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.

Case No. S201116

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

After an Appeal from the Alameda County Superior Court,
Case No. RG10517314
Honorable Frank Roesch, Judge

BRIEF OF AMICUS CURIAE ATTORNEY GENERAL KAMALA D. HARRIS

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STATEMENT OF INTEREST

Attorney General Kamala D. Harris respectfully submits this brief as amicus curiae pursuant to Rule 8.520(f)(8) of the California Rules of Court. The brief is submitted in the Attorney General's independent capacity and not on behalf of any state agency or entity.

The Attorney General's interest in this case stems both from her responsibility as the State's chief law enforcement officer to ensure that the State's laws are appropriately enforced and from her duty under the Government Code to protect the environment and natural resources of California. (Cal. Const., art. V, § 13; Gov. Code, §§ 12600-12612; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 14-15.) The proper interpretation of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA) and of the regulations implementing CEQA (Cal Code Regs., tit. 14, § 15000 et seq.)[1] (hereafter, CEQA Guidelines) is of great importance to the Attorney General.

In the Attorney General's view, neither party to this appeal, and neither the trial nor the appellate court, properly addressed and applied the steps required to determine whether the "unusual circumstances" exception to CEQA categorical exemptions (CEQA Guidelines, § 15300.2, subd.(c)) applies or the standard of review applicable to the inquiry. The Attorney

[1] See Pub. Resources Code, § 21083 (mandating the regulations).

General therefore submits this brief to assist the Court in identifying the proper steps and standards.[2]

INTRODUCTION

In enacting CEQA, the California Legislature charged the California Natural Resources Agency (Resources Agency) with devising categories of projects that, in typical circumstances, will not have significant impacts and thus are exempt from environmental review. The availability of these categorical exemptions ensures that the statute operates efficiently and serves CEQA's goal of reducing unnecessary delay and paperwork. At the same time, the Resources Agency recognizes that categorical exemptions must be applied in a manner consistent with CEQA's underlying purposes: that is, to ensure that projects that may result in significant environmental impacts are subject to environmental review and feasible mitigation.

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[2] The Attorney General does not address the line of cases commencing with *Baird v. Court of Appeal* (1995) 32 Cal.App.4th 1464 and culminating with *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, cited in the parties' briefs (though not in the trial or appellate court decisions). In *Ballona*, the appellate court held that the lead agency was not required to consider the potential for a proposed mixed-use real estate development to be inundated due to sea level rise, on the ground that "identifying the effects on the project and its users of locating the project in a particular environmental setting is neither consistent with CEQA's legislative purpose nor required by the CEQA statutes." (201 Cal.App.4th at p. 474 [criticizing CEQA Guidelines, § 15126.2, subd. (a)].) The environmental effects asserted in this case, in contrast, do not appear to focus on potential impacts to future residents of the single-family structure. Accordingly, the issue raised by *Ballona* is not squarely presented here.

Accordingly, the CEQA Guidelines provide for an exception to a categorical exemption "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (CEQA Guidelines, § 15300.2, subd. (c).)

At issue in this case are the proper steps, and proper standard of review, for determining whether the "unusual circumstances" exception to CEQA categorical exemptions applies. As set forth in the Argument section below, based on the plain language of the regulations, the case law, and CEQA's underlying purposes, determining whether the "unusual circumstances" exception to a categorical exemption applies involves a two-step inquiry. First, a court must determine whether the project's circumstances are "unusual." If there are no unusual circumstances, the inquiry ends, and the categorical exemption applies. Second, if there are unusual circumstances, a court must determine whether there is a reasonable possibility that those same circumstances will result in a significant environmental impact. (CEQA Guidelines, § 15300.2, subd. (c).) This two-step process affords proper deference to the Resources Agency's determination, in establishing each categorical exemption, that projects typical of the category will not have significant impacts and allows lead agencies routinely to utilize categorical exemptions for typical projects.

Significantly, each step has its own standard of review. In determining whether "unusual circumstances" exist, a court must defer to the lead agency's factual determinations concerning the project (e.g., the project's size, its proximity to hazards, or its expected operation), provided they are supported by substantial evidence in the record. The determination whether the project's circumstances are "unusual" is, however, a matter of legal interpretation and therefore subject to *de novo* review. To be "unusual," the circumstance must be atypical of the category, that is, one that the Resources Agency likely did not consider in establishing the categorical exemption.

