA upside down. Instead of using the act to defend the existing environment from adverse changes caused by a proposed project, SOCWA wants to use the act to defend the proposed project . . . from a purportedly adverse existing environment . . . ." (*Id.* at 1615.)

And most recently, in *Ballona Wetlands*, the court held that CEQA did not require an EIR for construction of a mixed-use development to evaluate potential impacts of coastal inundation on the project site due to global warming. (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 473-474, citing *SOCWA* and *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889, 905 [EIR was not required to examine purported impacts of emissions from nearby freeway on staff and students of proposed school].)

These cases make clear that evidence suggesting that existing environmental hazards may adversely affect a project is legally incapable of supporting a fair argument of a potentially significant environmental impact of that project.

Consistent with these cases, at least one court has *specifically* held that allegations of the effect of existing seismic risks on a proposed project are not relevant when considering whether the unusual circumstances exception applies. That case concerned a challenge to an agency's determination that two school closures were exempt from CEQA. (*San Lorenzo Community Advocates for Responsible Education v. San Lorenzo Valley Unified Sch. Dist.* (2006) 139 Cal.App.4th 1356, 1389-1390.) Among the grounds for challenge was a claim that the agency should have found the unusual circumstances exception applied, since the closures would transfer students to another school that was alleged to be in a high seismic-risk zone. (*Id.* at 1389-1393.) The court held that, since the seismic risks already existed, evidence that the project would expose students to that risk was not evidence of an "environmental impact" capable of serving as the basis for the unusual circumstances exception. (*Id.* at 1392.)

Therefore, the evidence upon which the Court of Appeal in this case relied to hold that there was a reasonable possibility that the Project may result in a significant impact, and therefore that a categorical exemption could not be used, is inadequate for that purpose as a matter of law. The Court noted that Mr. Karp opined that the Project could 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, 4-5, 18.) Mr. Karp further opined that the alleged side-hill fills would be subject to "seismic lurching" due to the location of the Project site "alongside the major trace of the Hayward Fault." (*Id.* at 4.)

Mr. Karp's evidence, therefore, supported at most an argument that the allegedly required "side-hill fill" component of the Project would be adversely affected by seismic events due to an existing fault line. The record contains no evidence that alleged "seismic lurching" would cause damage to the environment other than to the imagined "side-hill fill" element of the Project itself. This is exactly the sort of evidence of a potential adverse *effect of the environment on the Project* that courts have uniformly held to be legally incapable of establishing a potentially significant environmental impact that requires analysis under CEQA. Accordingly, the Appellate Court erred, as a matter of law, in finding that the unusual circumstances exception applied.

IV. THE COURT OF APPEAL ERRED IN ORDERING THE CITY TO PREPARE AN EIR

Finally, the Court of Appeal erred in ordering the City to prepare an EIR after setting aside the City's categorical exemption determination, rather than allowing the City to exercise its discretion as to whether alternative procedures under CEQA would be more appropriate. (Opinion, 20.)

CEQA affirmatively prohibits a court from directing an agency to exercise its discretion in any particular way. Section 21168.9, subdivision (c), provides in relevant part: "Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way." This provision affords lead agencies a substantial amount of discretion throughout the multi-step CEQA process to determine what level of environmental review is appropriate.

Here, because the City initially found the Project to be exempt, it did not have occasion to consider what type of environmental document would be appropriate, such as another exemption, a mitigated negative declaration, or EIR. As a consequence, the appropriate remedy should have been to remand the matter to the City to exercise its discretion to determine what CEQA review is appropriate. The Court of Appeal's command that the City prepare an EIR deprived the City of its discretion and violated the plain language of section 21168.9.

The court's order also runs afoul of an unbroken line of authority holding that where there is more than one way for an agency to comply with CEQA pursuant to a court's decision finding non-compliance, then the appropriate remedy is an order setting aside the agency's decision and remanding the matter to the agency for further consideration. In *Gentry v. City of Murrieta, supra,* 36 Cal.App.4th at 1424, for example, the court vacated a city's negative declaration, but held that:

> Nothing in this opinion should be taken to mean that the City must prepare an EIR for the Project. When the City takes up the matter again, it may consider: whether ... an SEIR is required; whether the Project is partially exempt under section 21083.3; whether to use tiering; and whether to propose a new mitigated negative declaration.

