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 and Real Parties in Interest.

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 No. A131254

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

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION & SUMMARY OF ARGUMENT

Appellants' Answer to the Petition for Review itself demonstrates why this Court should grant review of the Court of Appeal's decision (the "Opinion") in this case. While denying that the Opinion has changed anything, Appellants repeatedly tout how the Opinion "now" provides guidance for agencies, project applicants and the public in "navigating CEQA's evolving categorical exemption landscape." (Answer, p. 1.) Appellants identify the trial court's "confusion" in following well-established law, and then declare that the Opinion "will prevent such a result in the future." (Answer, p. 10-11.)

Notwithstanding Appellants' admiration of the Opinion, the problem clearly described in the Petition for Review is that it stands in sharp contrast to a long line of established law, and significantly alters the state of the law. While Appellants obviously believe the Opinion is correct, they largely ignore all of the contrary cases cited in the Petition for Review. Rather than providing guidance and preventing confusion, the Opinion's conflict with other cases will *result* in confusion and uncertainty for public agencies, project applicants and the public attempting to apply categorical exemptions. That confusion and uncertainty will result in categorical exemptions being deemed virtually useless, and will further result in significant expense and delay for what should be minor and routine development proposals throughout the State.

Moreover, Appellants' defense of the Opinion is wrong. The Resources Agency's "unusual circumstances" prong of the significant effects exception is entirely consistent with the Legislature's statutory directive, the purpose of CEQA and this Court's decisions. Moreover, contrary to Appellants' contention, the Opinion effectively eliminates the use of categorical exemptions whenever there is any opposition to a project.

Appellants' attempts to counter this point are contradicted by their own arguments in this case.

Appellants are also wrong in arguing that there is no judicial split over the correct standard of review applicable to the exception. Case after case, as recently as 2010, have identified the split. The fact that the issue has escaped judicial resolution for so long is yet another reason for this Court to grant review and resolve the issue.

Finally, Appellants' response to the third issue raised by the Petition is telling. Appellants spend much of their Answer defending the credentials and opinions of their expert. However, this defense misses the point. The point is not that there is a dispute among experts. Rather, the point is that the expert was commenting on an element of the project that was *not approved* by the City. It is important that the Court review this issue because it contradicts existing case law and, if allowed to stand, no project subject to the fair argument standard could ever withstand judicial review. Any expert could simply opine that the project could not be built as approved, but in a manner that would result in significant environmental impacts. Every project would conceivably require an EIR, resulting in considerable delay and expense for a substantial amount of development throughout the State.

Thus, the Opinion clearly satisfies the criteria for review in California Rule of Court 8.500(b)(1), because review is "necessary to secure uniformity of decision or to settle an important question of law." Appellants' Answer serves to underscore the need to settle the three important questions of law relating to categorical exemptions, and the "significant effects" exception to the categorical exemptions, identified in the Petition. Public agencies, homeowners, developers and environmental groups throughout the State need resolution of these issues.

II. LEGAL DISCUSSION

A. Appellants' Answer Demonstrates Why the Court Should Review Whether the Significant Effects Exception Requires a Finding That Effects Are Due To Unusual Circumstances.

1. The Opinion Contradicts Established Case Law.

The Court of Appeal's Opinion contradicts a long line of cases holding that whether allegedly significant effects would result from "unusual circumstances" is a separate and necessary inquiry under the exception. (See Petition, p. 11-14.) Appellants' defense of the Opinion focuses mainly on Appellants' contention that the Opinion was correctly decided under Public Resources Code section 21084 and this Court's decision in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190. Even assuming for the sake of argument that Appellants and the Court of Appeal are correct (which, as discussed below, they are not), the Opinion stands alone and contrary to decades of other Court of Appeal decisions. Accordingly, Appellants' defense of the Opinion itself demonstrates why this Court's review is warranted.