If a court determines that unusual circumstances exist and moves to the second step, a challenger prevails by establishing a fair argument based on substantial evidence in the record that the identified unusual circumstance may cause significant environmental impacts. This less deferential standard – the same that applies to the review of an agency's decision to prepare a negative declaration – is appropriate in light of the language of the regulation, which requires only the "possibility" of impacts, and the fact that the exemption is being used to avoid environmental review when there is an attribute of the project that has not been considered as typical of projects in that category.

The approach advocated by the Attorney General strikes a reasonable and well-supported balance between CEQA's goal of efficiency

and its fundamental purpose to ensure informed and transparent decision-making.

FACTUAL AND PROCEDURAL BACKGROUND

The Attorney General incorporates by reference the Statement of Facts and Procedural History set out in Respondents' Opening Brief on the Merits at pages 8 through 11 and Appellants' Answer Brief on the Merits at pages 8 through 13. In this section, the Attorney General highlights only those undisputed facts that are relevant to arguments pertaining to the analysis and standard of review applicable to the "unusual circumstances" exception.

The project at issue in this appeal is the demolition of an existing single-family home and the construction of a new 6,478 square-foot home with an attached 3,394 square-foot, 10-car garage. (1 AR 3.)[3] The lot is on a steep slope (approximately 50 percent grade in some areas) (1 AR 29, 34, 62), and is located near traces of the Hayward fault within a state designated earthquake-induced landslide hazard zone. (2 AR 448; see also 3 AR 665-668.)

Appellants filed a petition for writ of mandate challenging the City's application of the "in-fill" and single-family residential conversion categorical exemptions. (CEQA Guidelines, §§ 15303, subd. (a), 15332;

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

Berkeley Hillside Preservation v. City of Berkeley (March 7, 2012, A131254) (Opinion) at p. 7.) The trial court held that the geotechnical expert opinion that the project risked "seismic lurching," though it was disputed by the City's expert, constituted "substantial evidence of a fair argument of a significant environmental impact consequent to the Project." (Order Denying Petition for Writ of Mandate (December 30, 2010, RG10-517314) at p. 17 [citing 2 AR 449].) The trial court summarily concluded that these potential impacts were not the result of any "unusual circumstances," and thus determined that the exception to the exemption did not apply. (*Id*. at p. 18.) The trial court denied the petition, and the challengers appealed.

The Court of Appeal, First District, reversed, disagreeing with the trial court's application of the well-established two-step approach. (Opinion at p. 13.) The appellate court held that "the fact that proposed activity may have an effect on the environment is itself an unusual circumstance, because such action would not fall 'within a class of activities that do not normally threaten the environment,' and thus should be subject to further environmental review." (Opinion at p. 13 [citing *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1206 (*Azusa Land*)].) Under the appellate court's ruling, where there is a fair argument based on "substantial evidence" that any attribute of a project "may have an effect on the

environment, an agency is precluded from applying a categorical exemption." (Opinion at p. 13.)

STATUTORY BACKGROUND

A. Purpose of Categorical Exemptions.

The Legislature charged the Resources Agency with identifying and establishing by regulation classes of projects that are deemed "categorically exempt" from the environmental review process based on the Agency's express determinations that the listed classes of projects do "not have a significant impact on the environment." (Pub. Resources Code, § 21084; CEQA Guidelines, §§ 15300-15333, 15061, subd. (b)(2); see also *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380 [citing Pub. Resources Code, § 21084].) The Resources Agency has made such a determination for each categorical exemption contained in the Guidelines, including those exemptions at issue in this appeal: CEQA Guidelines sections 15332 ("In–Fill Development Projects") and 15303(a) ("New Construction or Conversion of Small Structures" for a single-family residence).[4]

Because no further environmental review is required when a project is deemed categorically exempt from CEQA, categorical exemptions enable

[4] In interpreting CEQA, the courts give the CEQA Guidelines great weight except where they are clearly unauthorized or erroneous. (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564, fn.3.)

lead agencies to expedite the project approval process. There is little utility in routinely requiring multi-step public review for projects that will not have a significant effect, as determined by the state agency charged with implementing CEQA. Categorical exemptions thus function to keep the CEQA process operating efficiently consistent with its public disclosure and informed decision-making purposes. As this Court has stated, "[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283.)