Other cases recognize that CEQA firmly prohibits courts from ordering an agency to exercise its discretion in any particular way when an agency retains the discretion to choose among alternatives to satisfy its obligations under CEQA. (See *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 369 [reversing a writ that infringed on the agency's discretion]; *California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. District* (2009) 178 Cal.App.4th 1225, 1248 [ruling setting aside finding of categorical exemption did not preclude agency from finding another exemption applied]; *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1232 [disposition "should not be construed to require City to exercise its lawful discretion [under CEQA] in a particular way."]; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1266 [courts cannot direct agency to exercise its discretion in particular way]; *San Bernardino Valley Audubon Soc'y v. Metro. Water Dist.* (2001) 89 Cal.App.4th 1097, 1103 [same]; *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 453 [same]; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1112 [same].)

The rationale for this rule protecting an agency's discretion under these circumstances is a function of the constitutional separation of powers. (See *Western States Petroleum Association, supra,* 9 Cal.4th at 572.) These principles explain why the "corrective power" of the courts under CEQA is "distinctly limited – and essentially negative." (*Schellinger Bros. v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1266.) CEQA thus recognizes that "a public agency may be directed to comply with CEQA, or to exercise its discretion on a particular subject, but a court will not order that discretion to be exercised in a particular fashion, or to produce a particular result." (*Ibid*, citation omitted.)

For all of these reasons, this Court should vacate the Court of Appeal's ruling on remedies.

CONCLUSION

The City and the Kapors respectfully request that the Court reverse the Court of Appeal judgment.

DATED: July 19, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

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WORD CERTIFICATION

I hereby certify that, as counted by my MS Word word-processing system, this brief contains 23,385 words exclusive of the tables, signature block, the quotation of issues pursuant to California Rules of Court, Rule 8.520(b)(2) and this certification.

Executed this 19 day of July, 2012 at Oakland, California.

Amrit S. Kulkarni

PRACTICE UNDER THE
California Environmental Quality Act

SECOND EDITION

1

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of Mammoth v Board of Supervisors, supra, was probably even more important than the result in the case. The court held (8 C3d at 259) that

> the Legislature intended [CEQA] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.

Citing precedents interpreting the National Environmental Policy Act of 1969 (NEPA) (42 USC §§4321–4370h), the court carved out an active role for the courts in enforcing CEQA. 8 C3d at 261.

§1.22 2. Legislative Response to *Friends of Mammoth* Decision

When *Friends of Mammoth v Board of Supervisors* (1972) 8 C3d 247, 104 CR 761, was decided in September 1972, agencies and the construction industry were confused because they had formerly assumed that CEQA did not apply to private projects. In response to reports that previously approved projects were being stopped in progress, the legislature crafted a compromise within three months that was the first significant amendment of the statute. In tandem with enacting Pub Res C §21065 to confirm the holding in *Friends of Mammoth,* the legislature enacted short statutes of limitation on CEQA-based challenges to project approvals and a 120-day moratorium on the application of CEQA to private projects. See Comment, *After* Mammoth: Friends of Mammoth *and the Amended California Environmental Quality Act,* 3 Ecology LQ 349 (1973).

§1.23 3. Judicial Interpretation Following *Friends of Mammoth* Decision

Following the approach in *Friends of Mammoth v Board of Supervisors* (1972) 8 C3d 247, 104 CR 761, later California Supreme Court cases defined fundamental principles governing the CEQA process. In *No Oil, Inc. v City of Los Angeles* (1974) 13 C3d 68, 85, 118 CR 34, the supreme court stated that an EIR should be prepared whenever an agency action "arguably" might have a significant adverse environmental impact. The court generally rejected agency attempts to characterize government actions as "nonprojects" outside CEQA's reach. See, *e.g., Fullerton Joint Union High Sch.*

to as categorical exemptions (14 Cal Code Regs §§15061(b)(2), 15354). The categorical exemptions are found in the CEQA Guidelines (14 Cal Code Regs §§15300-15329). See §§5.68-5.109.

Finally, even if a project does not fit within a statutory or a categorical exemption, it can be exempt from CEQA under the general rule that "CEQA applies only to projects which have the potential for causing a significant effect on the environment." 14 Cal Code Regs §15061(b)(3). This rule is known as the "common sense" exemption, and was adopted as part of the Guidelines to avoid the possibility that projects that obviously should be exempt might needlessly be required to comply with CEQA's review requirements. See §§5.110-5.112.

A critical difference between statutory and categorical exemptions is that, unlike statutory exemptions, categorical exemptions are subject to exceptions that defeat the use of the exemption. *Great Oaks Water Co. v Santa Clara Valley Water Dist.* (2009) 170 CA4th 956, 966 n8, 88 CR3d 506; *Communities for a Better Env't v California Resources Agency* (2002) 103 CA4th 98, 128, 126 CR2d 441. Thus, statutory exemptions are absolute; the exemption applies if the project fits within its terms. In contrast, when considering use of a categorical exemption, a lead agency considers both whether the activity fits within the terms of the exemption and whether one of the exceptions might apply to defeat use of the exemption. On exceptions to the categorical exemptions, see §§5.70-5.71.