The Opinion's holding that use of a categorical exemption is precluded *whenever* significant impacts are alleged, regardless of whether those impacts are related to circumstances which are "unusual" for the exempted category, contradicts a long line of established precedent. Those cases, which all require both a finding that there is a reasonable possibility of a significant environmental effect *and* a finding that the alleged effect is *due to unusual circumstances* with regard to the exempt category of projects, are discussed in the Petition at pages 11-14. (See *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800 ["[a] negative answer to *either* question means the exception does not apply." (emphasis added)]; *Fairbank v. City of Mill Valley* (1999) 75

Cal.App.4th 1243, 1260-1261 ["in the absence of any evidence of unusual circumstances nullifying the grant of categorical exemption, there can be no basis for a claim of exception under Guidelines section 15300.2(c)."].) Appellants ignore these cases. The Opinion's conflict with these cases warrants review.

When Appellants do briefly try to reconcile the Opinion with existing case law, their efforts fall short. Appellants' contention that Division Four's earlier decision in *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329 is consistent with the Opinion is wrong. In *Wollmer*, the same Court of Appeal specifically cited and applied the established two-part test for determining whether the exception applied, and concluded that the location of the project in that case was "well within the range of characteristics one would except [sic] for Class 32 projects" and therefore was not an "unusual circumstance" that would trigger the exception. (*Id.* at 1350-1351.)

Appellants also claim that the long line of cases applying the two-part test to the exception did not have the benefit of the legislative history judicially noticed in the Opinion. However, this legislative history has been available this whole time and has not caused a different result. Moreover, the Court of Appeal here expressly did not rely on this legislative history; rather its decision was based on the language of the Guidelines and judicial interpretation of CEQA. (Slip Opinion, p. 12 fn. 9.)

Thus, this Court's review is necessary to secure uniformity of decision on this important question of law.

2. Appellants' Defense of the Opinion Is Wrong.

Appellants' primary point is that the Opinion is correct in changing established law. According to Appellants, the phrase "unusual circumstances" in Guideline section 15300.2(c) "inform[s] the quality of evidence required to except a project from an exemption category" but does

not rise to the level of a "separate-but-equal criterion." (Answer, p. 13.) Again, this conclusion contradicts a long line of established cases, which in itself warrants review. The conclusion is also wrong.

The fundamental error in Appellants' argument is demonstrated by their following statement: "Yet in creating classes of projects eligible for categorical exemptions, the power of the Secretary of the Resources Agency is restricted to projects that have *no environmental impacts*." (Answer, pp. 14-15, italics added.) To the contrary, the legislative restriction in the statute is to projects "that have been determined not to have a *significant* effect on the environment." (Pub. Resources Code § 21084(a), emphasis added.)

There is no dispute that construction of all of the exempt classes of projects will result in *some* effect on the environment and, arguably, even an adverse effect on the environment. For example, constructing four new commercial buildings in urban areas will indisputably have some adverse effects on the environment. Indeed, for CEQA to be applicable in the first instance, the "project" must be an "activity which may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." (Pub. Resources Code § 21065.)

However, the question is not, as Appellants claim, whether these projects will cause *any* adverse effect on the environment. Rather, the question is whether these projects will result in a "significant effect on the environment." The Legislature has defined "significant effect on the environment" as "*a substantial, or potentially substantial, adverse* change in the environment." (Pub. Resources Code § 21068, emphasis added.) The issue of whether physical changes to the environment constitute a "significant effect on the environment" is a legal question. CEQA Guidelines section 15064(b) provides:

> The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data.

Thus, the lead agency has the discretion to determine whether to classify an impact as significant, depending on the nature of the area affected. (*Ibid*; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 243.) "In exercising its discretion, a lead agency must necessarily make a policy decision in distinguishing between substantial and insubstantial adverse environmental impacts based, in part, on the setting." (*Ibid*, citation omitted. See also *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 375-376.)

Here, the Resources Agency made the policy determination that the physical changes to the environment typically associated with building these classes of projects do not, as a matter of law, constitute " a substantial, or potentially substantial, adverse change in the environment." Accordingly, these types of impacts do not constitute a significant effect on the environment as a matter of law.

