S201116

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

BERKELEY HILLSIDE PRESERVATION, ET AL.
Petitioners and Appellants,

v.

CITY OF BERKELEY, ET AL.
Respondents.

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

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

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

JOINT SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Respondents, City of Berkeley and City Council of the City of Berkeley ("City") and Respondents and Real Parties in Interest Mitchell Kapor and Freada Kapor-Klein ("Kapors") (collectively, "Respondents") hereby submit this joint supplemental brief to address the document entitled "Hearing Before the Secretary of Resources, Proposed Guidelines for Implementation of the Environmental Quality Act ... Presentation of the Attorney General of California" (January 30, 1973) (hereafter, "1973 AG Presentation"). This Court requested, and the Attorney General submitted, the 1973 AG Presentation.

Respondents have argued herein that categorical exemptions render all projects that fall within those classes exempt from CEQA review, notwithstanding the environmental effects of any given project within that class.[1] Respondents also contend that the unusual circumstances exception to categorical exemptions in Guidelines section 15300.2(c) requires both a "reasonable possibility" that the project in question "will have a significant effect on the environment" *and* that the significant effect is "due to unusual circumstances." In contrast, the Court of Appeal held and Appellants argue that whether "unusual circumstances" are present is not a separate inquiry under the unusual circumstances exception. Rather, the Court of Appeal held that if a project may have a significant effect on the environment, it is ineligible for a categorical exemption, without regard to whether the possible significant effect is due to unusual circumstances.

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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.

As set forth herein, the 1973 AG Presentation substantiates Respondents' interpretation of categorical exemptions and the unusual circumstances exception.

II. THE 1973 AG PRESENTATION

A. Timing.

First, it is important to put the 1973 AG Presentation into the historical context of the relevant actions taken by the Legislature, this Court and the Resources Agency. A timeline of the key actions is below:

1970: Legislature enacts CEQA

1972: California Supreme Court issues *Friends of Mammoth v. Board of Supervisors of Mono County, et al.* (1972) 8 Cal.3d 247, holding that CEQA applies to private activity for which a government permit is necessary.

1972: In response to *Friends of Mammoth*, the Legislature passes AB 889, which includes a direction to the Resources Agency to designate categorical exemptions from CEQA

1/30/1973: Attorney General comments on Proposed CEQA Guidelines

1973: Resources Agency adopts CEQA guidelines, including categorical exemptions

1976: California Supreme Court issues *Wildlife Alive, et al. v. Chickering, et al.* (1976) 18 Cal.3d 190, stating that "where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper."

1980: Resources Agency adopts the unusual circumstance exception to categorical exemptions.

Thus, the 1973 AG Presentation was commenting on the Resources Agency's initially proposed Guidelines following this Court's decision in *Friends of Mammoth* and the Legislature's direction to the Resources Agency to adopt categorical exemptions. Importantly, the Attorney

General was not commenting on the Resources Agency's subsequent adoption of the unusual circumstances exception in 1980.

B. AG Comments on Categorical Exemptions.

In the 1973 AG Presentation, the Attorney General provided comments on all of then-proposed CEQA Guidelines, and referred to the proposed guidelines on categorical exemptions in two places.

First, in commenting on the definition of "categorical exemption," the 1973 AG Presentation states:

> This definition should be redefined in accordance with the definition indicated at Section 21084 of the Act. That section provides that categorical exemptions are those classes of projects which have been determined not to have a significant effect upon the environment. To state that significant environmental effects are not "anticipated" is not in accord with the statute.
>
> Section 21083 states when a project must be found to have a significant effect upon the environment. Any definition of categorical exemption should include a reference to this section and take this section fully into account. For example, section 21083(b) provides that a significant effect on the environment must be found if the possible effects of a project are individually limited but cumulatively considerable. The definition of categorical exemption should therefore be revised to state:
>
> "A categorical exemption is a class of projects which has been determined not to have a significant effect on the environment either individually or cumulatively and which shall be exempt from the provisions of the Act."

(1973 AG Presentation, pp. 16-17.)

Second, the 1973 AG Presentation includes comments on specific classes of proposed exempt projects (*id.* at p. 35), and then adds "one more suggestion":

> There can be projects, normally categorically exempt, which in fact do have significant environmental impacts.

