S201116



**IN THE SUPREME COURT**
**OF THE**
**STATE OF CALIFORNIA**

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BERKELEY HILLSIDE PRESERVATION, ET AL.
Petitioners and Appellants,

v.

CITY OF BERKELEY, ET AL.
Respondents.

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

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

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

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

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MEYERS, NAVE, RIBACK, SILVER & WILSON
Amrit S. Kulkarni (SBN: 202786)
Julia L. Bond (SBN: 166587)
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Respondents and Real Parties in Interest Mitchell Kapor and Freada Kapor-Klein

Zach Cowan, City Attorney (SBN: 96372)
Laura McKinney, Deputy City Attorney (SBN: 176082)
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Telephone: (510) 981-6998
Facsimile: (510) 981-6960

Attorneys for Respondents City of Berkeley and City Council of the City of Berkeley

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**STATUTES**

**EVIDENCE CODE**



**GOVERNMENT CODE**



**PUBLIC RESOURCES CODE**

## OTHER AUTHORITIES

### CALIFORNIA CODE OF REGULATIONS TITLE 14

#### CEQA GUIDELINES

## INTRODUCTION

In their Answer Brief, Appellants largely ignore the fundamental legal questions presented by this case, and instead attempt to recast the facts rather than tackle the legal authorities cited in the Opening Brief. The facts are extremely important to the resolution of this case for the Kapors and the City, and will be discussed herein. More fundamentally, however, Appellants fail to recognize that this case presents questions for this Court about the application of CEQA that will have significant consequences for every public agency, homeowner, developer and environmental group in the State. Appellants' effort to downplay these questions is unpersuasive.

Indeed, Appellants' Answer Brief itself demonstrates the fundamental problem with their argument. Appellants concede that the single-family house at issue fits within two separate categorical exemptions for new construction projects and infill projects. And yet, they spend most of their 106-page Answer Brief arguing that their assertion that the house has potentially significant impacts on the environment is all that matters, regardless of the unchallenged determination that the house qualifies for two separate categorical exemptions. Put simply, although Appellants insist that under their interpretation a determination of categorical exemption still fulfills a role in CEQA analysis, their Answer Brief proceeds as if that exemption determination is completely meaningless.

Appellants' factual argument that the proposed house may have a significant impact on the environment is exactly the type of inquiry that the Legislature was trying to avoid when it directed the Resources Agency to designate categorical exemptions, and subjects to case-by-case re-evaluation of exactly the types of projects that the Resources Agency already found would not be significant. Under Appellants' interpretation of the law, however, this intrusive inquiry would be the norm for construction of new classrooms, single-family homes, garages, fences, swimming pools,

earthquake retrofit projects at existing schools and hospitals and thousands of minor projects throughout the State. This result is clearly not what the Legislature intended.

## SUMMARY OF REPLY ARGUMENT

In enacting Public Resources Code section 21084(a)[1], the Legislature directed the Resources Agency to determine that certain categories of projects do not have a significant impact on the environment, and are therefore exempt from CEQA. The fundamental issue presented by this case is whether the "unusual circumstances" exception to categorical exemptions in CEQA Guidelines section 15300.2(c) is consistent with the statutory language in Public Resources Code section 21084(a). The Legislature and this Court, in Government Code section 11342.2 and *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, have established a legal rubric for determining whether a regulation is consistent with a statute. As discussed in the Opening Brief, section 21084 clearly authorizes the Resources Agency's exception to categorical exemptions where "unusual circumstances" are present.

Appellants wholly ignore these authorities in favor of a reading of CEQA that would nullify categorical exemptions whenever potentially significant impacts are alleged, regardless of whether they are "due to unusual circumstances." Appellants base their argument on what they contend is the "overriding legal mandate" in CEQA: "[A] fair argument of potentially significant environmental impact always triggers the favored

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[1] All references to "CEQA" are to Public Resources Code section 21000 *et seq*. Unless otherwise indicated, all further statutory references are to the Public Resources Code. All references to "CEQA Guidelines" or "Guidelines" are to California Code of Regulations Title 14.

EIR process." (Answer Brief, p. 1.) Appellants' contention is simplistic and untrue, and would render meaningless not only the Legislature's directive for designation of categorical exemptions, but also many other CEQA provisions designed to streamline the environmental review process.

The foremost principle in interpreting CEQA is that it "be interpreted in such a manner as to afford the fullest possible protection to the environment *within the reasonable scope of the statutory language*." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259, emphasis added.) Appellants' argument is flatly inconsistent with the statutory language in section 21084 itself, and the broader context of the overall CEQA statute. Appellants maintain most of their argument with the rule-making file of the Resources Agency and out-of-context language in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190. However, the fundamental inquiry is what the *Legislature* intended when it enacted section 21084.

In this respect, as set forth in detail in the Opening Brief, the Legislature enacted section 21084 in direct response to this Court's decision in *Friends of Mammoth*, and as part of a compromise amid widespread concerns that applying CEQA to all types of private projects would cause undue hardship, confusion and economic uncertainty. This history and the statutory language demonstrate that the overriding legislative intent behind CEQA is to protect the environment to the fullest extent possible *in a reasonable and cost-effective manner*.

While Appellants concede that the Legislature's actions following the *Friends of Mammoth* decision was a "very dramatic time," and "certainly of interest to CEQA practitioners," they utterly dismiss it as not appearing to "illuminate the issues before the Court." (Answer Brief, pp. 53-54.) If this Court were to adopt Appellants' blithe dismissal of the

history and legislative intent, it would produce the very chaos and uncertainty that the Legislature was guarding against.

Appellants further assert that they "do not suggest that the words 'due to unusual circumstances' should be deleted from or 'read out' of section 15300.2 subdivision (c)." (Answer Brief, p. 47.) This assertion is unequivocally contradicted by the core of their argument, namely, whether an alleged significant environmental impact is due to an unusual circumstances cannot and should not be a separate inquiry under the exception. The inconsistencies in Appellants' contentions not only underscore the flaw in their arguments, they demonstrate the extremely troubling consequences of adopting Appellants' position.

While Appellants insist that categorical exemptions still retain value under their interpretation, the only logical outcome of their interpretation is that public agencies and homeowners can only use categorical exemptions when no opposition is presented. Under Appellants' interpretation, use of categorical exemptions is determined not by the Legislature, or the Resources Agency, or even the local agency. Rather, use of categorical exemptions is controlled entirely by opponents to a project and their attorneys, and can be defeated by a single neighbor commenting that he or she does not like the aesthetic appearance of the project. The Legislature clearly did not intend this result.

Appellants' arguments on the other issues presented fare no better. On the standard of review issue, Appellants deny that there is a split in the appellate courts. However, there is a clear split in the appellate courts, and it was recognized as recently as two months ago by the most recent appellate decision on this issue. Resolution of the split on standard of review is vital, not just for the courts, but to agencies' determination of whether they can use a categorical exemption in the first instance. The

continued uncertainty regarding the proper standard itself militates against agencies' ability to use categorical exemptions as the Legislature intended.

Appellants make the conclusory assertion that the fair argument standard always applies under CEQA when the question is whether an EIR should be prepared in the first instance. However, as discussed in the Opening Brief, the statutory language and policy concerns regarding whether an EIR should be prepared are different, depending on whether a project fits within a class of projects determined by the Resources Agency to be exempt from CEQA. In that context, the substantial evidence standard should apply.

Next, Appellants try to side-step the issue of whether the public agency may consider only the potential for impacts of the project as proposed, or must also consider the alleged effects of a project as it is hypothetically re-defined by project opponents. Appellants try to make their dispute about the definition of the Project in this case into a "dispute among experts." However, the Opening Brief set forth extensive legal authority for the proposition that the City's determination regarding the scope of the proposed project as set forth in the approved plans is *not subject to expert dispute*. Apparently recognizing that there is no legal response to these established authorities, Appellants simply ignore them and continue to parrot their expert's opinion that the project will not be built as proposed and approved. Appellants' attempts to support their expert's opinion by mischaracterizing the project plans are without merit and should be rejected. The record clearly demonstrates that the Project, as approved by the City, does not contain the alleged "side-hill fill" invented by Appellants' expert.

Appellants also ignore the discussion in the Opening Brief of what may constitute "unusual circumstances" for purposes of the exception. They appear to adopt the Court of Appeal's position that "unusual" is

whatever a petitioner or reviewing court thinks it is; *e.g.*, that the house in this case is "too big." Again, however, there is a long line of established cases holding that the relevant inquiry is whether the project differs from the *typically exempt project* that fits within the categorical exemption established by the Resources Agency. Appellants also ignore that local agencies have legislatively adopted zoning and development standards for determining whether the size or dimensions of a proposed house is so atypical as to create adverse impacts, and that the proposed home here complies with all of the City's development standards. Indeed, the City of Berkeley is widely recognized as having some of the most rigorous and exacting development standards in the State.

Both Appellants and the Court of Appeal also ignored and failed to analyze whether the Project was unusual compared to the typical project that qualifies for the separate and equally applicable categorical exemption for infill projects. This same Court of Appeal recently held that a typically exempt infill project includes a 5-story building with 98 residential units, 7,700 square feet of commercial space and 114 parking spaces. Compared to that project, it is difficult to comprehend how the single-family home at issue in this case would present unusual circumstances that would remove it from the infill exemption category. This Court can uphold the City's decision under this separate and equally applicable exemption.