The focus of the significant effects exception is whether there is something *unusual* or *different* about the circumstances associated with the project that would take it outside of the normal physical changes associated with the typically exempt project. That is why case after case has cited the two-part test and held that the exception *only* applies "where the circumstances of a particular project (i) *differ from the general circumstances* of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that *does not exist for the general class of exempt projects*." (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207, emphasis added.)

This point is illustrated by *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, cited in the Petition at p. 12. That case involved construction of a retail/office building, which the court acknowledged was "likely to cause minor adverse changes in the amount and flow of traffic and in parking patterns in the area." (*Id.* at 1260.) Under Appellants' argument and the Opinion, these adverse changes would be enough to take the project out of the categorical exemption. However, the court held that these adverse changes did not constitute "unusual circumstances," because they were no different from the adverse changes that would be associated with any similar office/retail building, and therefore the exception did not apply. (*Ibid.*) Appellants ignore this case.

Thus, the flaw in Appellants' argument is that not every adverse change in the environment meets the legal definition of a "significant effect on the environment." The Resources Agency interpreted the Legislature's directive to designate categories of projects without significant impacts (section 21084) to craft an exception where circumstances that are *unusual* with respect to exempt categories would present the reasonable possibility of a significant effect. Nothing in the CEQA statute or *Wildlife Alive* precludes this definition of the exception. The Opinion renders meaningless the Resources Agency's determination that the adverse effects typically associated with the 33 exempt classes of projects do not constitute a "significant effect on the environment." The Court should grant review to resolve this issue.

Appellants' Answer also demonstrates another problem with the Opinion. Appellants concede that a "comparably-sized home on a less-constrained site" could be exempt. (Answer, p. 15.) However, this contradicts the Opinion's holding that the size of the proposed home in this case was unusual within the meaning of the exception *as a matter of law*. (Slip Opinion, p. 17-18.) Thus, even a "comparably-sized home on a less-

constrained site" (Answer, p. 15), which Appellants concede could be exempt, would *not* be exempt under the Opinion. This Court's review is necessary to settle this issue.

Appellants also miss the point with respect to the Petition's discussion of the commonsense exemption.[1] Appellants argue that there is a material difference between the commonsense exemption in Guideline section 15061(b)(3) and the significant effects exception in Guideline section 15300.2(c). However, as explained in the Petition, case law has applied the same standard to the commonsense exception as the one adopted in the Opinion here for the significant effects exception. (See Petition, pp. 18-19.) The court in *California Farm Bureau Federation v. California Wildlife Conservation Board* (2006) 143 Cal.App.4th 173, 194, in construing the commonsense exemption, relied on the same statement in *Wildlife Alive* that the Court of Appeal did here in construing the significant effects exception (Slip Opinion, p. 11). In both situations, then, the inquiry is whether there is a reasonable possibility that a proposed project will have a significant effect on the environment. Under the Court of Appeal's Opinion, the significant effects exception is essentially the same inquiry as the commonsense exemption, only with a different standard of review. Appellants ignore this point as well.

For all of these reasons, the Opinion was wrongly decided, and this Court should grant review to resolve this important issue.

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[1] Appellants' claim that this issue was not timely raised on appeal ignores that this issue only came to light following the Court of Appeal's Opinion, and its mirroring of language in other cases regarding the commonsense exemption. Nor was there any need to raise it in the Petition for Rehearing, since it did not involve omission or misstatement of an issue or fact. (Cal. Rule of Court 8.500(c)(2).)