> While single family dwellings are the standard example of projects which individually do not have significant environmental impacts, some do. Hearst Castle, for instance, is a single family dwelling. To use a more recurrent example, in an area where there is no sewer system and septic tanks have overloaded the earth's carrying capacity, one more single family dwelling may be a health hazard as well as a smelly nuisance.
>
> Means should exist to insure that *the exceptional case* can be taken out of the categorical exemption. We suggest the following addition:
>
> "Within 20 days after a public agency has made a determination that a project falls within a categorical exemption, any interested person may petition the public agency, alleging that in fact the project may have a significant environmental effect. The public agency shall then determine whether or not it may have such an effect."

(*Id.* at p. 36.) (Emphasis supplied.)

III. THE 1973 AG PRESENTATION SUPPORTS RESPONDENTS' INTERPRETATION OF THE GUIDELINES

A. The 1973 AG Presentation Confirms that the "Unusual Circumstances" Requirement in Guidelines Section 15300.2(c) Is Consistent with Section 21084.

As set forth in Respondents' briefs, 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 Legislature's 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 Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11. Thus, the Court must determine 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.

The 1973 AG Presentation confirms that Guidelines section 15300.2(c) is consistent with section 21084. It states that section 21084 "provides that categorical exemptions are those *classes of projects which have been determined not to have a significant effect upon the environment.* To state that significant environmental effects are not 'anticipated' is not in accord with the statute." (1973 AG Presentation, p. 16, italics added.) This statement demonstrates that the Resources Agency, at the direction of the Legislature, made a determination that potential environmental impacts of projects within certain classes are *by definition* not significant and, therefore, projects which fall within those categories are exempt from CEQA. Appellants' argument, that agencies are required to question the Resources Agency's determination that impacts of projects fitting within exempt categories are not significant, is flatly inconsistent with section 21084.

The second sentence quoted above expresses the Attorney General's opinion that local agencies should not second-guess the Resources Agency's determination for projects in exempt classes. It verifies that, in listing a class of projects as categorically exempt, the Resources Agency will have *already determined* that those projects will not have a significant effect on the environment. The Attorney General's objection to stating that significant environmental effects are not "anticipated" from categorically exempt projects interprets the Legislature as instructing that exempt categories be defined by a pre-determination that impacts of projects fitting within those categories will *never* be significant.

Accordingly, Appellants' interpretation, requiring local agencies to second-guess the Resources Agency's definitional determination that impacts of projects that fit into exempt classes are not significant, would contradict section 21084 as interpreted by the Attorney General.

B. The 1973 AG Presentation Foreshadowed the "Unusual Circumstances" Requirement in Guidelines Section 15300.2(c).

As the timeline set forth above shows, the Attorney General's comments in 1973 were directed at the Resources Agency's adoption of the categorical exemptions themselves, and not the subsequent adoption of the unusual circumstances exception in 1980. Nevertheless, the comments do provide insight into the exception.

First, the Attorney General's comment that "[t]here can be projects, normally categorically exempt, which in fact do have significant environmental impacts" (1973 AG Presentation, p. 36), supports the Resources Agency's adoption of exceptions to the exemptions. Indeed, in its adoption of the 1973 Guidelines, the Resources Agency included former section 15114, "exception for location," which was a precursor to current section 15300.2, subdivision (a). (Appellants' Request for Judicial Notice in Court of Appeal, pages 1-2 [excerpt from February 1973 Order Adopting Regulations of the California Resources Agency].) The current exception provides that "a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant." (Guidelines § 15300.2(a).) This exception accommodates the Attorney General's example of the exceptional circumstance of "an area where there is no sewer system and septic tanks have overloaded the earth's carrying capacity, one more single family dwelling may be a health hazard as a well as a smelly nuisance." (1973 AG Presentation, p. 36.)

Second, the Attorney General's reference to Hearst Castle unquestionably buttresses the Resources Agency's subsequent adoption of the unusual circumstances exception in 1980. The Attorney General stated: "While single family dwellings are the standard example of projects which individually do not have significant environmental impacts, some do.

Hearst Castle, for instance, is a single family dwelling." (*Ibid.*) The Attorney General then appropriately categorized Hearst Castle as an example of an "exceptional case" and suggested that "[m]eans should exist to insure that [such an] exceptional case can be taken out of the categorical exemption." (*Id.*)

The Attorney General's Hearst Castle example demonstrates perfectly how the unusual circumstances exception works. As set forth in Respondents' Opening Brief, it is established legal principle that the unusual circumstances exception applies "where the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, *and* (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 278, emphasis added; s*ee also Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207; *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1350; *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800.)