Finally, Appellants are correct in one sense, *i.e.*, that by adopting Appellants' interpretation and deleting the "unusual circumstances" requirement, the Court will simplify the CEQA process for thousands of routine California projects. According to Appellants, public agencies will no longer have to bother looking at whether minor projects fit within categorical exemptions or whether there is something unusual about them, but can proceed directly to the issue of whether the project may have a significant environmental impact. The problem with this result is that it

will "simplify" CEQA by greatly expanding its reach, and requiring EIRs for countless routine and minor development projects throughout the State. And, of course, it will eviscerate the Legislature's intent and directive to carve out categorical exemptions from CEQA. Therefore, while simple, it would place an enormous financial and time-consuming burden on development throughout the State and on local agencies. Such a result obviously cannot be squared with the letter or intent of CEQA.

The City and the Kapors request that the Court reverse the Court of Appeal decision in its entirety, and uphold the City's determination that the Kapors' proposed home is categorically exempt from CEQA.

## ARGUMENT

### I. APPELLANTS HAVE NOT SHOWN THAT "UNUSUAL CIRCUMSTANCES" SHOULD BE DELETED FROM THE UNUSUAL CIRCUMSTANCES EXCEPTION

#### A. This Court's Inquiry Is Whether the Competing Interpretations of Guidelines Section 15300.2(c) Are Consistent with Section 21084.

As set forth in the Opening Brief, the fundamental question presented by the Court of Appeal's Opinion is whether the "unusual circumstances" requirement in Guidelines section 15300.2(c) is consistent with the statutory language in section 21084(a). As such, the Court reviews the Resources Agency's regulation under Government Code section 11342.2 and the two-prong test established in *Yamaha, supra,* 19 Cal.4th at 11. Under these authorities, the Court determines whether Guidelines section 15300.2(c) is: (1) consistent with and not in conflict with section 21084; and (2) reasonably necessary to effectuate the purpose of the statute.

#### B. The "Unusual Circumstances" Requirement in Guidelines Section 15300.2(c) Is Consistent with Section 21084.

The "unusual circumstances" requirement in Guidelines section 15300.2(c) meets the two-prong *Yamaha* test. Under the plain meaning of

section 21084, the Legislature clearly directed the Resources Agency to find that *classes* of projects do not have a significant effect on the environment and are exempt from CEQA. Nothing in the statute directs public agencies to review whether an otherwise categorically exempt project may have a significant effect on the environment. Indeed, if that were what the Legislature intended, section 21084 would be meaningless, since the Legislature already directs this exact same inquiry in section 21080 and other provisions in CEQA.

Moreover, the timing of the Legislature's enactment of section 21084 is critical. The Legislature's enactment of section 21084 was part of a comprehensive amendment and compromise following this Court's *Friends of Mammoth* decision and its use of the "unusual circumstances" language. The legislative history clearly shows that the Legislature intended that classes of projects be exempt from CEQA, in the absence of unusual circumstances.

### C. Appellants Failed to Address and Demonstrate That Their Proposed Deletion of "Unusual Circumstances" from Guidelines Section 15300.2(c) Is Consistent with Section 21084.

While Appellants deny that they are reading the "unusual circumstances" language out of Guidelines section 15300.2(c), their argument effectively does just that. They argue that unusual circumstances "are self-evident underpinnings when a project has potentially significant impacts but also arguably fits into an exemption category." (Answer Brief, p. 47.) This nonsensical statement is just another way of saying that "unusual circumstances" is not a separate requirement and should be read out of the guideline. To be absolutely clear, the following is how Appellants and the Court of Appeal read the exception:

> A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will

have a significant effect on the environment ~~due to unusual circumstances~~. (Guidelines § 15300.2(c).)

Under *Yamaha*, Appellants have the burden of showing that their interpretation of the Guideline, with the "unusual circumstances" language deleted, is: (1) consistent with and not in conflict with section 21084; and (2) reasonably necessary to effectuate the purpose of the statute. Appellants do not and cannot make this showing.

### 1. Under *Yamaha* Prong One, Appellants Fail to Give Meaning to the Plain Language of Section 21084.

Appellants fail to show that their deletion of the phrase "due to unusual circumstances" from Guideline section 15300.2(c) is consistent with and not in conflict with section 21084. Indeed, notably absent from Appellants' Answer Brief is any discussion of the language or plain meaning of section 21084. Rather, Appellants repeatedly refer to *other* provisions of CEQA to support their claim that the "overarching rule" in CEQA is that it does not allow categorical exemptions for any project that may have a significant impact on the environment. (Answer Brief, pp. 32-33 and 49, citing §§ 21082.2, 21100, 21151.)

However, Appellants fail to answer the following question: If that is the overarching rule, what is the meaning and intent of section 21084? If the only inquiry in every case is whether a project may have a significant effect on the environment, the Legislature already established this inquiry in sections 21082.2, 21100 and 21151, and section 21084 is meaningless.

Appellants argue that section 21084 and categorical exemptions still have meaning because agencies can approve projects if they "fit" into one of the 33 exempt classes and there is no evidence of a significant environmental impact. (Answer Brief, pp. 47-48.) Appellants argue that categorical exemptions "provide a streamlined process for routine projects *without* significant impacts." (Answer Brief, p. 50.) However, according

to Appellants, if there is evidence of a significant environmental impact, then the fact that a project fits into one of the 33 exempt classes is meaningless. We are right back to the same inquiry set forth in sections 21082.2, 21100 and 21151. Appellants never explain how section 21084 sets forth any different inquiry than is already set forth in sections 21082.2, 21100 and 21151, and for good reason: Appellants believe they are the same inquiry.

Indeed, without citing section 21084, Appellants characterize the Public Resources Code "generally" as "empower[ing] 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." (Answer Brief, p. 49, italics in original.) The word that Appellants painstakingly ignore and read out of section 21084 is "*classes* of projects that have been determined not to have a significant effect on the environment." (Emphasis added.) Thus, if it fits within the class, then the Resources Agency has already determined that the typical impacts associated with the projects in the class *are not significant*. Nothing in section 21084 allows local agencies to second-guess the Resources Agency's determination that these typical impacts are not significant. Appellants also ignore that, pursuant to the legislative directive, the Resources Agency adopted these categories pursuant to the California Administrative Procedures Act and after notice and public hearing. (Opening Brief, pp. 15-17.)

Appellants dispute Respondents' argument that the Legislature intended exemptions to be bright-line, categorical rules. However, that conclusion is supported by the language in section 21084 itself, by directing that the Resources Agency determine that *classes* of projects do not have a significant effect on the environment. Categorical, class-based determinations *are* bright-line rules. Otherwise, there is no point to them.

Appellants' interpretation of section 21084 would fundamentally alter the meaning of that statutory provision to be: Identify a class of projects that does not have a significant effect on the environment and is exempt from CEQA, except where an individual project within that class has a significant effect on the environment and is not exempt from CEQA. This circular interpretation is inconsistent with the language and plain meaning of section 21084.

Appellants claim that Respondents are arguing that the only inquiry for a public agency is whether the project fits within an exempt class. Appellants blatantly misstate Respondents' argument. As clearly set forth in the Opening Brief:

> the only remaining inquiries are whether the project at issue falls within the scope of a categorical exemption, and, if so, whether under Guidelines section 15300.2, one of the exceptions to the categorical exemptions applies. For the unusual circumstances exception, that inquiry is whether there is something unusual or different about that project that takes it outside of its class of typically exempt projects. (Opening Brief, pp. 24-25.)

Appellants evidently have no response to the actual argument made by Respondents.

Moreover, in their single-minded focus on the legislative goal of protecting the environment, Appellants ignore the *other* legislative goals of CEQA, including the legislative goal of not "unduly prolonging the process so that the process deters development and advancement." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1132 ["*Laurel Heights II*"].) In *Laurel Heights II*, this Court stated:

> Significantly, at the time section 21092.1 was enacted, the Legislature had been and was continuing to streamline the CEQA review process. [Footnote omitted.] Recognizing the legislative trend, we previously have cautioned: "[R]ules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of

> social, economic, or recreational development and advancement." (*Goleta Valley II, supra, 52 Cal.3d at p. 576.*) In our interpretation of section 21092.1, we have given consideration to both the legislative goals of furthering public participation in the CEQA process and of not unduly prolonging the process so that the process deters development and advancement. (*Ibid.*)

Similarly, here, in interpreting section 21084, the Court should give consideration to this legislative goal as well. Appellants' interpretation of section 21084 directly conflicts with this legislative goal.

Finally, Appellants also ignore the authorities in the Opening Brief explaining that whether an impact is "significant" is a policy decision for the lead agency. (Opening Brief, pp. 25-26.) Appellants appear to assume that any physical impact on the environment is a "significant" impact. However, there is no dispute that many of the 33 classes of exempt projects will result in some physical changes to the environment. Constructing these facilities, such as adding up to ten classrooms to schools (Guidelines § 15314), will indubitably require people using bulldozers and other tools to dig holes, move dirt and build structures.

The question, however, is not whether these projects will cause any physical changes to the environment; rather the question is whether these physical changes to the environment will result in a "significant effect on the environment." The Resources Agency has already made the policy decision and determined that the physical changes to the environment associated with building these classes of projects do not, as a matter of law, constitute a "significant effect on the environment." Accordingly, the focus of the unusual circumstances exception is whether there is something *unusual* or *different* about the project at issue that would take it outside of the normal physical changes associated with the typically exempt project.

Thus, Appellants have failed to show that their proposed deletion of the phrase "due to unusual circumstances" from Guidelines section 15300.2(c) is consistent with the plain language of section 21084.

