Civil No. A131254

IN THE COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION 4

BERKELEY HILLSIDE PRESERVATION and SUSAN NUNES FADLEY;

Plaintiffs and Appellants,

v.

CITY OF BERKELEY and CITY COUNCIL OF THE CITY OF BERKELEY;

Defendants and Respondents,

DONN LOGAN, MITCHELL D. KAPOR, FREADA KAPOR-KLEIN;

Defendants and Respondents.

Civil Number A131254

Alameda County Superior Court Case Number RG10517314

On appeal from the Superior Court of Alameda County
Honorable Frank Roesch

APPELLANTS' REPLY BRIEF

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Table of Contents

Table of Authorities

California Cases **Page**

Public Resources Code Sections

CEQA Guidelines Sections

Introduction

In view of the Court's broad experience with CEQA, the merits of this *de novo* appeal are straightforward. The City of Berkeley failed to pay attention to ample evidence of potentially significant impacts when it adopted a CEQA exemption for the Kapors' Rose Street project. The project poses many unanswered questions, and environmental review must now proceed in the public interest per salutary mandates of the Act.

Summary of Reply

The City and the Kapors are careless with the facts from the outset when they pronounce that the Kapor project was subject to "extensive review." (Opposition Brief at 1.) Since there has been *no* CEQA process at all, the claim is both false and ironic. Public process has been minimal, and the record demonstrates nothing akin to the respondents' fanciful claim of a "relentless campaign" against the project using "every conceivable approach" by people "living outside the immediate vicinity." (*Ibid.*)

In fact, by the time a scenic, historic neighborhood in the Berkeley hills learned that a 10,000 square-foot building was proposed in its midst, approval was days away. (AR1:75, 79, 81, 94, 96, 103-105, 120, 124, 262.) Word spread in spite of paltry notice, and letters of concern were rushed to

the Zoning Adjustments Board. Commenters questioned the siting of such a huge structure on narrow Rose Street, on steep slopes in a landslide zone, and at a mass and design out of compliance with the Berkeley General Plan protections for the famed historic neighborhood. (AR1:70-105, 146-147.)

The City assures the Court that all "persons who will be directly affected by the project have expressed strong support ..." (Opp. Brief at 2.) *Not so*. Four immediately-adjacent residences support the project (AR2:315-316), but the neighborhood stretches much farther than one home on each side of the Kapor lot, and scores of residents presented fact-based environmental concerns. (*E.g.,* AR2:305-431.)

In January 2010, the Zoning Adjustments Board approved the Kapor building without any CEQA review, rejecting requests for a continuance or for placement of the story poles required by City policy in the Berkeley hills. (AR2: 490-491, 496-506, 516.) Over 30 neighbors signed an appeal to the City Council. (AR1:186-192.) Citywide residents also voiced concern about the unstudied approval. (*E.g.,* AR2:378-379, 405, 429-434.)

While awaiting the City Council's consideration of its appeal, neighbors had time to study the Kapor proposal and sought advice from an experienced Berkeley architect, a geotechnical engineer, and a CEQA lawyer. They submitted reports to support their appeal, and City staff

responded. (AR1:193-468.) The Council then denied the appeal on a 6-2 vote, allowing only 10-minute presentations by the Kapors and the appellants. (AR2:524, 533, 542.) The crowd packing City Hall in support of appellants was not allowed to address the Council, and even a representative of the City's own Landmark Preservation Commission was denied permission to testify. (*Id.* at 533, 541-542, *post* at 9.)

Thus, there was one public hearing before the Zoning Adjustments Board after a poorly-posted public notice was provided to a small section of the neighborhood. (AR1:65, 196; *see* citations *ante* at 1.) The City Council then denied the neighbors' appeal of the ZAB action without holding a public hearing. (AR1:160.) That was the entire public process.

There was no "relentless campaign." (Opp. Brief at 1.) All CEQA cases begin with an administrative process before moving to superior court, and both venues are typically pursued by residents protecting their well-loved environs. This administrative process was bare-bones. Significant environmental questions remain unanswered.

That is why appellants seek this Court's review. No-one seeks "to stop the Kapors from building their home" or to "police" their laudable philanthropic activities. (Opp. Brief at 1-2.) The City's inflammatory comments to the contrary have zero basis in the record and serve only to

disrespect this Court as well as the appellants. (*Ibid.*)

Appellants' goal is to effect the City's compliance with the mandates of CEQA, a citizen-enforced statute. They seek analysis of unresolved environmental issues and identification of reasonable mitigations to protect their beloved neighborhood in the environmentally-sensitive Berkeley hills. If such review had begun in January 2010 after the ZAB hearing, it could have been completed a year ago. It has been the City's and the Kapors' choice to delay review and approval by stonewalling CEQA review.

"CEQA compels process. It is a meticulous process designed to ensure that the environment is protected ... the EIR is the heart and soul of CEQA." (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 911.) Upon reversal of the judgment by this Court, CEQA review will expeditiously occur as is routine for thousands of California projects each year. There is no doubt that the Kapors will soon thereafter build a substantial new home on Rose Street — with its environmental issues publicly addressed and mitigated.

Only this Court's reversal can fulfill CEQA's mandate to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (CEQA Guideline § 15003 (d).) Appellants request no more than that.

Material Factual Clarifications

Material clarifications of fact are essential to the Court's consideration of this appeal:

- **Project Size**. The proposed Kapor project is a *single* 9,872 square-foot structure, including a 6,478 square-foot living area and a 3,394 square-foot 10-car garage in the same building. (AR1:3.) The City's brief never references the square footage of the building, referring instead to the living space and garage as if they are separate buildings. (Opp. Brief at 6, 28.)

  The fuzzy project description escalates to misrepresentation when the City compares the Kapor mansion to other residences in Berkeley, treating the project as a 6,478 square-foot building instead of a 10,000 square-foot mass. When straining to argue that the house is *not* an unusual size, the City posits that "the size of the single-family home is consistent with others in the area ... that range in size from 4,000 to 6,000 square feet." (Opp. Brief at 28.)

  A reference to "68 dwellings in the City [that] have more than 6,000 square feet of floor area," is doubly misleading. (Opp. Brief at 6, 28-29.) Not only is the Kapor project 10,000 square feet instead of 6,000, but the City knows that its count of "dwellings" includes multi-

family units. There may be 68 "dwellings" of over 6,000 square feet but there are only 10 "single-family residences" greater than 6,400 square feet in over 17,000 residences in Berkeley. (AR1:209.) In addition, floor area to lot ratios [FAR] do not reduce a building's square footage, as curiously implied. (*Id.* at 6.)

The 10,000 square-foot Kapor project — which actually has a mass equivalent to at least a 12,000 square-foot building when one considers its elevated main floor and the unenclosed, above-ground lower story (*see post* at 38) — is not at all comparable to the handful of 4,000 to 6,000 square-foot homes in the area that average about half its size, and most of the homes in its historic neighborhood are only a quarter to a third as large. (AR1:74, 82, 89, 99, 111-119, 194, 204, 227.)

- **Historic Cottage**. The 1917 Abraham Appleton cottage that existed on the site for almost a hundred years was demolished after this Court denied the Petition for Supersedeas. In the opening brief, appellants explained that in light of the demolition, they would seek no further relief relating to the cottage. (Opening Brief at 13.)

Apparently recycling portions of its prior briefs, the City does not bother to update its statement of facts and refers to the "existing" structure as if the cottage is still in place. (Opp. Brief at 7 ["The existing

house is vacant ...'], 9.) To be clear: the demolished cottage is no longer extant and is no longer part of this appeal.

- **Affected Neighbors.** As noted in the Summary, above, the City repeatedly trumpets that "all of the immediate" and the "adjacent" neighbors support the project (*e.g.*, Opp. Brief at 2, 8, 10), and incorrectly contends that adjacent neighbors are the only people who "will be directly impacted" by the project. (*Id.* at 2.) No citation to the record is offered for this pronouncement, and it is untrue.

