Civil No. S201116

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BERKELEY HILLSIDE PRESERVATION, *et al.*,

Plaintiffs and Appellants,

v.

CITY OF BERKELEY, *et al.*, Defendants and Respondents,

and

DONN LOGAN, *et al.*, Real Parties in Interest and Respondents.

From a published decision by the Court of Appeal
First Appellate District, Division Four
Civil Number A131254

Reversing the ruling by the Honorable Frank Roesch
Alameda County Superior Court Case No. RG10517314

ANSWER BRIEF ON THE MERITS

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Introduction

Long ago, the City of Berkeley enacted protections to the design and scale of new development within its historic and architecturally renowned neighborhoods. This appeal challenges four discretionary use permits sought for a 10,000 square-foot home/10-car garage in one just such area high in the Berkeley hills. The building was approved via "categorical exemption" from environmental review. That is, *without any*.

The Alameda County Superior Court and the First District Court of Appeal agree with the public-interest appellants that the house proposed on Rose Street, at a scale akin to a small office building, may have significant impacts. The unanimous opinion authored by the Honorable Justice Patricia Sepulveda applied unequivocal provisions of the California Environmental Quality Act to the facts of this case and required the preparation of an EIR.

The judgment should be affirmed. Single-family homes should and do normally qualify for categorical exemptions from CEQA even when more than routine building permits are required. *But any proposed categorical exemption is subordinate to an overriding legislative mandate*: a fair argument of potentially significant environmental impacts always triggers the favored EIR process.

That is the case here, and a peremptory writ should issue on remand.

Summary of Argument

CEQA requires discretionary projects with potentially significant environmental impacts to be analyzed within a public EIR process. (Pub. Resources Code, §§ 21082.2 subd.(d), 21100 subd.(a), 21151 subd.(a).) The goal is for public agencies to make informed land use decisions that reduce adverse environmental effects to the extent feasible. (*Id.*, §§ 21002, 21151.) Many of this Court's landmark decisions that have enforced CEQA's mandates also eloquently laud the salutary benefits of the EIR process.

EIRs are practical. They assist our elected decision-makers and "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, p. 86.)

That being said, many thousands of routine projects statewide have *no* significant environmental effects, and an EIR serves no purpose when that is apparent at the outset. Categorical exemptions allow streamlined approvals of "run-of-the-mill" projects that warrant neither study nor mitigation. (Pub. Resources Code, § 21084 subd.(a); *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, pp. 1260-1261.) As recognized by this Court, "[a] categorically exempt project is not subject to CEQA." (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, p. 286.)

But the EIR remains "the heart of CEQA." (*Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, p. 1123.) CEQA and its Guidelines "embody California's strong policy of protecting the environment." (*Tomlinson v. County of Alameda*, *supra*, 54 Cal.4th 281, p. 286.) Proposed categorical exemptions must harmonize with CEQA's low-threshold EIR requirement, consistently affirmed in scores of California cases for over four decades.

Here, *both* the Superior Court and the Court of Appeal found substantial evidence in the administrative record supporting appellants' contentions that the proposed Kapor mansion — to be anchored into a steep slope via massive excavation and fill next to an aging, cracked concrete overpass; in a landslide hazard zone; on a narrow, dead-end, one-lane roadway; out of scale with its famed walking-tour neighborhood of small architectural treasures — *may have* significant environmental impacts.[1]

Credible expert evidence indicates that the building's large mass and its siting atop a 27-foot foundation/ plinth built into the steep hillside would require extraordinary amounts of earthwork and strip the site of mature trees. It would rise five stories above grade on the site's downhill [Shasta Road] side, with its roof looming almost eight stories (78 feet) over the

road. Most of the historic homes lining the winding roads in the neighborhood are less than a quarter of its size.

The City concedes that "because of steep topography" the project requires special use permits. The record highlights geotechnical impacts, traffic problems during the fourteen months of construction to be staged off-site, adverse impacts on public views, and General Plan inconsistencies.

No reported case has ever upheld a categorical exemption when a record contains substantial evidence of significant environmental impacts. (*Post*, p. 57.) For this Court to do so, as urged by the City, would be inconsistent with *all* prior case law as well as with CEQA's statututory and regulatory foundations and its salutary purposes.

In overturning the categorical exemption, the Court of Appeal relied on the expert opinions of Lawrence B. Karp, a geotechnical engineer and licensed architect with fifty years of Bay Area experience. Dr. Karp prepared an independent on-site engineering study. His fact-based technical report explained how the proposed mansion in the context of its steep site "... is likely to have very significant environmental impacts not only during construction, but in service ..." (2 Administrative Record (AR) 449, 530.)

The City and Real Parties In Interest Mitchell Kapor and Freada

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[1] Facts in the Introduction and Summary are cited to the record *post*.

Kapor-Klein (collectively, the City) have a field day in their opening brief mischaracterizing Dr. Karp's geotechnical findings, proclaiming that he addressed impacts of a project "neither *proposed* nor *approved.*" (City Brief, *passim,* italics in original.) The City argues both that Dr. Karp misunderstood the project plans and that the plans changed after his review.

Saying so, even repeatedly, does not make it true. Dr. Karp and the Kapors' experts offered conflicting opinions about potential geotechnical impacts and the amount of cutting and filling required to build the house and garage on the steep slopes of the site. The City Council did not resolve or address the environmental issues in any way. And the project plans did not change at all in the months between project application and approval.

Fortunately, in a CEQA mandamus action the administrative record easily refutes factual misrepresentations. The four-volume record documents Dr. Karp's expert independent analysis of project impacts. The approved project includes only a conceptual grading plan (*see copy of plan, post,* p. 82), with a final plan defining excavation and fill limits scheduled for future submittal to City staff without any CEQA process, public review, or further notice to concerned residents. (1 AR 10-12.)

As to the import of the "Significant Effects Exception" to categorical exemptions codified in the CEQA Guidelines [Cal.Code Regs

§§ 15000 *et seq.*], section 15300.2 subdivision (c) ["A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances"], the CEQA statutes and legislative and rule-making files confirm that the exception disallows categorical exemption for any project that may have significant environmental impacts.

In recent years some courts have inquired as a separate issue of law whether a project being considered for the Significant Effects Exception is substantially different from other routine projects in its class: in other words, whether there are "unusual circumstances." While the Kapor project would have impacts that are indeed unusual for a single-family home, such an inquiry is inconsistent with the mandates of the Public Resources Code and involves unnecessarily complex agency and judicial review.

Simply stated, the documented presence of a potential environmental effect has always defeated a categorical exemption. (Pub. Resources Code, §§ 21082.2 subdivision (d), 21151.) Unusual circumstances should not be "read out" of the Guideline exception, but are instead inherent in a project named in a categorical exemption class that nonetheless has potentially significant impacts. (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, p. 129.)

The categorical exemption process remains of great utility. While the Public Resources Code emphatically disallows exemption when a project may have significant impacts, public agencies' quick and convenient approval of exempt projects has been and will continue to be widely used for scores of projects statewide. Affirming the First District judgment in this appeal will uphold the integrity of CEQA and will not lead to problems in the application of categorical exemptions, as claimed by the City and queuing *amici*. Their "sky is falling" mantra is puerile, as is the insistence that any scrutiny of such exemptions is somehow unfair.

Projects within a defined categorical exemption class do not receive an automatic free pass from CEQA. The point of each category is to streamline the approval of projects fairly assumed to be of minor effect. Exemptions dissolve upon evidence of a specific project's potentially significant environmental impacts. Such has always been required by Public Resources Code section 21082.2 and decades of judicial precedent. And that is the whole point of the "Significant Impacts *Exception*."

Here, the low threshold for EIR preparation is amply met under the facts in the certified administrative record, and the judgment should be affirmed. After an EIR process, the Kapors' home can be built on Rose Street with its environmental impacts analyzed and mitigated.

Statement of Facts

The City's factual summary is unusually short. (City Brief, pp. 8-9.) Even though a few additional facts appear within its legal arguments, the opening brief fails to address much of the relevant evidence. Perhaps this is because the material facts so strongly favor appellants' case.

Philanthropists Mitchell Kapor and Freada Kapor-Klein propose to build a 3-level, single-family dwelling of almost 10,000 square feet, including underground parking for 10 cars, at 2707 Rose Street in the Berkeley hills. (1 AR 48-64.)[2] The City required conditional use permits for exceptions to the height limit and reduction of setback, "*warranted because of steep topography.*" (1 AR 6, italics added.) Nonetheless, the project was treated as categorically exempt from CEQA under the classes for in-fill housing and single-family homes. (1 AR 2, 30, 40.)

The Berkeley Zoning Adjustments Board (ZAB) held a hearing in January 2010 to consider the project's four discretionary use permits:

- Demolition of an existing dwelling unit
- Construction of a dwelling

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[2] While the City quotes the Kapors' architect's statement that the home would cover 16% of the property, leaving 84 % in open space (City Brief, p. 9; 1 AR 127), the hardscape, terraces etc. are not equivalent to open space. (*E.g.*, 1 AR 289.)

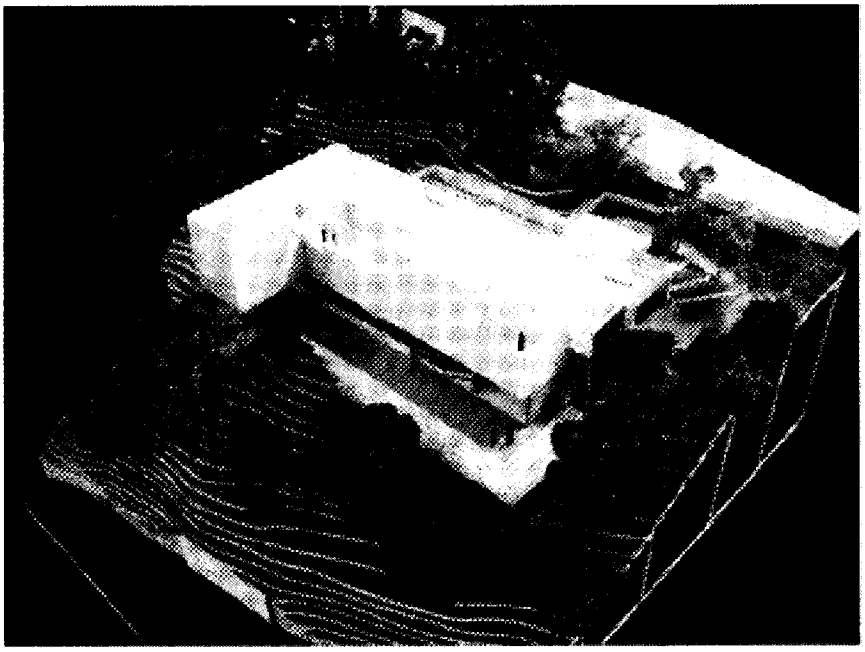
- Permitting an increased average height
- Permitting a setback reduction

(1 AR 30.)

Area residents raised fact-based environmental concerns relating to the requested use permits. (1 AR 70-77, 81-82, 85, 87, 97, 99, 120-124; 2 AR 489-491, 495-506.) Many objected to the City's failures to analyze seismic stability, landslide issues, impacts of massive excavation, and tree removal (1 AR 100, 117, 196, 199); accurately measure proposed height, visibility, and applicable setbacks (1 AR 82, 89, 94, 96, 100, 104, 111, 119); address evident inconsistencies in site and grading drawings (1 AR 288-289); assess pre- and post-construction traffic impacts (1 AR 81, 85, 88, 91-92, 97); analyze inconsistencies with the Berkeley General Plan, ordinances, and policies (1 AR 74, 92, 99-100, 105, 111-119); research or describe the architectural and historic significance of neighborhood residences (1 AR 105); consider project visibility, including by use of story poles (1 AR 100, 105, 117); or to assess the project's neighborhood compatibility. (1 AR 71-75, 81-82, 89, 94-97, 99, 103-105, 111-119, 124.)

Despite the extensive comments received in a very short time period, ZAB members refused to continue the hearing or to honor the City's customary practice of requiring story poles to assess visual impacts. (1 AR

146.) The permits were approved without environmental review, based on a categorical exemption and with conditions imposed to mitigate environmental impacts. (1 AR 163-168.)



2707 Rose Street Zoning Submittal (1 AR 169.)

Co-appellant Susan Nunes Fadley appealed the ZAB project approvals to the Berkeley City Council on behalf of herself and 33 others who signed the appeal. (1 AR 186-192.) Substantial documentation that included letters and reports was submitted to the City Council in support of the appeal. (1 AR 193-292; 4 AR 941-955.)

The appeal submitted expert reports from Lawrence B. Karp, a geotechnical engineer with a doctorate in civil engineering from U.C. Berkeley as well as other advanced degrees, who taught foundation

engineering at U.C. Berkeley for fourteen years and at Stanford University for three years, and whose work experience includes over fifty years of design and construction in Berkeley. (4 AR 1089.)

Dr. Karp detailed the basis for his professional opinions regarding potentially significant environmental impacts that would result from the Kapor project's unstudied massive grading, filling, and foundations. Based on his review, Dr. Karp found significant potential for the seismic lurching of hillside fills and for landslides resulting from grading necessary to achieve grade and structure elevations. (2 AR 448-449; 4 AR 1085-1089.)

During the appeal proceedings, the City was provided with evidence that categorical exemption from CEQA was unlawful based on potentially significant impacts relating to the demolition of a likely historic resource;[3] aesthetic impacts on public views; neighborhood incompatibility based on the mass, scale, and perceived institutional design of the proposed building; traffic impacts relating to construction; massive unstudied excavation of steep hillsides and creation of large retaining walls; material inconsistencies

[3] Early in the appellate proceedings, the Court of Appeal denied appellants' supersedeas petition. The Kapors then demolished the 1917 Craftsman cottage on the site that had been a subject of discussion at the City and at the trial court. The cottage is no longer at issue, as the City correctly notes. (City Brief, p. 9, n.3.)

with City land use plans and policies adopted for environmental protection; the unusual size of the house out of scale with the neighborhood and historic character; and removal of many mature trees. (2 AR 525-532.) The appeal sought a CEQA process to analyze a revised project consistent with the City's ordinances and plans. (2 AR 529, 532.)

Appellants submitted a written response to the City staff's report on the appeal. (2 AR 436-462.) The City Council considered the appeal at a public meeting in April 2010. (2 AR 523-594.) City staff provided a supplemental report minutes before the meeting. (2 AR 463-468, 524.) The City Council allowed a 10-minute presentation by appellants, timed to the second by the mayor, during which time the appellants' attorney and Dr. Karp each spoke. There was an equally-timed 10-minute presentation made on behalf of the Kapors. (2 AR 524-541.)

Appellants' request for a public hearing was denied. (2 AR 533.) The Councilchambers were packed with concerned residents who supported the appeal but who were not allowed to testify. The mayor also denied a request by City Councilmember Jesse Arreguin to ask questions of Landmark Preservation Commission representative Ann Wagley, who rose to speak on behalf of that Commission and was sent back to her seat. (2 AR

541-542 ["We are not holding a public hearing."].)[4]

While the Kapors' lawyer Rena Rickles lauded Dr. Karp's "excellent credentials," she contended that he had misread the architectural plans. (2 AR 530-531.) In response, Dr. Karp testified to the City Council that he had reviewed recent letters written by the Kapors' engineers that surmised that he had misread the plans, and that they were mistaken. He explained that he had reviewed *all* project materials and plans and had personally visited the project site, and that his opinions were based on his independent creation of a section drawing that showed conflicts between grades and retaining walls. He confirmed his independent evaluation and verified his opinion. (2 AR 530-533; 4 AR 1089.)

Before voting, City Councilmembers explained their opinions about the project, but none addressed the geotechnical issues *or* the categorical exemption. (2 AR 541-591.) The Council did not at any time question either Dr. Karp's expert opinions or his personal or professional credibility. (2 AR 548-592.) It is wholly untrue, as proclaimed by the City, that the City Council in any way "rejected" Dr. Karp's assessment of potential geotechnical impacts relating to excavation and fill. (City Brief, p. 3.) The Council majority ignored it and denied the appeal [6-2-1]. (2 AR 591.)

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[4] Appellants do not contend that a public hearing was required.

Factual Clarifications

Since appellants will not have the opportunity to file a reply brief in this Court, material facts consistently misrepresented by the City and the Kapors in briefing in the lower courts are highlighted below both in response to the City's opening brief and in anticipation of the reply.

Project Size. The proposed project is a *single* 9,872 square-foot structure, including a 6,478 square-foot living area and a 3,394 square-foot 10-car underground garage all in one building. (1 AR 3.) Throughout this litigation, the City has referred to the project as if two separate structures and continues to do so before this Court: a "6,478 square foot, single-family home, with a 3,395 square foot garage." (City Brief, p. 8.)

The fuzzy project description escalates to misrepresentation when the City compares the size of the proposed mansion to other Berkeley residences. It references the project as a 6,478 square-foot building instead of a nearly 10,000 square-foot mass. When straining to argue that the house is *not* an unusual size, the City posits that "the size of the single-family home is consistent with other homes in the area … that range in size from 4,000 to 6,000 square feet." (City Brief, p. 61.)

Similarly, a reference to "68 single-family dwellings in the City [that] have more than 6,000 square feet of floor area," is unsupported. (City

Brief, p. 61.) There may be 68 "dwellings" of over 6,000 square feet[5] but there are only 10 "single-family residences" larger than 6,400 square feet in over 17,000 residences in Berkeley. (1 AR 209.) The Kapor project would be one of the two largest single-family homes in the City. (1 AR 209.) In addition, floor-area-to-lot ratios [FAR] do not reduce a building's square footage, as curiously implied. (City Brief, p. 60.)