### 2. The Legislative History of Section 21084 Does Not Support Appellants' Interpretation of the Guideline.

Appellants largely dismiss the legislative history of section 21084 as "certainly of interest to CEQA practitioners," but not appearing to "illuminate the issues before the Court." (Answer Brief, pp. 53-54.) Appellants contend the history does not show a legislative intent that categorical exemptions would be "bright-line" determinations that a project should proceed if it has potentially significant impacts.

However, as discussed in the Opening Brief, the Legislature's directive to the Resources Agency to adopt categorical exemptions was part of the legislatively-crafted compromise in response to this Court's decision in *Friends of Mammoth, supra,* 8 Cal.3d 247. Moreover, it was this Court, in the *Friends of Mammoth* decision, that first used the "unusual circumstances" language that is at issue in this case, and the Legislature adopted the statute with clear knowledge of this language. Again, if the Legislature simply wanted to confirm the general rule that only projects that may have a significant effect on the environment are subject to CEQA, it accomplished that in section 21080. The history demonstrates that the Legislature further wanted to establish uniform classes of projects throughout the State that could easily be identified as being exempt from CEQA.

Appellants cite to Attorney General Younger's "Check List for Implementation of [CEQA]" from October 1972, which provides in part that categorical exemptions appear to be no problem as long as categories exempted "have no significant effect on the environment either individually

or cumulatively." (Answer Brief, p. 54.) However, that document was "intended to provide immediate guidance" to assist local agencies with the transition after the *Friends of Mammoth* decision and was "not intended to preempt the functions of the Office of Planning and Research, which is charged with adopting guidelines." (RJN, Tab 13, p. LC-97.)

More importantly, however, is that the Legislature initially included the language Appellants rely upon in an earlier version of section 21084, and *then deleted it in the final statute*. Specifically, the Attorney General's document that Appellants rely upon was dated October 1972. Thereafter, on November 13, 1972, the Legislature added the language of section 21084 as part of the amendments to clarify the statute in response to the *Friends of Mammoth* decision. (RJN, Legislative History Report and Analysis, p. 3; Exh. 1e.) The first version of section 21084 provided:

> The guidelines prepared and adopted pursuant to Section 21083 shall include a list of classes of projects which have been determined not to have a significant effect on the environment, either individually or cumulatively, and which shall be exempt from the provisions of this division. In adopting the guidelines, the Secretary of the Resources Agency shall make a finding that the list or classification of projects referred to in this section do not have a significant effect on the environment, either individually or cumulatively. (RJN, Exh. 1e, emphasis added.)

The Legislature amended the proposed language to delete the phrase "either individually or cumulatively" from both sentences in the proposed section, and then enacted it into law. (RJN, Legislative History Report and Analysis, p. 3-4; Exh. 1g, p. 8, 1h, 1i and 1j.) Thus, the Legislature deleted from the statute the very language Appellants rely upon to support their interpretation. By directing that the Resources Agency find that an entire "class" of projects does not have a significant effect on the environment, without reference to "either individually or cumulatively," the Legislature

clearly did not intend for individual review of projects to second-guess the class-based determination by the Resources Agency.

Finally, as discussed in the Opening Brief, the Legislature's subsequent amendment of section 21084 in 2011 confirms that the "unusual circumstances" requirement is consistent with the legislative intent in section 21084. (Opening Brief, pp. 32-33.) Appellants fail to address or respond to this point.

#### 3. Under *Yamaha* Prong Two, Appellants Fail to Show that Deleting "Unusual Circumstances" Is Reasonably Necessary to Effectuate the Purpose of Section 21084.

Under the second prong in *Yamaha*, Appellants must show that their interpretation is reasonably necessary to effectuate the purpose of section 21084. In this inquiry, Appellants must show that the Resources Agency's inclusion of the "due to unusual circumstances" language was "arbitrary, capricious, or without reasonable or rational basis." (*Yamaha, supra,* 19 Cal.4th at 11.) Appellants do not and cannot make this showing. Indeed, as discussed in the Opening Brief, it is only the inclusion of the phrase "due to unusual circumstances" that makes the exception effectuate the purpose of the statute – which is to provide for exemptions for *classes* of projects. Appellants do not respond to this point either.

### D. Appellants' Citation to Other Authority to Determine the Legislature's Intent in Section 21084 Is Misplaced.

The lynchpin of Appellants' argument is the rule-making file of the Resources Agency in 1980, and its citation to this Court's 1976 *Wildlife Alive* decision. What this argument overlooks, however, is that under Government Code section 11342.2 and *Yamaha*, the critical inquiry for the Court is what the *Legislature* intended when it adopted section 21084 in 1972. As discussed above, the Court of Appeal's and Appellants' deletion of the phrase "due to unusual circumstances" from Guideline section

15300.2(c) renders it inconsistent and in conflict with the plain language and legislative intent of section 21084. In any event, nothing in *Wildlife Alive* or the Resources Agency's rule-making file support deleting the phrase "due to unusual circumstances" from Guidelines section 15300.2(c).

Appellants argue that *Wildlife Alive* "disallows categorical exemptions for a project that may have a significant impact." (Answer Brief, p. 52.) In addition, according to Appellants, because the rule-making file of the Resources Agency for Guidelines section 15300.2(c) cites *Wildlife Alive*, that guideline also disallows categorical exemptions for a project that may have a significant impact.

However, as discussed in the Opening Brief, the issue in *Wildlife Alive* was the scope of the categorical exemption in then-Guidelines section 15107, and whether the project at issue fit within the scope of the exemption. Appellants reference this argument and deny it, but never specifically respond to it or acknowledge the facts that were before the Court. (Answer Brief, pp. 49-50.) The Court clearly stated that it would not "unreasonably expand[] statutory and regulatory language to imply an exemption for the commission when it enacts hunting regulations. We cannot conclude that the Legislature so intended." (*Wildlife Alive, supra,* 18 Cal.3d at 206.) Thus, the only issue before the Court was *whether the project fit within the categorical exemption at issue*. Again, as discussed in the Opening Brief, courts frequently apply the *Wildlife Alive* approach when determining whether a given project fits within the scope of a categorical exemption. (Opening Brief, pp. 35-36.)

The fact that the Resources Agency cited to this decision also does not support Appellants' interpretation. If the intent of the Resources Agency was to "disallow categorical exemptions for a project that may have a significant impact" (Answer Brief, p. 52), then it would not also have included the phrase "due to unusual circumstances" in the exception.

The Agency's inclusion of the "unusual circumstances" language from this Court's *Friends of Mammoth* decision has to mean something. Appellants have no explanation whatsoever for this language, and simply write it out of the regulation.

Finally, assume that Appellants' reading of *Wildlife Alive*'s language—"where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper" (18 Cal.3d at 206)—is correct. As read by Appellants, *Wildlife Alive*'s language is plainly dictum. As noted, the issue in *Wildlife Alive* was how broad a specific categorical exemption was and whether a specific project came within its scope. And as read by Appellants, *Wildlife Alive's* language is just as plainly incorrect. As observed by other courts, *Wildlife Alive*'s language cannot be read so broadly as to defeat the very idea underlying section 21084 of *classes* or *categories* of projects that do not have a significant environmental effect." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 127, italics original.) *Wildlife Alive* can be properly construed as meaning that a class of projects that may have a significant effect on the environment cannot be categorically exempt from CEQA. However, to the extent it is given Appellants' reading to mean that any individual project that fits within the scope of a categorical exemption is not exempt if it may have a significant effect on the environment—even if those impacts are typical for its class—then *Wildlife Alive's* language conflicts with section 21084 and is wrong. Otherwise, it will do away with categorical exemptions themselves, in direct contrast to the legislative directive in section 21084. This Court should take this opportunity to clarify or, if need be correct, *Wildlife Alive*'s language.

The controlling provision is section 21084, which directs the Resources Agency to adopt exemptions for classes of projects which it

determines do not have a significant effect on the environment. Thus, for projects that are within the exempted classes, the Resources Agency has already determined that the impacts typically associated with these projects are not significant. Allowing petitioners and courts to second-guess this determination for individual projects violates the letter and intent of section 21084. Rather, there must be something unusual or different about the project and its impacts that takes it outside of the scope of the typically exempt project.

### E. Appellants Have Failed to Refute the Other Factors Supporting the Resources Agency's Inclusion of "Unusual Circumstances" in Guidelines Section 15300.2(c).

Appellants also deny that the Court of Appeal's decision equates the unusual circumstances exception in Guidelines section 15300.2(c) with the commonsense exemption in Guidelines section 15061. Appellants argue that, even when deleting the phrase "due to unusual circumstances," there is a "material difference" between the two:

> (1) the commonsense exemption: exempt 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(b)(3).)
>
> (2) the unusual circumstances exception with "due to unusual circumstances" deleted: not exempt where there is a reasonable possibility that the activity will have a significant effect on the environment. (Guidelines § 15300.2(c).)

The problem that Appellants overlook, however, is that the cases citing the commonsense exemption rely on the same language in *Wildlife Alive* that the Court of Appeal did here in construing the unusual circumstances exception. (See *California Farm Bureau Federation v. California Wildlife Conservation Board* (2006) 143 Cal.App.4th 173, 194.) Although Respondents pointed this out in the Opening Brief, Appellants fail to address it. Thus, by removing the inquiry into whether alleged

impacts are due to "unusual circumstances," Appellants have made the "significant effects" inquiry the only relevant question and it is effectively the same question that is asked under the commonsense exemption.