  As emphasized in the opening brief and supported by citations to the record, the neighbors living and walking on Rose, Shasta, La Loma, Greenwood Terrace, and Tamalpais would be directly affected by the project as to traffic, aesthetics, general plan inconsistencies, and geotechnical impacts. The City's statement that "at the ZAB hearing, persons who were not the immediate neighbors ... protested," implies that concerned citizens living more than one house away from the Kapor site would not be impacted by its construction. (*Id.* at 9.) The record contains substantial evidence to the contrary. (Opening Brief, *passim; e.g.*, AR1:186-262.)

- **Only One Public Hearing.** The City does not directly deny that the

single public hearing on the Kapor project occurred at the Zoning Adjustment Board, but implies that there was also a public hearing before the Berkeley City Council. (Opp. Brief at 10.) The City states that "at the Council meeting ... the Council listened to both the opponents and the proponents of the Project ..." (Opp. Brief at 10.)

In fact, the City Council allowed only a 10-minute presentation by the ZAB appellants, timed to the second by the mayor, during which time the appellants' attorney and geotechnical expert Dr. Lawrence Karp spoke. There was an equally-time 10-minute presentation on behalf of the Kapors by their attorney and supporters. (AR2:524-541.)

It is not true that project "opponents" were allowed to address the Council. Appellants' request for a public hearing was denied. (Opp. Brief at 11; AR2:533.) The packed room was filled with concerned residents that were not allowed to speak, and the mayor even denied a request by City Councilmember Jesse Arreguin to ask questions of Landmark Preservation Commission representative Ann Wagley, who rose to speak on behalf of that Commission and was sent back to her seat. (AR2:541-542 ["We are not holding a public hearing."].)

- **Geotechnical Expert Evidence.** As part of the voluminous evidence of the Kapor project's potentially significant environmental impacts due to unusual circumstances, the record includes the geotechnical reports and City Council testimony of Dr. Lawrence Karp, a renowned geotechnical engineer and licensed architect. (AR2:448-452, AR4:1089, *attached* to appellant's opening brief.)

The opposition brief falsely and surprisingly states that "Mr. [sic] Karp's opinion was prepared without reviewing the geotechnical report prepared for the Project." (Opp. Brief at 34.) The City knows better. Dr. Karp's initial analysis necessarily occurred without the benefit of the Kapors' geotechnical report because it had never been provided to the City and was not in the project file. (AR2:448.) This was an early example of City staff's incomplete review of the Kapor project.

After Dr. Karp initially reviewed the City's project file and upon his inquiry was told that there was no geotechnical report available, he wrote his April 16, 2010 geotechnical report. (AR2:448.) The next day, City staff obtained a copy of the report from the Kapors and notified Dr. Karp that it was available. He immediately reviewed it and wrote a supplemental report on April 18th to include the additional information. (AR2:449.) It did not alleviate his professional concerns. (*Ibid.*)

Importantly, the Kapor geotechnical report, which had been prepared by two associates of engineer Alan Kropp in July 2009, addressed an early iteration of the project when the residence and its parking were in two separate buildings rather than a single 10,000 square foot structure. (AR3:654 ["...the site is to be developed with a new, approximately 6,000 square foot, two story residence with a detached carport."].) The report contains a proviso that its conclusions "should not be considered valid" if the project design were to change significantly. (*Id.* at 656.)

The consolidation of the living space and garage in the current project changed the design by a whopping factor of 40% and so the Kropp geotechnical report cannot be relied upon; perhaps that is why it was initially concealed. The report was never updated and the City's 2010 approval was thus made without the benefit of a complete geotechnical report from the applicant that accurately addressed the proposed 10,000 square-foot project. (AR1:2-3, 5, 36, 40, 144, 159.)

Standard of Review

A. The 'Fair Argument' Standard Applies

Appellants discussed the fair argument standard of review in their opening brief, upon which they continue to rely. (Opening Brief at 15-18.) The City contends that appellants did not fairly present the relevant case law. (Opp. Brief at 13.) In fact, appellants accurately explained that the "prevailing judicial view is that the 'fair argument' standard applies to whether the record contains evidence of significant effects to meet the exemption." (Opening Brief at 15, citing *Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, 264.)

While the City admits to worrying that this Court may find, as did the Honorable Frank Roesch of the Alameda County Superior Court, that appellants "*have met* their burden under the fair argument test," that cannot justify switching to a substantial evidence standard of review as now suggested. (Opp. Brief at 15, italics added.) The City's self-serving suggestion that the substantial evidence standard should apply because otherwise the application of the fair argument standard may result in a ruling against them is devoid of reason.

Decades ago there was a split in judicial authority as to the standard of review for exceptions to categorical exemptions, and several recent cases

continue to note that history. However, the last case to actually apply the substantial evidence standard to address a categorical exemption exception was *Centinela Hospital Association v. City of Inglewood* (1990) 225 Cal.App.3d 1586, as this Court referenced in *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1242, 1260. *Centinela* did not discuss *why* the substantial evidence standard should apply when it granted summary judgment upholding a categorical exemption; the standard of review was apparently not at issue. (*Centinela, supra*, 225 Cal.App.3d 1586, 1601.)

Post-*Centinela*, *Banker's Hill v. City of San Diego, supra,* 139 Cal.App.4th 249, cogently explained the reason why the fair argument standard applies to exceptions to categorical exemptions: it is because the underlying statutory authority limits categorical exemptions to projects with no potentially significant environmental impacts:

> We further conclude that it is consistent with the policy behind CEQA to preclude an agency from relying on a categorical exemption *when there is a fair argument* that a project will have a significant effect on the environment, because, as our Supreme Court has noted, the Secretary [of Resources] 'is empowered to exempt *only* those activities which do not have a significant effect on the environment. [Citation.] It follows 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." (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206...) This important limitation on the Secretary's authority, as established by CEQA, is best upheld by *disallowing an exemption for any project where the record reflects a fair argument that there may be a significant effect on the environment due to unusual circumstances.*

(*Id.* at 265-266, italics added.)

Banker's Hill firmly disagreed with a project applicant's contention that the fair argument standard should not apply because exemption categories are already "expressly determined by the Secretary 'to not have environmental impacts' and 'the analysis has already been done ...'" (*Id.* at 266, fn. 15.) The Court reiterated that the statutory authority given to the Secretary *only* allows categorical exemptions for projects that have no significant environmental effects, and "no statutory policy exists in favor of applying categorical exemptions where a fair argument can be made that a project will create a significant effect on the environment." (*Ibid.*)

> Here, the Honorable Frank Roesch pointed out that *Banker's Hill*
>
> is probably the best exposition of why in these kinds of circumstances it's the fair argument standard. If you look at it, it says 'a categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect.' *That cries out for the fair argument standard.*

(RT:55, italics added.)[1] Judge Roesch additionally ruled that the standard was met as to the Kapor project's impacts relating to geotechnical and general plan issues. (Appellant's Appendix (AA):156-157.)

B. "Unusual Circumstances" is an Integrated Factor

The record provides abundant evidence of "unusual circumstances" that warrant reversal of the judgment. As this Court knows from its prior review of categorical exemption cases, a showing of unusual circumstances has been treated in some — but not all — of the recent cases as an independent requirement for finding an exception under Guideline section 15300.2 (c), essentially creating a two-step test. (*Banker's Hill, supra*, 139 Cal.App.4th 249, 278.)

While the facts of this case pass the two-step test, appellants respectfully suggest that an integrated one-step inquiry is indicated by the statutory authority, legislative history, and Supreme Court precedent. When a project that fits in a CEQA exemption category nonetheless has potential significant environmental impacts, unusual circumstances are present.

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[1] As in the opening brief, appellants recognize that the Court may be interested in the reasoning of the trial court although its review of this appeal is *de novo*.