The 10,000 square-foot project — with a mass equivalent to at least a 12,000 square-foot building when counting its elevated main floor and the unenclosed, above-ground lower story — is not comparable to the few 4,000 to 6,000 square-foot homes in the area that average about half its size. And most of the vintage homes in the historic neighborhood are only a quarter to a third as large. (1 AR 74, 82, 89, 99, 111-119, 194, 204, 227.)

Administrative Process. The Kapor project, approved via categorical exemption, received no CEQA process at all. Public process was minimal. By the time residents of the scenic, historic neighborhood in the Berkeley hills learned that a 10,000 square-foot building was proposed nearby, approval was days away. (1 AR 75, 79, 81, 94, 96, 103-105, 120,

[5] The City denies that it is referring to multi-family dwellings, but its record citation does not support its point. (City Brief, p.61, n.8.)

124, 262.) Word spread despite minimal notice, and letters of concern were rushed to the Zoning Adjustments Board.

Commenters questioned the siting of such a huge structure on narrow Rose Street, on steep slopes in a landslide zone, and at a mass and design out of compliance with the Berkeley General Plan's protections for the famed historic neighborhood. (1 AR 70-105, 146-147.)

The residents of four immediately-adjacent homes supported the project. (2 AR 315-316.) But the neighborhood stretches much farther than one home on each side of the Kapors' lot, and scores of residents presented fact-based environmental concerns. (*E.g.,* 2 AR 305-431.)

Residents living and walking on Rose Street and adjacent Shasta Street, La Loma Avenue, Greenwood Terrace, and Tamalpais Road explained that they would be directly affected by the project as to traffic, aesthetics, general plan inconsistencies, and geotechnical impacts. The City has stated that concerned citizens living more than one house away from the Kapors' site would not be impacted by its construction. The record contains substantial evidence to the contrary. (*E.g.,* 1 AR 186-262.)

The Court may be assured that it is profoundly untrue that anyone sought "to stop the Kapors from building their home" or to "police" their laudable philanthropic activities, as was gratuitously claimed below.

(Opposition Brief on Appeal, pp. 1-2.) CEQA is a citizen-enforced statute. The record is clear that appellants solely seek analysis of unresolved environmental issues and the identification and implementation of mitigations to protect their well-loved neighborhood in the environmentally-sensitive Berkeley hills. As appellants told the trial court:

> A small house on that steep slope may not be a problem, but here we have a steep slope with a huge house, and that creates a problem. So it's not just a large house, the large house might be fine somewhere else. But put it on this narrow street in this architecturally significant neighborhood — we've got lots of evidence that the average homes in that area are 1,200, 1,500 square feet. Walking tours, documentaries — it's a famous area because of the Maybecks and the Morgans and the other homes that are there. So you're putting this huge home on the steep slope, on the narrow road that's going to cause traffic problems, ... All that adds up to *not* a run-of-the-mill home in the Berkeley hills, and in particular in this neighborhood.

(Reporter's Transcript (RT): 37-38.)

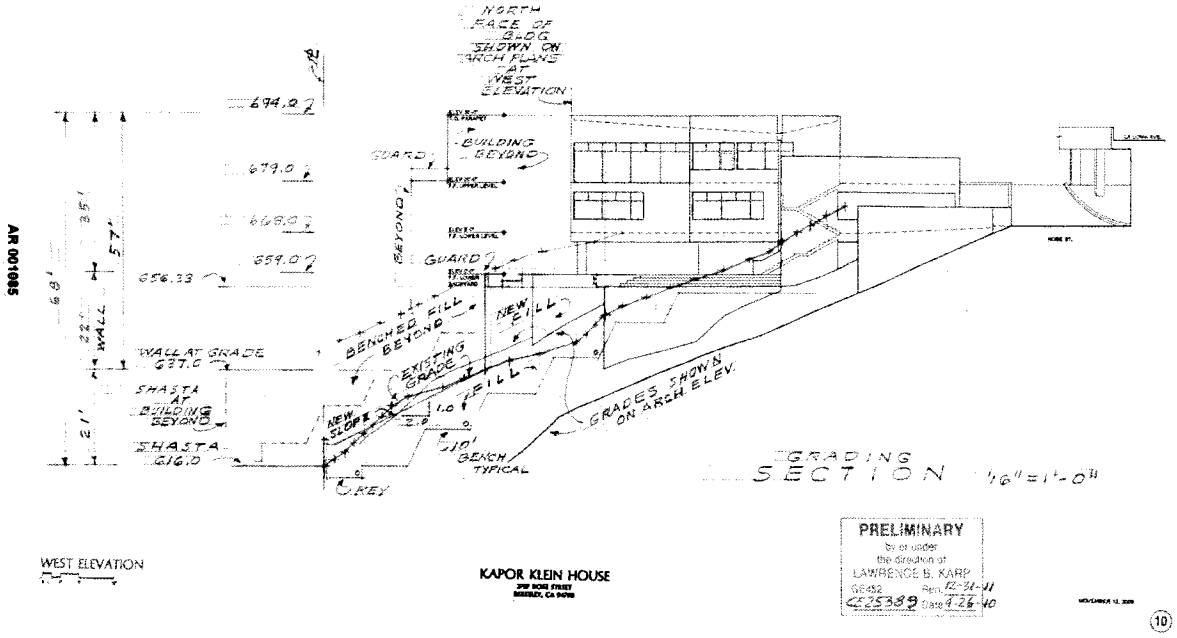
If CEQA review had begun in early 2010 after the ZAB hearing, it would have been completed two years ago and a home at 2707 Rose Street could be complete by now. It has been the City's and the Kapors' choice to delay approval by adamantly refusing any CEQA review.

Geotechnical Expert Evidence. The crux of the City's defense before this Court is an attack on the geotechnical reports and City Council testimony of Dr. Lawrence B. Karp, a well-known geotechnical engineer as well as a licensed architect. (2 AR 448-452, 4 AR 1089.)

The gist of the City's primary argument is that Dr. Karp's opinions should be disregarded because his conclusion that "significant construction fill would be required to construct the project" was "*not proposed* by the Kapors and, therefore, *not approved by the City*." (City Brief, p. 3, 6, 8, 11 italics in original.) The City repeatedly refers to the project's "approved plans" as if they were not reviewed by Dr. Karp and as if they definitively established, and limited, the amount of fill needed to build the home/garage on the Rose Street site. (*Ibid.*)

As discussed further below, the record instead shows that sixteen consecutively-numbered pages of architectural plans dated November 2009, identical to approved plans of April 2010 and officially stamped and signed by the Kapors' architect, depict various elevations of the proposed house/garage and a topographic survey of relevant slopes and boundaries. (4 AR 1068-1084 [application plans]; 1 AR 14-28 [approved plans].) As noted above, there is one page labeled "Conceptual Grading Plan" and numbered Sheet 16. (1 AR 28, 4 AR 1084; *post,* p. 82 [copy of plan].)

Dr. Karp reviewed *all* plans, visited the site, and prepared independent calculations and a section drawing (imposed on the Kapors' plan) to assess the amount of excavation required. (1 AR 23 [Sheet 10].)



(4 AR 1085 [Dr. Karp's Grading Section, also showing La Loma Overpass].)

Dr. Karp's technical reports depict the cutting and filling necessary to build the house and plinth on the steep slope. His opinions differ from those of the Kapors' experts. (2 AR 448-449; 4 AR 1085, 1089.)

Importantly, the Kapors' only geotechnical report, by James R. Lott, was prepared in July 2009 and addressed an earlier iteration of the project

— when the residence and garage were proposed in two separate buildings rather than as a single 10,000 square-foot structure. (3 AR 654 ["...the site is to be developed with a new, approximately 6,000 square foot, two story residence with a detached carport."].)

The report contained a proviso that its conclusions "should not be considered valid" if the design were to change significantly. (*Id.* at 656.) Yet the post-geotechnical report plans were changed to include a 10-car underground garage that, among other things, may undermine the foundations of the nearby 1950's La Loma Overpass that is already damaged and "cracked from fault creep." (3 AR 448.)

The consolidation of the living space and garage into the current project changed the design by a whopping factor of 40% and the Kapors' 2009 geotechnical report cannot be relied upon. It was never updated. The City's final project approval was thus made without benefit of a complete geotechnical report from the applicants' team that accurately addressed the 10,000 square-foot single-structure project. (1 AR 2-3, 5, 36, 40, 144, 159.)

The City's contention that the project was approved with a defined limit to grading and excavation is also unsupported. The one-page "Conceptual Grading Plan" is by its very name preliminary. (1 AR 28.) Project approval conditions require a "project grading plan" to be approved

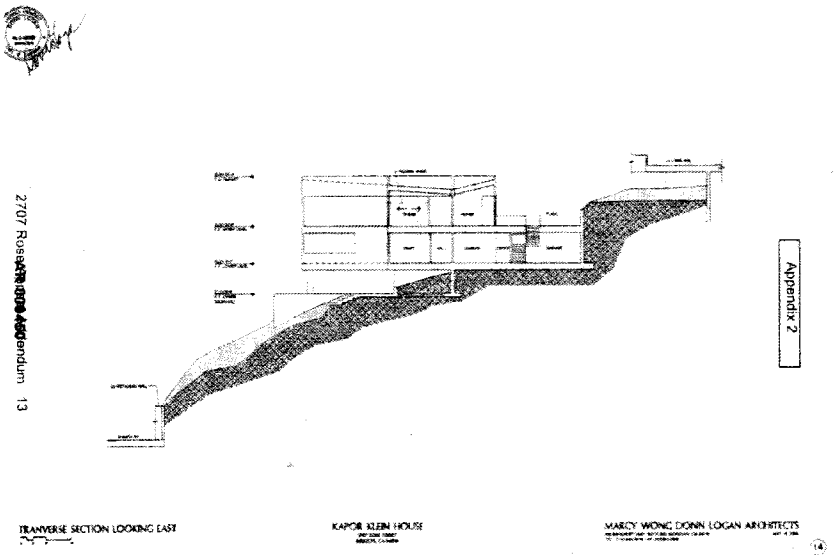
"prior to issuance of any building permit" that must include "Drainage and Erosion Control Plans to minimize the impacts from erosion and sedimentation during grading." (1 AR 10; *see* 12.) The City did *not* approve the "Conceptual Grading Plan" as the project's final grading plan nor impose limits on the project's excavation or fill, and its statement that "the approved grading plan is the *only* approved document that allows cut and fill for the Project" is false. (City Brief, p. 72.)

Dr. Karp explained the basis for his opinions to the City Council:

> **For this project I conducted an independent feasibility study. I now conclude there is potential for very significant environmental impacts from construction and seismic lurching in service. I reviewed City Planning's index and the entire file, including all plans. There was no feasibility study or foundation engineering, but there was a topographic map.**
>
> **The structure seemed inappropriate for the steep site so I did a reality check of the architectural drawings. The recent reports from the applicant's experts say I do not know how to read architectural drawings but I have been a licensed architect for many years so I do know. Their reports have not changed my opinion. I cut and matched prints and conclude that the depicted elevations typically misrepresent relationships between the steep site and the floor plans.**

(4 AR 1089, *attached*, bold added.)

Dr. Karp's opinion differs from the opinion of the Kapors' experts as to the extent of excavation into the hillside and side-hill fill necessary for the construction of the home. While the Kapors' engineers provided their opinions as to how and why Dr. Karp had, in their view, misunderstood "Sheet 14," Dr. Karp responded, disagreed, and confirmed that his professional opinions were based on his review of *all* of the project plans and drawings as well as his own site visit and independent calculations based on his half-century of experience. (4 AR 1089.) Even *had* he misconstrued "Sheet 14" his independent analysis of the house plans and the site provide substantial evidence supporting his opinion that the structure cannot be built without significant geotechnical impacts.



(2 AR 450 [Sheet 14], *see* yellow-marked section, which the Kapors'

engineers assumed was misread (4 AR 1065); *see* also the proximity of the cracked La Loma overpass (upper right).)[6]

This is a classic "dispute among experts;" not an opinion about different projects, as the City strains to argue. The opinions of the Kapors' experts cannot trump those of an expert with stellar, unchallenged credentials. Similar disputes abound in CEQA cases when experts reach different conclusions, based on the same facts, about the significance of a project's effect on the environment, including not only geotechnical issues but the potential to generate significant traffic, to significantly affect wildlife habitat or wetlands, or to significantly impact water supplies. (*E.g.*, *Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412.)

> As emphasized by the Court of Appeal regarding Dr. Karp's reports:
>
> Two engineers opined that Karp's conclusion that geotechnical issues were present at the site was based on a misreading of the relevant plans, and the director of the City's planning and development department likewise concluded that the site was

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[6] The final approved project plans (1 AR 14-28) do not include the "traverse section lodging east" drawing at Sheet 14 [2 AR 450; *see* the (14) at the bottom right of the page] that was part of the project application and ZAB review. Sheet 14 was among the project plans considered by Dr. Karp and the Kapors' experts — not architects — assume that it was misread. (*E.g.*, 2 AR 450; 4 AR 1065, 1084.) The exclusion of Sheet 14 in the approved plans is unexplained; regardless, all plans remain as originally submitted and provide a consistent factual basis for Dr. Karp's opinions.

> suitable for the proposed dwelling from a geotechnical standpoint, and that no landslide risk was present at the site.
>
> However, where there is substantial evidence of a significant environmental impact, '*contrary evidence is not adequate* to support a decision to dispense with an EIR. [Citations]. Section 21151 creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. [Citations.] For example, *if there is a disagreement among experts* over the significance of an effect, *the agency is to treat the effect as significant and prepare an EIR*. [Citations.]' (*Sierra Club v. County of Sonoma* [1992] 6 Cal.App.4th [1307], 1316-1317, italics added; see also Guidelines, § 15064, subd.(g) ...)

(*Berkeley Hillside Preservation v. City of Berkeley* ("*Berkeley Hillside*") (2012) 203 Cal.App.4th 656, pp. 674-675; italics in original.)

Dr. Karp provided his professional opinion that the Kapors' project construction would also require significant unstudied removal of virtually all of the trees on the site and risk seismic lurching of oversteepened side-hill fills. (2 AR 448-449, *attached.*) He did not assume that every home in the Berkeley Hills presents similarly significant geotechnical hazards. Based on his review of the plans, his personal on-site investigation and section drawing, and his independent professional analysis, he concluded

that the project had a "probability of seismic lurching." (2 AR 448.)

The City substantially bases its case on its contention that it made a "finding" that "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." (City Brief, p. 3.) No citation for this statement is provided, because none exists. The City made no such finding and did not discuss or reject Dr. Karp's opinions. The City Council simply affirmed the decision of the Zoning Adjustment Board on a vote of 6-2. (2 AR 547, 591.) Dr. Karp's reports and testimony regarding geotechnical impacts occurred in April 2010, four months after the ZAB decision, and were never considered by ZAB.

Statement of the Case

Trial Court Ruling. The Honorable Frank Roesch of the Alameda County Superior Court, a designated CEQA judge, applied the "fair argument" standard of review to the Significant Effects Exception to categorical exemptions at issue in this case, relying on *Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, p. 265. (AA:144.)

The Court noted that "the very language" of the Significant Effects Exception, referencing "a reasonable possibility that the activity will have a significant effect ... *cries out for the fair argument standard.*" (RT:55,

italics added.) In response to the urging from Kapor's counsel that the substantial evidence standard should instead apply, the Court said: "you can make that argument, but I think you're banging your head against a wall with more authority than I can cite." (RT:56.)

The Court found "evidence sufficient to support a fair argument of inconsistency with Berkeley's zoning policies" including Policy UD-16 that requires the design and scale of new buildings to "respect the built environment" in areas "largely defined by an aggregation of historically and architecturally significant buildings." (AA:156, citing 1 AR 205.)

Judge Roesch also found that Lawrence Karp's opinions provided substantial evidence of potential significant environmental effects due to geotechnical and seismic issues "consequent to the Project." (AA:156-157.) The Court explained to the Kapors' attorney at the writ hearing that "if you have an expert that says there's going to be an impact and I've got this degree and so I can opine about this, what difference does it make if some other expert opines to the contrary?" (RT:58.)

At the hearing, the Kapors' counsel argued that Dr. Karp's geotechnical concerns were not really addressing the approved project, and that "if the Kapors don't do what they said in their plans the City has every right to come along and stop that construction." (RT:60.) The Deputy City

Attorney agreed that if geotechnical issues raised by Dr. Karp in fact occurred during construction — "if the fears that petitioners have have come to pass" — that the City could "issue a stop-work notice and we would then investigate and evaluate the geotech concerns ..." (RT:67.)

Appellants' attorney pointed out that counsel was speaking outside the record. Further, even if City staff could issue a stop-work order (which could not cure the CEQA problems discussed throughout the writ hearing), "who knows" if it would occur? "There's no public process." (RT:67-67.) The Court concurred: "Who knows? ... Who's to say?" (RT:67-68.)

Judge Roesch nonetheless upheld the categorical exemption. Following recent case law requiring a separate finding of unusual circumstances as a matter of law, the Court found no such circumstances despite the admittedly significant environmental impacts. (AA:156-157.)

Court of Appeal Opinion. Appellants filed this appeal in February 2011 (AA:168) and sought a Petition for Supersedeas and stay request in March. The Court summarily denied the petition in April. Following the denial of supersedeas, the 1917 Abraham Appleton cottage on the site was demolished. This appeal does not seek relief relating to that demolition.

Three weeks before oral argument, the Court of Appeal issued a stay of project construction pending issuance of a remittitur. (*Berkeley Hillside,*

supra, 203 Cal.App.4th 656, p. 666, n.7.) The stay remains in place.

The unanimous published opinion reversing the trial court judgment was issued in Febuary 2012, authored by Justice Patricia Sepulveda and joined by Justices Ignazio Ruvula and Timothy Reardon. The opinion comprehensively reviews the statutory and regulatory authority for categorical exemptions as well as the relevant case law.