Indeed, Appellants themselves conflate the two inquiries, in citing *Dunn-Edwards Corporation v. Bay Area Air Quality Management District* (1992) 9 Cal.App.4th 644, 656. Appellants argue that *Dunn-Edwards* is a "key categorical exemption" case holding 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 pursuant to Guidelines section 15061(b)(3). (Answer Brief, p. 38.) However, Appellants' argument and that case provide that the inquiry under the commonsense exemption and under the unusual circumstances exception are one and the same. (*Dunn-Edwards, supra,* 9 Cal.App.4th at 656.) Thus, Appellants contradict themselves and demonstrate that their interpretation of Guidelines section 15300.2(c) is the same as the commonsense exemption.

Finally abandoning any pretense, Appellants then argue that it makes no difference because every project is subject to the same standard—whether a project may have a potentially significant environmental impact. (Answer Brief, p. 57.) Again, however, that is the same inquiry contained in section 21081 in CEQA, and renders section 21084 meaningless surplusage. Appellants have no interpretation or explanation that gives any real meaning to the Legislature's directive to adopt categorical exemptions. As such, Appellants' argument contradicts the statute and is wrong.

Appellants argue that no California case has upheld a categorical exemption where there has been evidence of a potentially significant environmental impact presented. Again, however, that is because many cases do not get past the first prong in the two-prong test—whether there are unusual circumstances that differentiate the project at issue from the

typical project in the category. If there are no unusual circumstances, then courts do not ask whether there are any potentially significant environmental impact presented. (See *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260.) Indeed, that is the entire point of categorical exemptions—to streamline the environmental review process for the classes of minor projects identified by the Resources Agency.

### F. Public Policy Supports the Resources Agency's Inclusion of "Unusual Circumstances" in Guidelines Section 15300.2(c).

Finally, Appellants deny that there will be any public policy implications from deleting the phrase "due to unusual circumstances" from Guidelines section 15300.2(c). They contend that CEQA will be simpler, and that every project in the State is subject to the same standard—if the project may have a significant effect on the environment, then it is subject to CEQA. Appellants' predictions themselves demonstrate the real-world implications of their arguments.

Under Appellants' interpretation, every routine and minor project listed in the 33 classes of categorically exempt projects will require preparation of an EIR if a project opponent or attorney raises an objection. Moreover, Appellants' Answer Brief demonstrates the rigorous, extensive factual and legal assault that Appellants contend can be asserted against any project that fits within the scope of any of the 33 classes of exempt project. Adoption of Appellants' interpretation will cause extraordinary delay and expense to development throughout the State. At the same time, it will shift agencies' limited resources away from projects that require close environment review to projects that do not warrant any such review at all. The Legislature, this Court, and the Resources Agency have all struck a careful balance between protecting the environment and not unduly

hampering development and wasting agency resources. Appellants' interpretation eviscerates that balance, and should be rejected.

## II. APPELLANTS HAVE FAILED TO SHOW THAT THE FAIR ARGUMENT STANDARD SHOULD APPLY TO THE UNUSUAL CIRCUMSTANCES EXCEPTION

### A. There Remains a Split Over the Proper Standard.

Appellants argue that there is no longer a split in authority over the proper standard of review applicable to the unusual circumstances exception. Appellants are wrong. As recently as October 2012, the Court of Appeal in *Voices for Rural Living v. El Dorado Irrigation District* (2012) 209 Cal.App.4th 1096, noted the existing split in authority:

> We are aware there is a split in authority on whether this second question in the analysis should be reviewed under the fair argument standard, as held by *Banker's Hill*, or under the substantial evidence standard. (*Id.* at 1109.)

The split remains, and every court that addresses the exception has to address and resolve this issue. Because Appellants agree with the *Banker's Hill* court's application of the fair argument standard, they contend the issue is resolved. However, this Court is not bound by *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, and should hold that the substantial evidence standard applies. At a minimum, public agencies applying categorical exemptions in the first instance need resolution of this continued uncertainty regarding the proper standard for the exception.

### B. The Court Should Adopt the Substantial Evidence Standard.

As discussed in the Opening Brief, this Court derived the fair argument standard from section 21151, which "commands that an EIR must be prepared whenever a project "*may* have a significant effect on the environment." (*Laurel Heights II, supra,* 6 Cal.4th at 1134-1135, citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 83-85, italics

added by Court.) According to the Court, the Legislature's use of the word "may" was significant in supporting application of the fair argument standard.

However, in contrast to section 21151, the Legislature did not use the word "may" in section 21084. Rather, the Legislature provided:

> The guidelines prepared and adopted pursuant to Section 21083 shall include a list of classes of projects that *have been determined not to have a significant effect on the environment* and that shall be exempt from this division. In adopting the guidelines, the Secretary of the Natural Resources Agency shall make a finding that the listed classes of projects referred to in this section *do not have a significant effect on the environment*. (Emphasis added.)

The Legislature did *not* say classes of projects that "may have a significant effect on the environment;" it said "have been determined not to have a significant impact on the environment." Thus, the language in section 21084 does not support application of the fair argument standard.

Moreover, Guidelines section 15300.2(c) does not include the word "may" either. Rather, it states: "where there is a reasonable possibility that the activity in question *will* have a significant effect on the environment due to unusual circumstances." (Emphasis added.) Thus, not only do Appellants want to delete the phrase "due to unusual circumstances" from the exception, they also want to change the word "will" to "may." However, the Resources Agency's use of the word "will" instead of "may" supports application of the substantial evidence standard.

Appellants argue that "may" means a reasonable possibility. (Answer Brief, p. 33, citing *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309.) Apparently, then, Appellants contend that the Resources Agency's use of "reasonable possibility" meant "may" have a significant effect on the environment due to unusual circumstances.

However, Appellants' citations all rely on this Court's decision in *No Oil, Inc., supra,* 13 Cal.3d at 83, fn. 16, which provides:

> CEQA does not speak of projects which *will* have a significant effect, but those which *may* have such effect. Although we agree with the trial court that the word "may" connotes a "reasonable possibility," that phrase again encompasses a range of meaning extending from the most unlikely possibility which might influence the views of a reasonable man to events which fall but a hair short of certainty.

Here, the guideline does speak of projects that "*will* have a significant effect on the environment due to unusual circumstances." Given this language and the language in section 21084, the Court should apply the substantial evidence standard to this inquiry.

Appellants also ignore that the court in *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1071-1074, has applied the substantial evidence standard to the historical resources exception in Guidelines section 15300.2, subsection (f). (See Opening Brief, p. 53, fn. 6.) Notably that exception provides that a categorical exemption shall not be used for a project that "may" cause a substantial adverse change in the significance of a historical resource. Thus, Appellants are simply wrong in arguing that use of the word "may" always requires application of the fair argument standard.

Moreover, the policy reason underlying the fair argument standard is that the interpretation of section 21151 that affords the fullest possible protection to the environment within the reasonable scope of the statutory language is the one which imposes a low threshold requirement for preparation of an EIR. (*No Oil, Inc., supra*, 13 Cal.3d at 84.) However, that same interpretation cannot be squared with the reasonable scope of the statutory language in section 21084. In that provision, the Legislature directed the Resources Agency to designate classes of projects that it

determines *not* to have a significant impact on the environment and are exempt. It is not consistent with this statutory language to impose a low threshold requirement for preparation of an EIR. Accordingly, in applying the unusual circumstances exception to that legislative direction, that low threshold requirement should not apply.

Appellants argue that there "is no pretense of prior environmental review of specific projects in a categorical exemption class." (Answer Brief, p. 42.) Appellants ignore that, while there is no prior environmental review of individual projects fitting within the class, the Resources Agency did determine that the impacts from these classes of projects will not have a significant impact on the environment. Appellants' argument gives no credence to this separate administrative determination made by the Resources Agency.

Appellants also miss the point with respect to the commonsense exemption. As explained in the Opening Brief, the leading CEQA practice guide interprets this Court's decision in *Muzzy Ranch v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372 as applying the substantial evidence standard to the commonsense exemption. (Opening Brief, pp. 55-56.) Thus, Appellants' position would create an anomalous situation where the same project could be exempt under the commonsense exemption applying the substantial evidence standard, but not exempt under a categorical exemption applying the fair argument standard to the exception. This Court should confirm a consistent substantial evidence standard for both situations.

Finally, Appellants ignore the complexities involved in applying two different standards to the same project, i.e., the substantial evidence standard to the categorical exemption determination and then the fair argument standard to the same set of facts under the exception. Again, these are routine, minor projects that the Legislature directed would be

found to be exempt from CEQA. And again, it is not just the courts who apply these standards; it is also the public agency that must apply these two different standards in determining whether the categorical exemption can be used in the first instance. The complexity of the analysis to make that determination undermines the legislative purpose of having categorical exemptions. Accordingly, the substantial evidence standard should be consistently applied to both inquiries.

## III. APPELLANTS HAVE FAILED TO SHOW THAT THE UNUSUAL CIRCUMSTANCES EXCEPTION APPLIES IN THIS CASE

Appellants' Answer Brief is largely unresponsive to the discussion in the Opening Brief that application of the unusual circumstances exception does not disqualify the Kapors' proposed home from the use of categorical exemptions for new construction and infill projects. That is because Appellants argue that the phrase "due to unusual circumstances" should be read out of the exception. Thus, while conceding the exemption classes exist, Appellants' brief proceeds as if the exemptions are meaningless and the only inquiry is whether the home may have a significant effect on the environment. Because Appellants' interpretation of the exception is wrong, their argument on this point is irrelevant. At page 99 of their brief, Appellants do finally try to argue that the home presents unusual circumstances, but that half-hearted effort fails.

### A. Appellants Failed to Show that the Project Is Unusual Compared to the General Class of Projects Covered by the Two Exemptions.