Another difference between statutory and categorical exemptions reflects the nature of categorical exemptions as "classes of projects" (or categories of projects) that the Secretary of the Natural Resources Agency has found do not have a significant effect. Many categorical exemptions include a general description of the category or activity that is excluded. Unlike statutory exemptions, however, many of the categorical exemptions set forth examples of the types of activities covered by the exemption. These examples are typically listed as nonexclusive, and, based on that characterization, it is appropriate for lead agencies to apply the exemption to activities that are similar to the listed examples. *California Farm Bureau Fed'n v California Wildlife Conserv. Bd.* (2006) 143 CA4th 173, 189, 49 CR3d 169 (rejecting use of exemption because the activity was not similar to the listed examples); *Centinela Hosp. Ass'n v City of Inglewood* (1990) 225 CA3d 1586, 1600, 275 CR 901 (upholding use of exemption because the activity was similar to the listed examples).

(1976) 18 C3d 190, 204, 132 CR 377. The *Wildlife* court held that, because the Secretary of the Natural Resources Agency may exempt only activities that do not have a significant effect on the environment (Pub Res C §21084), a reasonable possibility that an activity will have a significant effect on the environment precludes a categorical exemption. See also *International Longshoremen's & Warehousemen's Union, Local 35 v Board of Supervisors* (1981) 116 CA3d 265, 275, 171 CR 875; *Dehne v County of Santa Clara* (1981) 115 CA3d 827, 842, 171 CR 753. As the court explained in *Azusa Land Reclamation Co. v Main San Gabriel Basin Watermaster* (1997) 52 CA4th 1165, 61 CR2d 447, this exception apparently was adopted to allow agencies to determine which specific activities, within a class of activities that do not normally threaten the environment, should be excluded from the exemption and given further environmental evaluation. The unusual-circumstances exception applies when the circumstances of a project differ from the circumstances of projects covered by a particular categorical exemption, and those circumstances create an environmental risk that is inconsistent with the exemption. See also *Fairbank v City of Mill Valley* (1999) 75 CA4th 1243, 1260, 89 CR2d 233 (exception can be triggered by showing that some feature of project distinguishes it from ordinary use of categorically exempt project).

Under 14 Cal Code Regs §15300.2(c), an activity that would otherwise be subject to a categorical exemption is excluded from the exemption if "there is a *reasonable possibility* that the activity will have a significant effect on the environment *due to unusual circumstances.*" (Emphasis added.) See *City of Pasadena v State* (1993) 14 CA4th 810, 824, 17 CR2d 766. Application of this test involves two distinct inquiries: (1) whether the project presents unusual circumstances and (2) whether there is a reasonable possibility of a significant environmental impact resulting from those unusual circumstances. *Banker's Hill, Hillcrest, Park W. Community Preservation Group v City of San Diego* (2006) 139 CA4th 249, 261, 42 CR3d 537. See also *Turlock Irrig. Dist. v Zanker* (2006) 140 CA4th 1047, 1066, 45 CR3d 167. "A negative answer to either question means the exception does not apply." *Santa Monica Chamber of Commerce v City of Santa Monica* (2002) 101 CA4th 786, 800, 124 CR2d 731. For example, in *Wollmer v City of Berkeley* (2011) 193 CA4th 1329, 1351, 122 CR3d 781, the court rejected claims that the location of an infill project at a crowded intersection as a matter of law, the project was "similar to" the nonexclusive examples listed in the CEQA Guidelines. *Centinela Hosp. Ass'n v City of Inglewood* (1990) 225 CA3d 1586, 1600, 275 CR 901; see also *California Farm Bureau Fed'n v California Wildlife Conserv. Bd.* (2006) 143 CA4th 173, 189, 49 CR3d 169 (rejecting use of an exemption because the activity was not "similar in kind" to the listed examples). In contrast, in a decision reflecting the fact that the project would have major, significant environmental impacts, *Azusa Land Reclamation Co. v Main San Gabriel Basin Watermaster* (1997) 52 CA4th 1165, 61 CR2d 447, the court rejected a categorical exemption determination, interpreting narrowly the terms used in the exemption on which the agency relied.

The same test applies to a decision that a project does not fall within one of the exemption categories. The agency's decision will be upheld if it is supported by substantial evidence in the record. *Meridian Ocean Sys. v State Lands Comm'n* (1990) 222 CA3d 153, 169, 271 CR 445.