Berkeley Hillside recognized that Dr. Karp provided substantial evidence meeting the fair argument standard of review as to significant geotechnical impacts. The Court thus did not need to reach other environmental issues in order to set aside the categorical exemption. The Court ruled that the size of the Kapors' project was indeed unusual based on its size relative to other residences in Berkeley, but made clear that a finding of "unusual circumstances" was not required in light of the project's potentially significant environmental impacts. (*Berkeley Hillside, supra,* 203 Cal.App.4th 656, p. 673.)

> The Court noted that at the writ hearing in the trial court, the City represented that if inspections during construction revealed the geotechnical concerns that Karp raised, the City would issue a stop-work notice and investigate those issues. Appellants' counsel objected that the assertion was outside the scope of the record, and

the trial court apparently agreed that it was impossible to know what the City would do under such circumstances.

(*Id.*, p. 664, n.4.)

The Opinion held that the fair argument of potentially significant environmental impacts necessarily triggered the preparation of an EIR under mandates of the Public Resources Code, and ruled that upon a remand a writ of mandate should order the use permits and finding of categorical exemption to be set aside, and that an EIR be prepared prior to further project consideration:

> ... [W]e do not consider the potential massive grading and seismic lurching associated with the proposed construction to be "normal and common considerations" associated with the construction of a new home. ¶ Because there was substantial evidence in the record to support a fair argument that the proposed construction will have a significant effect on the environment (*Guidelines, ß 15300.2, subd. (c)*), the application of a categorical exemption was inappropriate here, and the trial court erred in denying appellants' petition ...

(*Berkeley Hillside, supra*, 203 Cal.App.4th 656, p. 675-676.)

Summary Answers to Issues For Review

The Petition for Review granted by this Court addressed three issues. (Petition, pp. 1-2.) The City's opening brief now lists six issues, adding

three new issues to those accepted for review. (City Brief, p. 1.) The Petition also references CEQA Guideline section 15300.2 subdivision (c) as the "significant effects exception." (Petition, pp. 1-2.) This Court's single summary of the issue consistently references the "Significant Effects Exception." (http://appellatecases.courtinfo.ca.gov.) However, the City now refers to the subject Guideline as the "unusual circumstances exception."

Appellants' short answers to the three issues being reviewed are:

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

Answer: ***No.*** Neither the relevant statutory authority nor the Supreme Court case upon which Guideline section 15300.2 subdivision (c) was directly based references "unusual circumstances." (Pub. Resources Code, § 21084 subd.(a); *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, pp. 205-206.) Unusual circumstances are inherent in a project that may have significant environmental impacts despite fitting into a generic categorical exemption class.

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

Answer: The "fair argument" standard of review applies, consistent with all categorical exemption cases decided during the last twenty years. There is no current conflict among the appellate districts on this point.

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

Answer: *N/A*. This question assumes facts not present. The proposed Kapor residence is well-defined as to its size and placement on the steep slope of its Rose Street site, but geotechnical experts disagree both about the amount of fill required to build the 10,000 square-foot structure and what environmental effects may result.

Scope and Standard of Review

A. Appellate Review is *De Novo*

In CEQA mandamus actions, "the trial and appellate courts occupy in essence identical positions with regard to the administrative record, exercising the appellate function of determining whether the record is free from legal error." (*Bowman v. Petaluma* (1986) 185 Cal.App.3d 1065, p. 1076.) The scope of this Court's review of the certified record thus encompasses a *de novo* determination of whether or not the City of Berkeley prejudicially abused its discretion in approving the Kapors' project on the basis of a categorical exemption from CEQA.

There is no dispute about the contents of the record. The City was

not required to make findings or to take any particular action to rely on an exemption, and the CEQA Guidelines provide that the City "may" file a Notice of Exemption. (Guidelines, § 15062.) Here, the City chose to do so. (1 AR 2.) Abuse of discretion will therefore be proven if the Court finds that the City did not proceed in the manner required by law in approving the Kapor project based on a categorical exemption rather than requiring environmental review. (Pub. Resources Code, § 21168.)

B. Review of Categorical Exemptions

Statutory Framework for EIRs. CEQA *requires* that "if there is substantial evidence, in light of the whole record before the lead agency, that a project may have a significant effect on the environment, an environmental impact report shall be prepared." (Pub. Resources Code, § 21082.2, subd.(d).)

The EIR requirement is underscored in mandatory language in Public Resources Code section 21100, subdivision (a):

> All lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they propose to carry out or approve that may have a significant effect on the environment.

Consistently, Public Resources Code section 21151, subdivision (a)

clarifies that the EIR mandate applies to all local agencies, which "... shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project that they intend to carry out or approve which may have a significant effect on the environment."

EIRs provide agencies with in-depth review of projects that have potentially significant environmental effects. (*Laurel Heights Improvement Association v. Regents of the University of California*, *supra*, 6 Cal.4th 1112, p. 1123.) The EIR acts as an "informational document," and by utilizing its objective analysis public agencies "shall mitigate or avoid the significant effects on the environment ... whenever it is feasible to do so." (Pub. Resources Code, § 21002.1.)

Preparation of an EIR is required if there is substantial evidence in the "whole record" of proceedings that supports a "fair argument" that a project "may" have a significant effect on the environment. (*No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d 68, p. 75; *Communities for a Better Environment v. California Resources Agency, supra,* 103 Cal.App.4th 98, pp. 111-112.) "May" means a reasonable possibility. (*League for Protection v. City of Oakland* (1997) 52 Cal.App.4th 896, pp. 904-905; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, p. 309.)

Courts have repeatedly affirmed that the fair argument standard is a

"low threshold test." Evidence supporting a fair argument of any potentially significant environmental impact triggers preparation of an EIR regardless of whether the record contains contrary evidence. (*E.g.*, *Sundstrom v. County of Mendocino, supra,* 202 Cal.App.3d 296, p. 310.)

Statutory Framework for Categorical Exemptions. Without in any way compromising the mandatory preparation of an EIR for projects that may have a significant environmental impact, the California Legislature has recognized that some types of minor projects that require discretionary governmental permits are *not* likely to have significant environmental impacts. One example is the construction of a new single-family home. (Guidelines, § 15303, subd.(a).)

It would be time-consuming and wasteful to require environmental review for such routine projects, and so the Secretary of the Resources Agency is empowered to adopt regulations [the CEQA Guidelines] for classes of projects that it determines "not to have a significant effect on the environment" and that may thereby be exempted from all environmental review. Public Resources Code section 21084, subdivision (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 adopted the guidelines, the Secretary of Natural Resources shall make a finding that the listed classes of projects referred to in this section do not have a significant impact on the environment.

The CEQA Guidelines now list 33 classes of projects that the Secretary has found generally do not have any significant effect on the environment and that are appropriately exempt from CEQA review for that reason. (Pub. Resources Code, § 21084; *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165.)

Implementation. CEQA does not mandate any process for agency approval of a project that it determines to be exempt from environmental review. (*Apartment Association of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, p. 1168.) CEQA Guideline section 15061 advises agencies to consider applicable exemptions from CEQA during its preliminary review of a project. But no public comment period or public hearing is required before adopting a categorical exemption. (*Tomlinson v. County of Alameda, supra*, 54 Cal.App.4th 281, pp. 289-290; Pub. Resources Code, § 21092 [providing for public comment only for projects reviewed via EIRs and negative declarations].)

Importantly, categorical exemptions are *rebuttable*. Even a project

that "fits" into one of the exemption classes is not exempt from environmental review if it is shown to have potentially significant site-specific or cumulative environmental impacts. (Guidelines, § 15300.2 subd.(b) subd.(c).) This Court explained why in *Wildlife Alive v. Chickering, supra,* 18 Cal.3d 190.

Wildlife Alive directly relied on the language of Public Resources Code section 21084 to hold that the California Fish and Game Commission had improperly found the setting of the black bear hunting season to be categorically exempt from CEQA. In ordering the Commission to set aside the exemption, the Court ruled that

> ... no regulation is valid if its issuance exceeds the scope of the enabling statute. (Citations.) The [Secretary of the Resources Agency] is empowered to [categorically] 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 [from CEQA] would be improper.

(*Id.*, pp. 205-206, italics added.) "Unusual circumstances" were neither mentioned by the Court nor are any part of the implementing statutory authority of Public Resources Code section 21084.

A few years before *Wildlife Alive*, this had Court decided *Friends of*

Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, before any CEQA Guidelines were adopted. As noted by the City in its opening brief, the Court ruled that "common sense tells us" that the majority of private projects needing permits, like those "relating to the operation of an individual dwelling or small business" are "minor in scope" and "in the absence of unusual circumstances have little or no effect on the environment" and require no CEQA review. (*Id.*, p. 272.) The Court logically tied "unusual circumstances" to potential significant effects on the environment that would be unexpected if related to a minor class of project.

Wildlife Alive was reinforced twenty years later in *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, which consistently holds 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.*, p. 124, italics added.)

Renumbered Guideline section 15300.2 subdivision (c) is still entitled "Significant Effect." (Appellants' Request for Judicial Notice, *post,* p. 57.) Together, the legislative history and this Court's guidance are unambiguous. A categorical exemption is only appropriate for projects with

no potentially significant impacts.

In *Dunn-Edwards Corporation v. Bay Area Air Quality Management District* (1992) 9 Cal.App.4th 644, a key categorical exemption case decided by the First District's Division Three twenty years ago, Honorable Justices White, Werdegar, and Chin ruled that "... a project is only exempt from CEQA '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.' (Guidelines, § 15061, subd.(b) subd.(3).)" (*Id.*, p. 656.)

Wildlife Alive became the basis for a key *exception* to the categorical exemption classes, codified in Guideline section 15300.2 subdivision (c): "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant impact on the environment due to unusual circumstances." (Appellants' Request for Judicial Notice (RJN), Exhibit C, p. 18 [rule-making history].)

Consideration of whether a categorical exemption from CEQA is proper thus involves two separate inquiries:

"Fit". Whether a categorical exemption from CEQA is proper begins with a determination that a project fits within a particular exempt category. (*Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, p. 264.) The substantial evidence standard — deferential to the City —

applies to the [easy question] of whether the Kapor project is a single-family home subject to the Class 3 category.

Exception: The Fair Argument Standard. The unique "fair argument" standard applies to whether the "Significant Effects Exception" should apply to defeat the exemption. *Banker's Hill, supra,* 139 Cal.App.4th 249, pp. 264-267; *Voices for Rural Living v. El Dorado Irrigation District* (2012) __Cal.App. __.) That is the standard that was applied by the trial court as well as the Court of Appeal. (AA:144, *Berkeley Hillside, supra,* 203 Cal.App.4th 656, p. 672.)

The fair argument standard is deferential to the public-interest petitioners, and is met if *any* facts, fact-based assumptions, or expert opinion in the administrative record support appellants' arguments that an exception may apply, regardless of contrary evidence. (Guidelines, §§ 15064 subd. (f) [fair argument standard], 15300.2 [exceptions].)

Most CEQA cases reference the fair argument standard vis-à-vis adoption of a negative declaration, but application of the fair argument to consider exceptions to categorical exemptions is identical in approach. Public Resources Code sections 21080 and 21100 provide that the standard is met unless "there is no substantial evidence" that a project "may have a significant effect on the environment." *Friends of B Street v. City of*

Hayward (1980) 106 Cal.App.3d 988, pp. 1002-1003, found that the fair argument standard was met due to a street improvement project's short term impacts (dust and traffic impacts relating to construction) as well as its long-term impacts:

> But if a local agency is required to secure preparation of an EIR 'whenever it can be *fairly argued* on the basis of substantial evidence that the project may have significant environmental impact' (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75), then an agency's adoption of a negative declaration is not to be upheld merely because substantial evidence was presented that the project would not have such impact ...
>
> If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR ..., because it could be 'fairly argued' that the project might have a significant environmental impact.

Public Resources Code section 21080 subdivision (e) defines substantial evidence sufficient to support a fair argument of potentially significant environmental impact as "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." Consistently, section 21082.2 mandates that "substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion

supported by facts." Neither of the definitions speaks to expert *determinations* of fact, but call out expert *opinion* supported by fact[s].

As held in *Sierra Club v. County of Sonoma*, *supra*, 6 Cal.App.4th 1307, pp. 1322-1323, CEQA ... "reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted." *Sierra Club* holds that a finding of no environmental impact "can be upheld only when there is *no credible evidence* to the contrary." (*Id.*, pp. 1317-1318; italics added.) It would make no sense for a categorical exemption to be subject to the deferential substantial evidence standard and thus be more difficult to overturn than a negative declaration easily overcome by a fair argument. (*Id.,* pp. 1322-1323.)

The City contends, although it knows better, that courts are currently "applying the more deferential substantial evidence standard" to the application of the "Significant Effects Exception." (City Brief, p. 5.) *Decades ago* there was a split in judicial authority as to the standard of review for exceptions to categorical exemptions — whether the fair argument standard or the substantial evidence standard — and recent cases often note that split. However, the last case to solely apply the substantial evidence standard to address a categorical exemption exception was *Centinela Hospital Association v. City of Inglewood* (1990) 225 Cal.App.3d

1586, later referenced in *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, p. 1260.

Centinela did not discuss *why* the substantial evidence standard should apply when it granted summary judgment upholding a categorical exemption; the standard of review was apparently not at issue. (*Centinela, supra*, 225 Cal.App.3d 1586, p. 1601.)

Similarly, the City provides no logical analysis to support the application of the substantial evidence standard. Its only substantive argument is that projects that may "fit" into a categorical exemption class have already had a "prior CEQA review or similar determination." (City Brief, p. 53.) Not so. The categorical exemption classes are set up to allow streamlined approval for routine projects that normally have no significant environmental impacts. (Pub. Resources Code, § 21084 subd.(a).)

There is no pretense of prior environmental review of specific projects in a categorical exemption class; to the contrary, the very appropriate assumption is that projects subject to categorical exemption do not need any environmental review at all. The *exceptions* ensure that non-routine projects may receive environmental review if appropriate, avoiding violation of the Public Resources Code's mandate that any with potentially significant environmental impacts must receive EIR review. (Pub. Resources

Code, §§ 21082.2 subd. (d), 21100 subd.(a), 21151 subd.(a).)

Banker's Hill, supra, 139 Cal.App.4th 249, cogently explained why the fair argument standard applies to the "Significant Effects Exception": it is because statutory authority limits categorical exemptions to projects with no potentially significant environmental impacts:

> We further conclude that it is consistent with the policy behind CEQA to preclude an agency from relying on a categorical exemption *when there is a fair argument* that a project will have a significant effect on the environment, because, as our Supreme Court has noted, the Secretary [of Resources] '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.' (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206...) This important limitation on the Secretary's authority, as established by CEQA, is best upheld by *disallowing an exemption for any project where the record reflects a fair argument that there may be a significant effect on the environment due to unusual circumstances.*

(*Id.*, pp. 265-266, italics added.)

Banker's Hill firmly disagreed with a project applicant's contention that the fair argument standard should not apply because exemption categories are already "expressly determined by the Secretary 'to not have

environmental impacts' and 'the analysis has already been done ..." (*Id.*, p. 266, n.15.) The Court reiterated that the statutory authority given to the Secretary *only* allows categorical exemptions for projects that have no significant environmental effects, and "no statutory policy exists in favor of applying categorical exemptions where a fair argument can be made that a project will create a significant effect on the environment." (*Ibid.*)

Unusual Circumstances. A showing of unusual circumstances has in recent years increasingly been treated as an independent requirement for finding an exception under the Significant Effects Exception. (*E.g, Banker's Hill, supra*, 139 Cal.App.4th 249, p. 278.)

The presence of unusual circumstances is always treated as a question of law for the Court, without deference to the agency. (*Id.*, p. 262, n.11.) Under this approach, if a Court finds that the record presents unusual circumstances, it next turns to the question of whether the project may have significant impacts due to those unusual circumstances, under the fair argument standard of review. (*Id.*, p. 264 ["... [W]e conclude that an agency must apply a fair argument approach in determining whether, under Guidelines section 15300.2(c), there is no reasonable possibility of a significant effect on the environment due to unusual circumstances."].)

Azusa Land Reclamation Co., Inv. v. Main San Gabriel Basin

Watermaster, *supra*, 52 Cal.App.4th 1165 was *the first appellate opinion* to suggest that two-step test,[7] noting that "the question of whether [a] circumstance is 'unusual' within the meaning of the significant effect exception would normally be an issue of law that this court would review *de novo*." (*Id.*, p. 1207.) Since *Azusa*, a showing of unusual circumstances has been treated in many categorical exemption cases as an independent requirement for finding an exception under the Significant Effects Exception. (*Banker's Hill, supra*, 139 Cal.App.4th 249, p. 278.)

However, consistent with two landmark cases from this Court, along with statutory authority, the Guideline rule-making files, and the legislative history, the words "unusual circumstances" referenced in the Significant Effects Exception should be interpreted as relevant and descriptive without triggering a separate test. Recent cases applying the so-called two-step test did not yet have the benefit of the rule-making background that has been accepted for judicial notice in this appeal without objection. (*Berkeley*

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[7] The City's statement that "until this case, all courts have conducted the two-part inquiry" to identify unusual circumstances is untrue. (City Brief, pp. 3-4.)

Hillside, *supra*, 203 Cal.App.4th 656, p. 669, n.9.)[8]

Communities for a Better Environment (CBE) v. California Resources Agency, *supra,* 103 Cal.App.4th 98, held that if a project that fits into an categorical exemption category nonetheless presents a reasonable possibility of significant environmental effects, "those effects *would be* 'unusual circumstances' covered by the section 15300.2, subdivision (c) exception." (*Id.*, p. 129, italics added.)