As discussed in the Opening Brief, to meet their burden under the exception, Appellants must show that the circumstances of the Project (i) differ from the general circumstances of the projects covered by Guidelines sections 15303(a) for New Construction and 15332 for In-Fill Development Projects, and (ii) those circumstances create an environmental risk that does

not exist for the general class of these exempt projects. (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1350.)

A good example of how the unusual circumstances exception works is demonstrated by the recent decision *Voices for Rural Living, supra,* 209 Cal.App.4th 1096. The project in that case was a district's MOU to provide water to a casino located on tribal land. The district determined that the MOU was exempt from CEQA pursuant to the categorical exemption in Guidelines section 15303 for new construction. In the MOU, the district agreed to provide water to the tribe to equal 260.74 equivalent dwelling units ("EDUs") – 45 EDUs for existing service and an additional 215.74 EDUs for increased service to the casino, an increase of 579 percent.

The court of appeal first reviewed whether the project involved unusual circumstances. It applied the rule that "whether a circumstance is '*unusual*' is judged relative to the *typical* circumstances related to an otherwise typically exempt project." (*Id.* at 1109, citation omitted, italics original.) The court reviewed the types of projects covered by the new construction exemption, and the examples listed in Guidelines section 15303. The exemption also covers "water main, sewage, electrical, gas, and other utility extensions, including street improvements, of reasonable length to serve such construction." (*Id.* at 1110, citing Guidelines 15303(a), (b), (c).) The court then concluded:

> We conclude the MOU project presents circumstances that are unusual for this categorical exemption. The proposed project's scope, providing 216 additional EDUs of water to a casino and hotel project so large it brings with it its own freeway interchange instead of providing one or four EDUs of water as contemplated by the class 3 categorical exemption is an unusual circumstance under that exemption. The sheer amount of water to be conveyed under the MOU obviously is a fact that distinguishes the project from the type of projects contemplated by the class 3 categorical exemption. . . .

> There is no doubt that modifying and relocating a water meter and pipeline for a casino and hotel development greatly differs from doing the same for a single family residence, the type of project covered by the class 3 categorical exemption. A small construction project would not normally require an additional 216 EDUs of water delivery or its own freeway interchange. (*Id.* at 1110-1111.)

The court then reviewed whether there was a reasonable possibility of a significant effect on the environment due to the project's unusual circumstances. The court held the project may have an adverse effect on the district's water supply and its ability to provide service, particularly during a drought. (*Id.* at 1110-1111.) Accordingly, the court held that the exception applied and that the district was required to comply with CEQA.

Here, unlike the petitioners in that case, Appellants make no attempt to meet their burden of showing the exception applies. Rather, they make general assertions that the proposed home is "unusual," without comparing it to the general class of projects covered by the two exemptions. As discussed in detail in the Opening Brief, the proposed home is not unusual compared to typical new construction projects under Guidelines section 15303 or typical infill projects under Guidelines section 15332. (Opening Brief, pp. 57-64.) Appellants do not respond to these points. Their general assertions fare no better.[2]

**1. Size of the Home.**

First, Appellants argue generally that the proposed home is too big, citing to a Wikipedia definition of a mansion being "over 8,000 square

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[2] In the administrative proceedings, trial court and court of appeal, Appellants argued that the Kapors' proposed philanthropic activities constituted an "unusual circumstance." (2 AR 440-441; AA 46.) Appellants appear to have dropped this argument before this Court.

feet." (Answer Brief, p. 100.) Again, however, the relevant comparison is to the projects covered by the two exemptions. The new construction exemption does not contain a square-footage limitation for single-family homes. Nor does the proposed home compare to the sheer size of the casino and hotel project in *Voices for Rural Living*. Moreover, Appellants ignore the City's determination that the size of the proposed home was normal and typical under its legislatively-adopted development standards. In addition, the infill exemption also does not contain a size limitation, and has been applied to a 5-story building with 98 residential units, and a 14-story high-rise condominium project. (Opening Brief, p. 64, citing *Wollmer, supra*, 193 Cal.App.4th 1329 and *Banker's Hill, supra*, 139 Cal.App.4th 249.) The size of the proposed home is clearly not unusual compared to the size of these projects. Appellants fail to respond to this point as well.

**2. Environmental Setting.**

Appellants haphazardly throw out a number of alleged facts that they claim constitute unusual circumstances with respect to the "environmental setting." None of these alleged facts constitute unusual circumstances.

First, Appellants claim the site is located within a state-designated earthquake-induced landslide hazard zone. However, this allegation stems from an expert report based on erroneous facts. As was explained in the record:

> In several locations, the Karp letters refer to the City maps which indicate the site falls within the boundaries of an area that requires investigation for possible earthquake-inducing landsliding. The maps included in the City documents were taken from maps prepared by the California Geologic Survey (CGS) in response to the 1990 Seismic Hazards Mapping Act. . . . projects falling within the jurisdiction of this Act are mandated to have a site-specific investigation to evaluate whether a hazard actually exists.

> Again, the assumptions and facts relied on for the Karp opinion are not the facts in this case. The areas on these maps are not "landslide areas," only areas that need site-specific studies to confirm whether a landslide is or is not present here. The subject site, along with the majority of the Berkeley and Oakland hills, is located in such a mapped potential earthquake-induced landslide hazard zone by CGS. My firm specifically evaluated the landslide potential of this site during our investigation and we concluded the evidence at the site did not indicate that a landslide hazard was present. (4 AR 1062, emphasis original.)

Thus, the site itself is not in a landslide area, it is only in an area that requires a site-specific investigation. Moreover, this house is not unusual in this respect; rather, most of the Berkeley and Oakland hills is included in that area. Under Appellants' argument, proposed construction of any home in the Berkeley or Oakland hills would not be categorically exempt from CEQA. Finally, the site-specific investigation showed there was no landside hazard on the site. Accordingly, nothing in this mapping designation shows "unusual circumstances."

Appellants next state that Rose Street is a "narrow, steep, single-lane road." However, the Project is designed to *alleviate* existing problems and there is no substantial evidence of any traffic or parking impacts as a result of the Project. (2 AR 407.) Moreover, as explained by City staff, the Project did not present any different situation than any other residential development in the City's hills. (2 AR 466.) The court in *Association for Protection of Environmental Values in Ukiah v. City of Ukiah* (1991) 2 Cal.App.4th 720, 736, held that the "hillside site" of the single–family residence at issue was not "so unusual in the vicinity as to constitute the type of unusual circumstances required to support application of the exception." The same conclusion is warranted here.

Appellants also state that there are historic and architecturally significant buildings within walking distance. However, at the

administrative level and on appeal, Appellants gave no indication of how the proximity of historic resources affects the Project. (1 AR 150; 2 AR 467.) Although Appellants assert that there are walking tours in the area, the site is not readily visible from the public right-of way. (2 AR 468.) There are also a range of styles of new dwellings in the area. (*Ibid.*)

Accordingly, Appellants have failed to demonstrate that the "environmental setting" of the Project differs from the general circumstances of projects covered by the new construction and infill categorical exemptions.

**3. Site Constraints.**

Appellants repeat their claims that the Project site has significant geological site constraints, and claim this constitutes unusual circumstances. However, as discussed in detail in the Opening Brief and further below, those allegations are based on an expert who is opining on a different project, not the project actually approved by the City. Accordingly, nothing in this misinformation demonstrates that the proposed home is unusual compared to the general classes of new construction and infill projects.

Thus, because Appellants did not demonstrate that the first prong of the unusual circumstances exception applies to the project, the exception does not apply.

**B. Appellants Failed to Show a Reasonable Possibility of a Significant Environmental Impact Resulting From Unusual Circumstances.**

Even if Appellants had shown that unusual circumstances exist, they do not and cannot show that there is a reasonable possibility of a significant environmental impact due to those unusual circumstances. Again, because Appellants advocate deleting the phrase "due to unusual circumstances" from Guidelines section 15300.2(c), and because they have not shown any unusual circumstances, they do not identify any significant environmental

impacts *due to* unusual circumstances. Their argument fails for that reason alone. Instead, Appellants simply argue that the proposed home may have a significant impact on the environment, which is the wrong inquiry. Even if it was the correct inquiry, Appellants have also failed to show a reasonable possibility of a significant environmental impact.

### 1. There Is No Expert Dispute Over Geotechnical Impacts.

Appellants have still failed to show a reasonable possibility of a significant geotechnical impact. They argue that Respondents advocate rejecting Appellants' expert's opinion in favor of the Kapors' expert's opinion, which "is not how the CEQA standard of review works." (Answer Brief, p. 71.) Appellants miss the point. This is not a case of dueling expert opinions over the impacts of a project as proposed and approved. Rather, Appellants' expert has postulated a *different* project, and opined about the impacts of that different project. *That* is not how CEQA works.

Appellants mischaracterize Respondents' argument as Mr. Karp misread the project plans, respond that Mr. Karp insists that he did not misread the project plans and, therefore, claim that this a classic dispute among experts. However, this case is not about whether Mr. Karp reviewed all the plans, or whether the project changed, or whether he conducted his own investigation, or his credentials as an expert. Rather, the fundamental point is that there cannot be a dispute over what the approved project is. The City approves specific project plans. That is the project. Respondents cited extensive legal authority in the Opening Brief for the propositions that: (1) the City's determination regarding the scope of the proposed project per the approved plans is not subject to expert dispute (Opening Brief, pp. 67-70); and (2) CEQA's requirement to prepare an EIR is not triggered by alleged impacts of project elements which are neither

proposed nor approved (Opening Brief, pp. 70-74). Appellants failed to respond to these legal authorities.