Legislative History. Appellants believe that under two landmark Supreme Court cases and the legislative history, the words "unusual circumstances" referenced in section 15300.2 (c) should be interpreted as relevant and descriptive but should not trigger a separate test to qualify for an exception to a categorical exemption. Recent cases applying the so-called two-step test did not yet have the benefit of the legislative history that appellants have now provided to this Court without objection by the City or the Kapors. This Court's recent ruling in *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329 is consistent with this integrated approach; the Court considered unusual circumstances to be inextricably tied to the potential for significant effect. No unusual circumstances had triggered any potentially significant environmental impacts, and so the exemption was upheld. (*Id.* at 1352.)

While the City argues that appellants' arguments are "flawed" because some of the case law directs a two-step test, the integrated approach to section 15300.2 (c) is supported by the statutory authority, the relevant Supreme Court case law, *and* legislative history not previously available. A fresh look at the implementation of the 15300.2 exception is warranted and is consistent with this Court's ruling in *Wollmer*.

The City's rationale for treating "unusual circumstances" as an

independent criterion of section 15300.2 (c) is that otherwise "no project that satisfies the criteria under the exemption could ever be found to be exempt." (Opp. Brief at 20.) This is illogical. To meet the exception, an administrative record must contain *substantial evidence* sufficient to support a fair argument that a project may have a significant environmental impact. This is the same standard that applies to negative declarations and mitigated negative declarations. (Guideline § 15064 (f).)

While the City essentially presumes that it is always possible to meet the admittedly low-threshold fair argument standard, if that were true no negative declaration or mitigated negative declaration could withstand challenge.[2] After 40 years with CEQA, we know better. Negative declarations exponentially outnumber EIRs. The sky is not going to fall. The simple premise to both categorical exemptions *and* negative declarations is that they are *disallowed* by CEQA in the presence of a qualified fair argument of potentially significant environmental impacts.

The "unusual circumstances" referenced in section 15300.2 (c) inform the interpretation of the guideline and the quality of evidence

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[2] The unsupported opinion of a "single neighbor who complained that he did not like the look of a new house or that it would increase traffic" would not reasonably qualify as substantial evidence to defeat a categorical exemption, any more than it would be sufficient to defeat a negative declaration. (Opp. Brief at 27.)

required to except a project from an exemption category. But they do not logically rise to the level of a separate-but-equal criterion. It cannot be overstated that CEQA's statutory authority does not allow categorical exemptions for any project that *may have a significant impact on the environment*; that remains the overarching rule. (Opening Brief at 40-44.)

The California Supreme Court ruled in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206, that

- The Public Resources Code empowers the Secretary of the Resources Agency to adopt regulations to categorically exempt projects from CEQA *only* for projects that will not have a significant environmental effect.
- No regulation may exceed the scope of the enabling statute.
- Use of a categorical exemption is improper for any project that may have a significant impact, since otherwise the subject regulations (the CEQA Guidelines for categorical exemptions) would exceed the statutory authority of the Public Resources Code.

(Opening Brief at 41-43.)

In response, the City argues that since *Wildlife Alive v. Chickering* was decided in 1976, and Guideline section 15300.2 (c) was not adopted

until 1980, "clearly, the Supreme Court's decision did not address the scope of the future exemption." (Opp. Brief at 23-24.) This odd statement is rebutted by the legislative history, which the City misconstrues. (*Ibid.*).[3] The City focuses briefly on the *title* of the section 15300.2 (c) exception (which is tagged, appropriately, as "significant effect" rather than "unusual circumstances") but misses the key point of the legislative history, which is that we now know that when adopted in 1980 the Guideline cited only four elements as its underlying authority:

1. Public Resources Code section 21083
2. Public Resources Code section 21084
3. Public Resources Code section 21085
4. *Wildlife Alive v. Chickering*

(Request for Judicial Notice, Ex.4 at 18, *attached* to the opening brief.)

Parsing the four authorities is illuminating. First, as explained in the opening brief, Public Resources Code sections 21083 and [former] section 21085 provide *general authority* for the adoption of regulations (aka the CEQA Guidelines) to implement the California Environmental Quality Act.

Next, Public Resources section 21084 is specific to categorical

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[3] Appellants' Request for Judicial Notice of that legislative history is unopposed by the City and the Kapors. (Opp. Brief at 26.)

exemptions: it allows CEQA guidelines to be prepared and adopted to "include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt."

The last authority relied upon for adoption of section 15300.2 (c) is the *Wildlife Alive v. Chickering* case, which disallows categorical exemption for a project that may have a significant impact. (*Ante* at 15-16.)

Thus, *the impetus for Guideline section 15300.2(c),* as contemporaneously documented by the legislature, was *not* "unusual circumstances." There is no evidence that circumstances are a factor separate from the concept of "determined not to have a significant impact on the environment." Yet, ironically, those two words are now being given equal status to the point that the Honorable Frank Roesch agreed with appellants that the Kapor project had potentially significant environmental impacts on multiple grounds, and yet allowed a categorical exemption from CEQA to defeat any environmental review or mitigation of those impacts because he found the circumstances insufficiently "unusual." (AA:158.) This is inconsistent with the legislative history since it allows a project with potentially significant environmental impacts to avoid CEQA review.

Reversal of the ruling is surely warranted based on the legislative history, and will provide guidance for agencies and superior courts that may

utilize the two-step test to compromise CEQA's statutory mandate that category exemptions only excuse environmental review for projects that are "determined not to have a significant environmental impact." (Pub. Resources Code § 21084.)

Projects in Exempt Categories, yet with Significant Impacts.

When a project that fits into an exempt category has potentially significant environmental impacts, that inherently evidences unusual circumstances. *Communities for a Better Environment (CBE) v. California Resources Agency* (2002) 103 Cal.App.4th 98, 129 held that if a project that fits into an categorical exemption category nonetheless presents a reasonable possibility of significant environmental effects, "those effects *would be* 'unusual circumstances' covered by the section 15300.2, subdivision (c) exception." (*Id.* at 129, italics added; Opening Brief at 19.)

The City takes issue with appellants' reference to the *CBE* case, but in doing so provides a lengthy quote from the case that simply cannot be reasonably construed to do anything but support appellants' view. (Opp. Brief at 25.) *CBE* unequivocally holds that a project demonstrating a reasonable possibility of significant environmental effects *despite* fitting into an exempt category demonstrates unusual circumstances by that very fact. (*Ibid.*, citing *CBE*, *supra*, 103 Cal.App.4th 98, 129.) The same *CBE*

quote supports appellants' argument that the fair argument standard fully applies to the section 15300.2 (c) exceptions to the urban infill exemption. (*Ibid., see* Opening Brief at 34, n.5.)

The City's argument that "by deleting the phrase 'due to unusual circumstances,' appellants are trying to narrow the express statutory authority in section 21084" and are "rewriting the statute" is inexplicable. (Opp. Brief at 24.) First, appellants do not suggest that the words "due to unusual circumstances" should be deleted from section 15300.2 (c). They suggest that the words are an integrated part of the section rather than an independent requirement. Unusual circumstances are self-evident underpinnings when any project has potentially significant impacts but also arguably fits into an exemption category for projects that normally have no such impacts. Second, if a CEQA guideline includes a provision not supported by its authorizing statute, deleting those words [which could only be done by the Secretary of the Resources Agency, per Pub. Resources Code section 21083] would not alter the still-intact statute.

Finally, as discussed in the opening brief, appellants have researched published California cases to see if any court has ever denied a Guideline section 15300.2 (c) exception based on a perceived lack of unusual circumstances when the record contains a fair argument of potentially

significant environmental impacts. (Opening Brief at 44-51.) As appellants surmised, *there is no such case*. (*Ibid.*) A fair argument of environmental impacts for a project that fits into an exemption category signals its unusual circumstances. That makes sense, consistent with *Wildlife Alive, Friends of Mammoth*, and Public Resources Code section 20184.