Thus, assuming that a public agency found that Hearst Castle was categorically exempt from CEQA as a single family dwelling (Guidelines section 15303(a) for New Construction), the burden would then shift to an opponent to argue that the unusual circumstances exception applied. To meet its burden under the exception, the opponent would have to show that the circumstances of Hearst Castle (i) differ from the general circumstances of the projects covered by Guidelines sections 15303(a) for New Construction, and (ii) those circumstances create an environmental risk that does not exist for the general class of these exempt projects. (*Wollmer, supra,* 193 Cal.App.4th at 1350.)

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

As discussed in Respondents' Opening Brief (pp. 58-62), the proposed home in this case squarely fits within the range of exempt projects for the class. It is legally "usual," in that it complies with all of the City's development standards for normal development. (*Id.*)

Hearst Castle, indisputably, is not. The total square footage of the buildings on the Hearst Castle estate exceeds 90,000 square feet. The "castle" alone is 60,645 square feet, and there are three smaller guest houses. Hearst Castle has 165 rooms and 127 acres of gardens, terraces, indoor and outdoor pools, and walkways. With 56 bedrooms and 61 bathrooms, it was plainly designed to accommodate a population of staff and guests vastly larger than a "single family." (Request for Judicial Notice, Exhibits A and B.)

On its face, then, Hearst Castle is vastly different than the small facilities and structures covered by Guidelines sections 15303(a) for New Construction. Moreover, Hearst Castle is also located in a highly unusual and sensitive setting – perched on a mountain top, looming above a pristine coastline, surrounded by undeveloped countryside. (Request for Judicial Notice, Exhibit B.) Therefore, the massive scale and environmentally sensitive site of Hearst Castle creates an environmental risk that does not

exist for the general class of the new construction covered by the small facilities and structures exemption.

In fact, Hearst Castle is so unusual a project that the subsequent development of the Hearst Ranch required extensive studies and preparation of a master plan representing the long range development plan for the area. (See County of San Luis Obispo North Coast Area Plan, Land Use Chapter, p. 4-6 [Request for Judicial Notice, Exhibit C.].) These special land use and planning considerations further confirm that Hearst Castle differs from the general circumstances of the projects covered by Guidelines sections 15303(a) for New Construction. Indeed, the Attorney General's Hearst Castle example demonstrates just how truly exceptional a project must be to take it out of the categorical exemption.

Thus, the Attorney General's Hearst Castle example corroborates the propriety of the Resources Agency's adoption of the unusual circumstances exception and the subsequent two-prong test developed by courts "to insure that the exceptional case can be taken out of the categorical exemption." (1973 AG Presentation, p. 36.)

Finally, the 1973 AG Presentation suggests allowing any interested person to "petition the public agency, alleging that in fact the project may have a significant environmental effect. The public agency shall then determine whether or not it may have such an effect." (*Ibid.*) Consistent with the statute (albeit not via the precise route suggested by the Attorney General), the Resources Agency subsequently adopted the unusual circumstances exception. Notably, the Attorney General has submitted an amicus brief in this case in which it agrees with Respondents' argument that the "unusual circumstances" requirement is part of the unusual circumstances exception.

IV. CONCLUSION

To the extent that the 1973 AG Presentation applies to the issues before this Court, it undeniably substantiates Respondents' arguments which rely upon the plain language of the unusual circumstances exception itself and an unbroken line of authority. Respondents respectfully request that the Court reverse the Court of Appeal decision and direct the Court of Appeal to affirm the trial court judgment.

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WORD CERTIFICATION

I hereby certify that, as counted by my MS Word word-processing system, this brief contains 2,506 words exclusive of the tables, signature block and this certification.

Executed this 3rd day of February, 2014 at Oakland, California.

Julia L Bond

Amrit S. Kulkarni
Julia L. Bond

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

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

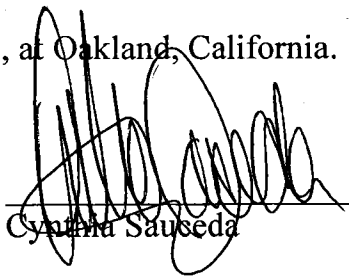
On February 3, 2014, I served true copies of the following document(s) described as **JOINT SUPPLEMENTAL BRIEF** on the interested parties in this action as follows:

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 February 3, 2014, at Oakland, California.



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