Instead, Appellants' brief contains a baffling, jumbled explanation of the Project plans, evidently in hopes that the Court will be so confused that it will default to the "dispute among experts" conclusion. However, the project plans approved by the City are the Project. It is this Project that the City must review to determine whether CEQA review is required. The City has said over and over again that the Project it considered and approved does not contain the "side-hill fill" invented by Appellants. The legal presumptions and authorities in favor of the City and its official actions discussed in the Opening Brief are enough to establish the definition of the Project as a matter of law. However, in order to respond once and for all to Appellants' repeated and confusing mischaracterizations of the Project plans, the following explanation walks through those plans step by step.

The City adopted Resolution No. 64,860-N.S., which approved the Project and expressly adopted the project plans contained in Exhibit B. (1 AR 3.) The project plans contained in Exhibit B are located at 1 AR 13-28, and consist of 17 pages of "Approved Plans" dated November 12, 2009. Each sheet of the Approved Plans serves a distinct function, and the Index to the Approved Plans provides a detailed list of each sheet, as follows:

Plan 1 is the Vicinity Map/Neighbor Contact. (1 AR 14.)

Plan 2 is the Site Plan with Revised Driveway. (1 AR 15.)

Plan 3 is the Landscape Plan. (1 AR 16.)

Plan 4 is the Upper Floor Plan with Revised Driveway. (1 AR 17.)

Plan 5 is the Lower Floor Plan with Revised Driveway. (1 AR 18.)

Plan 6 is the Landscape West Elevation. (1 AR 19.)

Plan 7 is the Landscape North Elevation. (1 AR 20.)

Plan 8 is the Landscape East Elevation. (1 AR 21.)

Plan 9 is the Landscape South Elevation. (1 AR 22.)

Plan 10 is the West Elevation. (1 AR 23.)

Plan 11 is the North Elevation. (1 AR 24.)

Plan 12 is the East Elevation. (1 AR 25.)

Plan 13 is the South Elevation. (1 AR 26.)

Plan 14 is the Tranverse Section Looking East.

Plan 15 is the Boundary & Topographic Survey. (1 AR 27.)

Plan 16 is the Conceptual Grading Plan. (1 AR 28.)

Thus, Plans 2-14 are simply visual representations of the house from different directions, which is unambiguously denoted on the Plans. Plans 2-5 present a view of the house from above and each shows a different perspective about the view from above. Plans 6-13 provide a 360 degree perspective of the house with a focus on landscaping and depictions of the elevations. Plan 14 is a visual representation of the cross-section of the inside of the house. Plan 15 provides the boundaries and topography of the site. Plan 16 depicts the cut and fill that will be necessary to effectuate the construction of the house.

Mr. Karp relied on Plan 14 to form his opinion that the grading for the Project would actually be much larger than what the City approved and would require the "side-hill fill." (Answer Brief, pp. 22-23.) However, Plan 14 is the Tranverse Section Looking East, which is the cross-section showing the inside of the house. (4 AR 1082.) Plan 14 does not have anything to do with grading, or cut and fill information. It also does not show any elevations or topographical information. The City only approved one grading plan in the Approved Plans. That is Plan 16 at 1 AR 28. That approved grading plan only allows 1500 cubic yards of cut and 800 cubic yards of fill. (1 AR 28.)

The Kapors' expert explained how Plan 14 did not show any grading for the Project:

> Page 14 of the plans submitted by Marcy Wong Donn Logan's office shows the existing slope of the hillside with a hatch below it and another line and different hatch pattern above this. This upper line is meant to depict the existing grade at another location on the site, not a fill line. No other sheet, including the conceptual grading indicates any intent of spreading any earthworks on the site. The Brandt-Hawley/Karp statements are based on erroneous reading of only Page 14, and not the full set of plans. Their failure to consider the entire document combined with their mis-reading of page 14 apparently led to their completely incorrect assumption that the cut material will be placed on the surface of the existing slope, when in fact the surface of the existing slope will remain intact. (4 AR 1065, underlining original.)

Indeed, given the confusion caused by Appellants' expert over Plan 14, that plan was not included in the "Approved Plans" attached to City Resolution No. 64,860-N.S. and approved by the City. (1 AR 3.) Thus, the entire foundation of Mr. Karp's opinion is not part of the Approved Plans. As such, Mr. Karp's opinion does not constitute substantial evidence of a geotechnical impact *of the approved Project.* Nothing in CEQA or the fair argument standard supports Appellants' request that this Court simply disregard the City Council's approved grading plan for the Project.

To the contrary, Appellants fail to even acknowledge the citation in the Opening Brief to *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, which rejected claims by project opponents that the project would be larger than what was approved, holding that such claims "ignored the reality of the permit as approved and accepted." (*Id.* at 162.) The court held that "the focus must be on the use, as approved, and not the feared or anticipated abuse." (*Id.* at 164.) Here too, Appellants' expert ignored the reality of the permit as approved and accepted. As such, it does not show a potentially significant impact *of the project.*

Appellants also argue that because the "Conceptual Grading Plan" in Plan 16 includes the word "Conceptual" it is "by its very name

preliminary." (Answer Brief, p. 20.) However, Appellants disregard that the City Council expressly adopted Plan 16 in Resolution No. 64,860-N.S. (1 AR 3), which *does* make it the only approved document that allows cut and fill for the Project.

Appellants further contend that: 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." (Answer Brief, pp. 20-21, citing "1 AR 10, see 12.") However, these conditions require Drainage and Erosion Control plans associated with the Project grading—they do not authorize or contemplate any additional or different grading than what is already included in the Approved Plans. (1 AR 10, 12.)

Appellants misrepresent the record by claiming that the final design of the Project was never subject to review for geotechnical impacts. To the contrary, the record contains expert evidence that the geotechnical investigation supports the construction of the Project. (4 AR 1065-1066.)

Finally, Appellants argue that Mr. Karp's opinion that the Project cannot be built as proposed and approved is substantial evidence that the Project will have a significant impact on the environment. Just to state this argument is to demonstrate its absurdity. Appellants rely on Mr. Karp's preparation of his own plan for how the house should be built. (Answer Brief, p. 19, citing 4 AR 1085.) However, the City did not approve Mr. Karp's plan; it approved the Kapors' plan.

If the Project cannot be built as approved by the City, then there is no approved project. If the Kapors want to build a different project, they must return to the City for approval of a different project and the City could issue a stop-work notice to prevent unauthorized construction. Appellants reject this obvious reality as speculation and outside the record, and claim

the trial court agreed with them. However, the trial court did not agree with Appellants, but stated: "It's really just the operation of law in any event." (RT:67.) The trial court was correct. Courts presume that the City will comply with the law and perform its official duties (see Evid. Code § 664), which includes enforcing its own Approved Plans.

Thus, there is no dispute among experts as to the impacts of the Project as approved. Accordingly, Appellants have not shown that the unusual circumstances exception applies here.

### 2. Appellants Rely on Impacts of the Environment on the Project.

Appellants also dismiss the argument in the Opening Brief that a reasonable possibility of significant impact cannot be shown by alleged impacts of the environment on the project. (Opening Brief, pp. 74-77.) Appellants claim that this is not a situation of people choosing to move into an environmentally dangerous area. However, that is exactly the type of impact that Appellants allege—that the alternative project hypothesized by Mr. Karp will be subject to "seismic lurching."

In *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 473-474, the court questioned the validity of Guidelines section 15126.2(a), which provides that an EIR should evaluate "any potentially significant impacts of locating development in areas susceptible to hazardous conditions." The court further cast doubt on a particular question listed in Appendix G of the CEQA Guidelines—a checklist for use in evaluating a project's potentially significant impacts—namely: "Would the project . . . [e]xpose people or structures to . . . risk of loss, injury or death involving . . . [r]upture of a known earthquake fault." (*Id.* at 474.) The court held that this question, to the extent it might imply that an EIR should evaluate "the effects on users of the project and structures in the project of preexisting environmental hazards" was inconsistent with CEQA,

and therefore "cannot support an argument that the effects of the environment on the project must be analyzed in an EIR." (*Ibid.*) Similarly, here, evidence suggesting that existing environmental hazards may adversely affect a project is legally incapable of supporting a fair argument of a potentially significant environmental impact of that project.

**3. Seismic Issues.**

Appellants next address what they characterize as "seismic issues." (Answer Brief, p. 78.) Again, however, Appellants fail to show a reasonable possibility of a significant environmental impact due to "seismic issues," or to link any such impact to unusual circumstances.

Appellants rely on Mr. Karp's recommendation that the City approve an alternative project to avoid the massive grading and side-hill fill he has determined is required to construct the Project. Of course, since the approved Project does not include massive grading or side-hill fill, this is not substantial evidence of an impact of the Project.

Appellants' rely on Mr. Karp's reference to the "designated earthquake-induced landslide hazard zone" and claim it is buttressed by the Kapors' 2009 geotechnical report. However, as discussed above and clearly explained in the record, all this means is that the Project site, like the rest of the Berkeley and Oakland hills, is in an area that requires a site-specific investigation, which was done. (4 AR 1062.) Appellants do not cite any significant environmental impact due to the Project's location in the landslide hazard zone.

Appellants next argue that the La Loma overpass adjacent to the Project site will somehow contribute to significant environmental impacts. However, Appellants rely on the same recommendation of Mr. Karp that the City approve an alternative project to avoid the massive grading and the side-hill fill. Again, the approved Project does not include massive grading

or the side-hill fill, and therefore this opinion is not substantial evidence of a significant impact of the Project.