How does the City respond to the appellants' compilation of case law on this point? It does not disagree with appellants that no case has ever found potentially significant environmental impacts sans unusual circumstances. (Opp. Brief at 26.) But the City then claims that appellants' "sweeping generalization ... is without merit." (*Ibid.*)

It is unclear what "sweeping generalization" is being referred to. Appellants' compilation of cases is not a generalization. It is factual. As acknowledged by the City, the point is that "no case has upheld a categorical exemption where evidence has been presented of a potentially significant environmental effect." (Opp. Brief at 26.)

The City contends that the list is not meaningful, arguing that some categorical exemption cases have found that a project involves no unusual circumstances and thus "did not need to go beyond the first prong." It implies that this Court in *Fairbank* and *Wollmer* failed to find unusual circumstances and then did not bother to also consider whether there were

potentially significant environmental impacts. (Opp. Brief at 26.) But that is not what happened in those cases. In *Fairbank* and *Wollmer*, the Court looked both at unusual circumstances and potentially significant environmental impacts, and found neither. (*See* Opening Brief at 44, 48.)

Consistent with the results of all prior categorical exemption cases, appellants believe that this legislative history will assist the Court in its application of Guideline section 15300.2 (c) in the context of this case, circling back to its foundation in Public Resources Code section 21084. It is incontrovertible that each CEQA Guideline is informed and limited by its underlying statutory authority, and categorical exemption is unequivocally disallowed for a project with potentially significant environmental impacts.

Discussion

There is a Fair Argument of Significant Impact

Appellants continue to rely on their opening brief and in this reply will respond to arguments in the opposition brief that warrant clarification.

A. Geotechnical Impacts

The City urges the Court to disregard Dr. Lawrence Karp's detailed, fact-based, expert opinion regarding the potentially significant geotechnical impacts of the project, in favor of the Kapors' engineers' competing

opinions. (Opp. Brief at 34.) That is not how the CEQA standard of review works. Neither the City nor the Court may choose between conflicting expert opinions until after an environmental impact report is prepared. (Guideline § 15064.)

The City does not directly argue that this Court may make independent factual findings, although it is essentially asking it to do so. The trial court agreed with appellants on this point. (AA:157 ["Dr. Karp's opinion provides substantial evidence of a fair argument of a significant environmental impact consequent to the project."].)[4]

1. **Prior Geotechnical Report.** The City proclaims that "the underlying factual basis of [Dr. Karp's opinions] was completely undercut" and that therefore his professional opinion is clearly inaccurate or erroneous. (Opp. Brief at 33-35.) How so? To support its argument, the City first misrepresents the facts as to whether Dr. Karp had reviewed the applicants' geotechnical report for a smaller version of the project. (Opp. Brief at (AR2:449; *see ante* at 9-10.) Dr. Karp indeed reviewed the report

[4] While finding that the record contained a fair argument of significant geotechnical impacts, the trial court also stated that in his view portions of Dr. Karp's report were erroneous. Again, while this Court's review is *de novo* and the trial court's judgment is not reviewed for error, the trial court's ruling may be of interest. But since Judge Roesch did not explain his thinking on this point, appellants cannot comment. (AA:157.)

belatedly provided to him. (*Ibid.*)

As already explained, the Kapors' 2009 geotechnical report, which was the only geotechnical report that they provided to the City for their project, was not in the project file as of April 16, 2010, and thus had obviously not been reviewed by City staff or the ZAB as a basis for categorical exemption. Further, the report addressed a two-building project rather than the single approved 10,000 square-foot building. (*Ante* at 9-10.)

2. Interpretation of Plans. The City next claims that Dr. Karp's opinions should be disregarded because the Kapors' experts contended that he misread the architectural plans. (Opp. Brief at 36.) To support this contention, the City presents the opinions of the Kapors' experts as if somehow qualifying as facts. They do not.

The City relies on letters from Kapor attorney Rena Rickles, geotechnical engineer Alan Kropp, and civil engineer Jim Toby that contend that Dr. Karp misread the Kapor plans. (Opp. Brief at 35-36; AR4:934-935 [April 26, 2011, Rickles], 1061-1062 [April 21, 2011, Kropp], 1064-1067 [April 21, 2011, Toby].) Based on the letters, the City argues that "the underlying factual basis of [Dr. Karp's] opinions was completely undercut." (Opp. Brief at 34.)

This is not so. All that is demonstrated is a dispute among experts, which cannot undo a fair argument of environmental impact. Dr. Karp had an opportunity to review the critical letters before the City Council appeal meeting on April 27, 2011, and so testified. (AR4:1089, 2:530-531 [transcript].) He explained to the Council that he had *not* misread the plans and that based on independent analysis at the site he continued to disagree with the Kapors' engineers about potential project impacts:

> I conducted an independent feasibility study. I now conclude that there is potential for very significant environmental impacts from construction and seismic lurching in service. *I reviewed the City Planning's index and the entire file, including all plans* ... The structure seemed inappropriate for the steep site so I did a reality check of the architectural drawings. *The recent reports from the applicants' experts say I do not know how to read architectural drawings, but I have been a licensed architect for many years and I do know. Their reports have not changed my opinion.* I cut and matched prints and conclude that the depicted elevations typically misrepresent the relationships between the steep site and the floor plans...
>
> > ...[Dr. Karp provides a technical explanation of requirements for restraining the retaining walls from rotation, "extraordinary demand" requiring drilled piers to be very large and deep, tiebacks elevated to 14 feet above grade "which will require large machinery," and inability to use portable equipment] ...

> ... Project grading and tree removal, including removal of significant protected oak trees, will therefore be much more extensive than represented by the City, just as noted in my letter-reports and shown graphically on the Grading Section drawing you now have. This project has potential for very significant environmental impacts that should be studied and mitigated.

(AR4:1089; 2:530-532 [transcript of Karp testimony before the Council.])

The City contends that "although [Dr.] Karp protested that he did not misread the plans, *the City disagreed and properly disregarded his opinion.*" (Opp. Brief at 36, italics added.) But there is no evidence that the City Council disregarded Dr. Karp's opinion. The Council never questioned his credibility; it would indeed have been pointless to do so in light of his stellar credentials. The Council's discussion at the appeal meeting never even touched on geotechnical issues. (AR2: 541-591.)

Dr. Karp's opinions could only be disregarded if he was shown to lack credibility. As explained in *Pocket Protectors v. City of Sacramento* (2008) 124 Cal.App.4th 903:

> ..., if an expert purporting to hold a Ph.D. testifies as to the environmental effect of a project, a lead agency or a court may properly consider and 'weigh' evidence in the record showing the expert never attended college and his Ph.D. is phony. But this limited weighing of evidence to determine admissibility in an

> environmental debate must not be confused with a weighing of some substantial evidence against other substantial evidence.

(*Id.* at 935.) The Court explained further:

> ... since fair argument review is generally non-deferential and prefers resolving doubts in favor of maximizing environmental review ..., before accepting [a developer's argument to discount expert testimony] we would have to find that the City Council actually resolved disputed factual questions *going to credibility*. But the City Council's findings of fact do not discuss any opposing evidence: they merely recite generally that substantial evidence of a significant effect on the environment does not exist. Thus, we see no specific credibility call by the City Council which requires deference.

(*Id.* at 934-935.)

Dr. Karp's unassailable professional credentials as an eminently-experienced geotechnical engineer and architect who has taught at Stanford and Cal were never questioned, and his assertion that he reviewed the criticisms of the Kapors' engineers and disagreed with their opinions that he had misread the plans were not refuted. Attorney Rena Rickles acknowledged Dr. Karp's "excellent credentials" and his professional credibility has never been at issue. And *unlike* the Kapors' engineers, Dr. Karp has "been a licensed architect for many years." (AR2:531.) The Court

will note that the Kapors' architects, who drew the plans, never expressed an opinion regarding Dr. Karp's interpretation of their plans.

