

1 Susan Brandt-Hawley/SBN 75907
BRANDT-HAWLEY LAW GROUP
2 P.O. Box 1659
3 Glen Ellen, CA 95442
707.938.3900, fax 707.938.3200
4

5 Attorneys for Petitioners
6
7
8

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **FOR THE COUNTY OF ALAMEDA**
11

12 **Berkeley Hillside Preservation,**
13 **an unincorporated association, and**
14 **Susan Nunes Fadley;**

15 Petitioners,

16 v.

17 **City of Berkeley and City Council**
18 **of the City of Berkeley;**

19 Respondents;
20

21 **Donn Logan, Mitchell D. Kapor,**
22 **Freada Kapor-Klein, and Does 1 to 5;**

23 Real Parties in Interest.
24

Case No.

Petition for
Writ of Mandamus

California Environmental Quality Act
[CEQA]

1 Petitioners allege:

2 **Introduction**

3
4 1. Berkeley Hillside Preservation and Susan Nunes Fadley (collectively,
5 Preservation) bring this mandamus action in the public interest. Preservation challenges the
6 City of Berkeley’s approval of a proposed 10,000 square-foot structure on a hillside on
7 narrow Rose Street, in a vintage neighborhood. Wide community opposition has arisen
8 because of the City’s failure to require environmental review for geotechnical, historic,
9 aesthetic, and traffic impacts. In asserting categorical exemption from the California
10 Environmental Quality Act, the City approved the project without *any* environmental review
11 to inform the City Council’s discretion. This violated fundamental mandates of CEQA.
12
13

14 Categorical exemptions from CEQA are rebuttable. They are disallowed if there is a
15 single, low-threshold “fair argument” that a discretionary project *may* have any significant
16 environmental impact. In this case, fact-based opinion and expert evidence of potentially
17 significant impacts of the Rose Street project trigger mandatory environmental review to
18 analyze and mitigate such impacts and to identify feasible project alternatives. An
19 exceptionally large home and 10-car garage, which would require the demolition of a
20 c.1917 Craftsman bungalow, is not the kind of typical low-impact single-family project
21 that merits exemption. A split City Council nonetheless approved the project after
22 declining to consider key environmental issues.
23
24

25 A peremptory writ must therefore issue to require the City to fulfill its public duty.
26 Preservation requests that approval of the Rose Street project be set aside and reconsidered
27 only after the City conducts the salutary environmental review required by CEQA.
28

1 5. Respondent City of Berkeley, through the Respondent City Council, is the
2 governmental body that approved the Rose Street project. It is the lead agency under CEQA.
3

4 6. Real Parties in Interest Donn Logan, Mitchell D. Kapor, and Freada Kapor-
5 Klein are the named applicant and owners who sought and received City approvals for the
6 2707 Rose Street project. Does 1 to 5 are Real Parties in Interest whose true names and
7 capacities are currently unknown to Petitioners. If their true names and capacities become
8 known, Petitioners will amend this petition to assert them.
9

10 7. The paragraphs below refer to and rely on information contained in the City
11 project files relating to this action, all of which will be filed with this Court as part of the
12 record of proceedings and which are here incorporated by reference.
13

14 **General Allegations**
15

16 8. In 2009, applicant Donn Logan of Marcy Wong/Donn Logan Architects applied
17 to the City of Berkeley on behalf of property owners Mitchell D. Kapor and Freada Kapor-
18 Klein for discretionary permits to demolish an existing two-story, 1566 square foot, c. 1917
19 single-family dwelling and three detached one car garages. Logan requested permits to
20 construct a modern three-level single-family dwelling of about 10,000 square feet, including a
21 10-car garage, at 2707 Rose Street in the Berkeley hills.
22
23

24 9. A hearing on the proposed Rose Street construction project was held before the
25 City's Zoning Adjustments Board (ZAB) on January 28, 2010, to consider Logan's requests
26 for a use permit to demolish an existing dwelling unit, a use permit to construct a dwelling, an
27 administrative use permit to allow an increase from a 28-foot average height limit for a main
28

1 building to a 35-foot average limit, and another administrative use permit to reduce a front
2 yard setback from 20 feet to 16 feet.

3
4 10. The staff report prepared for the ZAB hearing proposed findings that the Rose
5 Street project was categorically exempt from CEQA on two grounds. First, it was claimed
6 exempt as “in-fill housing” under CEQA Guideline section 15332. A second categorical
7 exemption was claimed for new construction of a small structure — a single-family home —
8 under CEQA Guideline section 15303. City staff contended that the project met none of the
9 exceptions to categorical exemptions as it would have no significant effects due to unusual
10 circumstances, cumulative impacts, or adverse impacts to designated historical resources.
11