As in the lower courts, appellants disagree with the City's interpretation of the *CBE* case and agree with the First District. (City Brief, pp. 37-39.) *CBE* unequivocally holds that a project demonstrating a reasonable possibility of significant environmental effects *despite* fitting into an exempt category demonstrates unusual circumstances by that very fact. (*CBE*, *supra*, 103 Cal.App.4th 98, p. 129.) The same *CBE* quote agrees that the fair argument standard fully applies to the Significant Effects Exception to the urban infill exemption. (*Ibid.*)

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[8] While accepting judicial notice of the rule-making files, the Court of Appeal indicated that it had reached a decision based on "the unambiguous language of the Guidelines and judicial interpretation of CEQA," and so did not resort to the history provided. (*Berkeley Hillside*, *supra*, 203 Cal.App.4th 656, p. 669, n.9.)

Appellants do not suggest that the words "due to unusual circumstances" should be deleted from or "read out" of section 15300.2 subdivision (c). They suggest that the words are an integrated part of the section rather than an independent requirement. Unusual circumstances are self-evident underpinnings when a project has potentially significant impacts but also arguably fits into an exemption category.

The City's rationale for treating "unusual circumstances" as an independent criterion of Guideline section 15300.2 subdivision (c) is that considering whether a project proposed for an exemption "'may have a significant effect on the environment' would render it meaningless" and would be "simply duplicative of the Legislature's directive" in the Public Resources Code to prepare an EIR for any project with significant environmental impacts." (City Brief, p. 23.)

Not so. Agencies may approve projects based on a categorical exemption from CEQA as long as they "fit" into one of the 33 classes. Unless there is evidence before the agency that a project nonetheless has significant environmental impacts, it moves expeditiously forward. Projects considered for categorical exemption are by definition minor and routine. No environmental review is triggered unless the exemption fails due to information known by or provided to the agency that indicates that

significant environmental impacts may result. This would only happen in unusual circumstances, as acknowledged by the very language of the Significant Effects Exception.

Appellants and the First District's opinion in *Berkeley Hillside* are *not* proposing that a full-blown pre-environmental-review process of some sort is to be required for projects before a categorical exemption may issue. Local jurisdictions control their discretionary land use processes. Here, the City of Berkeley's zoning ordinances required four discretionary use permits for the proposed Kapor mansion, that in turn required public notice and one hearing wholly independent of CEQA. During the Zoning Adjustment Board process, significant environmental problems came to light that now trigger the preparation of an EIR.

The City indeed reveals the fallacy of its own argument when it complains that even the *Azusa* two-step process "violates the plain meaning of section 21084, because it requires review of individual projects [to determine if there are unusual circumstances] for more than whether they fall within the exempt class." (City Brief, p. 24.) The City's suggestion that "the *only* inquiry" for a public agency should be whether or not a project fits within a categorical exemption class, without considering unusual circumstances *or* potentially significant environmental impact, is based on a

profound misreading of section 21084, ignoring the substance of the Significant Effects Exception as well as the applicable statutory framework and direction of this Court.

It cannot be overstated that CEQA's statutory authority does not allow categorical exemptions for any project that *may have a significant impact on the environment*; that remains the overarching rule. (Pub. Resources Code, §§ 21082.2, 21100, 21151.) As this Court ruled in *Wildlife Alive*, *supra,* 18 Cal.3d 190, pp. 205-206:

- The Public Resources Code empowers the Secretary of the Resources Agency to adopt regulations to categorically exempt projects from CEQA *only* for projects that will not have a significant environmental effect.

- No regulation may exceed the scope of the enabling statute.

- Use of a categorical exemption is improper for any project that may have a significant impact, since otherwise the subject regulations (the CEQA Guidelines for categorical exemptions) would exceed the statutory authority of the Public Resources Code.

The City fails to acknowledge the Court's clear holding. It contends that in *Wildlife Alive* this Court was somehow considering only the *scope* of a categorical exemption rather than the exemption itself. (City Brief, p. 35,

italics in original.) The City repeatedly opines, without any authority, that "the Legislature intended ... exemptions to be bright-line, categorical rules ... and did not direct or intend that agencies and courts would revisit the question of whether activities falling within the exempted classes of project will have a "significant effect on the environment." (*Id.*, pp. 4, 36 ["the purpose of categorical exemptions is to provide a bright-line rule ..."].)

Instead, this Court has explained that bright-line rules are "desirable" but are not always possible while implementing CEQA's mandates. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 138.) And the City points to no evidence that the adoption of Public Resources section 21084 subdivision (a) was in fact intended to provide any such bright-line rule forbidding consideration of whether a project within a categorical exemption class may in fact have significant environmental impacts. Categorical exemptions classes provide a streamlined process for routine projects *without* significant impacts; they are not a bar to environmental review.

Rule-Making File. *Wildlife Alive* was specifically relied upon in the adoption of the Significant Effects Exception in Guideline section 15300.2 subdivision (c) in 1980. The City has argued that because *Wildlife Alive* was decided in 1976, and Guideline section 15300.2 (c) was not

adopted until 1980, this Court's decision did not address the scope of the future exemption. But this theory is rebutted by the rule-making history.

Below is a copy of the sole relevant page from the rule-making file:

~~15100/2/~~ 15300.2. EXCEPTIONS. (a) Location. Classes 3, 4, 5, 6, and 11 are qualified by consideration of where the project is to be located -- a project that is ordinarily insignificant in its impact on the environment ~~may in a particularly sensitive environment be significant. Therefore, these~~ classes are considered to apply in all instances, except where the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies.

(b) Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant -- for example, annual additions to an existing building under Class 1.

(c) Significant Effect. 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.

NOTE: Authority cited: Sections 21083 and 21087, Public Resources Code; Reference: Section 21084, Public Resources Code; Wildlife Alive v. Chickering (1977) 18 Cal. 3d 190.

Discussion of Section 15300.2

The only changes with this section are the numbering and the addition of titles for the subparagraphs.

(Appellants' RJN, Exhibit C, p. 33.)

We therefore now know that when adopted in 1980 the Guideline cited only four elements as its underlying authority:

1. Public Resources Code section 21083
2. Public Resources Code section 21084
3. Public Resources Code section 21085
4. *Wildlife Alive v. Chickering*

Parsing the four authorities is helpful. First, Public Resources Code sections 21083 and [former] section 21085 provide *general authority* for adoption of regulations (aka the CEQA Guidelines) to implement CEQA.

Next, Public Resources section 21084 is specific to categorical exemptions: it allows CEQA guidelines to be prepared and adopted to "include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt."

And the last authority relied upon for adoption of the Significant Effects Exception is the *Wildlife Alive* case, which disallows categorical exemption for a project that may have a significant impact.

Thus, the impetus for the Significant Effects Exception, as contemporaneously documented by the Resources Agency, was not "unusual circumstances." There is no evidence that such circumstances are separate from the concept of "determined not to have a significant impact on the environment." An independent requirement to find unusual circumstances is inconsistent with statutory authority since it could allow a project with potentially significant environmental impacts to avoid CEQA review, as the trial court proposed to do in this case. (*Berkeley Hillside*, *supra*, 203 Cal.App.4th 656, pp. 670-672.)

The City takes issue with appellants' references to the rule-making

file, contending that the reference to *Wildlife Alive* as the basis for the Significant Effects Exception "does not deal directly with the 'unusual circumstances' requirement." (City Brief, p. 40.) Of course, the City is asking this Court to rule that the words "unusual circumstances" *create* a separate requirement. The rule-making file does not cooperate with this goal. It is instead further supports the First District's ruling that unusual circumstances do *not* warrant separate inquiry but are inherent in any project that fits into a categorical exemption class but nonetheless has potentially significant environmental impacts.

Legislative History. The Legislative history for Public Resources Code section 21084 subdivision (a) in the aftermath of the landmark *Friends of Mammoth* decision is certainly of interest to CEQA practitioners but little of it appears to illuminate the issues before the Court. There was assuredly no "bright line" that a project's "fit" into a categorical exemption class is intended to establish a definitive absence of environmental impacts. There is also assuredly no indication that the Legislature intended that any project should proceed, in or out of a categorical exemption class, if it has potentially significant environmental impacts.

One relevant document is Attorney General Evelle J. Younger's "Check List for Implementation of [CEQA]" from October 1972, at a very

dramatic time in the implementation of the new Act following this Court's ruling in *Friends of Mammoth*. (City's Legislative History Motion for Judicial Notice, Tab 13, pp. LC-95 – LC-114.) In response to its self-directed query "*Are categorical exemptions proper*?", the Check List states:

> There would appear to be no problem with exempting categories of projects on a prima facie basis as long as (1) the categories exempted truly are in keeping with the act and have no significant effect on the environment either individually or cumulatively and (2) some sort of appellate procedure (with adequate public notice) exists so that an individual project within the category can be taken out of the category on either the initiative of the government agency or on that of members of the public if it has a significant effect on the environment.

(*Id.*, p. LC-102, *attached*.) This appears to foretell the Significant Effects Exception and is fully consistent with the arguments of appellants and the First District's opinion in *Berkeley Hillside*.

Case Law. The City relies upon and mischaracterizes the consideration of unusual circumstances in *Association for Protection of Environmental Values in Ukiah v. City of Ukiah* (1991) 2 Cal.App.4th 720. A proposed 2,700 square foot single family home was about a quarter of the size of the Kapor mansion. The First District acknowledged that

geotechnical problems *could* have defeated the exemption, but held that there was no credible evidence of any soil instability or drainage problems. The only expert opinion essentially recommended that soil borings would be "prudent" but "*did not suggest the possibility of adverse environmental effects . . .* " (*Id.*, pp. 734-735, italics added.)

That is not the case here, where expert evidence documents potentially significant impacts. The Court of Appeal similarly distinguished the *Ukiah* case as involving only "normal and common" impacts. (*Berkeley Hillside*, *supra*, 203 Cal.App.4th 656, p. 675.)

In *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329 the Court noted that its job was to see if the record "*reveals substantial evidence of a fair argument that there could be a significant effect on the environment.* " (*Id.*, p. 1350.) Treating unusual circumstances as inextricably tied to the potential for significant effect, the Court found neither. (*Id.*, p. 1352.) In upholding the categorical exemption, the Court characterized the appellant's position as "nothing more than argument and unsubstantiated opinion. What is lacking are the facts, reasonable assumptions predicated on the facts, and expert opinion supported by the facts. (Pub. Resources Code, § 21082.2, subd. (c).)" (*Ibid.*)

The City contends that under *Berkeley Hillside* review of a project

proposed for categorical exemption would be identical to the review of a commonsense exemption as explained in *Muzzy Ranch v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372 [modified following a request by the undersigned counsel and others to remove references to the substantial evidence standard inapplicable to categorical exemptions].

The claimed relevance of the commonsense exemption and the *Muzzy Ranch* case first surfaced in the City's Petition for Review.

The analogy is without merit. There is a material difference between the commonsense exemption in Guideline section 15061subdivision (b) subdivision (3), where it "can be *seen with certainty that there is no possibility* that an activity in question may have a significant effect on the environment," and its converse: the Significant Effects Exception for projects with a "*reasonable possibility*" of significant effect. (Italics added.)

Projects described by the 33 classes of categorical exemptions are not equivalent to commonsense exemption projects that have "no possibility" of impacts. They instead encompass minor projects that are generally "not expected" to have significant impacts, albeit not "seen with certainty." In fact, when competent evidence of potentially significant impacts surfaces, a categorical exemption fails.

The fact that proposed categorical exemptions and commonsense

exemptions are both subject to the same restriction — they are unlawful if a proposed project has potentially significant environmental impacts — simply reflects the underlying mandates of the Public Resources Code favoring the preparation of EIRs. *Proposed negative declarations are subject to the same standard.* The "test" referenced by the City (City Brief, p. 44) applies to all CEQA activities except for statutory exemptions. That does not mean that categorical exemptions, common sense exemptions, and negative declarations are otherwise equivalent. It just means that each one fails in the presence of potentially significant environmental impacts that require the preparation of an EIR.

Importantly, and appropriately, *no* California case that the parties have found has upheld a categorical exemption on a record *that has also provided fact-based assumptions/expert opinion supporting a fair argument of potentially significant environmental impacts*. In addition to those already discussed, categorical exemption cases that have considered the "Significant Effects Exception" include (listed alphabetically): [9]

- ***Apartment Association of Greater Los Angeles v. City of Los Angeles*** (2001) 90 Cal.App.4th 1162. A categorical exemption was *upheld* for a housing code enforcement program in the absence of

[9] The listed cases do not include some that simply recite Guideline section 15300.2 subdivision (c) without applying it to any facts.

any evidence of potentially significant environmental impacts that would justify an exception. (*Id.*, pp. 1172-1176.)

- ***Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster*** (1997) 52 Cal.App.4th 1165, pp. 1203-1208. Under the fair argument standard, the Court found that reopening a closed landfill had potentially significant environmental impacts *and,* as a matter of law, also held that the landfill was unusual in that it handled waste and was physically connected to a drinking water aquifer. Categorical exemption was *denied.*

- ***Banker's Hill v. City of San Diego*** (2006) 139 Cal.App.4th 249. A categorical exemption was *upheld* for a large residential building, when the record did *not* contain a fair argument of significant environmental impacts due to unusual circumstances. The Court indicated that since it had found no fair argument of potential effects, it did not need to separately consider whether circumstances were in fact unusual. (*Id.*, pp. 267, 280-281.)

- ***Bloom v. McGurk*** (1994) 26 Cal.App.4th 1307. A categorical exemption for the operation of a medical waste treatment facility was *upheld* for an existing facility, despite requiring a new permit to operate under a new waste management statute. The facility had been operating since 1982 and was not expanding, and the Court held that the existing facilities exemption applied since there had been no change in operation and there were no unusual circumstances. The statute of limitations had long run as to ongoing operations. The opinion does not reference any evidence of

potentially significant environmental impacts.

- ***City of Pasadena v. State of California*** (1993) 14 Cal.App.4th 810, 815. A lease for a parole office was held neither to constitute an unusual circumstance nor to have physical environmental effects. "The principal issue ... is whether Pasadena has submitted sufficient evidence ... that the exception to the categorical exemption was applicable. That turns on whether Pasadena presented substantial evidence of an adverse physical change related to the lease. We conclude that it did not." Categorical exemption was *upheld.*

- ***Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles*** (2008) 161 Cal.App.4th 1168, p. 1187. Categorical exemption was *denied* for a proposed new fence on an historic wall. The Court found that there was no substantial evidence that the project properly fit into the minor alteration category, but also recited the 2-step *Azusa* test regarding unusual circumstances and significant effect. (*Id.*, pp. 1186-1188.)

- ***City of Santa Clara v. LAFCO*** (1983) 139 Cal.App.3d 923. The Court reversed a categorical exemption based on potentially significant impacts from annexation of land prezoned for agriculture but designated for development in the applicable general plan. Categorical exemption was *denied* because under the exception provided by Guideline section 15100.2 (c), the former version of the current section, the inconsistency between the zoning and general plan was an unusual circumstance that might lead to significant environmental impacts. (*Id.*, pp. 932-933.)

- ***Davidon Homes v. City of San Jose*** (1997) 54 Cal.App.4th 106. A categorical exemption was *denied* for adoption of a geologic hazard ordinance allowing borings. The City's conclusory recitation that the ordinance would have no potential significant impact was unsupported. (*Id.*, pp. 114-155.) The Court referenced the Guideline section 15300.2 (c) exception that requires a challenger to produce evidence of a "reasonable possibility of adverse environmental impact sufficient to remove the project from the categorically exempt class." (*Id.*, p. 115.)

- ***Dunn-Edwards Corporation v. Bay Area Air Quality Management District*** (1992) 9 Cal.App.4th 644. A categorical exemption for amendment of air quality regulations was *denied* because there was a fair argument of significant environmental impacts. The Court noted that a project is only exempt from CEQA "[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 ... if the court perceives there was substantial evidence that the project might have an adverse impact, but the agency failed to secure preparation of an EIR, the agency's action must be set aside because the agency abused its discretion by failing to follow the law." (*Id.*, p. 656.)

- ***Fairbank v. City of Mill Valley*** (1999) 75 Cal.App.4th 1243. A categorical exemption for a 5,855 square foot commercial building in an urban downtown was *upheld* when there were neither significant potential environmental impacts nor any unusual circumstances. Comments relating to existing traffic and parking

concerns that could be exacerbated by the project were minor and unsubstantiated.

- ***Hines v. California Coastal Commission*** (2010) 186 Cal.App.4th 830. Under the fair argument standard, the Court found no substantial evidence of potentially significant environmental impacts of a 1200 square-foot home and 400 square-foot garage proposed in the coastal zone, and thus *upheld* a categorical exemption.

- ***Lewis v. Seventeenth District Agricultural Association*** (1985) 165 Cal.App.3d 823. A categorical exemption for auto racing at a fairgrounds was *denied* because the Court found significant environmental impacts directly related to the unusual circumstance of the adjacency of residential areas to the racetrack. (*Id.*, p. 829.)

- ***Magan v. County of Kings*** (2002) 105 Cal.App.4th 468. The Court noted that a project is not exempt if there are unusual circumstances that "create a 'reasonable possibility' that the activity will have a significant effect on the environment. A challenger must therefore produce substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the project from the categorically exempt class." (*Id.*, p. 464.) The Court *upheld* an ordinance regulating sewage sludge as categorically exempt because the appellant had "failed to produce substantial evidence to support any exception ..." (*Id.* , p. 477.)

- ***McQueen v. Board of Directors of the Midpeninsula Open Space District*** (1988) 202 Cal.App.3d 1136. This relatively early case

denied a categorical exemption when an agency acquired contaminated property and was pursuing plans for its remediation. The Court found potentially significant environmental impacts based on the agency's activities affected by the unusual, contaminated condition of the property. (*Id.*, pp. 1146-1150.)