E. Standard of Review for Exceptions to Categorical Exemptions

§5.127 1. Significant Effects Exception and Other General Exceptions

It is unclear what standard applies to judicial review of questions of fact when it is asserted that an activity that would otherwise be categorically exempt is subject to one of the three general exceptions to the categorical exemptions. These three general exceptions (significant impacts due to unusual circumstances, significant cumulative impacts, and impacts on a uniquely sensitive environment) are set forth in 14 Cal Code Regs §15300.2(a)–(c). See §§5.71–5.74.

One view is that the standard substantial evidence test does not apply and that any substantial evidence in the record that significant impacts *might* result triggers the significant effects exception to the categorical exemptions even though there is substantial evidence to the contrary. This is the same standard used to review adoption of a negative declaration in a case alleging that the project may have significant effects on the environment. See §6.37.

In *Dunn-Edwards Corp. v Bay Area Air Quality Mgmt. Dist.* (1992) 9 CA4th 644, 11 CR2d 850, the court found that possible adverse impacts precluded a categorical exemption and recited the "fair argument" test that applies to negative declarations: An EIR must be prepared whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impacts, even though the agency is presented with substantial evidence to the contrary. On the fair argument test, see §6.37. The court in *Association for Protection of Envt'l Values v City of Ukiah* (1991) 2 CA4th 720, 3 CR2d 488, also relied on negative declaration cases in upholding the agency's decision to find a project exempt only after reviewing the record to determine whether any substantial evidence supported a fair argument that one of the exceptions to the categorical exemptions applied.

In *Azusa Land Reclamation Co. v Main San Gabriel Basin Watermaster* (1997) 52 CA4th 1165, 61 CR2d 447, the court applied the fair argument test to a determination that the exception in 14 Cal Code Regs §15300.2(c) precludes an exemption if there is a "reasonable possibility" the project will result in a significant effect on the environment due to unusual circumstances. The court reasoned that because the significant effects exception is triggered by the *possibility* of a significant effect, the exception should apply when there is substantial evidence in the record showing that a significant effect *might* occur. The court in *Banker's Hill, Hillcrest, Park W. Community Preservation Group v City of San Diego* (2006) 139 CA4th 249, 261, 42 CR3d 537, came to the same conclusion based on the exception's use of the term "reasonable possibility" as well as the policy that only activities that do not have a significant effect on the environment can be declared categorically exempt from CEQA. 139 CA4th at 266. With respect to the question whether an impact would result from an "unusual circumstance," however, the court noted that the agency's factual determinations regarding the relevant circumstances would be reviewed under the substantial evidence test, while the determination whether those circumstances are unusual would normally involve a question of law. 139 CA4th at 262 n11. See also *Wollmer v City of Berkeley* (2011) 193 CA4th 1329, 122 CR3d 781 (citing *Banker's Hill* and applying fair argument standard, but finding no evidence to support claimed fair argument); *City of Pasadena v State* (1993) 14 CA4th 810, 17 CR2d 766 (finding that exception did not apply but apparently assuming that substantial evidence of significant impacts would be sufficient to trigger the exception precluding an exemption).

The alternative view is that the questions of fact relating to the application of the significant effects exception must be reviewed under the traditional substantial evidence test. For example, the court in *Dehne v County of Santa Clara* (1981) 115 CA3d 827, 171 CR 753, held that a reviewing court is limited to the substantial evidence test and may not independently weigh the evidence to determine whether a significant impact on the environment might result from a project subject to a categorical exemption. In *Centinela Hosp. Ass'n v City of Inglewood* (1990) 225 CA3d 1586, 1601, 275 CR 901, the court affirmed an exemption, holding that substantial evidence supported the city's implied determination that the proposed facility would not cause any significant environmental effects and rejecting the arguments about conflicting evidence as a request that the court "adopt an improper standard of review and independently reweigh the evidence."

In *Association for Protection of Envt'l Values v City of Ukiah* (1991) 2 CA4th 720, 728 n7, 3 CR2d 488, the court noted that a "reasonable case" may be made that the "fair argument" test is not appropriate for a decision that a project is categorically exempt and that the traditional substantial evidence test applies. Similarly, in *Fairbank v City of Mill Valley* (1999) 75 CA4th 1243, 1259, 89 CR2d 233, the court recognized the split in authority but found it unnecessary to decide which standard of review applied because there had been no showing of unusual circumstances triggering the exception.