12
13 11. At the ZAB hearing on January 28th, many environmental objections to the
14 project were raised. Twenty-eight letters in opposition were submitted, most of which
15 requested a continuance of the hearing due to lack of adequate notice to area residents. Many
16 also objected to the City’s refusal to require story poles consistent with its published rules and
17 guidelines for R-1(H) zoning, so that residents could assess the visual import of the project; to
18 its failure to allow project review by the Landmarks Preservation Commission in light of the
19 prospective demolition of a potential historic resource; to the failure of the project application
20 or staff report to research or accurately describe the architectural and historic significance of
21 neighborhood residences, or the historic significance of the c.1917 existing residence
22 proposed for demolition; to the failure to adequately analyze seismic stability, landslide
23 issues, impacts of massive excavation and tree removal, or the applicability of the Alquist
24 Priolo Act; to the failure to recognize the proposed house as containing three stories rather
25 than two stories, thus eliminating the exemption and requiring analysis of impacts
26
27
28

1 accordingly; to the failure to accurately measure the height of the proposed house or
2 applicable setbacks; to the failure to accurately consider the visibility of the new structure or
3 to assess the numbers of trees required to be removed to facilitate construction; to the failure
4 to adequately assess the new structure's neighborhood compatibility; to the failure to assess
5 traffic impacts; to the failure to address project inconsistencies with the Berkeley General
6 Plan, ordinances, and City policies, including those requiring the placement of story poles.
7

8
9 12. Despite the many requests, ZAB members refused to continue the project
10 hearing or to honor the City rule requiring the placement of story poles. Project permits were
11 approved based on the claimed categorical exemption from CEQA, despite the many project
12 conditions imposed to mitigate environmental impacts. Such conditions included, among
13 other things, providing a construction noise management manager, securing approval of a
14 construction traffic management plan, provision of drainage and erosion control plans to
15 minimize impacts from erosion and sedimentation during grading and wet weather, filing a
16 soils report prior to construction during wet weather, adherence to requirements of the
17 arborist report, limitation on hours of construction, avoidance of use of pneumatic tools when
18 possible, compliance with maximum sound levels, prohibition on use of heavy machinery
19 causing vibration or excessive noise, watering of active construction areas, shielding of
20 exterior lighting, and establishment and maintaining of drainage patterns that do not adversely
21 affect adjacent properties and rights of way.
22

23
24
25 13. Petitioner Susan Nunes Fadley filed an appeal of the ZAB project decisions to
26 the Berkeley City Council on February 19, 2010, on behalf of herself and 33 others who
27 signed the submitted appeal document. Substantial additional documentation, including a
28

1 lengthy addendum as well as individual letters and reports, was thereafter submitted to the
2 City in support of the appeal on all of the topics listed above. Among other things, the appeal
3 noted that property owner Mitchell Kapor had publicly disclosed his intention to use “a
4 substantial part” of the proposed new home for philanthropic fundraising activities,
5 forecasting intended use beyond those at a typical residence.
6

7 14. The substantive supporting documentation for the appeal included expert
8 reports from Dr. Lawrence B. Karp, a prominent geotechnical engineer who detailed the basis
9 for his fact-based professional opinion regarding significant environmental impacts that
10 would result from the unstudied massive grading, filling, and foundations required for the
11 project and the potential for seismic lurching of hillside fills and landslides pursuant to the
12 2003 State of California Landslide Hazard Map resulting from grading necessary to achieve
13 grade and structure elevations shown on the plans. Dr. Karp’s “excellent credentials” were
14 acknowledged by the applicant’s lawyer, who then claimed that although also a licensed
15 architect, Dr. Karp must have misread the architectural plans relating to the expected
16 placement of fill. Dr. Karp explained to the City Council that he had not misread the plans,
17 that he had separately reviewed the project site and the proposed project plans, and that he
18 had created a major section from the project drawings that showed conflicts between grades
19 and retaining walls shown on the drawings. Dr. Karp further confirmed his independent
20 evaluation of the site grading requirements and impacts that verified his expressed opinions.
21
22

23 15. Berkeley Architectural Heritage Association (BAHA) President Daniella
24 Thompson, an architectural historian, notified the City that BAHA supported the appeal “on
25 historic preservation issues and on errors and omissions in the project application,” including
26
27
28

1 the fact that the project's prepared Structure History report had erroneously found that "there
2 is no architect of record and no associated persons of historic interest" for the 1917 structure
3 known as the Dunham House at 2707 Rose Street, proposed for demolition. In fact, as Ms.
4 Thompson explained, it had been simple to determine that the architect was the well-known
5 Abraham Appleton. Further, the Dunham House's first owner, Lucia Dunham, was a
6 renowned opera singer and Julliard music professor. The last owner of the Dunham House,
7 who lived there for 50 years, was noted biophysicist Frank Lindgren, who discovered good
8 and bad cholesterol (HDL & LDL) and is listed among "*25 Berkeley Lab Breakthroughs that*
9 *Improved the World -- and Our Lives.*" Ms. Thompson provided a fact-based expert opinion
10 that the Dunham House is eligible for the California Register of Historical Resources.
11
12

13
14 16. Ms. Thompson and others further noted that the application had failed to
15 document the historic and architectural resources in the vicinity of the planned new residence.
16