B. Purpose of the "Unusual Circumstances" Exception to Categorical Exemptions.

In establishing categorical exemptions, the Resources Agency necessarily made determinations concerning impacts based on projects typical of each category. The Resources Agency also included exceptions to the exemptions, to ensure that project attributes that the Agency did not, and could not, consider categorically, and that could have serious environmental impacts, do not escape review. CEQA Guidelines section 15300.2, subdivision (c) (hereafter Section 15300.2(c)) thus states: "Significant effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." If applicable, this exception removes a project from categorical exemptions,

triggering CEQA's requirement to conduct appropriate environmental review.

ARGUMENT

I. THE "UNUSUAL CIRCUMSTANCES" EXCEPTION TO CATEGORICAL EXEMPTIONS INVOLVES A TWO-STEP INQUIRY.

Based on the plain language of the statute, case law, and policy considerations, the determination whether the "unusual circumstances" exception applies necessarily is a two-step inquiry that asks whether there are unusual circumstances and, if so, whether those circumstances may cause significant environmental impacts. If the answer to the first question concerning unusual circumstances is "no," the exception to the exemption is not triggered, and there is no occasion reach the exception's second question concerning impacts.

A. The Plain Language of the Exception Contemplates A Two-Step Test.

Fundamental principles of statutory construction dictate that, in interpreting a statute, one must look first to the words of the statute, and apply their usual and ordinary meanings. (See *People v. Skiles* (2011) 51 Cal.4th 1178, 1185; *Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977.)

Again, Section 15300.2(c) provides:

> A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

By its plain language, Section 15300.2(c) asks a two-part question: whether there are unusual circumstances, and, if there are, whether it is reasonably possible that those same circumstances will result in a significant effect on the environment. If the Resources Agency had intended for the possibility of significant impacts, standing alone, to be sufficient to trigger the exception to the exemptions, there would have been no reason for the Agency to include the "due to unusual circumstances" language. The appellate court's interpretation effectively strikes the causation language from the exception. A court, however, must read and give effect to every word and clause to ensure that no part is rendered meaningless or inoperative. (See *Compulink Management Center, Inc. v. St. Paul Fire and Marine Ins. Co.* (2008) 169 Cal.App.4th 289, 296.) This is achieved only through the recognition of a two-part inquiry.

B. Case Law Recognizes That Section 15300.2(c) Calls For a Two-Step Inquiry.

Case law also acknowledges that Section 15300.2(c) contemplates a two-pronged test. As the Fourth Appellate District noted in applying the unusual circumstances exception, "First we inquire whether the project presents unusual circumstances. Second, we inquire whether there is a reasonable possibility of a significant effect on the environment *due to* the unusual circumstances." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 278

(*Banker's Hill*) [emphasis in original]; see also *Voices for Rural Living v. El Dorado Irrigation District* (2012) 209 Cal.App.4th 1096, 1107-1108 (*Voices for Rural Living*).) The impacts to the environment must result from the identified "unusual circumstances." (See, e.g., *Banker's Hill*, *supra*, 139 Cal.App.4th at p. 278; *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800 [noting need for "causal connection" between impacts and unusual circumstances].)

This Court's decision in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190 (*Chickering*) does not require a different result. In *Chickering*, the Court held that the Fish and Game Commission's setting of hunting and fishing seasons did not fall under the categorical exemption for actions taken by a regulatory agency to restore or enhance natural resources. (*Chickering*, *supra*, 18 Cal.3d at pp. 204-205; Cal. Code Regs., tit. 14, § 15107.) In this context, the Court observed that "where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper." (*Id.* at p. 206.) While the *Chickering* case may provide guidance for interpreting the breadth and scope of a categorical exemption, it does not suggest that the unusual circumstances exception to an exemption is a single-step inquiry focusing only on impacts. The Third District, in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 127, cautioned that *Chickering* "cannot be read so broadly as to defeat the

very idea underlying CEQA section 21084 of classes or categories of projects that generally do not have a significant environmental effect."