Appellants next claim that Mr. Karp stated that the drainage from the Project would be inconsistent with the "intended very deep fill slopes." (Answer Brief, p. 83.) Again, however, the approved Project does not contain these "intended very deep fill slopes," and therefore there is no substantial evidence of a significant environmental impact of the Project.

**4. No Conflict With Berkeley General Plan/Zoning.**

Appellants have also failed to show that there is a reasonable possibility of a significant impact due to unusual circumstances based on any alleged general plan inconsistencies.

First, "an inconsistency between a project and other land use controls does not in itself mandate a finding of significance. [Citations] It is merely a factor to be considered in determining whether a particular project may cause a significant environmental effect." (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1207.) Thus, even if Appellants had shown an inconsistency between the Project and the City's General Plan, they failed to show any significant impact on the environment due to the alleged General Plan consistency.

Second, Appellants cite *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, as applying the fair argument standard to a claim that the proposed project was inconsistent with a general plan. However, the well-established rule is that courts review the City's general plan consistency determination under the "arbitrary and capricious standard." (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782.) Under this standard, the City's conclusions of consistency carry "a strong presumption of regularity that can be overcome only by a showing of abuse of discretion." (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th

342, 357.) This presumption exists because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1509; see also *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719 ["It is, emphatically, not the role of courts to micromanage these development decisions."].)

Appellants' citation to the fair argument standard to review the City's general plan consistency determination adds yet another level of complexity and, indeed, absurdity to Appellants' standard of review argument. Again, standards of review in CEQA are not just for the courts; they also govern the agency's application of CEQA to projects. Under Appellants' interpretation, a public agency would have to review the same project and the same facts under *three* separate standards of review. First, in determining whether a project is consistent with an agency's general plan, the agency would apply the arbitrary and capricious standard discussed above. Second, general plan consistency is a necessary element for the City to determine that the Project is categorically exempt in the first instance, pursuant to Guidelines section 15332 for infill development. Specifically, the Project must be "consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations." (*Id.* at subsection (a).) The Court reviews the City's determination that the categorical exemption applies under the substantial evidence standard, and Appellants concede this point. (Answer Brief, p. 65.) Third, the City would then review the general plan consistency determination in the context of the unusual circumstances exception, which under Appellants' position, is the fair argument standard. (Answer Brief, p. 83.)

Requiring courts and public agencies to review the same project and same set of facts under three separate standards of review is the height of absurdity. It is also clearly at odds with the Legislature's entire purpose for categorical exemptions—a streamlined environmental review process for classes of minor projects. It also conflicts with one of the legislative goals of CEQA of not "unduly prolonging the process so that the process deters development and advancement." (*Laurel Heights II, supra,* 6 Cal.4th at 1132.) It also unduly complicates CEQA litigation, which is at odds with the legislative directive that CEQA cases be heard and resolved expeditiously. (See § 21167.4; *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12 ["the Legislature has recognized that, particularly in the CEQA context, time is money."].)

In any event, Appellants' reliance on *Pocket Protectors* is misplaced, because that case involved review of a mitigated negative declaration, not a categorical exemption, and thus is inapplicable. (124 Cal.App.4th at 930-931.) Also, the project in *Pocket Protectors* involved 143 single-family homes and therefore was much too large to qualify for the categorical exemption for one single-family home at issue in this case. Moreover, the city's plan at issue in that case did not authorize the type of housing that was being proposed in the project, and even city staff admitted the project was inconsistent with the plan. (*Id.* at 929-931.) There are no such facts here.

Appellants' claim that the Project is inconsistent with City plans and policies is a bald assertion, supported only by speculative conclusions, not substantial evidence. Appellants cite the following General Plan policies in support of their claim: Policy LU-3 Infill Development, Policy UD-16 Context, Policy UD-17 Context, Policy UD-24 Area Character, Policy UD-31 Views. (Answer Brief, p. 85.) Appellants focus on Policy UD-16, which provides that 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 38.)

The record reflects that City staff, on the basis of factual evidence in the record, went through all of the applicable general plan policies and explained why the Project was consistent with them as to views, shadows, neighborhood compatibility, green building design and reflection of the character of the buildings in the vicinity. (1 AR 34-39, 157-158.) With respect to Policy UD-16, City staff explained:

> The ZAB's acceptance of the modern design of the proposed dwelling is consistent with other recent approvals, in similarly "historic" neighborhoods. The ZAB's standard is to look to the style of the area, but not to be held to a continuance of historical building styles or details for new construction. [T]he nearby historic buildings have a significant visual separation from this site such that the proposed dwelling cannot be viewed along with any Landmark property. The view of the proposed dwelling along with the abutting neighbors would include significant horizontal separation allowed by the large parcel and on-site setback, mature trees and steep topography. The ZAB concluded that the proposed project would be consistent with the purposes of the R-1 District, H Overlay District, and General Plan policies. (1 AR 158.)

City staff also specifically addressed Appellants' concerns regarding the size of the proposed home and explained that the Project would be within the R-1(H) limitations for height (35-foot maximum and the 694-foot roof parapet elevation). (1 AR 151-152; 2 AR 550-552; see also 2 AR 318, 407.) Based on a detailed analysis, the City concluded that "[t]he project is consistent with the applicable General Plan designation and applicable General Plan policies . . . as well as with applicable zoning designation and regulations." (1 AR 34-39, 157-158.)

Appellants also cite the conclusion by the trial judge that "the very generalities of Berkeley's zoning policies, which provide the flexibility to allow the City to exercise discretion in governing well and making good land use decisions, also make it a simple matter to satisfy the low threshold of a fair argument that a particular project is inconsistent with those policies." (AA, p. 156.) While it is difficult to reconcile the trial judge's assessment of the great flexibility built into the City's zoning policies with his conclusion that this same flexibility creates the potential for inconsistency for many projects, his analysis and conclusion are irrelevant for purposes of this appeal. This court does not review the trial court's ruling, this court reviews the City's determination. (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602, fn. 3 [court of appeal conducts its review independent of the trial court's findings]; *Banker's Hill, supra,* 139 Cal.App.4th at, 257 [court of appeal examines the City's decision, not the trial court's].)

Thus, Appellants present no substantial evidence regarding potential environmental impacts due to inconsistencies with the City's general plan or zoning regulations and policies. Therefore, Appellants have not met their burden.

**5. There Are No Aesthetic Impacts.**

Appellants have also failed to show that there is a reasonable possibility of a significant aesthetic impact due to unusual circumstances.

It is well established that "obstruction of a few private views in a project's immediate vicinity is not generally regarded as a significant environmental impact." (*Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 586-587, citing *Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402 [that a project affects "only a few private views" suggests that its impact is insignificant]; *Mira Mar Mobile Community v. City of Oceanside,* (2004)

119 Cal.App.4th 477, 492-493 [distinguishing public and private views; "[u]nder CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons"]; *Association for Protection etc. Values v. City of Ukiah, supra,* 2 Cal.App.4th 720, 734 [views of "only a few of the neighbors," not "persons generally," were affected].)

Even if such view impacts were relevant, the evidence in the record shows that the site is not readily visible from the public right of way. (2 AR 468.) Photo simulations show that the proposed dwelling would only be minimally visible from several points in the area. (2 AR 468; 1 AR 152-155; see also 4 AR 1034-1040 [photo simulations showing proposed house is nearly invisible from any vantage point].) Moreover, the evidence shows that the proposed site "is one of the most secluded and invisible lots in Berkeley. Not only is the site itself heavily wooded—with over 50 mature trees—the neighborhood is also replete with large trees, further obstructing the view of the site from any distance or vantage point." (4 AR 1038.) Notably, none of the personal opinions of Project opponents cited by Appellants provide any factual evidence that the Project will have any view impacts. Project opponents "must produce some evidence, other than their unsubstantiated opinions, that a project will produce a particular adverse impact." (*Ukiah, supra,* 2 Cal.App.4th 735-736.)

Rather, all of the personal opinions cited by Appellants—none of which came from any of the applicant's immediate neighbors— are that the Project is too large, too institutional and out of scale with the neighborhood. (Answer Brief, pp. 89-92.) Importantly, these same concerns were raised by the project opponents in *Bowman, supra*, 122 Cal.App.4th at 587, a recent case addressing very similar issues brought against the City of Berkeley. Indeed, a comparison of the complaints in the Answer Brief at

pages 89-92, with the complaints in *Bowman,* suggests that they could have been written by the same author:

> The Neighbors' chief objection to the scale of the Project is the purely aesthetic one that it is out of character with its surroundings. Petitions were submitted arguing that the Project would "spoil the attractive visual character of our low-rise neighborhood." One area resident called the building "a Costco-sized box on a Monterey Market-sized plot," and others complained: that there was "nothing ... this massive for as far as you can see in any direction"; that the building would be "completely out of scale with the surrounding one- and two-story homes and businesses"; and that the building would be "a monstrosity, not fitting into the fabric of the neighborhood." A city council member observed that all of the surrounding buildings were "much, much smaller," and another called the Project "plain too big." Some DRC members thought that the Project would be "out of scale" and "too massive," and some local architects shared that opinion. One architect called the Project "grossly over-scaled for the neighborhood"; another thought that the building would "stand out like a sore thumb for 100 years"; another was "just speechless" at "the size of this thing," and found it "mind-boggling" that the City would "even consider" it. (*Bowman, supra*, 122 Cal.App.4th at 587.)