The Kapors' expert, Alan Kropp, provided a conflicting opinion that although both he and Dr. Karp had reviewed the same architectural plans and he did not question Dr. Karp's credentials or credibility, he "*believe[d]* there has been a misunderstanding of the plans" and "does not *believe* there will be grading necessary downhill of the lower backyard." (AR2:538.) Such statements were couched as Mr. Kropp's "beliefs" and he underscored that he was offering opinions, not stating facts. (*Ibid.*)

The City's presentation of the Kapors' engineers' contrary opinions as if they are fact is without legal support. In the context of a categorical exemption (unlike the very different context of an EIR) the opinions of the Kapors' engineers cannot trump the opinions of the equally-if-not-more-eminent Dr. Karp, who is an architect as well as a prominent engineer.

The City generally cites to *Leonoff v. Monterey County Board of Supervisors* (1990) 22 Cal.App.3d 1337 [with no page cite] as support for its contention that it could "disregard Dr. Karp's opinion" because "erroneous information that is corrected by other evidence in record may be disregarded." (Opp. Brief at 36.) However, unlike this case, *Leonoff* had no highly-qualified expert providing technical analysis. Instead, non-expert

opponents presented bits and pieces of information easily shown to be without foundation. The Court discounted the evidence as incomplete, misleading half-truths. (*Id.* at 1349-1356.)

Here, experts have expressed differing professional opinions based upon their independent review of the Kapors' project plans. The Kapors' experts' opinions do not trump Dr. Karp's professional opinions in this context since he is a credible expert who conducted his own analysis after reviewing all project plans. As part of his review, he prepared a grading section drawing of the geotechnical impacts of the 10,000 square-foot home proposed on the existing slopes, and also confirmed errors in the Kapors' submitted plans that neighbors had repeatedly pointed out as part of their City Council appeal. (*E.g.*, AR2:198-204, 288-292 [Council appeal exhibits re height measurements, topography, site plan], 4:1085, 1089.) The "he-must-have-misread-the-plans" defense is without merit.

3. **Geotechnical Impacts Related to Grading.** The relevant query is whether Dr. Karp provided a fact-based professional opinion of potentially significant geotechnical impacts. (Public Resources Code § 21082.2 [Substantial evidence includes "expert opinion supported by facts"].) As the trial court found, Dr. Karp did just that and provided an expert opinion regarding geotechnical impacts relating to the need for

massive grading and excavation that in turn required extensive trucking and removing of mature trees for the side-hill fill necessary to secure the 10,000 square-foot structure on its steep site. (AR2:448-449, 4:1085, 1089.)

As a basis for Dr. Karp's opinion, he visited the site on several occasions, reviewed all of the plans, reviewed the outdated 2009 geotechnical report prepared for the separate house and carport as well as the later Planning Department submittals on the project as finally conceived, and created his own grading section drawing to determine the extent of earthwork and excavation necessary to support the 10,000 square foot house on its hillside site. (AR2:448-449.)

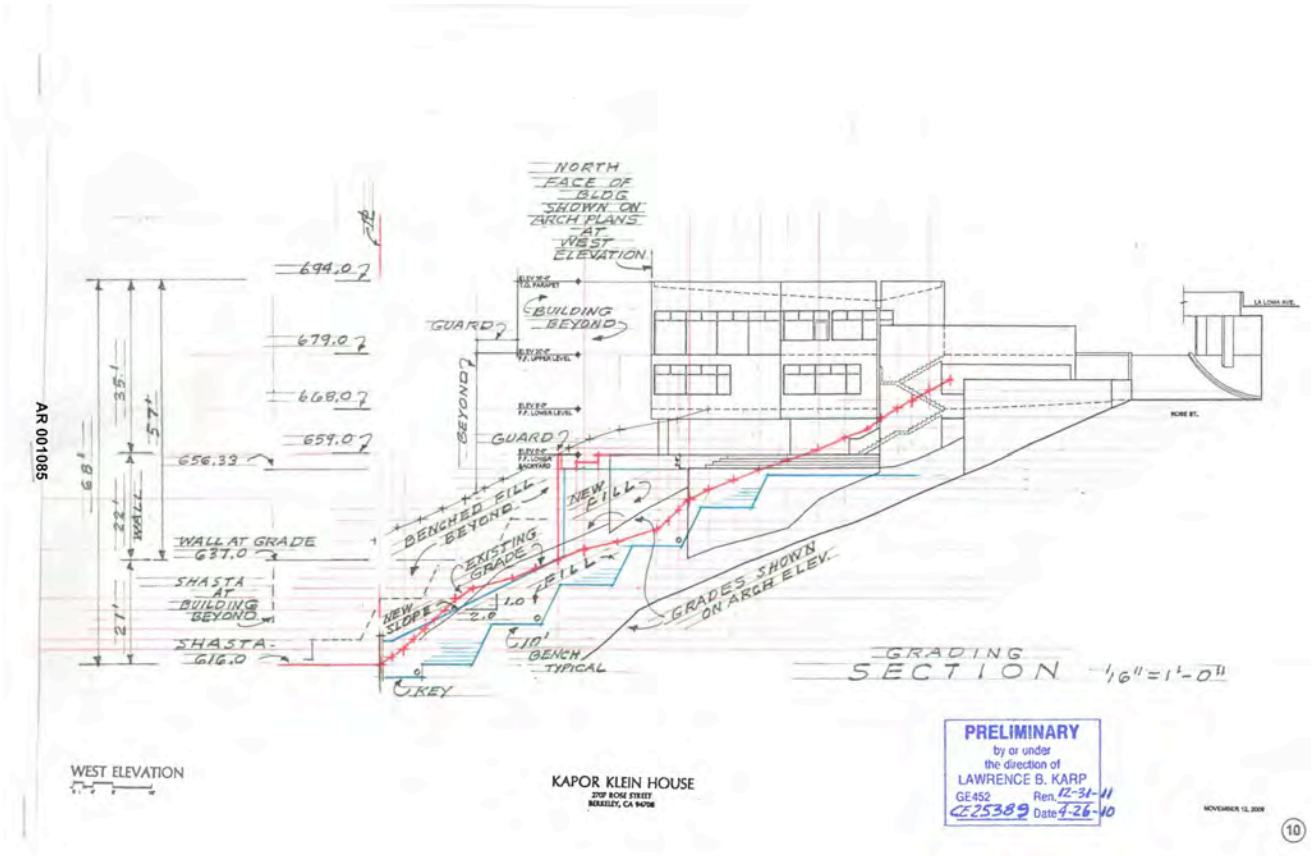
Those professional tasks were well within Dr. Karp's extensive education and decades of experience in the Berkeley hills. From those efforts, Dr. Karp developed a fact-based professional opinion as to excavation and grading required to provide an adequate foundation and anchorage for such a large building. His independent evaluation provided the basis for his opinions regarding significant environmental impacts. (AR2;448-449; 4:1085,1089.)

As was discussed at the trial court hearing on the writ, plans for the massive Kapor house show it perched on a steep hillside "like a little hat." (RT:46.) "That's how it's supposed to look sitting on the hillside, and it

shows different elevations. It's just sitting there." (*Ibid.*)

> Appellants summarized Dr. Karp's opinion that the building
>
> … *can't* just sit there. They'll have to do benches and fills and all kinds of retaining wall to do that work … he did his own evaluation of this house on this site and indicated where he thought the benched-fill locations would need to be. He said the slopes were different than had been represented … there would be significantly more fill required. The … trees [would need to be] removed to get the equipment in to do that … *no one refuted this* …

(RT:46-47, italics added.)



(AR4:1085.)

Dr. Karp's reports and testimony qualify as substantial evidence supporting a fair argument of potentially significant geotechnical impacts relating to site grading and excavation. No comparable evidence was provided in cases in which categorical exemption was denied. (Opening Brief at 45-51.) For example, in *Association for Protection of Environmental Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, geotechnical impacts were alleged that this Court agreed could defeat a categorical exemption. But the only expert opinion in the record essentially recommended that soil borings would be "prudent" but "did not suggest the possibility of adverse environmental effects ... " (*Id.* at 734-735.) Here, on the other hand, Dr. Karp's reports provide sufficient evidence that well meet the fair argument standard, as recognized by the trial court. (AA:157.)