C. The Two-Step Approach Respects the Policy Considerations Underlying CEQA.

A two-step analysis of the application of the "unusual circumstances" exception is consistent with the policy considerations underlying CEQA and the creation of categorical exemptions. If, as the appellate court ruled, the only relevant question is whether a project may have significant impacts, the utility of categorical exemptions is substantially reduced. In every case, a lead agency would be required to determine whether any aspect of the project might cause significant impacts, even if the project is a typical one in the category.

A two-step inquiry, in contrast, allows a lead agency to rely on categorical exemptions for typical projects, to consider whether there are unusual circumstances, and then to focus its inquiry about potential impacts only on those aspects of the project that are unusual. This approach thereby respects both the framework established by the Legislature and the Resources Agency's determination that typical projects within the classes of projects it has identified in the CEQA Guidelines will not have significant impacts, and allows lead agencies to rely on the determinations the Resources Agency made in creating the categorical exemptions.

The question of what standards of review apply to each step is addressed in the next section.

II. A DIFFERENT STANDARD OF REVIEW APPLIES TO EACH STEP OF THE INQUIRY.

A. A Court Must Uphold an Agency's Factual Determinations Concerning a Project's Circumstances if Supported by Substantial Evidence, but Must Determine De Novo Whether the Circumstances are "Unusual" as Defined in the Regulations.

The determination whether a project's circumstances are "unusual" may involve questions of both fact and law. "[C]ase law establishes that any factual determination relating to the existence of a certain circumstance is reviewed as a question of fact under the substantial evidence standard, but 'the question whether that circumstance is "unusual" within the meaning of the significant effect exception would normally be an issue of law that this court would review de novo.'" (*Banker's Hill, supra,* 139 Cal.App.4th at p. 261, fn.11 [quoting *Azusa Land, supra,* 52 Cal.App.4th at p. 1207].)

Whether a project's circumstances are "unusual" is often an issue of law specifically because it involves interpretation of the CEQA Guidelines and application thereof to undisputed facts concerning the nature and scope of the project. (See, e.g., *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1351 (*Wollmer*) [in context of in-fill project, holding that location at major intersection is expected and thus not unusual as a

matter of law]; *Lewis v. Seventeenth District Agricultural Association* (1985) 165 Cal.App.3d 823, 828-829 [there is "no question" that racetrack's location adjacent to residential uses was an unusual circumstance].)

A project's circumstances may be "unusual" where they "differ from the general circumstances of the projects covered by a particular categorical exemption" (*Wollmer, supra*, 193 Cal.App.4th at p. 1350 [citing *Azusa Land, supra*, 52 Cal.App.4th at p. 1207]; see also *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260-1261) or where the project's attributes are not within "the range of characteristics one would expect" for the class of projects at issue in the categorical exemption. (*Wollmer, supra*, 193 Cal.App.4th at p. 1351; see also *Committee to Save Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1186; *Azusa Land, supra*, 52 Cal.App.4th at pp. 1206-1209 [citing *Myers v. Board of Supervisors* (1976) 58 Cal.App.3d 413].) Stated another way, a court must determine whether the project circumstance that the challenger asserts may lead to significant impacts is atypical of the category, that is, whether it is one that the Resources Agency likely did not consider in establishing the categorical exemption.

The Attorney General expresses no opinion whether the circumstances in this case (e.g., the project's size, slope, and location) are

unusual as a matter of law.[5] Rather, this should be determined by the lower court in the first instance on remand, taking into account all relevant facts and applying the proper standard of review.

B. Where There are Unusual Circumstances, a Court Must Uphold Application of the Categorical Exemption Unless the Challenger Presents a Fair Argument Supported by Substantial Evidence That the Unusual Circumstances May Cause a Significant Environmental Impact.