3. Contrary to Appellants' Assertion, the Opinion Will Vitiate the Use of Categorical Exemptions.

Appellants also try to downplay the impact of the Opinion. They disagree with the statement that, under the Opinion, no project that satisfies the criteria under the exemption could ever be found to be exempt. However, this was exactly the conclusion of the Court in *Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th 1243, 1260:

> While the addition of any small building to a fully developed downtown commercial area is likely to cause minor adverse changes in the amount and flow of traffic and in parking patterns in the area, such effects cannot be deemed "significant" without a showing of some feature of the project that distinguishes it from any other small, run-of-the-mill commercial building or use. Otherwise, no project that satisfies the criteria set forth in Guidelines section 15303(c) could ever be found to be exempt. (Emphasis added.)

Attempting to further diminish the effect of the Opinion, Appellants argue that a single neighbor who complained that he did not like the look of a new house or that it would increase traffic "would not qualify as substantial evidence defeating categorical exemption and would also be insufficient to defeat a negative declaration." (Answer, p. 12 fn. 2.) This statement is incredible because it is flatly inconsistent with Appellants' position so far in this case. The following is a sample of the evidence that Appellants argued in the trial court constituted "[e]vidence of a fair argument of potentially significant [] impacts:"

> Resident Dawn Hawk found the project to be a breathtaking and radical departure from the style of the neighborhood.
>
> Berkeley resident Elaine Chan is of the opinion that this large, office-like structure will change the character of the neighborhood in a negative way.
>
> Rose Street resident Rick Carr explained that a project of this size with the proposed amount of parking will in fact invite

commercial level use in terms of traffic, not consistent with the current zoning.

(AA 54-55, 58 [Petitioner's Opening Brief in trial court, pp. 12-13, 18].)

Thus, Appellants' own arguments in the trial court demonstrate why the effect of this Opinion is far-reaching. Under Appellants' view and the Opinion, any one of the above statements would be enough to defeat the use of a categorical exemption for a single-family home, regardless of whether it was a completely typical home with no unusual circumstances associated with its development.

Finally, Appellants argue that negative declarations are common and no different than the standard that is applied to categorical exemptions. However, with categorical exemptions, the Resources Agency has made a determination that the adverse effects typically associated with these classes of projects do not constitute a "significant effect on the environment." Appellants' argument and the Opinion essentially eviscerate categorical exemptions and put all minor, routine projects that would otherwise fall within the 33 exempt classes on the same footing as large development projects. That was not the intent of the Legislature.

B. Contrary to Appellants' Assertion, There Is a Long-Standing Split Over the Standard Of Review Applicable To Exceptions To Categorical Exemptions That Needs To Be Resolved.

Appellants are simply wrong in asserting that there is no current conflict among the appellate districts over the standard of review applicable to exceptions to categorical exemptions. Indeed, Appellants do not even bother to address the numerous cases and CEQA treatise identified in the Petition for Review, all of which detail the long-standing split in authority. (See Petition, p. 22-23.) Instead, Appellants simply cite to one case (*Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249), which held that the fair argument standard should apply. However, there are

numerous other cases citing the contrary view and continuing to identify the split in authority, even after the *Banker's Hill* decision. (See *Hines v. Coastal Commission* (2010) 186 Cal.App.4th 830, 855-856; *Committee to Save Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1187.)

Appellants' contention that no case has applied the substantial evidence standard to the exception in the last twenty years misses the point. As detailed in those cases, and in the Petition at page 28, the courts did not need to reach the issue of the correct standard of review because the petitioners did not meet their burden under any standard. Again, however, all of those cases have continued to identify the split in authority. This split in authority is very much alive.

Indeed, the fact that this issue has escaped judicial resolution for so many years makes this Court's resolution of the issue even more important. As pointed out in the Petition, judicial uncertainty over the correct standard of review leads to uncertainty and confusion in analyzing development proposals. The correct standard of review is critically important for public agencies when deciding whether categorical exemptions properly apply to a particular proposal.

Moreover, Appellants fail to address the discrepancy between the standard of review applicable to the commonsense exemption and the significant effects exception. As explained in the Petition, the Opinion has made these two inquiries essentially identical, but the different standards of review applicable to each promotes confusion and uncertainty. As also explained in the Petition, there are also different standards of review applicable to the exemption determination in the first instance and the exception determination, and also different standards applied to different exceptions. Public agencies, developers, homeowners and environmental

groups throughout the State need clarity and resolution of this long-standing uncertainty.