17 17. During the appeal proceedings, the City was also provided with fact-based
18 evidence that categorical exemption from CEQA was unlawful based on the project's
19 potentially significant impacts relating to the demolition of a likely historic resource, aesthetic
20 impacts on public views, neighborhood incompatibility based on mass, scale and institutional
21 design of the new home, traffic impacts relating to construction and non-residential uses,
22 massive unstudied excavation of steep hillsides and creation of large retaining walls,
23 inconsistencies with City land use plans and policies adopted for environmental protection,
24 the unusual size of the proposed structure that is out of scale with neighboring development
25 and historic character, and removal of mature trees. Preparation of environmental review for a
26 project consistent with City ordinances and adopted plans was requested.
27
28

1 18. A hearing on the appeal was held before the City Council on April 27, 2010.
2 Appellants had prepared a written response to the City staff's report on the appeal. City staff
3 then prepared a supplemental responsive report that was provided to the appellants at the time
4 of the hearing; a short break in the proceedings was taken to allow time to read the report.
5 The appellants and applicant were then allowed to address the Council for 10 minutes per
6 side, but no public comment was allowed by the many Berkeley residents who packed City
7 Council chambers based on their interest in the project. Before voting, members of the City
8 Council explained their views of the merits of the project, and provided conflicting opinions
9 as to the need to comply with City policy regarding story poles. A 6-2 majority then voted to
10 deny the appeal.
11

12
13
14 19. A Notice of Determination was filed on April 30, 2010.

15 20. Petitioners have no plain, speedy, and adequate remedy in the ordinary course
16 of law. Issuance of a peremptory writ is needed to avoid immediate, severe, and irreparable
17 harm to Berkeley residents via the implementation of the Rose Street project without
18 adequate environmental review. The City has the capacity and opportunity to correct its
19 violations of law but has failed and refused to do so.
20
21

22 **Violations of the California Environmental Quality Act**

23
24 21. Petitioners incorporate all previous paragraphs as if fully set forth.

25 22. The City abused its discretion and failed to act in the manner required by law in
26 approving the Rose Street project on the basis of a categorical exemption instead of requiring
27 environmental review. The City's findings are not supported by substantial evidence in the
28

1 record. No substantial evidence supports a determination that the Rose Street project is
2 categorically exempt as urban infill or a typical single-family home.

3 23. Environmental review is required because the administrative record contains
4 substantial evidence supporting a fair argument that the Rose Street project may result in
5 significant site-specific, direct, indirect, or cumulative environmental impacts relating to,
6 among other things, massive unstudied excavation of steep hillsides and creation of large
7 retaining walls, inconsistencies with City land use plans and policies adopted for
8 environmental protection, the unusual size of the structure out of scale with neighboring
9 development and historic character, the demolition of an historic resource, aesthetic impacts
10 on public views, neighborhood incompatibility based on mass, scale and institutional design
11 of the new home, traffic impacts relating to construction and non-residential uses, and
12 removal of mature trees.

13 24. The City failed to proceed in the manner required by law to adequately assess
14 the environmental setting relative to on-site and off-site architectural and historic resources as
15 a basis for environmental analysis.

16 25. The City failed to proceed in the manner required by law to obtain accurate,
17 comprehensive analysis and data regarding the project height and setbacks, the three-story
18 character of the proposed house, the requirement to close-in the lower open floor as additional
19 interior living or work space, the amount of fill required, the number of trees required to be
20 removed, visual impacts, the type of excavation equipment needed and its method of access,
21 traffic routes and disposal sites for fill, and cumulative traffic impacts.

1 25. Categorical exemption from CEQA is disallowed because the City's adopted
2 mitigation measures that attempt to address potential environmental effects provide an
3 acknowledgment of potential adverse impacts.
4

5 WHEREFORE, Petitioners pray:
6

7 1. That the Court issue a peremptory writ of mandamus ordering respondents City
8 of Berkeley, *et al.*, to set aside and void all approvals relative to the 2707 Rose Street project,
9 and to refrain from further consideration of project approval until full compliance with CEQA
10 is achieved, including preparation and certification of an adequate environmental document
11 and adoption of feasible mitigations and alternatives based upon findings supported by
12 substantial evidence;
13

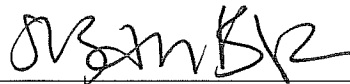
14 2. For a temporary stay of any and all physical actions relating to new
15 construction, including pre-demolition or demolition of the Dunham House or excavation in
16 furtherance of the proposed project, but without preventing maintenance or clean-up of the
17 site and the maintenance or repair of the historic Dunham House;
18

19 3. For Petitioners' costs and attorney fees pursuant to CCP section 1021.5; and
20

21 4. For such other and further relief as the Court finds proper.
22

23 May 27, 2010

BRANDT-HAWLEY LAW GROUP

24 

25 Susan Brandt-Hawley
26 Attorney for Petitioner
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Verification

I, Susan Brandt-Hawley, am the attorney for Petitioners who are located outside of Sonoma County where I have my law offices, and so I verify this petition on their behalf. I have read the Petition for Writ of Mandamus and know its contents. The matters stated in it are true and correct based on my knowledge, except as to the matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the above is true and correct and is executed this 27th day of May, 2010, at Glen Ellen, California.



Susan Brandt-Hawley