The well-considered consensus in case law is that the fair argument standard applies to the question whether the challenger adequately has established the significant impacts prong of the "unusual circumstances" exception. (See, e.g., *Wollmer, supra*, 193 Cal.App.4th at p. 1350 [First District]; *Azusa Land, supra*, 52 Cal.App.4th at pp. 1197-1198 [Second District]; *Lewis, supra*, 165 Cal.App.3d at p. 830 [Third District]; *Voices for Rural Living, supra*, 209 Cal.App.4th at p. 1108 [Third District]; *Banker's Hill, supra*, 139 Cal.App.4th at pp. 264-268 [Fourth District]; *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1074 [Fifth District]).)

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[5] Compare *Myers, supra*, 58 Cal.App.3d 413 (holding that the proposed construction of two dwellings in a rural area presented "unusual circumstances" including the existence of "steep hillside" and risk of soil erosion and creation of a "hazard of severe fire on the steep, thickly forested hill") with *Association for Protection of Environmental Values in Ukiah v. City of Ukiah* (1991) 2 Cal.App.4th 720, 734-35 (holding that sloped site of proposed single-family home was not so unusual as to support the "unusual circumstances" exception).

As the *Banker's Hill* court observed, there are "close textual similarities" between Section 15300.2(c), which asks whether there is a "reasonable possibility that the activity will have a significant impact" and Public Resources Code section 21151, which requires an EIR where a project "may have a significant effect on the environment." (*Bankers Hill*, *supra*, 139 Cal.App.4th at pp. 264-265.) "Because the fair argument standard was derived from a phrase in CEQA section 21151(a), which is substantively identical to the phrase in Guidelines section 15300.2(c), it is logical to apply the fair argument standard to both." (*Id*. at p. 265.)

Indeed, the lead agency's responsibility where there are "unusual circumstances" that may trigger an exception to a categorical exemption is similar to its responsibility to determine whether to prepare an EIR where no exemptions are implicated. The Resources Agency, in finding that certain classes of projects do not cause significant impacts, could not have considered the potential for impacts caused by projects with unusual or outlying circumstances. Where such unusual circumstances exist, it is the lead agency that must consider in the first instance whether the circumstances will cause significant impacts, just as in non-exemption matters it must consider in the first instance whether the record before it contains sufficient evidence to require an EIR. Since the agency's responsibilities are substantially similar, the standard of review of the agency's decisions should be the same.

The *Banker's Hill* court also noted that the "fair argument" approach to evaluating whether significant impact may result from unusual circumstances is consistent with CEQA's underlying policy to "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Banker's Hill, supra*, 139 Cal.App.4th at p. 266 [quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84].) *Banker's Hill* properly states the rule, provided that – where a categorical exemption is at issue – the "fair argument" inquiry is focused on the potential for impacts that may result from unusual circumstances.

III. THE RULE ADVANCED BY THE ATTORNEY GENERAL FURTHERS THE POLICY AND PURPOSE UNDERLYING CEQA.

The approach described in this brief will further both the policy and purpose underlying CEQA. It will provide lead agencies with increased clarity regarding the application of categorical exemptions, which will in turn encourage the application of categorical exemptions and facilitate the streamlining that the Legislature intended when it required the Resources Agency to adopt categorical exemptions. (Pub. Resources Code § 21084, subd. (a).)

Moreover, adoption of the approach described above will allow lead agencies routinely to rely on the class-based determinations that the Resources Agency made in establishing each categorical exemption, but also will allow challengers to establish that a particular project is atypical of

the class in a way that may cause significant impacts, making application of the exemption inappropriate.

Finally, adoption of the approach described in this brief ultimately will result in less uncertainty (and thus less litigation) over how and when lead agencies may properly use categorical exemptions.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court adopt the two-step inquiry suggested in this brief for determining whether the "unusual circumstances" exception to CEQA categorical exemptions applies, which approach is squarely supported by CEQA, the CEQA Guidelines, case law, and the policy underlying CEQA. The Attorney General also respectfully requests that the Court rule that each step of this inquiry is subject to the standards of review described in this brief.

Dated: January 15, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Brief of Amicus Curiae Attorney General Kamala D. Harris uses a 13 point Times New Roman font and contains 3,899 words.

Dated: January 15, 2013

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