- ***Meridian Ocean Systems v. California State Lands Commission*** (1990) 222 Cal.App.3d 153. The State Lands Commission had initially adopted a categorical exemption for a geophysical research project, but later decided to prepare an EIR when potentially significant environmental impacts were identified. Meridian Ocean Systems sued to require the Commission to reinstate the categorical exemption so the company could continue with seismic research. The Court of Appeal *denied* the categorical exemption reinstatement request, because there were adequately demonstrated potential significant impacts. (*Id.*, pp.164-165.)

- ***Myers v. Santa Clara County*** (1976) 58 Cal.App.3d 413. The Court *denied* a categorical exception for a 3-lot subdivision, warning that "one of the easiest methods for evading CEQA is by misclassifying projects as categorically exempt." (*Id.*, p. 431.) The Court set aside an exemption based on evidence that "each dwelling in the project" presented unusual circumstances, including disturbance of natural conditions with improvements, grading on a steep hillside, long leach lines near a stream, removal of 9 specimen scenic oak trees, grading away 8400 square feet of brush, and inadequate water for fire protection. (*Id.*, p. 426.) The Court held that "these explicit

claims, even if exaggerated or untrue, are sufficient to remove the subject project from the class '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, . . .'" (*Id.*, p. 427.)

- ***San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley School District*** (2006) 139 Cal.App.4th 1356. Noting that exemptions from CEQA are to be narrowly construed since environmental review is avoided, the Court *upheld* a categorical exemption for a school closure upon insufficient evidence of either potentially significant environmental impacts or unusual circumstances. (*Id.*, pp. 1381, 1395.)

- ***Santa Monica Chamber of Commerce v. City of Santa Monica*** (2002) 101 Cal.App.4th 786. Categorical exemption was *upheld* for a permit-only parking district. While discussing unusual circumstances at some length, the Court found that there was insufficient evidence of a reasonable possibility of significant environmental impact and therefore no exception to the applicable exemption applied. The parking district simply provided preferential parking for residents instead of commercial users. (*Id.*, pp. 800-802.)

- ***Turlock Irrigation District v. Zanker*** (2006) 140 Cal.App.4th 1047. The adoption of water conservation rules was *upheld* as categorically exempt. "In the first place, even if these circumstances were 'unusual' in some sense, there is no showing that the circumstances operate through the rules to create a reasonable possibility of a significant adverse effect on the environment. In other words, the

question is … whether [unusual circumstances] could possibly *cause* the rules to have a significant effect ..." (*Id.*, p. 1066.)

- ***Voices for Rural Living v. El Dorado Irrigation District*** __Cal.App.4th ___ (Third Appellate District, October 4, 2012). A categorical exemption for a water supply agreement was *denied* and an EIR was ordered to be prepared because the amount of water to be provided was large enough to be an unusual circumstance that created a potential for a significant environmental impact.

Thus, under *all* of the case law a categorical exemption has never been upheld when the administrative record supports a fair argument of potentially significant environmental impacts.

Discussion

The philanthropic Kapors will be welcome Berkeley residents. The record contains letters from their friends and colleagues, as well as emails, letters, and testimony from some of their neighbors and hired experts expressing sincere opinions that the 10,000 square foot project proposed on Rose Street is unlikely to have significant environmental impacts. Since the Court does not weigh such evidence under the fair argument standard of review explained above, most of it will not be referenced.

A. Exemption Classes are Conceded

The City exempted the Kapor project from CEQA based on two claimed categorical exemptions: Class 3 [single-family residence] and Class 32 [in-fill development]. (1 AR 1-5.) Appellants argued at trial that Class 32 does not apply, since it requires that in-fill be consistent with applicable general plan policies, lack significant traffic impacts, and provide emergency services: those requirements are not here met. (Guidelines, § 15332, subd.(a), subd.(d), subd.(e).) The size and proposed use of the structure for substantial philanthropic events are also arguably inconsistent with the Class 3 single-family home category. (2 AR 456.) However, appellants' focus has always been on the Significant Effects Exception that defeats any categorical exemption.

B. There is a Fair Argument of Significant Impact

A categorical exemption from CEQA is allowed only when there is *no substantial evidence* — a fact or fact-based reasonable assumption/ expert opinion — supporting a low-threshold "fair argument" that a project may have any site-specific or cumulative significant effect on the environment. The overarching bottom line is that environmental review is favored under CEQA and that therefore categorical exemptions must be

very narrowly applied in the interests of environmental protection.

All of the evidence listed below that supports a fair argument of potentially significant geotechnical, planning, traffic, and aesthetic impacts was provided in the trial court and the Court of Appeal. Because the geotechnical issues were sufficient to meet the fair argument standard, the Court of Appeal did not address the other evidence and perhaps this Court will do the same. But appellants want to provide the full record evidence.

Except for the geotechnical "side-hill fill" issue, the City has now paraphrased just a few minor snippets of appellants' environmental concerns from the record, snidely and out of context, falsely stating that appellants "argued that any one of the [three listed comments] would be enough alleged 'evidence'" to meet the Significant Effects Exception. (City Brief, p. 46.) Appellants stated no such thing. And the City as petitioner in this Court should have provided a fair recitation of the evidence.

Appellants catalogue below a plethora of fact-based reasonable assumptions and expert opinions, including but not limited to evidence relating to geotechnical issues, sufficient to support a fair argument of potentially significant environmental impacts that require preparation of an EIR rather than reliance on a categorical exemption.

The City's argument that the existing site constraints cannot be

considered because "CEQA does not require agencies to analyze the significance of impacts of the existing environment on a proposed project" is scrambled. (City Brief, pp. 74-77.) This is not a situation involving risks to people choosing to move into an environmentally dangerous area, as in *San Lorenzo Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356. (City Brief, p. 76.) The proposed project in combination with the environmental constraints of its site has potentially significant environmental impacts. They require study and mitigation.

Geotechnical Impacts. The reports and testimony of Dr. Lawrence B. Karp, a structural engineer and architect extremely familiar with the Berkeley hills, explain the Kapor project's significant geotechnical impacts. Dr. Karp's undisputed credibility is not at issue.

Fact-based expert opinion supporting a fair argument of potentially significant impacts geotechnical impacts of the Kapors' project includes:

- The 3-story project (*e.g.*, described as including *a third open-air lower level* (1 AR 199, 2 AR 464 [diagram]) requires earthquake resistance analysis due to its location in the Landslide and Alquist-Priolo zone. (1 AR 100-101 [drawing of earthquake zone], 2 AR 441-443.) The tallest portion of the building is supported on isolated

columns, with glass walls above, which should require steel or steel-reinforced concrete. (1 AR 199.) The City consulted with engineers who disagreed. (2 AR 467.)

- The Zoning Adjustment Board staff report discusses the site's claimed 50% slope and 1500 cubic yards proposed for excavation, and notes that ZAB's approval "includes five conditions to address construction-related erosion and drainage." (1 AR 149.) These conditions to mitigate environmental impacts defeat the categorical exemption.

- Dr. Karp wrote two reports. (2 AR 448-449, *attached.)* In the first report, dated April 16th, he noted that the City's project file that he had reviewed the day prior, April 15th, did not include a geotechnical report. Following the filing of the April 16th report, Dr. Karp was contacted by City staff and was provided with a geotechnical report dated August 2009. (2 AR 449.) He then prepared his April 18th letter and referenced that information.

  Dr. Karp's reports speak for themselves. They conclude that "*the project as proposed is likely to have very significant environmental impacts not only during construction, but in service due to the probability of seismic lurching of the oversteepened side-hill fills.*" (*Ibid.*, italics added.) The 2009 geotechnical study that was relied upon by the Kapors was not for their current project but addressed a structure two-thirds of the current size and without the 10-car garage. (*Ibid.*, *see* 4 AR 944.)

- The Kapors' engineering experts did not question Dr. Karp's credentials or credibility but disputed his opinions and claimed that they believed that he had misread and misunderstood the project plans. (4 AR 934, 1061.)

- At the City Council hearing on the appeal, Dr. Karp appeared and testified. (2 AR 530-531.) He summarized his credentials: "I have an earned doctorate in civil engineering and other degrees from UC Berkeley including two Masters and a post-doctoral certificate in earthquake engineering. I am fully licensed. I taught foundation engineering at Berkeley for 14 years and at Stanford for 3. I was born and raised in Berkeley. I own homes in Berkeley. I work throughout the West Coast. My experience includes over 50 years of design and construction in Berkeley. I prepare feasibility studies before, and engineering during, construction of unusual projects. (2 AR 530, *attached*; 4 AR 1089, *attached.*)

  He confirmed that "for this project, I conducted an independent feasibility study." (*Ibid.*) He prepared his own section drawing. (4 AR 1085.) He read the Kapors' experts reports that contended that he had misread the architectural drawings, and insisted that they were mistaken. (2 AR 531.) He confirmed his reports, including his conclusions regarding "very significant environmental impacts that should be studied and mitigated." (2 AR 531-532; 4 AR 1089 [transcript of Dr. Karp's testimony at City Council].)

  Dr. Karp's expert opinions amply meet the fair argument standard.

Substantively, his opinions provided grounds for significant concerns about the Kapor project's impacts. The trial court agreed, finding that "despite criticisms" leveled by the Kapors, and even if some of those were somehow considered to be valid, "Dr. Karp's opinion provides substantial evidence of a fair argument of a significant environmental impact consequent to the Project." (AA:157.) The court was surely correct on that point.

The Court of Appeal also found Dr. Karp's opinions to comprise substantial evidence supporting a fair argument of potentially significant environmental impacts due to unusual circumstances:

> ... Karp opined that the proposed construction would (1) require the excavation of all vegetation and extensive trucking of earthwork in order to achieve grading, (2) result in steepening of the already existing steep slope, (3) necessitate 27-foot retaining walls, and (4) impact the environment because of the probability of 'seismic lurching of the oversteepened side-hill fills' in a landslide hazard zone. These were certainly potential 'direct physical change[s] in the environment,' which justified Karp's opinion that the construction would result in a significant impact to the environment. (Citations) Stated differently, Karp's opinion provided substantial evidence upon which it could be fairly argued that the proposed construction may have significant environmental impact. (Citation.)

(*Berkeley Hillside, supra*, 203 Cal.App.4th 656, p. 674.)

The City urges the Court to disregard Dr. Lawrence Karp's detailed,

fact-based, expert opinion regarding the potentially significant geotechnical impacts of the project, in favor of the Kapors' engineers' competing opinions. That is not how the CEQA standard of review works. If this is not expert evidence, what is? Neither the City nor the Court may choose between conflicting expert opinions until after an environmental impact report is prepared. (Guidelines, § 15064.)

1. **Prior Geotechnical Report.** The Kapors' 2009 geotechnical report, which was the only geotechnical report that they provided to the City for their project, was not in the project file as of April 16, 2010, and thus had obviously not been reviewed by City staff or the ZAB as a basis for categorical exemption. Further, the report addressed a two-building project rather than the single approved 10,000 square-foot building. (*Post, p.* 80.)

2. **Interpretation of Plans.** The City presents the opinions of the Kapors' experts as if somehow qualifying as facts. They do not.

The City relies on letters from attorney Rena Rickles, geotechnical engineer Alan Kropp, and civil engineer Jim Toby that contend that Dr. Karp misread the Kapor plans. (4 AR 934-935 [April 26, 2011, Rickles], 1061-1062 [April 21, 2011, Kropp], 1064-1067 [April 21, 2011, Toby].)

As noted above, all that is demonstrated is a dispute among experts, which cannot undo a fair argument of environmental impact. Dr. Karp had an opportunity to review the critical letters before the City Council appeal meeting on April 27, 2011, and so testified. (4 AR 1089, 2 AR 530-531 [transcript].) He explained to the Council that he had *not* misread the plans and that based on independent analysis at the site he continued to disagree with the Kapors' engineers about project impacts. (4 AR 1089, attached.) Dr. Karp provided a technical explanation of requirements for restraining the retaining walls from rotation, "extraordinary demand" requiring drilled piers to be very large and deep, tiebacks elevated to 14 feet above grade "which will require large machinery," and inability to use portable equipment, and concluded:

> ... Project grading and tree removal, including removal of significant protected oak trees, will therefore be much more extensive than represented by the City, just as noted in my letter-reports and shown graphically on the Grading Section drawing you now have. This project has potential for very significant environmental impacts that should be studied and mitigated.

(4 AR 1089; 2 AR 530-532 [transcript of Karp testimony].)

The City Council gave no indication that it disregarded Dr. Karp's opinion. The Council never questioned his credibility; it would indeed have

been pointless to do so in light of his credentials. The Council's discussion at the appeal meeting never touched on geotechnical issues. (2 AR 541-591.) Dr. Karp's opinions could only be disregarded if he was shown to lack credibility. As explained in *Pocket Protectors v. City of Sacramento* (2008) 124 Cal.App.4th 903:

> ..., if an expert purporting to hold a Ph.D. testifies as to the environmental effect of a project, a lead agency or a court may properly consider and 'weigh' evidence in the record showing the expert never attended college and his Ph.D. is phony. But this limited weighing of evidence to determine admissibility in an environmental debate must not be confused with a weighing of some substantial evidence against other substantial evidence.

(*Id.*, p. 935.) The Court explained further:

> ... since fair argument review is generally non-deferential and prefers resolving doubts in favor of maximizing environmental review ..., before accepting [a developer's argument to discount expert testimony] we would have to find that the City Council actually resolved disputed factual questions *going to credibility*. But the City Council's findings of fact do not discuss any opposing evidence: they merely recite generally that substantial evidence of a significant effect on the environment does not exist. Thus, we see no specific credibility call by the City Council which requires deference.

(*Id.*, pp. 934-935.)

Dr. Karp's unassailable professional credentials as an experienced geotechnical engineer and architect who has taught at Stanford and Cal were never questioned, and his assertion that he reviewed the criticisms of the Kapors' engineers and disagreed with their opinions that he had misread the plans were not refuted. And *unlike* the Kapors' engineers, Dr. Karp has "been a licensed architect for many years." (2 AR 531.) The Kapors' architects, who drew the plans, never expressed an opinion regarding Dr. Karp's interpretation of their plans.

The Kapors' expert, Alan Kropp, provided a conflicting opinion that although both he and Dr. Karp had reviewed the same architectural plans and he did not question Dr. Karp's credentials or credibility, he "*believe[d]* there has been a misunderstanding of the plans" and "does not *believe* there will be grading necessary downhill of the lower backyard." (2 AR 538.) Such statements were couched as Mr. Kropp's "beliefs" and he underscored that he was offering opinions, not stating facts. (*Ibid.*)

In the context of a categorical exemption (unlike the very different context of an EIR) the opinions of the Kapors' engineers cannot trump the opinions of Dr. Karp, who is an architect as well as an engineer.

The City generally cites to *Leonoff v. Monterey County Board of Supervisors* (1990) 22 Cal.App.3d 1337, p. 1352, as support for its contention that it could "disregard Dr. Karp's opinion" because "erroneous information that is corrected by other evidence in record may be disregarded." (City Brief, p. 74.) However, unlike this case, *Leonoff* had no highly-qualified expert providing technical analysis. Instead, non-expert opponents presented bits and pieces of information easily shown to be without foundation. The Court discounted the evidence as incomplete, misleading half-truths. (*Id.*, pp. 1349-1356.)

Here, experts have expressed differing professional opinions based upon their independent review of the Kapors' project plans. The Kapors' experts' opinions do not trump Dr. Karp's professional opinions in this context since he is a credible expert who conducted his own analysis after reviewing all project plans. As part of his review, he prepared a grading section drawing of the geotechnical impacts of the 10,000 square-foot home proposed on the existing slopes, and also confirmed errors in the Kapors' submitted plans that neighbors had repeatedly pointed out as part of their City Council appeal. (*E.g.*, 2 AR 198-204, 288-292 [Council appeal exhibits re height measurements, topography, site plan]; 4 AR 1085, 1089.) The "he-must-have-misread-the-plans" defense is without merit.

3. Geotechnical Impacts Related to Grading. The relevant query is whether Dr. Karp provided a fact-based professional opinion of potentially significant geotechnical impacts. (Public Resources Code, § 21082.2 [Substantial evidence includes "expert opinion supported by facts"].) Dr. Karp did just that and provided an expert opinion regarding geotechnical impacts relating to the need for massive grading and excavation that in turn required extensive trucking and removing of mature trees for the side-hill fill necessary to secure the 10,000 square-foot structure on its steep site. (2 AR 448-449, 4 AR 1085, 1089.)

As a basis for Dr. Karp's opinion, he visited the site on several occasions, reviewed all of the plans, reviewed the outdated 2009 geotechnical report prepared for the separate house and carport as well as the later Planning Department submittals on the project as finally conceived, and created his own grading section drawing to determine the extent of earthwork and excavation necessary to support the 10,000 square foot house on its hillside site. (2 AR 448-449.)

Those professional tasks were well within Dr. Karp's extensive education and decades of experience in the Berkeley hills. From those efforts, Dr. Karp developed a fact-based professional opinion as to excavation and grading required to provide an adequate foundation and

anchorage for such a large building. His independent evaluation provided the basis for his opinions regarding significant environmental impacts. (2 AR 448-449; 4 AR 1085,1089.)

As discussed at the trial court hearing on the writ, plans for the massive Kapor house show it perched on a steep hillside "like a little hat." (RT:46.) "That's how it's supposed to look sitting on the hillside, and it shows different elevations. It's just sitting there." (*Ibid.*)

> Appellants summarized Dr. Karp's opinion that the building
>
> ... *can't* just sit there. They'll have to do benches and fills and all kinds of retaining wall to do that work ... he did his own evaluation of this house on this site and indicated where he thought the benched-fill locations would need to be. He said the slopes were different than had been represented ... there would be significantly more fill required. The ... trees [would need to be] removed to get the equipment in to do that ... *no one refuted this* ...

(RT:46-47, italics added.)