4. Seismic Issues.

a. Landslide Hazard Zone. Dr. Karp explained that the Kapor site is "alongside a major trace of the Hayward fault and it is mapped within a state designated earthquake-induced landslide hazard zone." (AR2:448, *attached* to the Opening Brief.) Further "although the site as now configured appears stable, the Rose Steps and the concrete of the elevated part of La Loma [overpass] are cracked from fault creep ..." (*Ibid.*) He recommended "an alternative project ... to avoid grading with massive excavations and

fills as well as the shoring and retaining walls necessary" for the project, concluding that in his professional opinion the 10,000 square-foot project had potentially significant impacts "not only during construction, but in service due to the probability of seismic lurching ..." (AR2:448-449.)

The City critiques Dr. Karp's analysis because "the site itself is not in a landslide area, it is only in an area that requires a site-specific investigation," as is "most of the Berkeley and Oakland hills." (Opp. Brief at 32.) Yet, Dr. Karp's reference to the "designated earthquake-induced landslide hazard zone" is fully consistent with the Kapors' 2009 geotechnical [Kropp] report's reference to the site being "within a Special Studies Zone for potential fault rupture hazards as well as a Seismic Hazard Zone for earthquake induced landsliding." (AR3:655.)

The Kropp report warned that it did not contain "a quantitative evaluation of earthquake induced landslide hazards fulfilling all the rigorous investigation and analysis requirements of the Special Studies Zone and Seismic Hazard zone acts." (AR3:655.) It noted the site's location on "the eastern margin of the Alquist-Priolo Earthquake Fault Zone. Possible traces of the Hayward fault are shown about 600 and 900 feet west of the site" and "large landslides ... are 500 feet or more from the site." (*Id.* at 657; *see* 676, map of Berkeley Hills Landslides and Hayward Fault.) A landslide hazard

map "places the site within an area of high seismic landslide hazard." (*Ibid.*) Finally, the Kropp report noted that a 2003 [California Geologic Survey] Seismic Hazard Zone map placed the Kapor site "within a zone mapped as potentially susceptible to earthquake induced landsliding." (*Id.* at 658.)

The 2009 Kropp report's investigation concluded that "the site is suitable for the construction of the proposed residence from a geotechnical standpoint" but stated that the report's recommendations "should be incorporated in the design and construction of the project *to minimize possible geotechnical problems*." (AR3:660, italics added.) Among the recommendations for what was at that time only *a 6,000 square foot house* were that piers be designed "to resist a lateral creep force over the upper portion of the piers that extend through the expansive near-surface walls." (*Id.* at 661.) The report also recommended that the site be "cleared and stripped" of all "surface vegetation." (*Id.* at 663; *see* many other Kropp recommendations at 663-671.)

The City's statement that "the site itself is not in a landslide area, it is only in an area that requires a site-specific investigation," is misleading. (Opp. Brief at 32.) As the Karp and Kropp reports agree, there are no current landslides on the Kapor site and it appears stable, *but* it is in a zone mapped as a "landslide hazard zone" and is close to the Hayward Fault. (AR2:448-

449; 3:655-661; 4:1062.)

Dr. Karp did not say that the Kapor site was in a landslide "area," but correctly confirmed its location in a landslide "hazard zone" adjacent to the Hayward Fault. (AR2:448-449, 4:1089.) The fact that the Kropp report did not locate any current "landslide hazard" on the site does not change its location in a landslide hazard zone. (Opp. Brief at 32.)

Dr. Karp did not state that every home in the Berkeley and Oakland hills presents significant geotechnical hazards. This particular home at the size proposed on its sloped lot will require excavation for steep side-hill fills resulting in a "probability of seismic lurching." (AR2:448-449.) Dr. Karp also emphasized that the Kropp report's site plan and limitations for the 6,000 square foot house proposed in 2009 were "inconsistent with" the approved architectural plans for the later 10,000 square-foot structure with attached garage. (*Id.* at 449.)

The 2009 Kropp geotechnical analysis did not address the actual project. Dr. Karp's geotechnical analysis did, and his conclusion that the house is too large for its steep site (AR4:1089) provides substantial evidence supporting a fair argument of potentially significant environmental impact.

b. La Loma Overpass. The 2009 Kropp report notes that "La Loma Avenue passes along the south margin of the site and is an elevated

roadway constructed directly above the end of Rose Street." (AR3:659.) Kapor architect Donn Logan explained that "our site is beyond where you see the underside of what looks like a freeway" and referenced "the general blight of the La Loma concrete road structure hanging off the end of Rose Street about opposite where our front door will be ..." (AR2:471-472.)

Dr. Karp pointed out that in his investigation he had observed that the Rose Steps and the concrete of the La Loma overpass "are cracked from fault creep and other ground movement." (AR2:448.) He urged that a project alternative be considered "to avoid grading with massive excavations and fills as well as the shoring and retaining walls necessary to achieve grades shown on the drawings." (*Ibid.*) There is no record of a study of the potential of undermining the foundation of the overpass by the massive excavation necessary for the Kropp project. The danger presented by the location and condition of the La Loma overpass adjacent to the site, pointed out by Dr. Karp, provides additional fair argument evidence of significant impact.

c. Alquist-Priolo Act. Further evidence of geotechnical problems is demonstrated by a fair argument that the Kapor project contains three stories rather than two stories, which the Alquist-Priolo Act treats as a threshold for earthquake resistance analysis. (Opening Brief at 21; AR1:199.) The City contends that the lower story of the house does not

"count" as a story because "it is not enclosed and does not have an internal connection with any floor," and notes that staff at the Geological Survey Office agreed. (Opp. Brief at 37; AR1:151, 2:466-467.) This does not negate the substantial evidence supporting a fair argument to the contrary.

The concerned neighbors relied on relevant definitions from the Berkeley Municipal Code to urge the City Council to recognize that the lower unenclosed floor of the Kapor house qualifies as a usable "story." They compared the Kapor's architect's drawings to the definition of "story" in the Municipal Code. (AR3:893-4:947.)[5] The Code provides that if the finished floor level directly above the ceiling of unused underfloor space is more than six feet above existing grade at any point, that space must be considered to be a story. (AR1:290.)

The Kapor project's lower floor meets the Municipal Code definition of "story." It is designed as a full open floor below the main level that can easily be enclosed with glass or other material, with parking for ten cars easily accessible. The architectural plans show living areas on the upper and middle floors, with ten parking spaces also taking up part of that middle floor, and an open lower floor. Parking is on the middle floor, not

[5] The neighbors also noted inconsistencies in the Kapors' drawings as to the siting of the proposed structure. (AR1:288-289.)

the lower, open level. (AR1:52, 53, 58-60.)

The house is three levels or stories in terms of the environmental impacts of its mass; the enormous mass of the single structure on the steep hillside is evident to laypersons. It should reasonably be considered to be three stories, with an actual project mass of at least 12,000 square feet. (AR1:180-181, 2:433 [AIA Architect and City Commissioner Gary Parsons noted that the building's square feet of "built area" is "even more if you count the massive terrace upon which it sits."], *see also* 4:946 "["... 2,000 additional square feet of developed space in the bottom first floor ... could easily be enclosed in future..."].)

The applicability of the Alquist-Priolo Act in light of the project's 3-story mass underscores seismic issues that trigger environmental review.

d. Drainage. Dr. Karp explained in his April 18th geotechnical report that "a drawing in the [Kropp] report depicts the site drainage to be collected and discharged into an energy dissipator dug into the slope, which is inconsistent with the intended very deep fill slopes." (AR2:449.) In response, the April 21st letter from civil engineer Jim Toby states that "site drainage concerns raised by [Dr.] Karp are customarily addressed during the construction documents/building permit phase of a project." (AR4:1066.) The Toby response did not deny a potential environmental problem directly

related to the project's unusual excavation and fill on steep slopes.