The court in *Bowman* held that these opinions did not constitute substantial evidence supporting a fair argument that the project in that case would have a significant effect on the environment. (*Id.* at 576.) The court stated:

> Where scenic views or environmentally sensitive areas are concerned, aesthetic considerations are not discounted as environmental impacts merely because they involve subjective judgments. . . . But we do not believe that our Legislature in enacting CEQA, any more than Congress in enacting NEPA, intended to require an EIR where the sole environmental impact is the aesthetic merit of a building in a highly developed area. (Citations.) To rule otherwise would mean that an EIR would be required for every urban building project that is not exempt under CEQA if enough people could be marshaled to complain about how it will look. While

> there may be situations where it is unclear whether an aesthetic impact like the one alleged here arises in a "particularly sensitive" context (Guidelines, § 15300.2) where it could be considered environmentally significant, this case does not test that boundary. (*Id.* at 592.)

The same result is required here. Appellants have not presented any evidence that the Project arises in a "particularly sensitive" environment, or that scenic views are concerned. Moreover, in reaching its conclusion, the court relied on the fact that the project there had already been subject to thorough design review, and that "aesthetic issues like the one raised here are ordinarily the province of local design review, not CEQA." (*Id.* at 593.) Similarly, here, the Project underwent extensive pre-application design modifications, and analysis under the City's General Plan policies designed to ensure compatibility with the neighborhood. (1 AR 38.)

Appellants try to dismiss the *Bowman* case in a footnote, claiming it was distinguished in two subsequent cases. (Answer Brief, pp. 88-89, fn 11.) However, the single family home at issue in this case does not remotely resemble the facts in those cases, as they all involved more substantial projects approved with negative declarations rather than an exemption. (See *Bowman, supra,* 122 Cal.App.4th 572 [project was four-story, mixed use facility with retail space and 40 dwelling units approved with mitigated negative declaration]; *Pocket Protectors, supra,* 124 Cal.App.4th 903, 939 [project was 143 single-family houses on 20 acres with zero to 5-foot setbacks, approved with a mitigated negative declaration; distinguishes *Bowman* on the grounds that it dealt with a single building]; *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323 [project was a 120-unit senior housing facility, a 6,500 square foot community center and a four-acre park, approved with a mitigated negative declaration].) Obviously, neither of the projects in *Pocket Protectors* or *Citizens for Responsible and Open*

*Government* could have been approved under a categorical exemption. If anything, the single-family home here is closest factually to the facts in *Bowman.*

Thus, Appellants have failed to show that there is a reasonable possibility of a significant aesthetic impact resulting from unusual circumstances.

**6. There Are No Traffic Impacts.**

Appellants do not present any substantial evidence showing there is a reasonable possibility of traffic impacts resulting from unusual circumstances. Most of the personal opinions cited as "evidence" by Appellants simply describe the existing constraints at the site, i.e., that Rose Street is a narrow road with limited access and scarce parking. (Answer Brief, pp. 95-98.) From these existing constraints, Appellants speculate that the Project will cause traffic impacts. However, "although local residents may testify as to their observations regarding existing traffic conditions, in the absence of specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence." (*Banker's Hill, supra,* 139 Cal.App.4th at 274, citation omitted.) In addition, claims based entirely on speculation are not substantial evidence. (*Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, 857-858.) "Opinions which state 'nothing more than "it is reasonable to assume" that something "potentially ... may occur" ' do not constitute substantial evidence 'necessary to invoke an exception to a categorical exemption.'" (*Ibid.*)

Moreover, Appellants wholly ignore the fact that the Project was designed, not only with the street constraints in mind, *but so that the Project will solve the existing problems.* (2 AR 407.) Because Rose Street dead-ends at the Project site, there is currently no turn-around for vehicles. The Project will create a new turn-around for all vehicles to use. (1 AR

126; 2 AR 407.) In response to the site-constraints and concerns of the neighbors, the house was designed to include parking for 10 cars beneath the main floor level of the house, not on the street. (1 AR 29, 84; 2 AR 407.) Indeed, the applicant got this idea from the immediate neighbors, who have 8 off-street parking spaces at their house for the same reason. (1 AR 84, 126.)

With respect to excavation of fill from the site, and resulting parking and traffic impacts, the evidence shows that the total amount of soil to be excavated will be 940 cubic yards. (2 AR 465; 1 AR 149.) The evidence in the record shows that this is not an unusual amount for a typical single family residence, and in fact, is significantly less in comparison with smaller homes with basements. (4 AR 1066.) The comment by Appellants' expert, Mr. Karp, that massive grading will be involved is again based on his contention that the Project will be different than the one approved by the City.

Further, the off-site construction impacts are addressed by the City's standard condition of approval that is applied to all Use Permit construction projects that may affect the public right of way. (2 AR 465-466; 1 AR 149.) This standard condition is routinely imposed on all single family residence projects exempt from CEQA that have similar connections to public rights of way to address the typical construction impacts. (See *Ukiah, supra,* 2 Cal.App.4th at 735-736 [issues of soil stability and water runoff are "common and typical concerns" from construction of a single-family home, were addressed by standard provisions in the Uniform Building Code, and did not constitute unusual circumstances].)

To the extent Appellants claim this standard condition of approval defeats the categorical exemption, Appellants are wrong. This argument is based on *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1102, which held that a public agency may

not rely on mitigation measures in order to conclude that a project is categorically exempt. However, a project can still be designed to qualify for an exemption. (*Wollmer, supra,* 193 Cal.App.4th at 1352-1353 [holding that dedication of land for left-turn lane to alleviate existing traffic concern was part of project and not improper mitigation, distinguishing *Salmon Protection*].)

Moreover, in *Salmon Protection, supra,* 125 Cal.App.4th at 1103-1104, the county imposed specific mitigation measures to minimize adverse physical impacts of the project on a riparian area designated as an environmental resource of critical concern. Nothing in this case precludes reliance on standard conditions applicable to all development and which are not specific to the project at issue. For example, in *Ukiah, supra,* 2 Cal.App.4th 735-736, the city imposed standard conditions from the Uniform Building Code on the project, to address soil stability and water runoff issues. The court upheld the city's reliance on a categorical exemption, finding that such issues were "common and typical concerns" from construction of a single-family home. (*Ibid.* See also *Hines, supra,* 186 Cal.App.4th 837 [single family residence approved with conditions exempt from CEQA review].)

Here, the conditions of approval for the Project were standard conditions imposed on residential development in the hills and "which are not intended to address any specific environmental impacts resulting from construction of this project." (1 AR 149; 2 AR 465-466.) The only special condition imposed by the City was a courtesy condition offered by the applicant to meet with the neighbors, which condition has no relation to any potential environmental impact. (2 AR 466.) Appellants' argument is therefore without merit.

Thus, Appellants have not met their burden of showing a reasonable possibility of a significant traffic impact resulting from unusual

circumstances. Accordingly, the unusual circumstances exception does not apply in this case. The Court should therefore uphold the City's determination that the Project is categorically exempt from CEQA.

## IV. APPELLANTS HAVE FAILED TO SHOW THAT THE PROPER REMEDY IS TO ORDER PREPARATION OF AN EIR

Respondents request that the Court reverse the decision of the Court of Appeal in its entirety and direct it to affirm the trial court judgment dismissing the petition for writ of mandate. However, in the event that the Court declines to reverse the decision in its entirety, it should nevertheless reverse it to the extent that it requires an EIR. Appellants are simply wrong in arguing that an EIR is mandated.

Appellants rely on *Voices for Rural Living, supra,* 209 Cal.App.4th 1096, and claim it supports an order requiring an EIR. The court actually reached the opposite conclusion. In that case, the court found that the unusual circumstances exception applied and the agency could not rely upon a categorical exemption. However, the court held that the trial court exceeded its authority when it mandated the district to prepare an EIR. The court explained:

> How an agency complies with CEQA is a matter first left to the agency's discretion. Having determined the project was not exempt from CEQA, the court should have ordered [the agency] to proceed with further CEQA compliance, which in this case would have been the preparation of an initial study and a determination of whether further environmental review would require an EIR or a mitigated negative declaration. (*Id.* at 1115.)

In the event the Court of Appeal decision is not reversed in its entirety, the same result is required here.

## CONCLUSION

The City and the Kapors respectfully request that the Court reverse the Court of Appeal decision, and uphold the trial court judgment dismissing the petition for writ of mandate in its entirety.

DATED: December 13, 2012 MEYERS, NAVE, RIBACK, SILVER & WILSON

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

DATED: December 12, 2012 ZACH COWAN, City Attorney

By: _____
Laura McKinney
Attorneys for Respondents City of Berkeley and City Council of the City of Berkeley

## WORD CERTIFICATION

I hereby certify that, as counted by my MS Word word-processing system, this brief contains 14,816 words exclusive of the tables, signature block and this certification.

Executed this ____ day of December, 2012 at Oakland, California.

Amrit S. Kulkarni
Julia L. Bond

2015268.1

## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

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

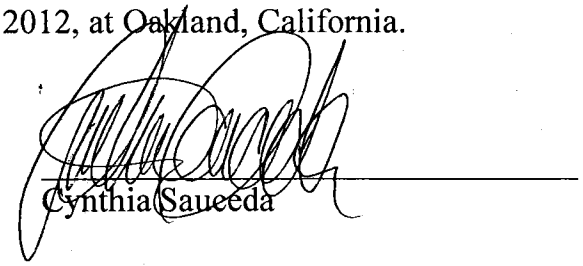
On December 13, 2012, I served true copies of the following document(s) described as **RESPONDENTS AND REAL PARTIES IN INTEREST'S REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

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

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

Executed on December 13, 2012, at Oakland, California.



Cynthia Saucedá

**SERVICE LIST**

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

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

Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612