Dr. Karp's reports and testimony qualify as substantial evidence supporting a fair argument of potentially significant geotechnical impacts relating to site grading and excavation. No comparable evidence was provided in cases in which categorical exemption was denied. (*Association for Protection of Environmental Values in Ukiah v. City of Ukiah* (1991) 2

Cal.App.4th 720, p. 734-735.) Dr. Karp's reports well meet the fair argument standard, as recognized by the trial court. (AA:157.)

4. Seismic Issues.

a. Landslide Hazard Zone/La Loma Overpass. Dr. Karp explained that the Kapor site is "alongside a major trace of the Hayward fault and it is mapped within a state designated earthquake-induced landslide hazard zone." (2 AR 448, *attached.*) Further "although the site as now configured appears stable, the Rose Steps and the concrete of the elevated part of La Loma [overpass] are cracked from fault creep ..." (*Ibid.*)

Dr. Karp recommended "an alternative project ... to avoid grading with massive excavations and fills as well as the shoring and retaining walls necessary" for the project, concluding that in his professional opinion the 10,000 square-foot project had potentially significant impacts "not only during construction, but in service due to the probability of seismic lurching ..." (2 AR 448-449.)

Dr. Karp's reference to the "designated earthquake-induced landslide hazard zone" is fully consistent with the Kapors' 2009 geotechnical [Lott] report's reference to the site being "within a Special Studies Zone for potential fault rupture hazards as well as a Seismic Hazard Zone for earthquake induced landsliding." (3 AR 655.)

The Lott report warned that it did not contain "a quantitative evaluation of earthquake induced landslide hazards fulfilling all the rigorous investigation and analysis requirements of the Special Studies Zone and Seismic Hazard zone acts." (3 AR 655.) It noted the site's location on "the eastern margin of the Alquist-Priolo Earthquake Fault Zone. Possible traces of the Hayward fault are shown about 600 and 900 feet west of the site" and "large landslides ... are 500 feet or more from the site." (*Id.*, p. 657; *see* 676, map of Berkeley Hills Landslides and Hayward Fault.) A landslide hazard map "places the site within an area of high seismic landslide hazard." (*Ibid.*) Finally, the Lott report noted that a 2003 [California Geologic Survey] Seismic Hazard Zone map placed the site "within a zone mapped as potentially susceptible to earthquake induced landsliding." (*Id.*, p. 658.)

The 2009 Lott report's investigation concluded that "the site is suitable for the construction of the proposed residence from a geotechnical standpoint" but stated that the report's recommendations "should be incorporated in the design and construction of the project *to minimize possible geotechnical problems*." (3 AR 660, italics added.) Among the recommendations for what was at that time only *a 6,000 square foot house* were that piers be designed "to resist a lateral creep force over the upper portion of the piers that extend through the expansive near-surface walls."

(*Id.*, p. 661.) The report also recommended that the site be "cleared and stripped" of all "surface vegetation." (*Id.*, p. 663; *see* many other Lott recommendations at pp. 663-671.)

As the Karp and Lott reports agree, there are no current landslides on the Kapor site and it currently appears stable, *but* it is in a zone mapped as a "landslide hazard zone" and is close to the Hayward Fault. (2 AR 448-449; 3 AR 655-661; 4 AR 1062.) Dr. Karp did not say that the Kapor site was in a landslide "area," but correctly confirmed its location in a landslide "hazard zone" adjacent to the Hayward Fault. (2 AR 448-449; 4 AR1089.) The fact that the Lott report did not locate any current landslide hazard on the site does not change its location in a landslide hazard zone.

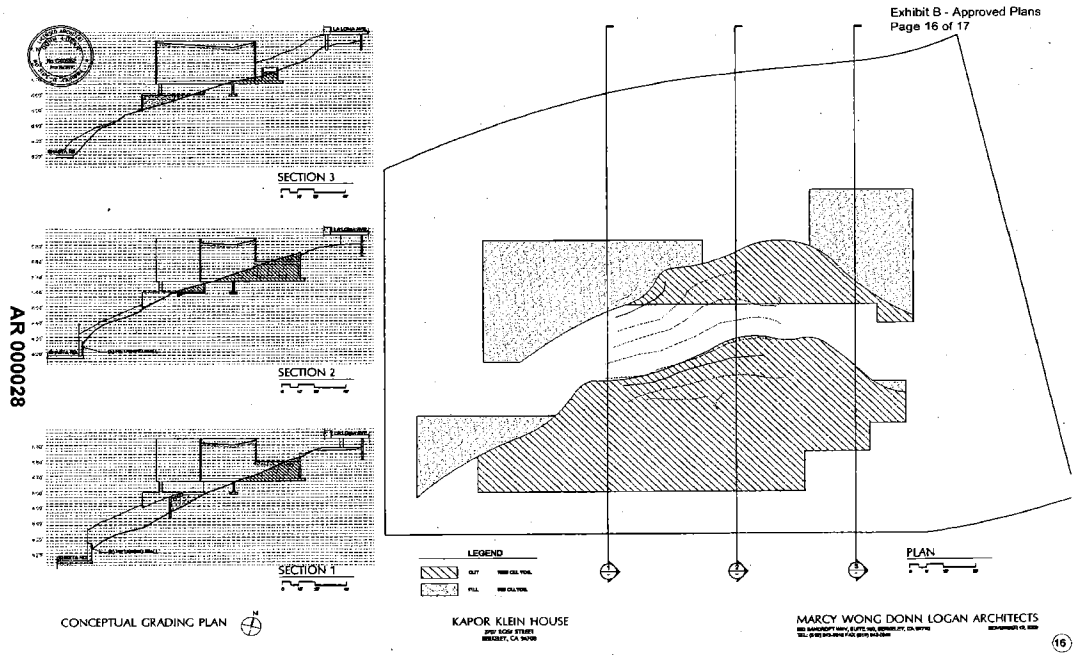
Dr. Karp did not state that every home in the Berkeley and Oakland hills presents significant geotechnical hazards. This particular home at the size proposed on its sloped lot will require excavation for steep side-hill fills resulting in a "probability of seismic lurching." (2 AR 448-449.) Dr. Karp also emphasized that the Lott report's site plan and limitations for the 6,000 square foot house proposed in 2009 were "inconsistent with" the approved architectural plans for the later 10,000 square-foot structure with attached garage. (*Id.*, p. 449.)

The 2009 Lott geotechnical analysis did not address the actual

project. Dr. Karp's geotechnical analysis did, and his conclusion that the house is too large for its steep site (4 AR 1089) provides substantial evidence supporting a fair argument of significant environmental impact.

b. La Loma Overpass. The record describes the La Loma overpass as a "large concrete structure, supported on massive walls and columns facing 2707 Rose, … constructed in place of the original La Loma Avenue road-bed." (3 AR 613.) The 2009 Lott report notes that "La Loma Avenue passes along the south margin of the site and is an elevated roadway constructed directly above the end of Rose Street." (3 AR 659.) Kapor architect Donn Logan explained that "our site is beyond where you see the underside of what looks like a freeway" and referenced "the general blight of the La Loma concrete road structure hanging off the end of Rose Street about opposite where our front door will be …" (2 AR 471-472.)

Dr. Karp pointed out that in his investigation he had observed that the Rose Steps and the concrete of the La Loma overpass "*are cracked from fault creep and other ground movement.*" (2 AR 448.) He urged that a project alternative be considered "to avoid grading with massive excavations and fills as well as the shoring and retaining walls necessary to achieve grades shown on the drawings." (*Ibid.*)



(1 AR 28, Conceptual Grading Plan, Sheet 16, *see* La Loma Overpass at upper right at Sections 1-3, and depictions of excavation near the Overpass.)

There is no record of any study of the potential of undermining the foundation of the overpass by the massive excavation necessary for the Kapor project, including the underground 10-car garage added after the 2009 Lott engineering report. The danger presented by the location and condition of the La Loma overpass adjacent to the site, pointed out by Dr. Karp, provides additional fair argument evidence of significant impact.

c. Drainage. Dr. Karp explained in his April 18th geotechnical

report that "a drawing in the [Lott] report depicts the site drainage to be collected and discharged into an energy dissipator dug into the slope, which is inconsistent with the intended very deep fill slopes." (2 AR 449.) In response, the April 21st letter from civil engineer Jim Toby states that "site drainage concerns raised by [Dr.] Karp are customarily addressed during the construction documents/building permit phase of a project." (4 AR 1066.) The Toby response did not deny a potential environmental problem directly related to the project's unusual excavation and fill on steep slopes.

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The expert evidence supporting a fair argument of significant geotechnical impacts of the Kapor project amply meets the "Significant Effects Exception"— and defeats the categorical exemption.

General Plan/Zoning Inconsistencies. Because the Court of Appeal ruled that the categorical exemption could not be allowed because of the Kapor project's potentially significant geotechnical impacts, it did not address its other potentially significant impacts. The trial court also found a potentially significant impact based on inconsistencies with adopted City plans and policies adopted for environmental protection. Such impacts are also a matter for "fair argument" review.

Pocket Protectors v. City of Sacramento (2008) 124 Cal.App.4th 903,

pp. 930-931, found a fair argument that a proposed housing project was inconsistent with an adopted area plan. The City of Sacramento argued that a dispute as to the issue of plan consistency should not be subject to the CEQA "fair argument" standard, since cities are generally accorded deference to interpret their own plans.

The Court of Appeal disagreed, reversing the trial court decision, finding that in addition to a fair argument of aesthetic impacts, the record included a fair argument that the project was inconsistent with adopted plans under the standards of CEQA Guidelines Appendix G, section IX, which queries whether a project *may* "conflict with any applicable land use plan, policy, or regulation of an agency ... adopted for the purpose of avoiding or mitigating an environmental effect." (*Pocket Protectors, supra,* 124 Cal.App.4th 903, p. 929.)

The *Pocket* Court held that "...if substantial evidence supports a fair argument that the proposed project conflicts with the policies of the [local plan], this constitutes grounds for requiring an EIR. Whether a fair argument can be made on this point is a legal question on which we do not defer to the City Council's determination. [Citations.]" *(Id.*, pp. 930-931.)

Under the Appendix G Checklist, an arguable inconsistency with the plans and policies used by an agency to assess environmental impacts

meets the fair argument standard. This includes general plans and other city policies. Here, the fair argument includes:

- The appeal recites inconsistencies with the General Plan, such as:

Policy LU-3 Infill Development: Encourage infill development that is architecturally and environmentally sensitive, embodies principles of sustainable planning and construction, and is compatible with neighboring land uses and architectural design and scale.

Policy LU-4 Discretionary Review: **Action:** When evaluating development proposals or changes to zoning consider General Plan and Area Plan policies, Zoning and Subdivision Ordinance standards, existing land uses, environmental impacts, safety and seismic concerns, social and economic consequences, and resident, merchant, and property owner concerns.

Policy LU-7 Neighborhood Quality of Life: Require that new development be consistent with zoning standards and compatible with the scale, historic character, and surrounding uses in the area. Carefully evaluate and monitor new and existing uses to minimize or eliminate negative impacts on adjacent residential uses.

Policy UD-17 Design Elements: In relating a new design to the surrounding area, the factors to consider should include height, massing, materials, ...

Policy UD-24 Area Character: Regulate new construction and alterations to ensure that they are truly compatible with and, where feasible, reinforce the desirable design characteristics of the particular area they are in.

Policy UD-31 Views: Construction should avoid blocking significant view, especially toward the Bay, the hills ... Whenever possible, new buildings should enhance a vista or clarify the urban pattern.

(1 AR 99, 205, 280.) The appeal claims that the Kapor project is particularly inconsistent with Policy UD-16:

Policy UD-16 Context: The design and scale of new or remodeled buildings should respect the built environment in the area,

particularly where the character of the built environment is largely defined by an aggregation of historically and architecturally significant buildings.

(1 AR 205, *see* also 204.)

- The appeal further explains that the Kapor project exceeds the City's average height and maximum height standards. (1 AR 200-201.)

- Shasta Road resident Paul Newacheck explained that General Plan policies UD-16, UD-17 and UD-24 are neglected by "this large, office-like structure [that] will change the character of the neighborhood in a negative way." (2 AR 346.)

- Attorney John McArthur of Stuart Street explained as a "concerned, long-term Berkeley resident ... I want to stress that this is not just a Rose-Street-area concern. The fair and equal application of zoning regulations are a major part of the quality of life for all of us in Berkeley. If relatively small houses receive detailed scrutiny, as they often do, but the largest house built in decades is rubberstamped ... it would be a sign that the zoning board is not ruling even-handedly..." (2 AR 348-349.)

The administrative record supports a fair fact-based argument of the Kapor project's inconsistency with the Berkeley General Plan, meeting the exception for significant impacts that defeat categorical exemption. Judge Roesch agreed that "the record here does contain evidence sufficient to support a fair argument of inconsistency with Berkeley's zoning policies,"

including Policy UD-16, cited above, "taken in context with the factual underpinning stated in the appeal." (AA:156.)[10] The Court of Appeal did not address the issue of General Plan inconsistency.

Aesthetic Impacts. The CEQA Guidelines' Appendix G Checklist inquires in its first section whether a project may have a substantial adverse effect on a scenic vista, or may substantially damage scenic resources [such as trees], or whether it may "substantially degrade the existing visual character or quality of the site and its surroundings." (Guidelines, Appendix G, I, Aesthetics, (a)-(c).)

Testimony of area residents that are not qualified environmental experts qualifies as substantial evidence when based on relevant personal

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[10] However, the trial court mistakenly held that the fair argument standard somehow should not apply to a claimed exception to the infill exemption exception, misinterpreting *Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, pp. 268-269, as if that case directed the application of the substantial evidence standard. (AA:156, n.3.) *Banker's Hill* held that while the substantial evidence standard applies to the initial question of whether a project fits into the infill exemption category, when considering the "unusual circumstances" exception *"we consciously apply a different standard than we applied in determining whether the elements of the urban in-fill exemption were met."* (*Id.*, p. 281, italics added.) The Court applied the fair argument standard to evidence in favor of the exception. (*Ibid.*) When a general plan inconsistency meets the exception [which did not occur in *Banker's Hill*] categorical exemption is unlawful.

observations. (*E.g., Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, p. 882 [residents may testify as to traffic within their personal knowledge]; *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, p. 173 ["... an adjacent property owner may testify to traffic conditions based upon personal knowledge ... "]; *Arviv Enterprises v. South Valley Planning Commission* (2000) 101 Cal.App.4th 1333 [Relevant personal observations of neighbors regarding slope, dust, erosion, and access problems met fair argument]; *Ocean View Estates Homeowner's Association v. Montecito Water District* (2004) 116 Cal.App.4th 396 [Residents' subjective opinions regarding potential aesthetic impacts affecting private views and public hiking trail provided fair argument]; *Pocket Protectors v. City of Sacramento, supra*, 124 Cal.App.4th 903 [Residents' opinions provided a fair argument of aesthetic impacts of housing project and its arguable inconsistency with adopted plans].) Under these cases, input from non-experts can provide the requisite "fair argument" where such input is credible and does not include analysis requiring special training.[11]

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[11] *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572 held that opinions regarding the aesthetic differences between a three-story versus four-story housing project on busy Sacramento Street in downtown Berkeley did not meet the fair argument standard as a matter of law in the context of

Berkeley resident Stephen Twigg provided *expert opinion* that the Kapors' structure "will appear institutional" and out of scale with the neighborhood. "My judgment *as a degreed artist* is that ... the appearance of this huge monolith looming over the existing ridge line will seem ominous..." (1 AR 72, italics added.) He suggested other sites, noting that . the Kapors "are asking for a variance that will provide a more valuable view *from* the proposed site ... the downside of this is that it will provide a less valuable view *toward* the site." (1 AR 73.)

- Berkeley resident Valerie Herr expressed a fact-based opinion that the proposed house with its 10-car garage is "completely out of the scale and spirit of the neighborhood, which contains historic districts and numerous individual houses by notable local architects built over many decades." (1 AR 95.)

- Berkeley resident Chuck Fadley explained that "the home is approximately three times larger than any in the adjacent historic neighborhood ... and of significantly different aesthetic character." Its "modern rectangular design ... cannot be said to be fully

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that case. The *Bowman* facts were emphasized and distinguished in *Pocket Protectors, supra*, 124 Cal.App.4th 903,939, and *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, each of which found a fair argument based in part on the aesthetic impacts of housing projects in different contexts.

compatible with most of the existing homes in the neighborhood." He pointed out that "the overall height of the structure appears to be underestimated, as it is in fact more like three stories high at some points of its expanse and grade, and will at its highest point be approximately 100 feet above Shasta Street below." (1 AR 99-100.)

- Resident Dawn Hawk found the project to be a "breathtaking and radical departure from the style of the neighborhood ... My neighbors have begun to refer to this house as the 'K-Mart House' and it is hard to disagree with this assessment." Further, "views in our neighborhood are not merely the sweeping views of the bay, San Francisco, the Golden Gate and Richmond-San Rafael bridges and Mt. Tamalpais, but also of the surrounding neighborhood. This massive and imposing commercial design is completely out of character for this neighborhood." (1 AR 105-106.)

  She described the neighborhood's modest but architecturally significant homes designed by architects such as Julia Morgan, Bernard Maybeck, Walter Ratcliffe, Carr Jones, and John Thomas Hudson. "Part of the great charm of this neighborhood is the variety of older homes which are a mixture of styles, but with few exceptions preserving the building pattern in the area which was begun in the teens." (1 AR 105.)

- The Fadley appeal pointed out that the City staff report had noted that dwellings to the north do not have views across the site, but did not assess views toward the site. The architect's model and drawings show that the building will be visible from properties to

the north. (1 AR 203.) The staff report also understated the size and volume of the building and how it fits into the topography.

The proposed house is three times the size of the average home in the area, or four and a half times larger if one counts the total square footage. (1 AR 204) Out of over 17,000 single-family residences in Berkeley, only 17 exceed 6000 square feet and only two of those were built after 1942. (1 AR 193.)