***

The evidence supporting a fair argument of potentially significant geotechnical impacts of the Kapor project amply meets the CEQA Guideline section 15300.2 (c) exception — and defeats the categorical exemption.

B. Aesthetic Impacts

The Public Resources Code declares the policy of the state of California to "take all action necessary to provide the people of this state with ... enjoyment of aesthetic, natural, scenic, and historic environmental qualities." (Pub. Resources Code § 21001 (b).) CEQA's protections to aesthetic resources are often raised via the testimony of area residents that are not qualified environmental experts. Their subjective opinions qualify as substantial evidence sufficient to support a fair argument when based on personal observations. (*See* cases in Opening Brief at 24-25.)

The key to determining the significance of aesthetic impacts is *context*. Thus, in *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 592, this Court was unmoved by subjective opinions that a four-story building on a busy downtown street could have significant adverse aesthetic impacts, especially when the project had no other significant impacts.

Nonetheless, the Court acknowledged that it is *not* always true that

opinions about aesthetic impacts are "discounted ... because they involve aesthetic judgments ..." (*Ibid.*) The Court made very clear that context is dispositive (*id.* at 589), and that requiring an EIR solely based on "the aesthetic merit of a building in a highly developed area" could lead to a plethora of unnecessary EIRs. The Court found that *Bowman*'s facts did not "test the boundary" of appropriate environmental review that could be required based on potential aesthetic impacts in other cases. (*Id.* at 592.)

The facts of this case are very different from *Bowman*. Although within City limits, the Rose Avenue site is in a highly scenic location in the Berkeley hills, in a neighborhood of remarkable historic homes frequented by walkers from the neighborhood and favored by organized tours. A 10,000 square-foot building would alter public views towards the now-wooded Kapor site. There is a dispute among experts as to the extent that the lot's current tree cover will be removed; according to Dr. Karp (and the Kropp report, prepared when the project was 60% of its present size; *see ante* at 10) all site trees will need to be cleared in order to bring in the large equipment necessary to build the house. (Opening Brief at 24-31.)

There is also credible evidence that the house will not be screened by trees as depicted in the project mock-ups provided by the Kapors. (AR1:201, 2:441, 4:944, 949-951.) The eloquent testimony of neighbors as well as

other city residents, and including degreed artist (thus, an expert) Stephen Twigg, speaks for itself regarding the potentially significant aesthetic impacts of the Kapor mansion when viewed from public streets and La Loma Park. (Opening Brief at 24-31.) The City's failure to follow its policy requiring story poles in the Berkeley hills did not reassure those concerned about aesthetic impacts relating to the project's massive size. (AR1:211.)

The City cites *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492-493, for the proposition that CEQA applies to only public views. (Opp. Brief at 37-38.) The City fails to acknowledge *Mira Mar's* ruling that aesthetic impacts including private views "are properly studied in an EIR to discuss the impacts of a project." Only during that EIR process may the agency decide whether to classify a particular aesthetic impact, such as a private view, as significant or not. (*Ibid.*; Opening Brief at 30.) Here there is substantial evidence that the Kapor's modern 10,000 square foot residence/garage will have significant aesthetic impacts when viewed from surrounding public streets and open space, as in *Ocean View Estates v. Montecito Water District* (2004) 116 Cal.App.4th 396. (Opening Brief at 24-31.)

The City argues that other cases in which aesthetic impacts were found to be significant involved larger projects that could not have been

approved via a categorical exemption. (Opp. Brief at 41.) This is a non-sequitur; the issue is whether this record provides a fair argument of potentially significant aesthetic impacts. That standard is the same for a categorical exemption or a negative declaration, and negative declaration cases are thus relevant. This record presents a fair argument that the 10,000 square-foot building at issue may have significant aesthetic impacts.

C. General Plan/Zoning Inconsistencies

Again, the City argues that cases involving the fair argument standard of review are not relevant if they address a negative declaration rather than a categorical exemption. (Opp. Brief at 41.) There is no explanation given for this assertion, and in earlier sections of its brief the City freely relies on both EIR cases and negative declaration cases (*e.g., Bowman, Ukiah, Mira Mar*) when it finds it convenient. (E.g., Opp. Brief at 37-39.) This tactic parallels its dismissal of any portion of Judge Roesch's ruling with which it does not agree, while happily reciting the portions that it prefers, with both approaches based on the acknowledged *de novo* nature of this appeal. (Opp. Brief at 43.)

The relevant question is whether this record presents a fair argument of potentially significant environmental impacts in specific impact areas. The inquiry does not change based on whether the CEQA document at

issue is a categorical exemption or a negative declaration.

The presence of a fair argument of general plan or zoning conflicts is also not determined by the type of project at issue, but requires review of the record for substantial evidence [facts or fact-based reasonable assumptions or expert opinion] that the project *may* "conflict with any applicable land use plan, policy or regulation ... adopted for the purpose of avoiding or mitigating an environmental effect." (Guideline Appendix G, § IX; *Pocket Protectors, supra*, 124 Cal.App.4th 903, 929.)

While the City claims that the planning inconsistencies in the *Pocket Protectors* case were obvious, that was assuredly not the position taken by the respondents in that case. (*Pocket Protectors, supra*, 124 Cal.App.4th 903, 933.). And the City's contention that the evidence in this case amounts only to "a bald conclusion, supported only by speculative conclusions" is not borne out by the record. (Opp. Brief at 41.)

Substantial evidence required to support a fair argument must be facts or fact-based assumptions or expert opinions, as previously noted. (Public Resources Code § 21082.2.) The evidence compiled regarding general plan inconsistencies provides reasonable assumptions based on fact. This is particularly simple relative to Berkeley General Plan Policy UD-16, requiring that the "design and scale of new ... buildings should respect the

built environment in the area, particularly where the character of the built environment is largely defined by an aggregation of historically and architecturally significant buildings." (AR1:205; Opening Brief at 32.)

It cannot reasonably be disputed that the Rose Street neighborhood contains just such "an aggregation of historically and architecturally significant buildings." A minute's walk leads to enclaves of local landmarks Greenwood Common and the La Loma Park Historic District and La Loma Steps. The Rose Walk and Rose Garden are in close proximity. (AR1:198.) Architecturally- prized homes in the vicinity were designed by famed architects Julia Morgan, Bernard Maybeck, John Galen Howard, Joseph Esherick, Ernest Coxhead, and William Wurster. (AR1:282-287.) Most are less than a quarter of the size of the Kapor project. (AR1:204, 208 ["Distribution of home sizes in Berkeley."].)

The record thus documents reasonable fact-based assumptions that a 10,000 square foot house of starkly contrasting size and design to others in the neighborhood *may* reasonably be perceived as not respecting "the built environment in the area." As noted in the neighbors' City Council appeal, "the staff report completely ignores what is one of Berkeley's richest collection of historically significant buildings" and its statement that the Kapor building in any way "reflects the character of the buildings in the

vicinity" is "wholly unsupported, as would be readily apparent to any person walking through the neighborhood." (AR1:204-205.)

CEQA's preference for environmental review cannot countenance an exemption under these facts. The Kapor house may yet be approved with a modern design and at a larger size than others in the neighborhood. But in light of the Berkeley General Plan's codified policies, environmental review must ensure plan consistency in the context of the unique setting. City staff's contrary views cannot undo a fair argument. (Opp. Brief at 42.)

During the EIR process, environmental consultants will document the environmental setting, including the historic neighborhood, and will analyze the project's consistency with the Berkeley General Plan. The City's ultimate approval findings will be accorded great discretion under the substantial evidence standard. But its discretion must first be informed by environmental review under the facts presented.