C. Appellants' Defense of Its Expert Misses the Point, Which Is Whether Courts Can Require EIRs For Project Elements Which Are Neither Proposed Nor Approved.

Appellants spend much of their Answer ardently defending the credentials and opinions of their expert witness. However, this defense misses the point. Indeed, Appellants do not even respond to the real issue raised in the Petition, but instead contend that this question "assumes facts not present and so cannot trigger review." (Answer, p. 6.) Appellants contend the issue is simply that geotechnical experts disagree over the amount of fill required to build the Project.

To the contrary, the issue is whether an expert's testimony can constitute substantial evidence sufficient to trigger the significant effects exception when that testimony addresses impacts of development that are not permitted by *the Project as approved.*

The testimony of Appellants' expert was based on his misconception as to what the project was in the first instance. The dispute was not over whether the project as designed and approved would result in environmental impacts, but over whether the project would include construction of a "side-hill fill", despite the fact that the permit did not allow it. All of the potentially significant effects identified by Mr. Karp assumed that a "side-hill fill" would be constructed as part of the project. (See Slip Opinion, p. 4-5.) However, Mr. Karp's comments were essentially directed at the *definition* of the Project, rather than to the City's determination that there was no possibility of a significant impact.

Under CEQA, a "project" refers "to the activity which is being approved . . ." (Guidelines § 15378(c). See also *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 164

["We have emphasized that the focus must be the use, as approved, and not the feared or anticipated abuse."].) A "project" means the whole of an action and, in this case, is "[a]n activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Guidelines § 15378(a)(3); Pub. Resources Code § 21065(c).) In *Lucas Valley Homeowners Assn., supra,* 233 Cal.App.3d 130, the court upheld the county's approval of a negative declaration and conditional use permit to convert a single-family home into a synagogue. The court rejected claims by project opponents that the synagogue would be larger than what was approved, holding that such claims "ignored the reality of the permit as approved and accepted." (*Id.* at 162.)

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

It is not Appellants' nor a court's role to decide whether or not the approval should be different than what is specified on the approved plans.

The purpose of CEQA is to review the environmental impacts *of the project*, which is defined as the activity that is approved by the public agency.

It is important that the Court review this issue. First, it should resolve the inconsistency between the Opinion and the holding in *Lucas Valley Homeowners Assn.* Second, if allowed to stand, no project subject to the fair argument standard could ever withstand judicial review. Rather, any expert could simply opine that the project could not be built as approved, opine as to how it must be modified, and that those modifications would have significant environmental impacts. In essence, a project opponent could imagine a significant environmental impact and there would be no defense against it. Every project would conceivably require an EIR. Such a result would impose significant delay and expense on what should be routine development proposals and is, thus, in contravention of CEQA.

III. CONCLUSION

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

DATED: April 25, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

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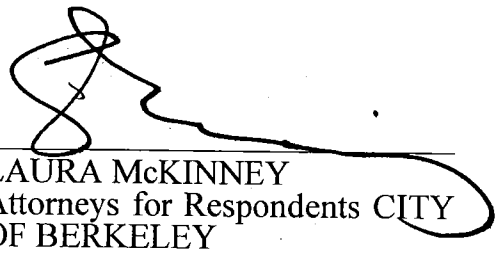
Attorneys for Respondents and Real Parties in Interest Mitchell Kapor and Freada Kapor-Klein

DATED: April 25, 2012

ZACH COWAN, City Attorney

By: 

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WORD CERTIFICATION

I hereby certify that, as counted by my MS Word word-processing system, this brief contains 4029 words exclusive of the tables, signature block and this certification.

Executed this 25 day of April, 2012 at Oakland, California.

Amrit S. Kulkarni

1874140.1

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

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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 April 26, 2012, at Oakland, California.

Cynthia Sauceda