In three other decisions, the courts recognized the split in authority, but found it unnecessary to decide which standard applied because there was no substantial evidence in the record that would support the claimed exception to the exemption, so the challenge failed under either standard. See *Hines v California Coastal Comm'n* (2010) 186 CA4th 830, 856, 112 CR3d 354 (citing this book) (no evidence in record that project would have a significant impact due to unusual circumstances or that significant cumulative impacts would occur); *San Lorenzo Valley Community Advocates for Responsible Educ. v San Lorenzo Valley Unified Sch. Dist.* (2006) 139 CA4th 1356, 1375, 44 CR3d 128; *Santa Monica Chamber of Commerce v City of Santa Monica* (2002) 101 CA4th 786, 796, 124 CR2d 731. See also *Apartment Ass'n of Greater Los Angeles v City of Los Angeles* (2001) 90 CA4th 1162, 1175, 109 CR2d 504 (vague and unsubstantiated expert opinion and public controversy are not sufficient to trigger application of an exception). By contrast, in another case, the court recognized the split in authority and found that the evidence was sufficient to support the claim that an exemption was barred by the exception for significant impacts due to unusual circumstances. *Committee to Save the Hollywoodland Specific Plan v City of Los Angeles* (2008) 161 CA4th 1168, 1187, 74 CR3d 665.

PRACTICE TIPS➤ As a practical matter, the courts tend to defer to an agency's determination that an action is categorically exempt. If there is support for the agency's decision in the record and if there is no substantial evidence of a significant impact, a reviewing court will ordinarily uphold it. Given the stringent standard of review for negative declarations (see §6.37), an agency should ordinarily find a project to be exempt from CEQA, rather than adopt a negative declaration, when there is a choice between the two courses of action and there is no evidence showing a reasonable possibility that significant impacts will occur.

Also, given the uncertainty regarding the standard of review that is applied to claimed exceptions to the categorical exemptions, agencies should evaluate whether there is any substantial evidence to support a claim that an exception applies. If there is no evidence supporting such a claim, or if the proffered evidence is not substantial evidence, then the agency should be able to determine that the exception does not apply, and such a determination should withstand legal challenge.

Practitioners should note that most of the case law discussing the standard of review for the three general exceptions has arisen under the significant effects exception. The court in *Association for Protection of Envt'l Values v City of Ukiah* (1991) 2 CA4th 720, 3 CR2d 488, however, considered all three general exceptions, and the court in *Santa Monica Chamber of Commerce v City of Santa Monica* (2002) 101 CA4th 786, 796, 124 CR2d 731, considered both the cumulative impact and significant effects exceptions. Thus, it appears that the uncertainty regarding the applicable standard of review extends to judicial review of all three of the general exceptions.

§5.128 2. Specific Exceptions

As noted in §5.70, there are specific exceptions to categorical exemptions that apply to projects that may damage scenic resources determined to be historic), the case law suggests that, until there are more definitive rulings on the standard of review, agencies should simply evaluate whether there is any evidence submitted to support the claimed exception. If there is no evidence supporting such a claim, or if the proffered evidence is not substantial evidence, then the agency should be able to determine that the exception does not apply, and such a determination should withstand legal challenge.

§5.129 F. Standard of Review for Common Sense Exemption

An agency's determination that the common sense exemption applies presents an issue of fact, and the agency invoking the exemption has the burden of demonstrating that it applies. *Muzzy Ranch Co. v Solano County Airport Land Use Comm'n* (2007) 41 C4th 372, 386, 60 CR3d 247. Under the terms of the exemption, however, the evidence must support an agency determination that "it can be seen with certainty that there is no possibility that the activity in questions may have a significant effect on the environment." 14 Cal Code Regs §15061(b)(3).

In *Muzzy Ranch*, the California Supreme Court arguably created some uncertainty regarding the standard of review that is applied to an agency's use of the common sense exemption. The court clearly departed from prior case law that had held that even a mere argument could defeat the use of the exemption (see §5.111), and the court plainly stated that whether an activity qualifies for the exemption presents "an issue of fact." 41 C4th at 386. The court also upheld the exemption in that case based on "the record before us." Although such statements normally suggest that a court is applying the substantial evidence standard, the court did not explicitly refer to that standard. In the authors' view, the statements in the *Muzzy Ranch* decision implicitly indicate that the court was applying the substantial evidence standard, and those statements are not consistent with other standards of review. Thus, in the authors' view, the substantial evidence standard applies to review of an agency's application of the common sense exemption, but the showing that must be made, and supported by such substantial evidence, is a stringent one—*i.e.,* that it is certain that there is "no possibility that the activity . . . may have a significant effect on the environment."

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Executed on July 20, 2012, at Oakland, California.

Erika Casady

Erika Casady