D. Traffic Impacts

The Kapor project will require over a year of construction-generated truck traffic on a one-lane road in the Berkeley hills. (Opening Brief at 35-39.) Dr. Karp confirmed that there will be "extensive trucking operations, as a nearby site to stockpile and stage the earthwork is not available. Such work has never before been accomplished in the greater area of the project

outside of reservoirs or construction [at UC Berkeley] and Tilden Park." (AR2:448.) The record is replete with references to the unusually narrow, problematic constraints of Rose Street and the current dilapidated state of its surface. (*Ibid.*) When Mayor Tom Bates visited the neighborhood, unfamiliar to him, he "couldn't believe how narrow that street is ... you can't turn around." (AR2:590.)

In response to the opening brief's compilation of evidence of potentially significant traffic impacts, which appellants will not here repeat, the City emphasizes that the Kapor project will solve the existing Rose Street traffic problems by creating a turn-around for the dead-end street and by providing off-street parking for ten cars. (Opp. Brief at 44.) However, as held in *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, the Court should "reject the City's advocacy of a 'net' environmental analysis. Any potential significant environmental effect triggers the EIR requirement" even if the project may arguably also provide a net environmental benefit. (*Id.* at 1197.)

While the project will provide ten off-street parking spaces and a turn-around at the end of the dead-end street, that does not eliminate the potentially significant construction truck traffic. The parking spaces and turn-around may be eventual project amenities, but in the meantime,

significant traffic impacts must be analyzed and mitigated.

The City states that the amount of soil to be removed from the site is 940 cubic yards, but cites to a staff report that acknowledges excavation of 1500 cubic yards just as noted by Dr. Karp. (Opp. Brief at 44, AR2:465.) The staff report notes that "in light of the slope of the site and the capacity of the streets to accommodate trucks, Lea & Braze Engineering recommends using Shasta Road to remove the soil via 20 yard trucks to take advantage of gravity to move the soil from the site." (AR2:465.) Traffic control measures are required. (*Ibid.*)

The City continues to insist that conditions imposed on the Kapor project's construction traffic are standard for projects "that may affect the public right of way." (Opp. Brief at 45.) But the administrative record states that the conditions are standard *in the Berkeley hills*. (AR1:149, 2:466.) Conditions commonly required in an environmentally-constrained area cannot be discounted as meaningless. Categorical exemptions are defined to apply to projects throughout the state. The standard California single-family home is not located in the Berkeley Hills, a beautiful area but with traffic constraints relating to narrow roadways, earthquake faults, and fire danger.

A comparable situation might be illustrated by a hypothetical project proposed in California's Death Valley in the Mojave Desert. Obviously, a

desert is environmentally sensitive in terms of scant water availability. A "standard" condition for a 10,000 square foot building approved in Death Valley would address the specifics of providing water to the project and avoiding any compromise of neighbors' water supplies. Such a condition might be standard in Death Valley, but it is still of great import.

Such a site-specific condition is distinguishable from the standard condition imposed in *Association for Protection of Environmental Values v. City of Ukiah, supra*, 2 Cal.App.4th 720, 735-736, relied upon by the City, requiring compliance with "standard conditions from the Uniform Building Code." (Opp. Brief at 46.) This case mirrors the riparian protection plan in *Salmon Protection and Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1103, tailored to prevent streambed impacts. While similar conditions might be appropriate to other projects in delicate riparian areas, they are not standard for single-family residences routinely approved statewide via a categorical exemption from CEQA.

A 10,000 square foot project in Death Valley may have significant environmental impacts if a water supply mitigation measure is violated. It is the potential for environmental problems that defeats a categorical exemption for a large project in an environmentally sensitive area, removing it from an exemption category designed for projects with no

potentially significant environmental impacts. Here, there is a fair argument that the Rose Street site in the Berkeley Hills is an environmentally sensitive area vis-à-vis traffic and other impacts. (Opening Brief at 35-39.)

Neighbors familiar with the site have explained the already-problematic traffic on their narrow roadways, including trucks that routinely have "trouble negotiating" Rose Street. (Opening Brief at 35-38.) First-hand layperson evidence *may* provide a fair argument of significant environmental impacts based on reasonable assumptions of traffic problems within residents' personal knowledge. (*Oro Fino Gold Mining Company v. County of El Dorado* (1990) 225 Cal.App.3d 872, 882.)

In this case involving a neighborhood whose residents are very familiar with the road constraints and current traffic problems, the evidence rises above speculation. This is validated by the City's acknowledgement of the need for traffic control. Whenever mitigation measures are imposed, there is a possibility that they may not be sufficient and that environmental impacts may therefore occur.

As this Division held when disallowing a categorical exemption for the single-family Hedlund residence in *Salmon Protection and Watershed Network, supra,* 125 Cal.App.4th 1098, 1108:

> Reliance upon mitigation measures (whether included in the application or later adopted) involves an evaluative process of assessing those mitigation measures and weighing them against potential environmental impacts, and that process must be conducted under established CEQA standards and procedures for EIR's or negative declarations.

Both the City's imposition of traffic mitigation measures and the administrative record evidence of potentially significant traffic impacts thus preclude a categorical exemption for the Kapor project.

Conclusion

CEQA provides classes of exemptions that as a practical matter allow agencies to forego environmental review for actions that have no reasonable possibility of significant environmental impact. The Kapors' proposed 10,000 square-foot residence is simply not such a project.

Size alone is not the problem, but it is the trigger for the Kapor project's potentially significant geotechnical, aesthetic, and traffic impacts. Impacts arise from the unusually large project *in combination with* special constraints of the scenic, steeply-sloped site on a narrow, degraded roadway; four use permits with exceptions for increased height and reduced setback; immediate proximity to the cracked La Loma Overpass; location along the Hayward fault in a landslide hazard zone; removal of mature trees

to allow massive excavation; significant construction truck traffic for over a year; and inconsistencies with Berkeley General Plan policies protecting the historic character of a famed neighborhood and walking street.

This case is anything but run-of-the-mill. No case that has upheld a categorical exemption involves comparable facts.

Whether this Court applies a two-step test of unusual circumstances *plus* potentially significant environmental impacts in order to find an exception to the categorical exemption, or considers the two elements to be integrated into one criterion as appellants suggest, the Guideline section 15300.2 (c) exception is manifestly met under the facts of this case.

CEQA must be interpreted "to afford the fullest possible protection of the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) Based on the controlling statutory language relative to categorical exemptions, the Supreme Court further explained in *Wildlife Alive, supra,* 18 Cal.3d 190, that "it follows 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 206, italics added.)

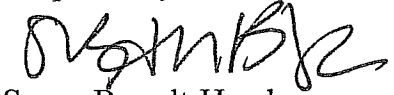
Public Resources Code section 21084 and *Wildlife Alive* together provide definitive guidance for the application of the CEQA Guideline

section 15300.2 (c) exception. Appellants respectfully request reversal of the judgment and remand for issuance of a peremptory writ.

Counsel's Certificate of Word Count per **Word**:mac[2011]: 10,696

September 6, 2011

Respectfully submitted,



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Berkeley Hillside Preservation, et al. v. City of Berkeley, et al.
Alameda County Superior Court Case No. RG10517314
Civil No. A131254

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 1659, Glen Ellen, CA 95442.

On September 6, 2011, I served one true copy of:

Appellants' Reply Brief

X By placing a true copy enclosed in a sealed envelope with prepaid postage in the United States mail in Glen Ellen, California, to addresses listed below.

X Zachary D. Cowan
Laura McKinney
Deputy City Attorney
City of Berkeley
2180 Milvia Street, 4th Floor
Berkeley CA 94704

Attorney for Defendants & Respondents

X Honorable Frank Roesch
c/o Clerk of the Court
1225 Fallon Street
Oakland CA 94612

X Amrit Kulkarni
Meyers Nave
555 12th Street, Suite 1500
Oakland CA 94607

Attorney for Defendants & Respondents

X By placing four (4) true copies thereof enclosed in a sealed envelope and postage thereon fully prepaid, in the United States mail at Glen Ellen, California addressed as follows:

X Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct and is executed on September 6, 2011, at Glen Ellen, California.

Susan Brandt-Hawley