"The impact of this building on its surroundings will be great. Its construction will entail massive retaining walls to re-profile the hill, and the building will loom over the small canyon to the north." (1 AR 206.) The project does not respect the context of the surrounding built environment, characterized by some of the most historic and architecturally significant buildings in the city. (1 AR 443.) Single-family home sizes in Berkeley average between 1,734 square feet and 1,970 square feet. (1 AR 208; *see* also pp. 209-210.)

- Mildred Henry analogized "our situation here with the push to insert a truly enormous structure into a closely knit, longstanding, historically interesting residence area and big money, big corporate push everywhere to wipe out smallness and individuality..." (2 AR 429.)

- Shasta Road resident Ira Lapidus protested that "the planned building is much larger than other houses in the neighborhood and the style is not in character with the rest of the neighborhood." (2 AR 431.)

- ZAB Boardmember Sara Shumer, who abstained from the final vote, said that "the owners of the property are upstanding citizens in every way. And that goes to credibility. *But it doesn't go to land use* … My concern when I visited [the site] was that I was quite surprised not to find any story poles. And I understand that height is probably not an issue. But bulk is … I was also concerned about the north landscape view…" (2 AR 510-516, italics added.)

- Long-term resident Ann Hughes, who ultimately supported the Kapor project, found it to be out of scale, and that "introducing a house with built square footage greater than the parcel size of many of the lots in the area requires more subtle handling than the big box — flat wall over 100 feet long — looming over Shasta Road 75 feet below." (1 AR 104.)

- Lawrence Karp provided expert opinion that the site grading with tree and stump removal and benching will be necessary from the midpoint of the new building down to Shasta Road, resulting in loss of significant oak trees. (4 AR 1029; *see* 2 AR 448-449.) Removal of trees will increase view impacts. The Fadley appeal pointed out that the Kapors' depictions of the site with photo overlays and the new structure depicted as substantially hidden by trees was misleading and unrealistic. (2 AR 441; 4 AR 944.)

The trial court found that the evidence of potentially significant aesthetic impacts did not rise to the level of a fair argument. (AA: 152-153.). The court questioned the credibility of some aesthetic concerns

expressed by neighbors, and dismissed them as personally motivated. (AA:152-153.) However, since no such credibility-based criticism was raised by the City Council, it cannot be a basis for a court to discount evidence. (*E.g., Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, pp/ 934-935; *see also* p. 937 ["opinions of area residents, if based on direct observation, may be relevant as to aesthetic impact and may constitute substantial evidence in support of a fair argument; no special expertise is needed on this topic."].)

The trial court mentions only three of appellants' twelve bulleted pieces of aesthetic-impact evidence (some containing multiple internal citations), and discounted what it perceives to be private versus public views. (AA:152-153.) Yet case law including *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, provides that "aesthetic issues, such as public *and private* views, are properly studied in an EIR to assess the impacts of a project." (*Id.*, p. 492, italics added.) *After* study, an agency may decide whether or not private views are of significance. (*Ibid.*)

There is also substantial record evidence of the Kapor project's impacts to *public* views. The trial court seems not to have understood that although the Kapor house will front on Rose Street, the southern boundary of the Kapor lot is Shasta Road. The rear of the 10,000 square foot home

will be highly visible from Shasta just below it and will be perceived as perching on the "ridgeline." (AA:153; 1 AR 99-100, 2 AR 449 [Dr. Karp explained that there will be 78 feet vertical between Shasta Road and the Kapor roof].) And the record notes walking tours on Rose Street, during which public pedestrians enjoy the views of neighborhood homes:

> This area has been and continues to be the subject of numerous walking tours held year after year, as well as books, magazines and newspaper articles, and recently a documentary film. The property is in a neighborhood of architecturally significant houses and groups of houses. Some are individually designated City of Berkeley Landmarks, and there are three separate historic districts including the Greenwood Common Historic District, La Loma Park Historic District, and Rose Walk & Cottages.

(1 AR 282.) The record thus presents a fair argument that the Kapor project may have significant aesthetic impacts — an admittedly subjective inquiry.

Traffic Impacts. Potentially significant traffic impacts of the Kapor project relate both to the projected 14 months of project construction and also to increased traffic caused by use of the 10,000 square foot structure for fundraising activities. Area residents may present evidence of current and likely traffic problems based on their personal knowledge. (*E.g., Oro Fino Gold Mining Corporation v. County of El Dorado, supra,* 225

Cal.App.3d 872, p. 882.)

Evidence supporting a fair argument of such impacts includes:

- 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 current zoning." He explained that Rose Street is "essentially a one lane road, with limited access & scarce parking," that will be significantly impacted by the Kapor project. (1 AR 88.)

- Nancy and Jim Russell of nearby Greenwood Common agreed that Rose Street is a "small, dead-end road" and requested adequate controls for delivery and movement of construction-related materials during the expected one year of construction. (1 AR 90.)

- The late Frederick Wyle of Greenwood Common pointed out that Rose Street and Greenwood Terrace are curb-less and "are the only access roads to the … site … and are narrow roads not in the best of condition, with cracks and potholes. Heavily loaded truck traffic [for a year or longer] will almost certainly aggravate the conditions of the roads." (1 AR 91-92.) Wyle testified at ZAB about the project's "enormous consequences in terms of the traffic," noting that trucks on Rose Street *"almost always find themselves compelled to hit the edge of our properties, [and] even a medium truck has trouble negotiating that area.*" (2 AR 501-502, italics added.)

- Hawthorne Terrace resident Valerie Herr, aside from urging construction of a smaller residence on the "very **steep** site," also

contended that the garage exit should be altered to "where it would cause far less of a traffic hazard." (1 AR 95, bold in original.)

- Charlene Woodcock of Virginia Street decried the City's actions: "To overrule existing regulations to allow for a 10-car private garage on a very narrow hillside street is so hypocritical, not to mention environmentally destructive, as to boggle the mind ... How much consideration has been given ... to the tiny 16-foot wide street that would have to service large trucks to remove the demolished building and heavy building equipment to excavate the hillside for this huge building and move materials to and from the site?" (1 AR 117.)

- Shasta Road residents Robert and Michaela Grudin noted that "enormous pressure will be put on two hillside roads by traffic seeking to avoid congestion" from the Kapor project. "Both Keith Road and Cragmont Road are very narrow and winding, and are ill equipped to handle the burden ... the effects of this congestion on fire trucks and other emergency traffic up Shasta Road, one of our only through streets in the hills, could be catastrophic ... the Kapor project is likely to have profoundly disturbing effects on hill traffic up to 5 miles away." (2 AR 339.)

- Buena Vista Way resident Jane Edginton pointed out that Rose Street "dead ends at the west edge of the property and is one lane 16-20 feet wide leading up to it ... the trucks and equipment required [to grade, excavate, and build the foundations] could not be less appropriate for the space and neighborhood." (2 AR 425.)

- Co-appellant Susan Nunes Fadley, a Tamalpais Road resident, explained that while the Rose Street right-of-way may be 25 feet wide as represented in the Kapor application, the actual street width is between 17 and 20 feet, and narrows as it approaches the dead end that is the access to the site. She noted that all trucks using this approach would probably have to back up or back down the street, not having enough room at the top to turn around. The stress on Rose Street would be enormous.

  All parking would be disallowed during construction. Many senior citizens live in the neighborhood, and the lack of parking and traffic and construction noise would greatly impact their lives. (2 AR 439.) The Kapors' planned fundraising activities also have unstudied traffic issues. (2 AR 441.)

- Consulting geotechnical engineer Dr. Lawrence Karp evaluated the project and provided an expert opinion that "the massive grading necessary ... will involve extensive trucking operations, as a nearby site to stockpile and stage the earthwork is not available. Such work has never before been accomplished in the greater area of the project outside of reservoirs or construction on the University of California campus and Tilden Park." (2 AR 448, *attached.*)

- The supplemental City staff report prepared on April 27, 2010, the day of the Council appeal hearing, explained that engineers that were consulted about project traffic impacts recommended using Shasta Road to remove the extensive excavated soil via 20-yard trucks, that a construction management plan was to be prepared later to consider

> specifics of site operations "that may block traffic," provisions for traffic control, and limitations of off-site parking of construction-related vehicles if necessary to protect the neighborhood, to ensure emergency vehicle access at all times and to minimize neighborhood impacts for parking and circulation.
>
> The City staff noted that the provisions are "standard conditions imposed on residential development in the Hills which are not intended to address any specific environmental impacts resulting from construction of the project. Rather, they represent the City's attempt to generally minimize detrimental impacts of residential development in the Hills." (AR2:466.) The one "unique" project condition added was to provide neighbors with a draft construction management plan. (*Ibid.*)

The City's imposition of traffic mitigation measures also defeated the categorical exemption. No mitigations may support a categorical exemption; the need for any such mitigation allows for the possibility that it may fail and that environmental impact may result. As the Court held in *Salmon Protection and Watershed Network v. County of Marin*, *supra*, 125 Cal.App.4th 1098, 1102, if a project requires mitigation measures it cannot be approved via categorical exemption:

> Only those projects having no significant effect on the environment are categorically exempt from CEQA review. (Pub. Resources Code, §§ 21080, subd.(b)(9), 21084, subd. (a).) If a project may have a

significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1199-2000.) Mitigation measures may support a negative declaration but not a categorical exemption.

Here, there is a fair argument of potentially significant traffic impacts based on the significant truck traffic on narrow winding streets and the long duration of construction of over 14 months, including significant removal of soil, as well as traffic connected with contemplated fundraising events after construction is complete. The imposition of traffic mitigation measures is also fatal to the categorical exemption; the fact that similar mitigations are imposed in other *Berkeley hills* projects does not make them any less necessary to mitigate impacts. They differ from traffic-related impacts accepted in Class 3 or 32 exemptions statewide.

The record thus supports an exception based on traffic impacts.

C. The Kapor Project Presents Unusual Circumstances

As discussed just above, the record amply demonstrates that the Kapor mansion would have potentially significant environmental impacts. While Guideline section 15300.2 subdivision (c) does not require *separate* proof of inherent "unusual circumstances," many unusual factors contribute

to the enumerated environmental impacts.

As held in *Communities for a Better Environment v. California Resources Agency, supra*, 103 Cal.App.4th 98, when a project initially fits into a categorical exemption class but nonetheless demonstrates potentially significant impacts relating to such matters as "aesthetics, cultural resources, water supply and health and safety," those effects "*fall within the concept of unusual circumstances . . .*" (*Id.*, p. 129.) The issues in this case similarly align. The very fact that a normally exempt project has demonstrable environmental impacts is adequate evidence that it is unusual.

Here, such circumstances are interwoven within the evidence of likely environmental impacts. Without repetitively referencing all of the evidence already catalogued upon which appellants rely, a short summary of *some* of the unusual circumstances includes:

Size and Design. The Kapor house and garage are proposed as one structure of almost 10,000 square feet. It would be 110 feet long and rise over 55 feet from natural grade. At that size, it is not comparable to a standard single-family home, but is a mansion — in common usage defined as a "very large dwelling house" of "over 8,000 square feet." (http://en.wikipedia.org/wiki/Mansion.)

The Kapor structure would be among the two largest single-family

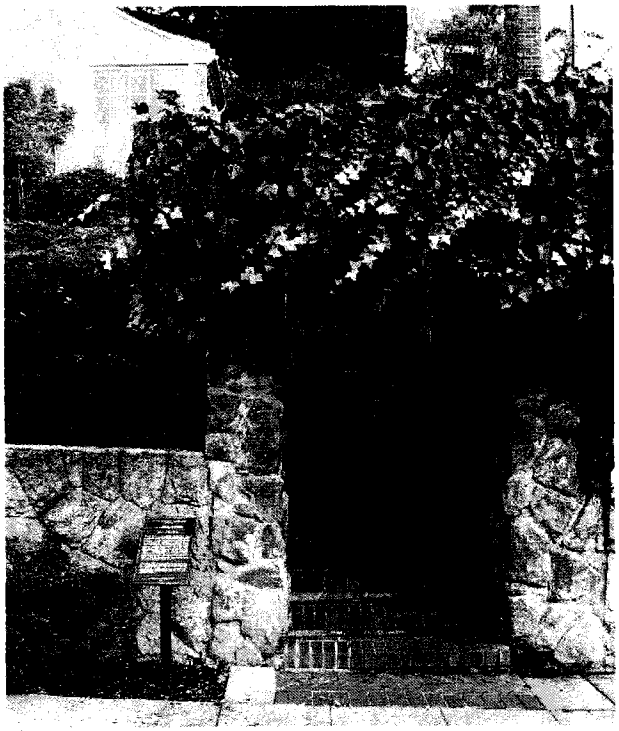
homes out of over 17,000 in Berkeley. (1 AR 209.) Only ten others even exceed 6,400 square feet. (1 AR 194; 2 AR 443; 3 AR 811-813.) In addition to its many construction-related impacts, its size will arguably affect area views. Even after trees are planted, they "will have to attain a height of at least 50 feet in order to mask the north side . . . The effect may not be attained for decades, if at all." (1 AR 203.)

As pointed out by Dr. Karp, in his decades of local experience the scope of the Kapor construction "has never before been accomplished in the greater area of the project outside of reservoirs or construction on the University of California Campus and Tilden Park." (2 AR 448.)

Environmental Setting. The Kapor site is located alongside a major trace of the Hayward fault and is mapped within a state-designated earthquake-induced landslide hazard zone. (2 AR 448; 3 AR 655.) Rose Street is a narrow, steep, single-lane road. The neighborhood is defined by its aggregation of historically and architecturally significant buildings, most of them relatively small in size, and is the subject of frequent walking tours. (1 AR 198-199, 282-292.)

The landmark Greenwood Common and the La Loma Park Historic District and La Loma Steps are only a minute's walk away. The Berkeley General Plan requires that "*the design and scale* of new … buildings should

respect the built environment in the area, particularly where the character ... is largely defined by an aggregation of historically and architecturally significant buildings." (1 AR 205, italics added.)



La Loma Steps

Site Constraints. All of the reports and testimony of Dr. Karp underscore the unusual circumstances presented by significant geotechnical site constraints. (2 AR 448-449; 4 AR 1089, *attached.*) To conform to the maximum allowed height, the large structure would be perched on a steep hillside on many hundreds of yards of fill needed to re-contour the terrain. Construction would require massive earthwork, benching and keying. (4 AR 1085.) Intrusive trucking operations would be required since there is no

convenient site in the vicinity upon which to stockpile and stage the earthwork. (2 AR 448.) Dr. Karp concluded that with a building this unusually high and this large on such a steep slope, all shrubs and trees would have to be removed for grading, and retaining walls totaling 27 feet would be necessary to achieve grades. (2 AR 449.)

D. The Peremptory Writ Should Require an EIR

Under the circumstances of this case, the categorical exemption should be set aside because the record presents a fact-based fair argument that the 10,000 square foot Kapor home/garage may have significant environmental impacts. The reason the categorical exemption fails is because mandates of the Public Resources Code require the preparation of an EIR upon such evidence. (Pub. Resources Code, §§ 21082.2 subd.(d), 21100 subd.(a), 21151 subd.(a).)

Upon remand, if the Kapors choose to proceed with an identical project, since the adequacy of the fair argument has been judicially affirmed an EIR is the only option and the peremptory writ should so state, as in *Galante Vineyards v. Monterey County Water Management District* (1997) 60 Cal.App.4th 1109, p. 1127 [ordering a supplemental EIR rather than an addendum]. The recent *Voices for Rural Living v. El Dorado Irrigation District, supra,* __Cal.App.__ affirmed a ruling overturning a

categorical exemption and requiring an EIR. The Court ordered that the writ on remand require the agency to proceed in accordance with CEQA, which in light of the substance of the opinion would require an EIR.

Of course, the Berkeley peremptory writ would necessarily address only the project as currently proposed. If the Kapors choose to alter the project or the City decides to impose additional mitigating conditions, the City would exercise its full discretion to consider whether a Mitigated Negative Declaration or an EIR would be required for that altered project.

Conclusion

As in *Save Tara v. City of West Hollywood, supra*, 45 Cal.4th 116, a local project has potentially significant impacts of great import to residents and their unique environment, and as it turns out will now impact the statewide implementation of CEQA through the review of this Court.

The City has failed to address the blatant conflict between its arguments and the mandates of the Public Resources Code regarding EIR preparation. It has assumed legislative intent that is nowhere stated. It ignores this Court's clear direction in *Wildlife Alive*, properly relied upon by both the Secretary of the Resources Agency and the Courts of Appeal.

Categorical exemptions provide a quick approval process. From the outset, as confirmed in the plain words of the implementing statute, the

exemptions were only intended to apply to routine projects without significant environmental impacts. *Without* the categorical exemption process, every run-of-the-mill project seeking a discretionary permit would require months of public process beginning with an Initial Study and ending with a negative declaration. Categorical exemptions are thus extremely important to move minor projects forward expeditiously.

The adoption of the Significant Effects Exception leaves no doubt, however, that the Resources Agency intends that the exemption classes not apply to any project that warrants an EIR. This Court's clarification of the exception will now facilitate compliance with CEQA by agencies statewide, while assuring the continuing robust use of exemptions for routine projects. The Court's application of the fair argument standard of review, which has been applied to the Significant Effects Exception for 20 years but has inspired each court to note a prior dispute, will also provide clarity and direction to agencies, applicants, and courts. Agencies are familiar with procedures to weigh a fair argument and now need not separately analyze the presence of unusual circumstances.

Categorical exemption is insupportable for the proposed 10,000 square-foot project on Rose Street, assuredly not a typical single-family residence free of environmental impacts. This Court's affirmance of the

Berkeley Hillside opinion and remand for a peremptory writ will allow environmental concerns to be objectively reviewed and mitigated as CEQA requires. The historic neighborhood will be protected from environmental harm after project impacts and applicable plans and policies are analyzed and applied in a participatory public process. CEQA's mandates will be honored and the Berkeley City Council will have the information it needs to fairly exercise its broad land use discretion.

This Court's ruling will *simplify* agency and applicant CEQA responsibilities. Categorical exemptions, unlike negative declarations, require neither findings nor public notice. But as it is now, agencies and applicants (and courts) debate the presence of unusual circumstances as well as potentially significant environmental impacts. All that is actually required is the latter, *if*, as here, such impacts become apparent. The streamlined categorical exemption process should continue more smoothly — not less — for thousands of routine California projects.

Counsel's Certificate of Word Count per Word:mac[2011]: 21,776 words

October 19, 2012

Respectfully submitted,

Susan Brandt-Hawley
Attorney for Appellants

ATTACHMENTS
Rules of Court, 8.504 (e)

Exhibits / Administrative Record

LAWRENCE B. KARP
CONSULTING GEOTECHNICAL ENGINEER

FOUNDATIONS, WALLS, PILES
UNDERPINNING, TIEBACKS
DEEP RETAINED EXCAVATIONS
SHORING & BULKHEADS
CEQA, EARTHWORK & SLOPES
CAISSONS, COFFERDAMS
COASTAL & MARINE STRUCTURES

SOIL MECHANICS, GEOLOGY
GROUNDWATER HYDROLOGY
CONCRETE TECHNOLOGY

Appendix 2

April 18, 2010

Mayor & City Council
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

Subject: 2707 Rose Street (Use Permit)
Supplemental Information

Dear Mayor & City Council:

After my letter-report of 4/16/10, which was based on my review of the file as was provided to me by City Planning on 4/15/10, a report "Geotechnical Investigation - Kapur Klein Residence" prepared for Marcy Wong was filed with the City. The report by Alan Kropp & Assoc. is dated 7/31/09. Architectural plans are not referenced, but the text refers to preliminaries and the Site Plan shows locations of exploratory borings. No fill slopes are shown in plan or section and the recommendations for retaining walls do not include lateral earth pressures for slopes with inclinations of more than 2h:1v (~27°) or for wall heights more than 12 feet. A footnote reads "Slopes steeper than 2:1 are not anticipated at the site.", consistent with 2007 CBC §J106.1.

The architectural plans I reviewed for the 4/16/10 letter-report are dated 11/12/09 and they include cross-sections and elevations that are inconsistent with the Site Plan and limitations in the 7/31/09 report (there have been significant changes). The Site Plan is the topo survey (attached) overlain with a building foot-print of 3,870 sq. ft. (includes carport). Decks indicated on fill total 1,670 sq. ft. without including the off-street parking area The 7/31/09 report indicates the project will be a 6,000 sq. ft. single family residence with a detached carport. The building that was approved is 9,868 sq. ft. which includes a 10 car garage.

As noted in my letter-report of 4/16/10, the plans (11/12/09)approved by the ZAB (1/28/10) depict portions of the major fill for the project (Sht. 16 attached) to be placed on an existing slope inclined at about 42° (~1.1h:1v) to create a new fill slope more than 50° (~0.8h:1v). The main site section (Sht. 14 attached) has the building's roof at Elev. 694, lower yard at Elev. 659, and Shasta is at Elev. 616. There will be 78 feet vertical between Shasta and the roof and 43 feet between Shasta and the lower yard level which means, for a 2h:1v maximum slope between Shasta and the building, all vegetation will have to be removed for grading, and retaining walls totaling 27 feet in height will be necessary to achieve grades. Vertical cuts for grading and retaining walls will total about 43 feet (17 feet for bench cutting and 26 feet for wall cutting).

A drawing in the report depicts site drainage to be collected and discharged into an energy dissipator dug into the slope, which is inconsistent with the intended very steep fill slopes. To reiterate, in my professional opinion, the project as proposed is likely to have very significant environmental impacts not only during construction, but in service due to the probability of seismic lurching of the oversteepened side-hill fills.

Yours truly,

Lawrence B. Karp

REGISTERED PROFESSIONAL ENGINEER
LAWRENCE B. KARP
No. 452
Ren 12/31/11
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STATE OF CALIFORNIA

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Appendix 2

April 16, 2010

Mayor & City Council
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

Subject: 2707 Rose Street (Use Permit)

Dear Mayor & City Council:

I have reviewed the architectural plans and topographic survey filed with the Zoning Administrator for the proposed project and I have visited the subject site on several occasions. I am familiar with the area having been involved since 1960 with new residences on Buena Vista and La Loma, and with remedial foundation design and construction on Euclid, Le Roy, Shasta, Tamalpais, and Maybeck Twin Drive.

The file, and the Administrative Record last updated on 3/1/10, do not show a geotechnical report being part of the record and it appears that the plans were not prepared pursuant to site specific geotechnical engineering recommendations for earthwork (excavations, subdrainage, placement of engineered fill). The architectural Conceptual Grading Plan (Sheet 16) gives cut and fill quantities but the Transverse Section Looking East (Sheet 14) indicates fills are placed directly on very steep existing slopes.

The project site is located alongside the major trace of the Hayward fault and it is mapped within a state designated earthquake-induced landslide hazard zone. Although the site as now configured appears stabl Rose Steps and the concrete of the elevated part of La Loma are cracked from fault creep and other grou movement. An alternative project should be considered to avoid grading with massive excavations and fills as well as the shoring and retaining walls necessary to achieve grades shown on the drawings.

Portions of the major fill for the project are shown to be placed on an existing slope inclined at about 42° (~1.1h:1v) to create a new slope more than 50° (~0.8h:1v). These slopes cannot be constructed by earth-work and all fill must be benched and keyed into the slope which is not shown in the sections or accounted for in the earthwork quantities. To accomplish elevations shown on the architectural plans, shoring and major retaining walls not shown will have to be constructed resulting in much larger earth-work quantities than now expected. The massive grading necessary to achieve grades for the proposed project will involve extensive trucking operations, as a nearby site to stockpile and stage the earthwork i not available. Such work has never before been accomplished in the greater area of the project outside o reservoirs or construction on the University of California campus and Tilden Park. In my professional opinion, the project as proposed is likely to have very significant environmental impacts not only during construction but in service due to the probability of seismic lurching of the oversteepened side-hill fills.

Yours truly,

Lawrence B. Karp

REGISTERED PROFESSIONAL ENGINEER
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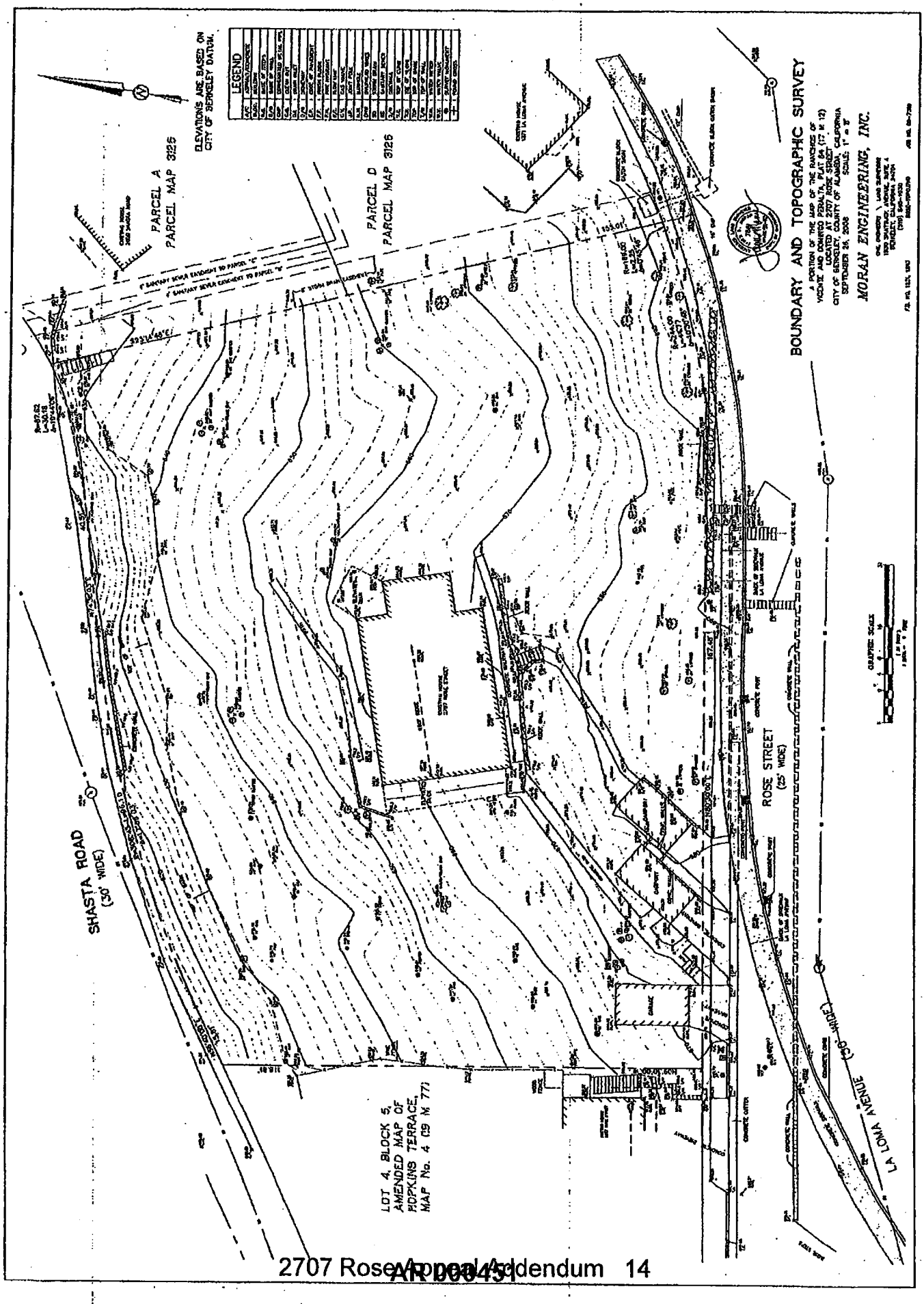
Appendix 2


BOUNDARY AND TOPOGRAPHIC SURVEY
A PORTION OF THE MAP OF THE RANCHOS OF VICENTE AND DOMINGO PERALTA, PLAT 6A (17 M 12)
LOCATED AT 2707 ROSE STREET
CITY OF BERKELEY, COUNTY OF ALAMEDA, CALIFORNIA
SEPTEMBER 24, 2002
SCALE: 1" = 5'
MORAN ENGINEERING, INC.
LEGEND
ELEVATIONS ARE BASED ON CITY OF BERKELEY DATUM.
PARCEL A
PARCEL MAP 3126
PARCEL D
PARCEL MAP 3126
SHASTA ROAD
(30' WIDE)
ROSE STREET
(25' WIDE)
LA LOMA AVENUE
(30' WIDE)
LOT 4, BLOCK 5,
AMENDED MAP OF
HOPKINS TERRACE,
MAP No. 4 OF M 77

>> I am Larry Carp. I am a geotechnical engineer specializing in foundation engineering and construction.

I have an earned doctorate in civil engineering and other degrees from U.C. Berkeley including two masters and a post-doctoral certificate in earthquake engineering.

I am fully licensed. I taught foundation engineering at Berkeley for 14 years and at Stanford for three. I was born and raised in Berkeley, attended Berkeley schools and Cal.

I own homes in Berkeley. I work throughout the West Coast. My experience includes over 50 years of design and construction in Berkeley. I prepare feasibility studies before, and engineering during construction of unusual projects.

For this project, I conducted an independent feasibility study. I now conclude that there is potential for very significant environmental impacts from construction and seismic lurching in service. I reviewed city panel's index and the entire file including all plans. There was no feasibility study or foundation engineering, but there was a topographic map. The structure seemed inappropriate for this steep site, so I did a reality check of the architectural drawings. The recent reports from applicant's say I don't know how

to read architectural drawings, but I have been a licensed architect for many years and I do know.

Their reports have not changed my opinion. I cut and match prints and conclude that the depicted elevations typically misrepresent the relationships between the steep site and the floor plans. There are no story poles. City planning should have noticed these problems.

The structure is 57 feet high at the northwest corner. The lower 22 feet is a retaining wall providing lateral support for fill that extends under the building's three stories. Retaining walls more than ten feet high have to be restrained from rotation due to active pressures.

Walls more than 12 feet high must have seismic forces added to the backfill which for this project are from near source Hayward fault. Added to all that, the code requires overdesign by 50% as a safety factor against overturning and sliding.

Lateral bearing for piers has to be below the ten foot to daylight line, so due to the extraordinary demand, the drilled piers will be very large and deep. Tie backs will have to be elevated to as much as 14 feet above grade, which will require large machinery. Ultimately due to strength requirements which preclude

Berkeley City Council 2707 Rose April 27, 2010

I am Larry Karp. I am a geotechnical engineer specializing in foundation engineering and construction. I have an earned doctorate in civil engineering and other degrees from U. C. Berkeley including two masters and a post-doctoral certificate in earthquake engineering. I am fully licensed. I taught foundation engineering at Cal for 14 years and Stanford for 3. I was born and raised in Berkeley, attended Hillside, Cragmont, Garfield, Berkeley High, and Cal. I own homes in Berkeley. I work throughout the West coast and my experience includes over 50 years of design and construction in Berkeley. I prepare feasibility studies before, and engineering during, construction of unusual projects.

For this project I conducted an independent feasibility study. I now conclude that there is potential for very significant environmental impacts from construction and seismic lurching in service. I reviewed City Planning=s index and the entire file, including all plans. There was no feasibility study or foundation engineering, but there was a topographic map. The structure seemed inappropriate for the steep site so I did a reality check of the architectural drawings. The recent reports from the applicant's experts say I do not know how to read architectural drawings, but I have been a licensed architect for many years and I do know. Their reports have not changed my opinion. I cut and matched prints and conclude that the depicted elevations typically misrepresent the relationships between the steep site and the floor plans. There are no story poles. City Planning should have noticed these problems.

The structure is 57 feet high at the northwest corner. The lower 22 feet is a retaining wall providing lateral support for a fill that extends under the building=s three stories. Retaining walls more than 10 feet high have to be restrained from rotation due to active pressures, walls more than 12 feet high must have seismic forces added to the backfill which for this project are from the near source Hayward fault. Added to all that, the code requires overdesign by 50% as a safety factor against overturning and sliding. Lateral bearing for piers has to be below the 10 foot to daylight line, so due to the extraordinary demand the drilled piers will be very large and deep. Tiebacks will have to be elevated to as much as 14 feet above grade which will require large machinery.

Ultimately, due to strength requirements and logistics which preclude using portable equipment, grading for large equipment will be required to drill piers and tiebacks as well as to lift and position reinforcing cages for piers. Fills have to be keyed, benched horizontally, and subdrained, and no fill or cut slope can be steeper than 27 degrees. Grading with tree and stump removal, and benching, will be necessary from midpoint of the building down to Shasta, which is alongside Codornices Creek. Project grading and tree removal, including removal of significant protected oak trees, will therefore be much more extensive than represented to the City, just as noted in my letter-reports and as shown graphically on the Grading Section drawing you now have. This project has potential for very significant environmental impacts that should be studied and mitigated.

W. Hallinan

ATTORNEY GENERAL'S

CHECK LIST

FOR IMPLEMENTATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (Public Resources Code §§ 21000-21151)

(Prepared by the Environmental Unit)

EVELLE J. YOUNGER
Attorney General of the
State of California
October, 1972

LC-95

C. Multiple permit question - does each permit require an EIS even though one project?

(1) This is presently unclear.

(2) This office has sponsored legislation (AB 889 - Knox) to try to deal with the multiple agency question by introducing the federal "lead agency" concept.

(3) Have also sponsored legislation to insure that multiple statements need not be prepared by one agency on one project for which there are multiple permits required by that one agency.

D. Are categorical exemptions proper?

There would appear to be no problem with exempting categories of projects on a prima facie basis as long as (1) the categories exempted truly are in keeping with the act and have no significant effect on the environment either individually or cumulatively and (2) some sort of appellate procedure (with adequate public notice) exists so that an individual project within the category can be taken out of the category on either the initiative of the government agency or on that of members of the public if it has a significant effect on the environment.

E. Are negative declarations proper?

There would appear to be no problem with the use of the negative declaration procedure as long as some sort of appellate procedure (with adequate public notice) exists so that such a negative declaration may be challenged. Perfunctory negative declarations which give the impression of arbitrariness should be avoided. A reviewable even if not lengthy record is desirable. 33/

F. What is a "significant environmental effect?"

This is extremely important, because this threshold determination must be made for all projects (whether or not the local government has a conservation element of a general plan).

Berkeley Hillside Preservation, et al. v. City of Berkeley, et al.
Supreme Court No. S201116

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to this action. My business address is P.O. Box 1659, Glen Ellen, CA 95442.

On October 19, 2012, I served one true copy of:

Answer Brief on the Merits

X By placing a true copy enclosed in a sealed envelope with prepaid postage in the United States mail in Glen Ellen, California, to addresses listed below.

X Zachary D. Cowan
Laura McKinney
Deputy City Attorney
City of Berkeley
2180 Milvia Street, 4th Floor
Berkeley CA 94704
Attorney for Defendants & Respondents

X Amrit Kulkarni
Meyers Nave
555 12th Street, Suite 1500
Oakland CA 94607
Attorney for Real Parties in Interest & Respondents

X Alameda County Superior Court
Attn: Clerk of the Court
1225 Fallon Street
Oakland CA 94612

X California Court of Appeal
First Appellate District, Div. 4
350 McAllister Street
San Francisco CA 94102

I declare under penalty of perjury that the foregoing is true and correct and is executed on October 19, 2012, at Glen Ellen, California.

Susan Brandt-Hawley